GUIDELINE HOURLY RATES

FINAL REPORT

APRIL 2021

Contents

Section A: Summary of Recommendations 3

Section B: Preliminary Observations 7

Section C: The Methodology of the Interim Report 10

Section D: Recommended Changes to London 1 & 2 51

Section E: The Recommended Guideline Hourly Rates (GHRs) 57

Section F: London 1 Grade D 64

Section G: Geographical Areas 65

Section H: The Revised Guide 69

Section I: Summary Assessment Form N260 78

Section J: Other Matters 82

Section A: Summary of Recommendations

Preamble

1.1. On 8th January 2021 the Guideline Hourly Rates Working Group Report for Consultation was published.[1] It shall be referred to in this Report as 'The Interim Report'.

1.2. The membership of the working group and its advisers were contained in Appendix A to the Interim Report and will not be repeated. Two matters should however, be noted:

a) Ms Elisabeth Davies, listed as 'Consumer Representative' member of the working group in Appendix A[2] participated in the discussions on this final report as a consumer adviser rather than a member, drawing on her experience as former Chair of the Legal Services Consumer Panel and current Chair of the Office for Legal Complaints.

b) Declaration of interest
The wife of Professor Neil Rickman, academic advisor to the working group, is employed as a lawyer by AXA XL. AXA Insurance UK plc (AXA UK) responded to the consultation. She was unaware, until after AXA UK's response, of the consultation and of Professor Rickman's involvement, and did not contribute to AXA UK's response. Professor Rickman has not read AXA UK's response or been consulted by the working group on it.

1.3. The Terms of Reference have been slightly (but significantly) amended such that the Report is to the Head of Civil Justice (the Master of the Rolls) and the Civil Justice Council. They now read:

"To conduct an evidence-based review of the basis and amount of the guideline hourly rates (GHR) and to make recommendations accordingly to the Head of Civil Justice and to the Civil Justice Council during Trinity term 2021."

1.4. The consultation period ran until 31st March 2021. Respondents were asked to complete a form, a copy of which is at Appendix 1. This sought feedback in relation

---

[1] https://www.judiciary.uk/wp-content/uploads/2021/01/20210108-GHR-Report-for-consultation-FINAL.pdf

[2] See also footnote 5 to the Interim Report.

to the 7 specific matters listed in the Interim Report at [8.1], as well as a box allowing 'Comments on any other aspects'.

1.5. The responses are summarised in this report, together with the working group's comments. After careful consideration, the recommendations of the working group to the Master of the Rolls, the Deputy Head of Civil Justice and the Civil Justice Council ("CJC") are respectfully set out below for their consideration.

1.6. The working group is of the opinion that, while there may be those who might (with some justification) describe the task of revision of Guideline Hourly Rates as Herculean, it is hoped that pessimists who might go further and say it is Sisyphean will not prevail. [3]

Recommendations

1. The Civil Justice Council accept that the methodology used in the Interim Report is a sufficiently sound basis upon which revised Guideline Hourly Rates should be based. (Section C)
2. The Civil Procedure Rule Committee is respectfully requested to consider whether to increase the hourly rate allowable for litigants in person. (Section C)
3. The recommended changes to London 1 and 2 as reflected in the Interim Report at [4.10] and in the Revised Guide should be adopted. (Section D)
4. The Guideline Hourly Rates proposed in the Interim Report should be implemented in full. (Section E)
5. There is no good reason for departing from the data produced for London 1 Grade D, noting that London 1 is now re-defined as *"very heavy commercial and corporate work by centrally based London firms."* (Section F)
6. The proposals set out in section 5 of the Interim Report and summarised below and in paragraph 1 of section G in this report - amended to include the removal of the London Borough of Kingston upon Thames from National 1, as it should be in London 3 - be implemented.

[3] *"Then I witnessed the torture of Sisyphus, as he wrestled with a huge rock with both hands. Bracing himself and thrusting with hands and feet he pushed the boulder uphill to the top. But every time, as he was about to send it toppling over the crest, its sheer weight turned it back, and once again towards the plain the pitiless rock rolled down. So once more he had to wrestle with the thing and push it up, while the sweat poured from his limbs and the dust rose high above his head."* (*Odyssey*, Book 11:593)

i) National Band 3 should be abolished.

ii) The counties of Kent, East Sussex, West Sussex and Surrey should become Band 1 counties. Medway, Maidstone, Canterbury, Lewes and Guildford are the only identified centres in those counties and each is categorised as Band 1.

iii) Existing Band 1 counties and other identified Band 1 centres will remain in Band 1.

iv) All other areas will be/remain in Band 2. (Section G)

7. The Revised Guide, Appendix J to the Interim Report, should be adopted, with:

    i) amendment to paragraph 14 to reflect the amendment to Rule 44.3(5) from 6th April 2021, namely to add *"(f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."*

    ii) amendment to paragraph 28 by addition of the words underlined:

    > *"28. The guideline figures are intended to provide a starting point for those faced with summary assessment. <u>They may also be a helpful starting point on detailed assessment.</u>"*

    iii) addition to paragraph 30 of the words: *"The principle in Wraith may apply also to litigants who instruct non-local solicitors outside London."*

    iv) addition to paragraph 31 of the words: *"The location of a fee earner doing the work is determined by reference to the office to which s/he is, or is predominantly, attached."*

    v) replacement of the words 'legal executives' with 'Fellows of CILEX' in the categories of fee earners at Grades B and C.

    vi) addition in Appendix 2 under the heading: 'Grades of fee earner' of the entitlement of employed barristers to be properly remunerated at the Grade which best reflects their litigation experience. (Section H)

8. The working group requests that the Civil Procedure Rule Committee consider whether form N260 should:

    i) Require the receiving party to specify the location - i.e. the office to which a fee earner is, or is predominantly, attached – of the fee earner(s) for whose work claims are made.

ii) Replace, in the ‘Description of fee earners’ section of the form, the word *‘(grade)’* with ‘*(GHR grade)’.* (Section I)

9. If the proposed GHRs are introduced they should applicable to all summary assessments from the date of their introduction. (Section J)
10. Any updates to the proposed GHRs (if adopted) should be guided by the outcome of the reviews of FRCs and IPEC capped costs. (Section J)

Section B: Preliminary Observations

2.1. Appendix 2 contains details of the circulation of the Interim Report which was with a view to obtaining as wide a consultation response as possible.

2.2. 11 of the organisations specifically consulted direct were considered to be those who might assist the working group in relation to the perspective of consumers. A message accompanied the communication with these organisations. The 11 organisations and the message to them are detailed in Appendix 3. The consumer adviser to the working group[4] is recorded in the minutes of the Civil Justice Council ('CJC') as saying:

> *"…whilst nuanced and complex there are three main issues relating to this.*
>
> *a) What impact the report, recommendations and subsequent changes has on consumers and where this is articulated in the report.*
>
> *b) What type of consumer is most affected e.g. individuals, corporate, the vulnerable.*
>
> *c) What is the impact of costs on consumers and what data is available to inform the group.*
>
> *… a number of consumer organisations had been contacted about the consultation to ensure the working group has done what it can to address the issues."*

2.3. The sole response received from a consumer organisation was a letter dated 29th March 2021 from the Association of Consumer Support Organisations ('ACSO'). This letter is addressed in Section E of this Report.[5] The working group has throughout borne in mind the interests of consumers.

2.4. In total 103 responses were received from solicitors, insurers, the NHS, a number of representative bodies of receiving and paying parties, judges (including 5 SCCO Masters, the Law Society, local Law Societies, the civil sub-committee of the council

[4] Elisabeth Davies.

[5] Ms Elisabeth Davies, listed as 'Consumer Representative' member of the working group in Appendix A of the Interim Report – see also footnote 5 to that Report – participated in the discussions on this final Report as a consumer adviser rather than a member, drawing on her experience as former Chair of the Legal Services Consumer Panel and current Chair of the Office for Legal Complaints.

of HM Circuit Judges), costs lawyers, local authority legal services and a substantial Limited company.[6] The full list of respondents is contained in Appendix 4.

2.5. The working group is grateful for the responses and has carefully considered them. This Report does not repeat the Interim report. Its format is to set out the matters which have arisen from the consultation and to comment upon them. It is not practicable to deal with every point raised. The major points arising are dealt with in Sections C-J below.

2.6. Many paying parties and their representatives submitted that the review should have been conducted in the wider context of Sir Rupert Jackson's civil justice reforms, that it should have awaited changes in (a) Fixed Recoverable Costs. (b) the HMCTS reform programme, (c) changes in business models and (d) the effect of home working. A number[7] submitted that location of fee earner should be irrelevant and geographical areas abolished. These suggestions could not at this point in time be properly assessed and taken into account by the working group, which repeats what was said in the Interim Report[8], namely:

> *"A further review by a working group should be considered once the need is considered by the CJC to have arisen. This may well be within, say, 3 years, though it is difficult to predict, especially given the impact of the Covid-19 pandemic and the HMCTS reform programme. That would be the appropriate occasion to examine the methodology, how effective this working group's work has been, and any appropriate, evidence-based amendments to geographical areas."*[9]

2.7. It would not be unfair to summarise the responses from receiving and paying parties by saying that the former argued that the proposed GHRs were insufficient and that more specialisations should be recognised as warranting separate and higher GHRs;

---

[6] This was in the form of a letter from a Senior Executive of Tyburn Film Productions Limited ('Tyburn') who explained that the company normally had an in-house lawyer, but did not have one at present. He stated that the company did not consider any aspect of the content of its letter to be of a confidential nature. Concern was expressed that *'..the great majority of the members (of the working group) have substantial vested interests and the majority of their respective views is clearly self-serving..'* The letters also said that opinions were not given on sections of the Interim Report '*with which we do not have direct experience*'.

[7] Including Law Abroad (Mr Kerry Underwood) most of whose staff work from Western Cape, South Africa, from where they do the fixed costs work.

[8] At [6.2]

[9] One substantial London firm stated that the '*idea that remote working is saving firms money is currently a myth. The cost of e-bundling comes at an extreme cost to the firm which is regarded on assessment, more often than not, as an overhead."*

the latter that they were based on totally flawed methodology and that no increase was warranted or, indeed, that the present GHRs were too high.

Section C: The Methodology of the Interim Report

3.1. In the Interim Report the history of GHRs and the particular difficulty of obtaining good evidence of expense of time (EOT) were summarised in section 1, leading to the conclusions that:

> a) *"The history of GHRs between 2010 and the present is one where it has become apparent that the holy grail of rigorous, fully evidence-based precision, sought but not achieved by the Foskett committee, is simply not possible."*[10]

And,

> b) *"The passages from the July 2014 statement of Lord Dyson MR cited above are important. GHRs are guideline rates. 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 approach of the present working group, therefore, has been to attempt to guide the GHR ship through the narrow strait between the Scylla of comprehensive but unachievable evidence and the Charybdis of arbitrariness."*

3.2. In section 2 the basis of GHR was explored and, for the reasons given, it was decided to *"seek evidence on what was in fact allowed by Costs Judges who have experience and expertise in reflecting what is reasonable and proportionate. The evidence was to be of the rates allowed on provisional and detailed assessment."*[11]

3.3. In addition, the working group sought evidence from members of the profession as summarised in the Interim Report at [3.6], namely:

> *"The profession was asked to provide two pieces of information, one historical covering the period 1 April 2019 to 31 August 2020, the other prospective, covering the period 1 September 2020 to 27 November 2020. In addition to the same information requested from the SCCO/RCJs, (i) summary assessment evidence was sought and (ii) the information was to include rates which were either awarded by the court at an assessment hearing or were agreed*

[10] After the working group's first meeting where this had been determined, it was of interest to note that a member of the London Solicitors Litigation Association, which was consulted at a meeting with Mr Justice Foskett, wrote an article stating: *"One major area in which the Foskett committee got bogged down was in attempting to ascertain the actual costs of running a litigation practice in different parts of the country. Not only was this an impossible task, but the rationale for attempting it in the first place had been flawed."* https://www.lawgazette.co.uk/practice-points/guideline-hourly-rates-in-a-post-covid-world/5104208.article

[11] At [2.8]

> *between the parties after the commencement of the assessment process."*

3.4. A different process was adopted for the Business and Property Courts (BPC), for the reasons given in the full paragraph, of which this is an extract:

> *"3.7. It was appreciated that the above methodology would not produce much evidence for assessments of cases in the Business and Property Courts ('BPC'). ……the working group decided to seek evidence over a snapshot period of a few weeks on the hourly rates Judges awarded on summary assessment cases in the BPC."*

3.5. A number of qualifications about the methodology which concerned the working group were set out.[12] These were:

i. It was understood that the information sought from judges might be influenced by the existing GHRs, but felt that this risk would be very substantially diminished by the expertise of specialist cost judges. Further, this possible risk was a factor in the working group seeking evidence from the professions, including rates agreed.

ii. The relatively small number of cases that result in a detailed assessment may not be representative of the hourly rates effectively paid between parties by agreement. Further, the majority of cases where costs are agreed do not specify or record any hourly rate agreement. Costs are agreed in a global sum. However, the working group stated[13] that it was seeking to follow the traditional basis of GHRs, i.e. what experienced costs judges do in fact award; also there was substantial historical evidence received from the professions.

iii. Insufficient data on which to form sound recommendations. In the event, there was sufficient data on which the academic advisers to the working group felt able to base their figures, both in respect of the general methodology and the methodology specific to the BPC.[14]

3.6. It is intended first to address some common themes in the responses and then detailed comments on the methodology from some particular respondents, though

[12] At [2.9] and [3.8]
[13] At [3.11]
[14] See Interim Report Appendix H

these comments were often registered in a similar way by others. In this way it is hoped that the vast majority of the arguments made will be addressed.

3.7. A number of responses agreed with the methodology used in the Interim Report and accepted that the fully evidenced-based precision, sought but not achieved by Foskett, was not possible. Examples of supportive statements were:

- *"We agree with the methodology proposed…it was right to do away with any attempt to ascertain the actual costs of running a litigation practice in different parts of the country. It was dismissed as a method of trying to arrive at the new GHRs by Lord Dyson previously and was inherently flawed as a concept anyway. We agree with what appears to be the guiding principle adopted by the working group, in trying to find the right methodology to use in determining new GHRs, namely that GHRs should be a simple guide to judges whose job is to assess costs, but no more than a simple guide, subject to the provision in paragraph 29 of the proposed revised Guide to Summary Assessment. It is recognised that over and beyond the actual guideline rates themselves, judges will exercise skill, care, common sense and proportionality in assessing costs. The working group appears to have sought evidence from a wide and diverse group of interested parties, whilst realising the shortcomings of the overall reliability of the evidence." (a firm of solicitors)*

- *The methodology "was coherent and well managed. This is a welcome change and one which should be implemented as soon as possible." (a firm of solicitors)*

- *The methodology used "a broad spectrum of appropriate data and experts." (a firm of costs lawyers)*

- *"The sub-committee considered that the methodology adopted by the working group is appropriate given the limited resources available to it. We agree that "the 'holy grail' of rigorous, fully evidence-based precision, sought but not achieved by the Foskett committee, is simply not possible. We consider that the working group has largely achieved its objective of attempting 'to guide the GHR ship through the narrow strait between the Scylla of comprehensive but unachievable evidence and the Charybdis of arbitrariness'" (Council of HM Circuit Judges, Civil Sub-Committee)*

- *"I support the methodology used by the working group. I have always thought that the expense of time calculation is the best way to determine a solicitor's hourly rate but it is clear that such*

information is never going to be obtained in sufficient quantity. In any event, the GHR are only involved in what is recoverable from the opponent and so any broad approximation imposed there can be ameliorated by agreement between the solicitor and client. Furthermore, the widespread use of CFAs, in my view, weakens the argument that the rates agreed between the client and solicitor are struck in a bargain of the sort considered by the Foskett J committee….." (A SCCO Master)

- *"As a standalone piece of work the Law Society is broadly supportive of the recommended GHR…..However, as often noted in Law Society submissions, there is a need for a holistic approach to civil justice reform, not least in the area of costs…"*
- *The London Solicitors' Litigation Association (LSLA) would like to praise the highly comprehensive methodology used. It is a welcome relief that this consultation is based on information largely collated from experienced Costs Judges and the profession….We consider the Report to be an excellent attempt to resolve a complex problem and are encouraged that progress on GHRs can now be made…"*

3.8. Some respondents suggested alternative approaches for the future, such as a full expense of time assessment, firms being required by their regulatory bodies to provide evidence or regulatory bodies requiring firms to provide data on rates charged. For the reasons summarised in Section 1 of the Interim Report, the working group does not believe that this is practicable. It requires much greater investment of resources and a means found of ensuring that data received from lawyers is sufficiently comprehensive. As referred to above, this conclusion was expressly accepted in some responses, though challenged by many paying parties. The latter will be examined below. An example of the former was in the response from the Litigation Committee of the City of London Law Society which wrote:

> *"….the Committee welcomes the departure from the sort of 'Expense of Time' approach which the Foskett Committee had employed as its primary methodology. Not only is there the obvious difficulty of collating sufficiently robust data (particularly bearing in mind the Foskett Committee's attempts to do so still appeared to fall short of the standard which Lord Dyson MR insisted was required), but the application of a percentage uplift to reflect a reasonable profit element adds an uncertain and subjective factor into the assessment."*

3.9. Some respondents stated that the largest percentage increases on the GHRs in the Interim Report were in London and that this suggested more confidence to depart from the GHR in a significant way in the SCCO, thereby giving rise to a London-centric approach. The pooled data for London 2 & 3 show an average increase across all grades of 15.14%; for National 1 & 2 the average increase is 17%. Even when adding in London 1 increases (primarily based on judicial awards in high-level BPC work) the overall percentage increase for all London grades only rises to 18.18%. Therefore, the working group does not accept the premise of the response.

3.10. Criticisms were made of the methodology on the basis of an element of circularity in using figures from past assessments.[15] The working group recognised and dealt with this in the Interim Report.[16]

3.11. A substantial number of respondents, perhaps particularly paying parties and their representatives, had considerable concerns about the methodology and data sample. Some of those concerns were accepted in the Interim Report and dealt with there.[17] Examples of the criticisms will be touched on at this stage, but more detailed treatment will follow later in this Section.

3.12. The sample size was said to be inadequate to provide a proper cross-representation of each respective claim and value. The working group's academic advice was that the sample sizes were sufficient to provide with reasonable confidence a true mean assessed rate and the detail of the confidence in the figures is in Appendix H. The issue of how representative the sample size was will be addressed later.

3.13. It was also said that there is a risk that certain regions or claim types may not be representative of the rate normally expected to be seen in those types of claims or regions. This may be correct, but it is impossible when providing GHRs to cater for

[15] One respondent suggested that the methodology was 'rather useless' as the evidence was supplied by people with a vested interest and judges just split the difference between figures supplied by receiving parties who charge as much as they can and paying parties who try to pay as little as possible. It was suggested that the whole system of costs assessment should be scrapped and replaced with highly experienced costs assessors assessing costs on a global basis, using the 'seven pillars of wisdom'.

[16] At [2.9]

[17] See Interim Report at [2.8], [2.9] and [3.8]

detail such as this and anomalies which may arise. That must be left to the good sense of negotiating parties and, if necessary, of an assessing judge.[18]

3.14. Respondents also made these points:

i. The methodology used would have included uplifts on costs from the GHRs because of judges using their discretion to allow for inflation since 2010 and, in individual cases, to award a higher rate because of the factors in CPR Rule 44.4.

ii. The data on assessment does not take into account any further reduction that may have been made by virtue of the proportionality test.

3.15. As to (i), the working group agrees that the judges may have used their discretion to uplift the 2010 GHRs as they are out of date. To ascertain that uplift, based on the awards of experienced costs judges, was the purpose of the exercise. It is also correct that the data will include some awards where the costs judge has increased the rates further to allow for other factors in the individual case. Nevertheless, as a counterbalance, since 2010 there has been implementation of fixed costs regimes catering for cases at the lower end of the spectrum.[19] Therefore these types of cases are no longer covered by GHRs. The cases represented by the sample are further addressed below.

3.16. As to (ii), there was concern[20] that civil litigation costs are too high and disproportionate with a consequent negative effect on access to justice. In principle GHRs should not affect proportionality since, irrespective of GHRs, the court should only allow costs which are “proportionate to the matters in issue”.[21] The determination of proportionality will always be a matter for consideration at the appropriate point in the assessment. Nevertheless, it is axiomatic that an increase in GHR will have some inflationary effect on costs. There are, and have been, a number of initiatives to restrict costs by way of fixed costs regimes. The working group’s remit was limited to an evidence-based review of the basis and amount of GHRs, and making recommendations on that review.

[18] The really complex commercial and corporate work, now being defined as London 1, avoids the risk of such work skewing the GHRs for other work.

[19] See e.g. the RTA and EL/PL Protocols and FRC regimes, and CPR Rules 45.16-45.29, introduced in 2010 and 2013 respectively. The working group is aware of further similar schemes in the pipeline.

[20] Including from a member of the judiciary.

[21] CPR Rule 44.3(2) – for assessments on the standard basis. See also the Interim Report [2.6].

3.17. Two sample responses[22] may assist in demonstrating how receiving parties and paying parties interpret the situation through markedly differing lenses. They said:

i) *"Our view overall is that the proposed rate increases, in particular outside of London, are too low. a. In view of the extension of fixed costs in 2013, the 2010 GHR arguably applied to a wider "basket" of cases than the cases where costs are now commonly assessed. The "basket" of cases where GHR now come into play are arguably generally both more complex and higher value, therefore more regularly justifying a higher rate. This trend is likely to continue considering other pending reforms. Whilst the proposed GHR are based on market rates and not the old GHR, the 2010 GHR will heavily influence the starting point for assessments. b. Costs Judges have not consistently factored in inflationary increases to the hourly rates on assessment because paying parties argue that the GHR have not been updated because the costs of legal services have remained static. This will have the effect of dragging down the mean average, and to counter that, either a general increase needs to be applied by reference to a check and balance against inflation indices and/or the lower end of the data set used to calculate the mean assessment should be disregarded as it is contaminated by artificially low 2010 GHR."*

ii) *"Further, the rates awarded by Judges have occasionally taken into account the lack of increase in the guideline hourly rates in recent years and the rate awarded reflected both a potential inflationary increase and an additional mark-up pursuant to CPR 44.4 Consequently, this approach could lead to a further uplift being applied to new guideline rates where a mark up has already been included within the methodology. This could lead to the scenario on a straightforward matter where no mark-up was appropriate in the circumstances though the new guideline rate would now be applied and which would include enhanced rates in its methodology*

…the data utilised was pre the COVID pandemic[23] *and would now unfortunately be outdated and not reflective of the new ways of working and increase in technology such as remote Court Hearings and video conference calls. Therefore, we consider that there has*

[22] One from a solicitor based outside London, the other from an insurer.
[23] The data provided by the judiciary was in fact gathered from assessments between September 2020 and November 2020.

been a saving in overheads and operational costs and therefore, a strong argument that the Guideline Hourly Rates themselves should be reduced from their current levels."

3.18. One respondent suggested that legal expenses insurers and legal aid rates are much lower than GHRs and should be adopted. This was not an approach which the working group had considered or consulted on. However, Legal Aid rates are not calculated to represent market rates – see under the sub-heading '*Legal Aid Solicitors'* below.

Court of Protection and the PLK case

3.19. A number of respondents were concerned about the effect of GHRs on Court of Protection (CoP) cases.

3.20. The following points were raised:

i. Guidance is needed as to which rates are appropriate to use – the GHRs or the rates set out in Master Whalan's decision in *PLK & ors.*[24]

ii. If costs officers are to use GHRs in CoP cases, instead of the rates in *PLK*, explanation is needed that they are merely a guide, otherwise CoP practitioners will be bound by these rates which are not reasonable payment for most complex matters.

iii. In CoP cases Grade D and C fee earners are expected to carry out most of the work and the hourly rates are not reflective of their input in 2020/2021. Some assessments in CoP cases from 2017 and 2018 have allowed rates in excess of the proposed National 1 rates. This indicates that they are too low and not representative of reasonable payment in 2020/2021.

iv. The proposed GHRs are lower for National 1 than the *PLK* rates. Master Whalan relied on significant evidence to reach his decision and it appears that the evidence has been disregarded in this exercise. If the proposed GHRs are to apply to CoP cases, the evidence in *PLK* needs to be considered in more detail to ensure that all relevant factors are taken into account.

v. The methodology did not break down practice areas. Specifically CoP work is by case law largely restricted to the GHRs. Additional attention should be given to

[24] [2020] Costs L.R. 1349

CoP given the serious impact of the review on the future of this work. In CoP unqualified but highly experienced staff can carry out work at Grade B level. This is commonly recovered on assessment by the SCCO.

vi. The GHR are lower than inflation and significantly lower than the SPPI Index for legal services.

3.21. It is important to bear in mind some statements made by Master Whalan in *PLK:*

> *Consistency and certainty are particularly relevant to CoP costs "where the protected party's assets very often derive from an award of damages. If COP costs are not predictable accurately, then a protected party's legal representatives will be unable to plead or assess quantum accurately in any substantive inter partes litigation".*[25]
>
> *"..the assessment of COP costs is a role undertaken primarily by Costs Officers. The SCCO processes over 8000 COP bills annually and the vast majority (certainly over 95% of the total) are assessed by Costs Officers. They comprise a specialist team that has amassed considerable experience in COP costs. They also they have the benefit of mature leadership and attentive judicial oversight. Yet the Costs Officer's general experience is limited necessarily, so that it cannot really be said they have the broad 'judicial experience' in applying CPR 44.4(3).."*[26]
>
> *"Mr Wilcock criticises Master Haworth's suggestion that 'substantial elements of general management COP work is mundane and routine' (SA, paragraph 24), but the priority he gives to this observation is, in my view, mistaken. Master Haworth stated that many aspects of the day-to-day general management of a protected party's interests are routine, but this does not detract materially from his acknowledgment of the significant responsibility undertaken by a deputy in overseeing a large estate over many years. This issue, in any event, is more relevant to the determination of the appropriate status or grade of fee earner for the work in question, rather than the calculation of hourly rates generally."*[27]

Having reviewed the evidence,[28] Master Whalan continued:

> *"Ultimately I am not satisfied that the evidence supports Mr Wilcock's contention that COP firms have experienced 'a significant increase in hard and soft overheads' (SA, 45). The evidence, both in*

[25] At [24]
[26] Also at [24]
[27] At [26]
[28] At [27] – [28]

respect of time and expenditure, is inconsistent and, in my view, incomplete. Nor am I persuaded by the submission made in the oral hearing that 'it is clear that no other area of practice requires such a level of unrecoverable time'. So far as the datum is consistent and stable — and, as noted, the most reliable figures are probably those produced by Clarion — it suggests a comparatively modest incidence of time and expenditure. However reliable the figures produced may be, they do not, in my view, demonstrate that the burden is one that is exclusive to COP work or that it is atypically high in comparison with that experienced by practitioners in comparable areas of practice. Fee earners in personal injury, medical and professional negligence, for example, incur invariably time and expense that is irrecoverable, in marketing, accessing cases that are not proceeded with or, indeed, pursued and lost. These are burdens which do not apply to Deputy's sources of work (on a case by case basis) which is often consistent and predictable over many years."[29]

"Although the GHR is adopted properly as a 'starting point', most COP bills will be properly assessed by Costs Officers, who will apply the relevant GHR unless there is good reason to depart from them. Some bills — in the future, as now, a small minority of the total — will be forwarded to Costs Judges for assessment, mainly because the total sum claimed is large or because the assessment raises a particular point of difficulty or complexity. Then, as now, Costs Judges may depart from the GHR if there is a good, case specific reason for doing so. In general, however, COP assessments can be conducted by Costs Officers utilising the GHR as the reasonable hourly rate. The issue as to the appropriate status or grade of fee earner for the work in question will always be a matter for discretion of Costs Officers and/or Costs Judges."[30]

3.22. Taking into account these extracts from *PLK*, points (i)-(v) summarised above are answered as follows:

i. The GHR rates (if approved) are the rates to be used, not the *PLK* rates. This is made clear by Master Whalan in the extracts cited. Further, at [35], Master Whalan expressly stated that his approach to the rates was subject to the recommendations of this working group and the Civil Justice Council.

ii. The approach of the assessing Costs Officer or Costs Judge is clear from *PLK* [at 31] and from the Revised Guide.

[29] At [29]

[30] At [30]

iii. The Revised Guide [at 29] specifically allows for the possibility of a significantly higher rate for Grade A, B and C fee earners. This is an intentional change from paragraph 43 of the present Guide where that possibility exists for Grade A fee earners only. Grade C includes fee earners of equivalent experience to solicitors and legal executives of under 4 years' experience. For that reason Grade D fee earners were not included at [29] of the Revised Guide.[31] The fact that some assessments in 2017 and 2018 may have allowed rates in excess of the proposed National 1 rates does not indicate that they are too low and/or unreasonable.

iv. It is correct that the rates proposed for National 1 rates are lower at Grades B-D than the *PLK* rates. The proposed Grade A rate is £261 (*PLK* rate £260). The proposed Grade B rate is 95% of the *PLK* rate (218/230), Grade C 92% (178/193) and Grade D 89% (126/142). These were evidence-based rates, as explained in the Report. Master Whalan, as cited above,[32] stated that the evidence before him, both in terms of time and expenditure, was "*inconsistent and…incomplete*". He recognised[33] that: (i) *"..the application of an inflationary uplift was not just a "blunt tool", but an approach which endorses the application of a practice which has been rejected explicitly since 2014, from which time the emphasis has been on a "comprehensive evidence based review.."* and (ii) the present GHR were not an index of reasonable remuneration. Having considered arguments on the impact of inflation and the evidence indicating *"a fairly broad range of salary increases, in circumstances where the uplifts are dictated (at least in part) by subjective factors",* his direction (subject to the recommendations of the working group and the CJC) was that Costs Officers "*should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed*".[34] It follows from all this that the evidence and conclusions in *PLK* , while considered by the working group, are not such that they should have a

[31] Omitting Grade D fee earners was criticised in responses from receiving parties; extending paragraph 29 to Grades B & C was criticised by paying parties. The criticisms are discussed later in this Report.
[32] At [29]
[33] At [31]
[34] At [34] – [35]

real impact on the conclusions drawn from the evidence based exercise which it has carried out.[35]

v. There is no basis on the evidence to give additional attention to CoP work. The recommended rates are based on the evidence and the Revised Guide enables assessment by the SCCO to allow higher GHR in individual cases, if appropriate.

3.23. As to point (vi), i.e. rises in accordance with inflation, the Interim Report made it clear that using the 2010 GHRs as a baseline is "*seriously open to challenge*";[36] further in Appendix I to the Interim Report, Professor Rickman said of the Legal Services SPPI: *"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."* There is a fuller discussion of this later in this Section.

Legal Aid Solicitors

3.24. A response was received from (and on behalf of) solicitors who carry out a significant proportion of legal aid work. The starting point was the importance of such solicitors to be able to recover inter partes rates in order to remain viable. As Lord Hope said:[37]

> *".. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work…."*

3.25. It was said that:

[35] The working group also notes that PLK was not an adversarial costs hearing; the Master heard submissions from one side.

[36] At [4.17(iii)].

[37] Re Appeals by Governing Body of JFS and Others [2009] UKSC 1; [2009] 1 WLR 2353 [at 25]; referred to more recently in ZN (Afghanistan) and KA (Iraq) v SSHD [2018] EWCA Civ 1059 – [87]-[90].

i) GHRs are arguably more important to Legal Aid firms than they are to firms able to rely on additional fee income from private clients and/or success in CFA-funded cases.

ii) Legal Aid firms' business models necessarily rely on Grade C and D fee earners to conduct most of the cases, with Grade A and B fee earners providing oversight, or dealing with very large or complex cases.[38]

iii) Most of the inter partes bills are below £75000 and are subject to provisional assessment, assessed by Costs Officers at the SCCO (if not agreed). The vast majority of those provisionally assessed cases have had the 2010 GHRs applied to them. Because of the financial disincentive to request an oral hearing,[39] the 2010 GHRs have been effectively binding.

iv) The methodology of the Interim Report is criticised on the basis that (a) no predominantly Legal Aid based firms were approached for comment in the consultation, (b) the judicially recognised importance of inter partes costs for the viability of such firms is not mentioned, (c) data gathered from SCCO costs officers is largely useless because of c) above, (d) the lowest proposed increases are for lower grades of fee earner in London 2 and 3 and National 1 and 2, these being those most likely to be provisionally assessed by SCCO costs officers; the 'nominal' increases proposed to these rates only partially make up for the real term reduction since 2010.

v) Consequently, the working group was asked to revise the proposals for London 2 and 3 and National 1 and 2 by increasing the 2010 GHRs by 25%, this being more reflective of inflation since 2010 (Bank of England inflation of 27% since 2010) and the likely effect of inflation in the future.

3.26. The working group acknowledges comments (i)-(iii) above. Considering the comments in (iv) and (v):

(iv)

[38] Irwin Mitchell, while not approaching the matter from the specific standpoint of a legal aid firm expressed a particular concern about the relatively lower rates of increase for Grade D, saying that using Grade D fee earners for more complex tasks is a way in which firms become more efficient and the recommended increases do not properly reflect the market demand or high quality Paralegals which we assert has driven up the cost of employing Paralegals by at least as much as other grades over a 10 year period.
[39] CPR Rule 47.15(10)

a) & b) The Interim Report[40] said:

> *"…A letter and forms for completion were sent to a number of organisations, listed at Appendix E. There have been at least 3 articles on the working group's work in the Law Society Gazette (17 April 2020, 11 May 2020 and 19 October 2020), and notices in the ACL News (10 September 2020) and the Costs Lawyers Standards Board September 2020 Newsletter. Also, some individual firms were contacted directly…."*

Only a few firms were listed in Appendix E, these being ones which the working group thought may have a large database of relevant information. However, the wide publication of the review, as demonstrated above, enabled anybody to send evidence or comments, as many did.

(v)

c) & d) The data gathered from SCCO costs officers properly form part of the overall dataset. While there may be some effect of cost officers' assessments in the lower increases in Grades C and D in London 2 & 3 and National 1 & 2, this is by no means self-proving. For example, National 2 Grades C & D increases are 21.3% and 13.5% respectively. 21.3% is towards the top end of any increase, irrespective of Grade and area, while 13.5% is only 0.2% less than the recommended increase for London 3 Grade A.

Further, Grade C fee earners may, if they are carrying out work which attracts the provisions of paragraph 29 of the Guide, claim a higher rate than GHR.

In any event, as made clear in the Interim Report[41] it is not appropriate to use the 2010 GHRs as a sound baseline on which to ground inflationary increases.

FOCIS/Other Claimant Solicitors

3.27. FOCIS and other claimant solicitors referred to the fact that (for example) Lord Dyson MR said that it was important to emphasise that the GHRs were originally intended to be broad approximations of actual rates in the market.[42]

---

[40] At [3.5]
[41] At [4.17(iii)] and elsewhere in this Report
[42] See Interim Report paragraph 1.4

3.28. FOCIS requested an analysis of the evidence of the rates claimed in the evidence which had been provided to the working group. Professor Fenn kindly prepared an analysis of that evidence and this was provided to FOCIS. The results are attached to this Report as Appendix 5. Raw data requested was also supplied, duly anonymised.

Claimed Rates

3.29. FOCIS provided their own comparison of assessed and claimed rates, based on the working group's data and commented:

> *"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 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."*

3.30. Another major claimant solicitor firm wrote:

> *"In utilising only data on rates awarded, rather than rates charged, the methodology runs the risk of ignoring the commercial reality of running a law firm given that individual firms are best placed to set rates required for their profitability and rates which clients are willing to pay as a commercial reality. Our experience is that clients are becoming increasingly aware of costs issues given the propensity of firms to charge success fees and costs shortfalls (i.e. that not recovered from a third party) and recognition should therefore also be given to claimed rates in the new GHR to reflect the commercial reality of market rates.*
>
> *The reliance on awarded rates, rather than claimed rates, also leaves little, if any, scope for considering inflation which has a drastic impact on the profitability of law firms, particularly given the squeeze on profit[43] which has resulted from other costs reforms over the last 10 years. The retail price index increased 34.7% between*

[43] Neither this respondent nor others provided hard evidence supporting the suggested "*squeeze on profit*"

January 2010 and November 2020 and the revised GHR should take this into account. If the new GHR fail to consider this rise, then the increases proposed by the CJC, which fall well below 35%, will present a reduction in rates in real terms."

3.31. These submissions were strongly supported by a number of other receiving parties.[44] For example, Irwin Mitchell wrote:

> *"…it is suggested by some that the hourly rate **claimed** is not relevant as it is set by the solicitor and the client is not ultimately liable to pay that rate. That assertion is incorrect. The client is primarily liable for the claimed hourly rate under the indemnity principle. For example, the difference between the claimed and recovered hourly rate is generally paid by clients as part of the 'shortfall' and that applies to both private funding and post LASPO CFAs.*
>
> *The client does, therefore, have a direct interest in the hourly rate claimed and we would assert that the market rate meets Jackson LJ's definition of rates which an intelligent purchaser with time to shop around for the best deal would negotiate. The hourly rate **claimed** can be said to be a market rate on this basis as it seeks to reflect the appropriate rate for the type of work, the location of the work and the business model of the law firm that sets the rate…"*

3.32. The fundamental issue which the working group would take is the proposition that there is clear correlation between rates claimed and market rates.[45] Nor does the working group accept that taking an average of rates claimed will provide a reliable figure for market rates, the definition of which in the Jackson report was "*…the rates which an intelligent purchaser with time to shop around for the best deal would negotiate*".[46]

3.33. The working group further comments:

i) There were numerous responses which challenged the proposition that claimed rates reflect market rates. One example was from an SCCO Master in these terms:

[44] And, for example, by the Birmingham Law Society. Also, Stewarts said: *"We are particularly concerned that the London 1 rates are a long way below the market rate for solicitors specialising in heavy weight commercial disputes. That is likely because of the lack of cost assessment data on the cases that meet the new criteria for London 1. We agree with the observations of Macfarlanes as set out in the working group's report …"*
[45] Some respondents suggested using information from costs budgets. However the court, when cost budgeting, does not approve hourly rates. Therefore the working group rejects this suggestion.
[46] See further paragraphs 3.16-3.19 of the Interim Report.

> *"…the GHR are only involved in what is recoverable from the opponent and so any broad approximation imposed there can be ameliorated by agreement between the solicitor and client. Furthermore, the widespread use of CFAs, in my view, weakens the argument that the rates agreed between the client and solicitor are struck in a bargain of the sort considered by the Foskett J committee. It is rare to the point of extinction to see any client privately paying fees in personal injury or clinical negligence cases which are a significant proportion of cases that come before the court. Since the end of recovery of success fees in most of those cases, there has been an increase in solicitors seeking a contribution to their costs from the client, usually known as the "shortfall". I do not agree with the submissions of FOCIS, as recorded in the report, that the shortfall mirrors the interest of a privately paying client in other litigation. The extent of the shortfall is usually a mixture of challenges to the hourly rates claimed, the amount of time spent, counsel's fees et cetera…"*

Another from a paying party was:

> *"...The vast majority of civil litigation is funded under "No win: No fee" conditional fee agreements. This means a client's liability to pay high hourly rates in respect of costs recovered from an opponent and either no liability, or a liability to pay a much lower hourly rate, in respect of unrecovered costs.*
>
> *These funding arrangements mean a client is never going to have to pay those high hourly rates out of their own pocket. As a result, because the client has no financial interest in reducing them, and so there is no meaningful competition on price within this area of the legal market. In fact the only downward pressure on hourly rates is how much a costs judge will allow on assessment."*

And another:

> *"…It might be suggested that the starting point is the retainer rate. In a world of competitive tendering for legal services that is a reasonable assertion. However in a system of CFAs and BTE insurance, the retainer rate is meaningless."*

ii) Apart from the SCCO Master's points on the 'shortfall', the extent to which clients engaged under post LASPO CFA retainers are actually held responsible for the difference between costs (including hourly rates) claimed and recovered is not known. It may well be difficult to obtain such information from a fully representative cross section of claimant solicitors.

Market inflation

3.34. The point that the recommended GHRs are out of step with market inflation is based on taking the 2010 GHRs as the baseline.[47] The Interim Report[48] made it clear that this was a flawed premise, stating: *"…An important difficulty with this (i.e. inflation on 2010 GHRs) is that the 2010 figures were more historic than evidence-based. Hence the baseline figure is seriously open to challenge."*

3.35. Irwin Mitchell addressed and supported many points made by claimant solicitors as reflected above. Their conclusion was that *"… an increase combining all these factors would be somewhere between 25% and 37.6% across all grades and towards the upper end of that range to reflect the cluster of indices referred to…"* They suggested that evidence from assessed rates should only be part, albeit an important part, of the determination of increases. They said that other inflationary indices should be taken into account, especially where the recommended increases fell well below these indices.[49] It can be seen from the discussion below on indices relied on by paying parties, that receiving parties and paying parties have used different indices to support their arguments that the increases recommended are too low or too high. That, in the working group's view, is a good reason to stick closely to the results obtained from assessed and agreed rates. This is relevant also to not accepting Irwin Mitchell's point that *" …in so far as this is a concern, this challenge is readily mitigated by applying indexation to the last data based rates (2006)…."* Further (a) there is nothing to suggest that the 2006 (in fact 2005) rates were soundly evidence based and (b) the longer the period to which one applies a historic inflation index, the more problematic it becomes to justify it as appropriate, given the massive changes in legal services and costs in the last 10-15 years.

---

[47] This suggestion was not limited to personal injury firms; e.g. a London 1 commercial firm said the same, based on the data for heavy commercial work in the London BPC.

[48] At [4.17(iii)]

[49] They relied on a number of indices, e.g. AWE Services Index, ASHE indices for legal and professional services, and SPPI legal services, saying of the Interim Report's comment on the latter in Appendix J: *"We believe it is wrong to dismiss the SPPI index for legal services completely as it is based on real data of business to business costs for legal services and there may be a number of reasons why legal services costs have increased faster than other services industries unrelated to a perceived failure by legal services organisations to control costs. The latter assumption is contrary to our experience of legal businesses which are at all times strongly focused on competitive considerations, driving efficiencies and reducing costs."*

FOCIS' example

3.36. FOCIS wrote in an article in the New Law Journal[50] as follows:

> *"To illustrate this issue, let us take a simplified example of ten cases for assessment, with grade A charge rates for cases 1-10 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."*

3.37. Taking the example given by FOCIS, the following points can be made:

a) The lower claimed rates are less likely to go to detailed assessment and are more likely to be agreed. Therefore rates claimed on cases which go to detailed assessment are likely to be higher than rates claimed across the spectrum. Thus, the data on claimed rates may be skewed.

b) The costs judge who did not allow more than £340 did so using his experience. That experience may include knowing that 50% of the solicitors firms did the work for £340 per hour or less.

c) The solicitors who claimed between £300 and £340 per hour would receive on assessment what they had claimed. Those claiming more than £340 per hour would only receive £5 per hour less than the mean for the claimed rate of £345 per hour.

FOCIS comparison rates

3.38. FOCIS provided a table making a comparison between the percentage increases recommended in the Interim Report[51] and data based on the rates claimed for London 3, National 1 and National 2, in Appendix 5.[52]

3.39. In summary, taking the average increase over 2010 GHRs across all four Grades, the FOCIS figures are:

---

[50] 3rd February 2021 – repeated in the FOCIS response

[51] Paragraph 4.18

[52] It was not possible because of the way London 1 and 2 were calculated to make such a comparison for them.

London 3: proposed GHR 12.6%; Table 8c claimed rates 29.2%

National 1: proposed GHR 13.6%; Table 8c claimed rates 31.2%

National 2: proposed GHR 22.6%; Table 8c claimed rates 40.5%

3.40. From this FOCIS drew certain conclusions which will now be set out and commented on.

i) *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.*

Comment: It is not accepted that the 2010 GHRs were below real market rates in 2010, though they may have been below an average of claimed rates.

ii) *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.*

Comment: If 2010 rates are not a sound starting point, then the effect of inflation is not a proper way to assess proposed GHRs. Further, as can be seen from the paying parties' submissions, below, there are fundamental differences as to which indices of inflation should be used.

iii) *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.*

No additional comment.

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

No additional comment.

3.41. FOCIS added that on the working group's data, rates were reduced by judges on assessment in 82% of cases, and, if one excludes the cases claimed at GHR, the percentage increases to 87%, thus demonstrating that most judges reduce hourly rates even if they are below *'the average market rate paid by the average litigant*.' The working group accepts that most judges reduce hourly rates from the rates claimed, but (i) does not accept that rates claimed are the market rate and (ii) notes that it is unsurprising that most hourly rates claimed are reduced on judicial assessment, particularly as such cases are the small minority of costs bills which are disputed to the extent that they go before a judge. Tapping into the judicial expertise

in assessing the hourly rates in such cases was the aim of the working group's inquiry.

3.42. It will be recalled that the Interim Report[53] noted that: *"the increase from 2010 (Q1) to 2020 (Q3) was 13% using the Service Producer Price Index (SPPI) for all services, 17% on SPPI (for professional services), 34% on SPPI (legal services) and 24% using the Consumer Price Index".* Reverting to the above comparison of increases over 2010 GHRs for the proposed GHRs in the Interim Report and those based on claimed rates, it can be seen that the former are broadly in line with SPPI for all services.[54] The latter, suggested by FOCIS (and others) would result in rises well above any index apart from SPPI (Legal Services).[55] Professor Rickman's comment in Appendix I to the Interim Report said of the SPPI (Legal Services) index: *"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."*[56]

3.43. One final point on the FOCIS comparisons is that if one excludes Grade D from their tables the average increases are:

London 3 Grades A-C 13.6%; Grade D 7%

National 1 Grades A-C 14.5%; Grade D 6.8%

National 2 Grades A-C 24.2%; Grade D 13.5%

Thus the average of Grades A-C across these 3 areas is 17.4%. This might be considered an unfair presentation of the figures, were it not for the fact that it substantially mirrors the pattern of Grade D being significantly lower than the average of A-C in the claimed rates which FOCIS provided. These were:

London 3 Grades A-C 30.5%; Grade D 21%

National 1 Grades A-C 33%; Grade D 19.8%

[53] At [4.17(iii)]

[54] The average across all 3 areas is 16.3%, close to the SPPI (for professional services)

[55] The question would also arise as to what to do with London 2 if rates claimed were used as the basis for proposed GHRs. Whilst all accept that it is not possible to make a proper comparison because of the change in London 2, the figures would result increases of Grade A 48%, Grade B 42%, Grade C 40% and Grade D 31%.

[56] See further below.

National 2 Grades A-C 42.2%; Grade D 31.2%

This analysis may also tend to undermine the point made by Irwin Mitchell, footnoted above under *'Legal Aid Solicitors'* that the proposes GHR "*….increases do not properly reflect the market demand or (?for) high quality Paralegals which we assert has driven up the cost of employing Paralegals by at least as much as other grades over a 10 year period."*

APIL

3.44. APIL criticised the methodology for the reasons referred to and answered in the Interim Report.[57] It is not proposed to repeat this paragraph. It is not accepted from that data that the hourly rates charged for personal injury claims are artificially deflated by historic GHR. As will be seen below, paying parties and their representatives rely on other data which they say prove that the GHRs awarded by costs judges are artificially inflated. It is clear that both 'sides' could rely on numerous different statistics/indices to seek to prove their point.

3.45. APIL sought to persuade the working party that the 2010 GHRs should be updated to take account of inflation. Though the working party believe that this is misconceived,[58] it is right to mention APIL's criticism of Professor Rickman's statement[59] that:

> *"… the reason for the larger increase in the Legal Services index is not clear, but it may be related to (1) the possibility that the sector has been slower to adopt cost-saving technology than others (including those in its wider Professional Services home), 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."*

APIL said that of this: "*There is no support, in the analysis or evidence submitted, for the assertion…"*

It is correct that direct evidence was not cited here. This was principally because the remarks were intended to illustrate why the indices *may* have differed, rather than

[57] At [3.20]
[58] See Interim Report at [4.17(iii)]
[59] Interim Report Appendix J.

to adjudicate on this. In turn, this was because the working party did not seek to recommend an inflation index, so much as to explore how its recommendations compared with those resulting from the application of various measures of inflation.

NHS Resolution/Acumension[60]/Keoghs, Solicitors

3.46. Many of the main points (and more) were made by these 3 respondents. It is convenient, since they provided substantial detail and figures, to begin with them. Overall, paying parties: (a) severely criticised the methodology, and (b) submitted that no increase in GHRs was justified, sometimes saying that, if anything, they should be reduced.

3.47. NHS Resolution ('NHSR') presented a detailed critique of the methodology and, consequentially, the proposed GHRs. Keoghs are one of their panel firms. There was substantial common ground between the NHSR and Keoghs responses. Similarly, Acumension had clearly had access to the Keoghs' data, relied upon it and made similar comments. The NHSR conclusions were:

> *"22. In conclusion, this review has failed to apply the established basis of Guideline Hours Rates; and has sought and relied upon a very limited dataset containing a completely different case profile to the profile of case the Guideline Hourly Rate typically represents.*
>
> *23. For all of the reasons which have been outlined above, it is our view that the current methodology should be extensively revisited on the basis of more accurate information and a closer appreciation of the developing realities of commercial practice.*
>
> *24. It is our view that the proper outcome of such a process would be that Guideline Hourly Rates would remain unchanged, or be reduced, in the light of commercial realties."*

3.48. NHSR made 3 main points which are first summarised, and then commented upon, below.

3.49. The first main point of NHSR's response (NHSR Point 1) is that it is '*simply not true'* that hard evidence of Expense of Time (EOT) is impossible to obtain.[61] A number of

[60] A professional services consultancy that offers legal spend management services to insurance and government sectors, including the NHS, several medical defence organisations and UK insurers.
[61] Interim Report at [2.8]

methods could and should have been used to obtain indicative (if not detailed) evidence of *'what it costs lawyers to run their practices':*

i) Data could have been sourced from the Solicitors Regulation Authority ('SRA') as part of their annual application process for the bulk renewal of solicitors' practising certificates. The process requires firms to fill in several screens and specifically asks how many legally qualified and non-legally qualified fee earners are in a firm and the level of competency reached by each fee earner. NHSR say it would be a simple expansion of that section to ask the SRA to include a data survey for the CJC to include questions such as mean salary of fee earners in each grade, number of fee earning and non-fee earning staff, where the work is done, annual overheads costs, average locational overhead per fee earner, gross profit of the firm and the EBITDA[62] of the firm.

ii) A broad range of statistics on the expense inflation of a legal practice between 2010 and 2020 is available which have not been considered. These include (a) the average earnings of legal staff, (b) the rateable value of offices, (c) the applicable business rates and (d) ASHE.[63]

3.50. The working group notes that the information currently obtained by the SRA would not enable an EOT calculation. As to future information, the SRA may not agree to obtain, or solicitors to allow, dissemination of that information.[64] In any event it is doubtful whether it would allow a soundly based EOT calculation, unless there was a very high response and a representative response rate.

3.51. A substantial number of paying parties emphasised the importance of any increase in GHRs on their legal costs, at the expense of many, including the taxpayer. The review which gave rise to the Interim Report was seen as a missed opportunity to deal with costs, and GHRs, on a comprehensive basis. For example, Acumension wrote:

> *"It is recognised that the working group may have had minimal time and financial resource to undertake this review, and has done its best in the circumstances.*

[62] Earnings before Interest, Taxes, Depreciation and Amortisation

[63] Annual Survey of Hours and Earnings compiled by the Office for National Statistics ('ONS')

[64] NHSR say: *"..it would be reasonable to expect that many firms would participate.."* The working group is unconvinced that participation would be such as to furnish a sound evidence base.

However, given the potentially large financial impact of the review, it is of particular importance that any guideline hourly rates review is undertaken in an appropriate manner.

In almost any other business sector, given the potentially large financial impact of such a review, one would expect a management consultancy (e.g. McKinsey & Company or Gartner Consulting) to have been engaged. Whilst the working group may have been hindered by lack of financial resource, the absence of such an engagement is unfortunate."

3.52. The following methodology proposed by Keoghs demonstrates the extent of inquiry indicated as potentially achieving a more satisfactory outcome. Without passing comment on whether or not such a methodology is feasible, even if resources were available, and whether it would be likely to achieve the desired outcome, it is clear that such an approach was not open to the working group:

"A new methodology

We propose a different method of determining GHR with the following criteria;

a) *Costs inquiry Committee*
    i. *High Court Judge (Chairperson)*
    ii. *Independent accountant*
    iii. *Independent economist*
    iv. *A member of the Financial Conduct Authority*
b) *Inquisitorial process*
    i. *Power to request evidence from the SRA, the Law Society, and from solicitor practices.*
    ii. *Power to hear evidence from stakeholders*
    iii. *Power to commission and obtain independent expert evidence;*
c) *Defined objectives*
    i. *To determine the broad average cost of a legal practice in doing 1 hour's work on a "run of the mill" case*

ii. *To determine the broad average hourly rate paid by clients out of their own monies when not recovered from an opponent*

iii. *To make recommendations as to the GHR by Grade of fee earner by location."*

3.53. Turning to the range of statistics which NHSR say the working group could have used, salary (based on ASHE) and office costs (based on office sector business floor space rateable value) were said to be the two biggest expenses of a typical solicitor's firm,[65] the indices used showing average percentage increases of 12.3% and 8% since 2010, as compared with the proposed GHRs which were estimated as averaging at an 18% increase. The working group responds:

i) As NHSR appreciate, these indices are (at best) 'indicative' not 'detailed' evidence of what it costs lawyers to run their practices'. Hence (presumably) their suggestion that the SRA could be asked to source much more extensive data.

ii) There are other costs upon which information would be needed, such as professional indemnity insurance, training costs, business development costs.

iii) The working group accepts that the ASHE data on salaries might be one statistic potentially relevant to an EOT calculation. There are many others, and the relevance and reliability in terms of GHRs would undoubtedly be hotly contested[66] - see further below. The working group did not consult on this basis and therefore does not have the benefit of responses from receiving parties on the suggested indices. What it does have, as reflected previously in this report, is a number of responses seriously critical of its recommended GHRs, with statistical evidence in support, arguing that the proposed increases are too low. Further, the working group questions whether ASHE contains

---

[65] Allianz Insurers said that staff salaries and bonuses comprise 68% of expenses/overheads and property costs 10.3%. But this was based on a Price Waterhouse Cooper (PwC) report of the financial state of the legal profession (data taken from the top 51-100 firms). One might ask how representative they are of the profession as a whole. It is noted that Foskett (paras 4.7-4.8) referring to the then equivalent PwC report of the 'top 100 law firms said: "*While not representative of all law firms, the survey provided very good data for the largest firms…".* FOIL also relied on similar PwC data while saying: "*It is inevitably broad-brush and must be presented with significant caveats, but it does present a snapshot of the profession.*"

[66] The statistics for inflationary increase 2010-2020 (see Interim Report at [4.17(iii)] in the SPPI (professional services) were 17% and for legal services 34%. The working group did not rely on these but NHSR do not address them or attempt to explain how they fit with their submissions.

sufficient detail to provide data appropriate to GHRs in the context of litigation. Litigation solicitors will be a subset of the ASHE data.

iv) Some respondents suggested that insurer panel solicitors' rates should be taken into account and that the introduction of Qualified One-Way Costs Shifting (QOCS) meant that the working group data would not include detailed assessments of those rates. No panel rate data was obtained. In any event it would not have been practicable to evaluate this without detail as to the retainers; further, personal injury claimant solicitors are not comparable, for example because they have to triage and reject work, they may not have a guaranteed stream of work and they have to wait for payment, sometimes for years – though this has been attenuated to some extent by interim payments on account of costs. The effect of QOCS in this area is likely to have been minimal, as Defendants are relatively rarely the successful party in personal injury cases and, when they are, the fees are rarely disputed because of the panel system.

v) Foskett[67] used no fewer than 8 sources of data and evidence, albeit not ASHE or any of those suggested above. Despite this, Lord Dyson concluded that *"...the evidence….is not a sufficiently strong foundation on which to adopt the rates proposed…"*

vi) Absent funding to undertake "*the sort of in-depth survey which the Civil Justice Council's Costs Committee and its expert advisers consider is required to produce an adequate evidence base.."*[68] any attempt to rely on data such as that relied on by Foskett, or that suggested by respondents to the Interim Report will, the working group believes, be doomed to failure. Even were funding available, the working group notes Lord Dyson's opinion:

> *"There is also considerable doubt that even if such funds were forthcoming there would be sufficient numbers of firms willing to participate and provide the level of detailed data required to enable the Committee (and in turn myself) to produce accurate and reasonable GHRs."*

[67] Section 4

[68] https://www.judiciary.uk/publications/guideline-hourly-rates/.

vii) It is against that backdrop that the Interim Report needs to be evaluated.

3.54. It may be of interest to compare the indices which a number of paying parties suggested should be used so as to arrive at appropriate updates from 2010, and those suggested by Claimants. ASHE and business rate increases were said to give an indicative increase of 8-12.3%. The SPPI (professional services) and SPPI (legal services) reflect increases of 17% and 34% respectively.[69] Many Claimants recommended using the latter to uplift the 2010 rates. The working group reiterates that any index uplift on 2010 GHRs is unacceptable since the 2010 rates cannot be assumed to be soundly based. However, it can also be noted that the various indices are different from a conceptual perspective: one is based on costs and the other on prices, with profit contributing an important part of the difference.[70] Given these notable differences, the working group believes that none of the indices referred to reliably assists in trying to ascertain the aim of GHR as stated by Jackson LJ when he said:[71]

> *"the aim of the GHR should be to reflect market rates for the level of work being undertaken" and that "[these] would be the rates which an intelligent purchaser with time to shop around for the best deal would negotiate."*

3.55. Secondly, NHSR commented on the data used by the working group (NHSR Point 2), saying:

i. Information from NHSR's panel firms indicates that only 1% of cases proceed to detailed assessment. In the vast majority of those 1% of cases, the level of hourly rates claimed is a significant issue in the detailed assessment. In the other 99% the average hourly rates claimed are lower and the 1% the court sees is not representative of the 99% which are settled. Therefore the 1% is not a fair representation of rates and the Interim Report is therefore statistically and factually erroneous.[72] The courts' knowledge of hourly rates claimed and

[69] Irwin Mitchell said that the ASHE index for professional services showed a 32.1% increase for professional services from January 2010 to January 2020, the equivalent ASHE index for legal services being 27%.

[70] Foskett added a percentage mark-up *"..to represent a reasonable profit element*"; the difficulties of estimating the appropriate mark-up being canvassed at Foskett [5.27] – [5.36].

[71] Interim Report at [2.4]

[72] NHSR added that information could not be provided from the settlements as to rates agreed since the agreements are all-inclusive and global.

allowed is limited to and influenced by the hourly rates claimed in the 1% of cases it determines. Therefore, court assessed rates should not be relied on.

ii. Information from NHSR's panel firms indicates that in the vast majority of clinical negligence cases the hourly rates claimed are higher than the 2010 GHR levels and lower than the 2020 levels.

iii. An analysis of accounts published at Companies House for a number of legal firms can be used to show that these arrangements have had little effect on profitability. If anything, their percentage of net profit has improved over the last decade.[73]

3.56. The working group has always accepted that only a small percentage of cases go to assessment. However, to suggest that the experienced costs judges' knowledge of hourly rates claimed and allowed should not therefore be relied on[74] is not accepted. Albeit that it is not a 'scientific' yardstick, it is a reasonable one, and is based on experience. As one response from a SCCO Master helpfully commented:

> *"….I find it instructive when the parties are both privately funding their litigation to see what rates are claimed (and paid). Similarly the offers made on detailed assessment/rates conceded are all useful pointers to what is a marketplace rate for the work in the bill before the court. I do not make a formal record of such pointers but I certainly try to absorb them in order to reflect "going rates" and to avoid falling into the trap of allowing rates that I 'always allow.'"*

3.57. The anecdotal information from NHSR panel firms as to the rates they agree cannot be relied on as it is not capable of any scrutiny. Nor is the analysis of a couple of firms' net profit margins, derived from Companies House, a proper basis from which conclusions can be drawn.

3.58. Thirdly, NHSR submitted that the proposed GHRs are not a reasonable starting point (NHSR Point 3), in summary for the following reasons:

i) The stated intention of the 2005 Guide is to assist judges: *"to assess costs summarily at the end of a trial on the fast track or at the conclusion of any other hearing which has lasted not more than one day."*

---

[73] Examples of 2 firms are given, one showing a 1.56% increase in net profit between 2011 to 2020, the other an increase of 4.07% between 2011 to 2019.

[74] E.g. one response said: *"…Meaning no offence to the Judges they are largely expected to pluck a figure from the air, albeit starting from the GHR, which is already flawed in the self-same way.."*

ii) Therefore, the level of case that the GHR represents is a run of the mill case:

a) of no more than £25,000;
b) of no more importance than any other routine case;
c) involving issues of no complexity;
d) that does not require the exercise of skill, expertise, specialised knowledge and responsibility above that of a routine case.

iii) The decision of the working group not to obtain summary assessment data[75] ignores the most representative dataset for GHRs. By their very nature cases at detailed assessment will include cases from £25,000 to life changing sums of many millions of pounds, of significant, if not the utmost, complexity and require the exercise of significant skill, expertise and responsibility well above that of a routine case.

iv) Keoghs lodged an FOI request of the working group's data. On analysis of the sample of clinical negligence cases (205 out of total sample of 754) the clinical negligence cases are unduly weighted towards cases with a value of £100,000 or more, of significant importance, involving issues of some considerable complexity and requiring more that routine skill, expertise, specialised knowledge and responsibility.

v) Therefore, as said to be seen from the table reproduced in the next paragraph, the working group's data sample is unrepresentative of the overall spectrum of clinical negligence case.

3.59. A table was produced as follows:

"Combined table comparing the CJC's data sample with Acumension and Keoghs data on NHS Resolution clinical negligence claims settled / assessed in the time period of 1st April 2019 and 27th November 2020 inclusive:"[76]

Claim Value	CJC No. of Cases	CJC % of Cases	NHSR No. of Cases	NHSR % of Cases
£0 to £49,999	73	35.6%	5,503	69.0%
£50,000 to £99,999	31	15.1%	921	11.6%
£100,000 to £499,999	42	20.5%	997	12.5%

[75] Interim Report at [3.4]
[76] Very similar data was produced by FOIL in their response.

£500,000 to £999,999	13	6.3%	185	2.3%
£1 million to £4,999,999	22	10.7%	205	2.6%
£5 million plus	24	11.7%	162	2.0%
Total	205	100%	7,973	100%

3.60. The submissions in NHSR Point 3 warrant detailed reply, particularly as essentially the same submissions were made by a number of paying parties, or those representing them. This was often accompanied by a history of GHRs from prior to, and since, their inception.

3.61. The stated intention in paragraph 2 of the 2005 Guide was only partially cited. Reflecting PD 44 para 9.1 it also provides:

> *"The court should consider making a summary assessment whenever it makes an order for costs which does not provide only for fixed costs."*[77]

3.62. The level of case intended to be represented by GHR is not the run of the mill case described above by NHSR (and in other paying parties' responses). In this regard:

i. Summary assessments are carried out in cases which do not fall within PD44 para 9.2 but are encompassed by para 9.1.

ii. Many cases within para 9.2 do not fall within the suggested 'run of the mill' case. These include appeals and applications in the Court of Appeal and High Court, as well as in the County Court.

iii. The working group's experience of detailed and summary assessments is not that in cases which fall outwith the suggested 'run of the mill' definition, paying parties concede that the GHRs should not be applied and higher hourly rates awarded. This experience, from the receiving parties' viewpoint, and, inferentially, clearly contentious before the Master, was demonstrated in the response of a SCCO Master who wrote:

> *"…I would like either the revised text or the final report to take the opportunity to spell out the sort of cases that the guideline rates are*

[77] See also PD 29 – the Multi Track: *"**10.5** In an appropriate case the judge may summarily assess costs in accordance with rule 44.6…";* Also, in the BPC, the shorter trials scheme for trials of up to 4 days, where PD57AB states: "***2.59*** *Save in exceptional circumstances—(a) the court will make a summary assessment of the costs of the party in whose favour any order for costs is made;"*

meant to be for in respect of detailed assessment. At the moment, the receiving party often says that the rates only apply to fast-track cases because the GHR are only for summary assessments and so apply to cases where the trial is expected to last no longer than one day. The 2014 review indicated that the rates would be the starting point for detailed assessments as well since that is how they were used. Many receiving and paying parties appear to be unaware of this. Consequently receiving parties regularly dismiss the GHR as being only for summary assessment and paying parties often do not challenge that assertion.

Many receiving parties' advocates go further to say that the rates only apply to the simplest of cases. The phrase "rear end shunt" is heard ad nauseam…."

iv. The GHRs are only one 'lever' on assessing costs. The applicability of GHR is capable of being much greater than suggested because of the court's discretion as to the grade of fee earner to allow for different levels of cases. Thus, it is commonplace to allow little (if any) grade A input in a case which is a fast-track 'run of the mill' case. Larger, more complex, cases are still within GHR but a greater allowance for higher grade fee earners will be awarded.

v. Nor is there an inevitable correlation between value and complexity of case. Particularly in clinical negligence cases, but also in other personal injury and non personal injury cases, smaller cases may be of similar complexity. Whether they attract a higher rate than GHR, pursuant to paragraph 29 of the Revised Guide, will depend, in the individual case on how 'substantial and complex' the litigation is, such that it '<u>may</u> be appropriate' for an hourly rate in excess of GHR. It should be clear that paragraph 29 is not for use in the majority of cases which do not fall within NHSR's above definition of 'run of the mill'.

vi. Another respondent said that one could reasonably have expected the best like-for-like data to be collected, namely: (i) summary assessments at the end of a trial on the fast track; and (ii) summary assessments upon conclusion of any other hearing of less than one day. Yet breaking down the data into two categories would be a further splintering of the purpose of GHRs. Again, PD 44 para 9.1 makes it clear that summary assessments are not restricted to these two categories. Summary assessments on trials and applications are not usually carried out by experienced costs judges. The working group, in adopting its assessment methodology, wished

primarily to tap into that experience, rather than be open to the criticism that it was the judges who most needed new GHRs who were providing the majority of the data. Finally, at the end of a fast track trial or other hearing in which costs have been summarily assessed, the time available to assess costs is often already greatly pressurised, which is why the working group did not feel it practicable to seek such information.[78]

vii. In the Foskett report[79] it was said:

> *"The GHR are themselves <u>guidelines</u> and a benchmark for summary assessments. As such, they may provide a helpful starting point in the detailed assessment process, but no more than that. The court's discretion and exercise of judgment in the application of the eight pillars of wisdom will be of significance in both forms of assessment, more obviously so in detailed assessments."*[80]

It is the case that GHRs are a helpful starting point in detailed assessments.[81]

viii. If the GHRs were meant to be applicable only to 'run of the mill' cases, as defined above, would the paying parties submit that the working group should have identified those cases and provided GHRs based upon them, such that all other cases would attract an increase under paragraph 29 of the Revised Guide? That would not be constructive or helpful. GHRs are used, and should be used, in a broad range of cases. Of course, they are a guide, and a starting point. Judicial discretion and the (now) eight pillars of wisdom[82] are relevant in both summary and detailed assessment. A judge may be persuaded that a case is so straightforward that a lower rate should apply;[83] or a judge may be persuaded that a case warrants a rate somewhat higher than the GHRs; or in some cases rely on paragraph 29 of the Revised Guide. GHRs are not, and cannot be, prescriptive to judges.

---

[78] Not to mention the extra pressures caused by remote working and the pandemic.

[79] At [6.7.5] - see also Foskett recommendation

[80] Cf Also Lord Dyson's response in April 2015: "*They GHRs) also form a part, even if only a starting reference point, in the preparation of detailed assessments. They also provide a yardstick for comparison purposes in costs budgeting*

[81] Now in the amended Revised Guide – see Section H below re paragraph 28.

[82] Rule 44.4(3) (a)-(h)

[83] Though, as stated above, may be more likely to cater for this in awarding fewer hours at the higher grades of fee earner.

ix. While the above table[84] shows a differing distribution of cases in terms of value - in this example with a substantially higher percentage of NHSR cases under £50,000 - it does not follow that the methodology is seriously flawed or the recommended GHRs inappropriate.

x. It would be impossible to cater for all types of work and all circumstances.[85] This can be seen from the Keoghs' equivalent table on personal injury claims, compared with the NHSR clinical negligence claims table. So, for example, in the bracket of <£50,000 the NHSR table has 69%, the Keoghs' table 39.04%, the equivalent figures in the bracket £100,000 - £499,999 being 12.5% and 28.66%. This is the Keoghs' table:[86]

Claim Value	**CJC No. of Cases**	**CJC % of Cases**	**Keoghs No. of Cases**	**Keoghs % of Cases**
£0 to £49,999	125	49.21%	1241	39.04%
£50,000 to £99,999	31	12.20%	822	25.86%
£100,000 to £499,999	62	24.41%	911	28.66%
£500,000 to £999,999	8	3.15%	101	3.18%
£1 million to £4,999,999	24	9.45%	86	2.71%
£5 million plus	4	1.57%	18	0.57%
Total	**254**	**100%**	**3179**	**100%**

Further, between £0 and £1m, the CJC sample was of 226 (88.97%) cases and Keoghs' 3975 (96.74%). There were 10% more under £50,000 cases in the CJC

[84] And similar tables presented by other paying party respondents

[85] Respondents on behalf of both receiving and paying parties criticised the amount of data of many differing types of work (though to suggest differing conclusions). The working group is firmly of the opinion that, with the exception of London 1 work, breaking down GHR into numerous differing types of work would be wholly counterproductive and undermine their basis and rationale.

[86] As with the clinical negligence cases table, very similar data was produced by FOIL in their response.

sample and a broad equivalence in cases between £100,000 and £1m. Thus roughly 90% of the data used by the CJC is in reasonably good alignment with Keoghs'.

Forum of Insurance Lawyers (FOIL)/DWF/Other paying parties

3.63. FOIL, as already stated, relied on tables very similar to those copied above. DWF provided tables breaking down not only case claim value in the working group's data,[87] but also the comparison of London to non-London cases in the data. FOIL, together with others in similar vein,[88] added these points:

i) *"The combined data from the judiciary and the profession reinforces the view that the dataset upon which the analysis has been based is very small. There are only 754 cases on the spreadsheets. In 73 of these no details are given of hourly rates agreed or awarded, rendering the data useless. The effective combined dataset is therefore only 681 cases.*

ii) *Looking at some specific areas, just 254 personal injury claims, 205 clinical negligence claims; 23 Court of Protection claims; and 16 abuse claims are included in the judicial figures. These numbers are tiny compared to the volume of litigation in these areas and are almost certain to be unrepresentative.*

iii) *Only 177 cases in total have been put forward by the judiciary and of these 110 are from the SCCO. Only 25% of the SCCO cases are from National Bands 1, 2 and 3: the majority are London bandings, resulting in London cases being significantly over-represented.*[89]

iv) *Details of the type of costs assessment undertaken are provided for 671 cases. Of these, 383 were dealt with by way of provisional assessment (57%); 72 were dealt with by summary assessment (11%); and only 213 were the subject of detailed assessment (32%). Therefore, two-thirds of the cases on which the recommendations were based were the subject of only rough and ready costs analysis.*

v) *DWF provided data on 377 claims as indicated in para 4.14 of the report, but the data from DWF was tabulated separately and not included in the spreadsheets. If it had*

[87] Which broadly corresponded with the NHSLA/Keoghs' analysis though with some variations not significant to the general thrust of the criticism.
[88] The DWF figures were sometimes slightly different from FOIL and others, but the significance of the point was the same.
[89] This point was also made by Acumension.

been included it would have amounted to almost 40% of the total data submitted by the legal profession. It is noted in the report that the DWF rates are in general lower than the rest of the data, being more comparable to 2010 GHR, but this significant amount of data has not formed part of the analysis and was used only to justify in general terms the recommended rates in the report. Although the DWF data was presented in a slightly different format, with such small amounts of data being available overall, the exclusion of a significant quantity of data likely to have reduced the average rates awarded is a serious omission."

3.64. As regards (i) and (ii), if one combines the personal injury, clinical negligence and abuse claims, they account for a substantial proportion, just under 70%, of the total dataset (475/681). Of course, they account for a tiny proportion of the volume of litigation in this area. No figures were provided of the overall volume, but the number of personal injury claims issued each year exceeds 100,000.[90] It does not follow that they are unrepresentative.

3.65. As regards (iii), on FOIL's figures, out of the 177 judicial figures, 82 (75% of 110) were from London and 95 from National Bands 1-3. Without providing figures on the number of cases going to detailed assessment in London and nationally, it is not understood how FOIL can conclude that London cases are significantly over-represented. In any event the London assessments inform only the proposed London GHRs and the national assessments only the proposed National GHRs.

3.66. As regards (iv), given that GHRs are supposed to represent a 'rough and ready costs analysis' the working group does not accept the suggested criticism. Expert assessment by costs judges on the issue of hourly rates will be to some extent 'rough and ready', irrespective of the type of assessment. Indeed, other paying parties criticised the fact that there were not enough summary assessments included in the dataset.

3.67. As regards (v), the reason for not including the DWF data in the analysis for proposing new GHRs was explained in the Interim Report,[91] with the working group

[90] 27000 personal injury cases issued Q4 of 2019, a drop of 5% - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/870184/civil-justice-statistics-quarterly-Oct-Dec.pdf

[91] At [4.14]

concluding that to use it would be to '*compare apples with pears'*. A substantial number of receiving parties' responses seriously challenged the working group even using the DWF data when it said: *"The DWF evidence may be an indicator that the modest increases recommended in this report are sensible and appropriate".*[92][93]

3.68. DWF also provided an analysis of hourly rates allowed in the working group's data for differing values of cases. The point can be taken from two brief tables (though a full breakdown was helpfully supplied). These tables were submitted to demonstrate why the working group's data which contains a higher percentage of larger claims is said to skew the proposed GHRs upwards. The tables were:

Figure 12: Averages across all personal injury data

Grade	***Claimed***	***Allowed***
Grade A	*£295.97*	*£270.39*
Grade B	*£251.30*	*£216.96*
Grade C	*£205.34*	*£179.62*
Grade D	*£145.41*	*£126.27*

Figure 13: Averages across claims valued at over £1 million

Grade	***Claimed***	***Allowed***
Grade A	*£397.11*	*£300.88*
Grade B	*£328.97*	*£239.06*
Grade C	*£270.98*	*£197.88*
Grade D	*£188.50*	*£133.83*

From the above and their fuller breakdown and graphs, DWF concluded:

[92] E.g. APIL wrote: "*We disagree with this comment and take the view that the data submitted by DWF should be ignored. The DWF rates are lower than the rest of the data, and very similar to the original 2010 GHRs. That is illogical and runs contrary to the obvious trends which have been identified in the data collected by the CJC and the data does not correlate with any of the inflationary indices considered."*

[93] DWF gave a further analysis of their data suggesting that '*given the current flaws the CJC data set has been proven to face it would be good practice to consider how it compares to a second data set.'* The working group did not find this of assistance. The major point is that like is not being compared with like.

"A full breakdown of the rates claimed and allowed across each band within the Personal Injury Data Set can be seen overleaf, however, the graph below shows clear trend lines within each Grade with the exception of Grade D: the higher the value of the claim the higher the allowed hourly rates. Given this, it is undeniable that the statistically improbable amount of high value claims within the Relevant Data Set has artificially inflated the hourly rates. Therefore no inference should be drawn on this data when considering it in the context of new GHRs."

3.69. The working group makes the following points in response:

i. As a preliminary matter, it is interesting how in the larger cases, the rate assessed is a substantially lower percentage of the rate claimed. For the >£1m claims, the percentage recovered is: Grade A 79%, Grade B 73%, Grade C 73%, Grade D 71%. The equivalent figures across all personal injury claims, which include the >£1m claims, are 91%, 86%, 87%, and 87%.

ii. Professor Fenn constructed a table from the original data (pooled judicial and professional)[94] showing the differences in mean assessed hourly rates when restricting the sample to claims valued less than £1m. This table (Table 5d), attached as Appendix 6, shows the numbers of claims in each grade/band combination, and the mean assessed hourly rates, for both the full pooled sample and the restricted lower value sample respectively. The penultimate column shows the percentage difference in the mean assessed hourly rates. For most grade/band combinations, the claim value cannot be proved with the 95% conventional confidence to have a statistically significant effect on the assessed rate.[95] This was established using a conventional test for the equality of means. The exceptions are for Grades B & D in London 1, and Grade A in National 1 & 2. London 1: (a) would not be the focus of FOIL's and other paying parties' criticism and (b) comprises a very different dataset. Moreover, the differences for Grade A in National 1 & 2 are in the region of only 4-6% -see the penultimate column of Appendix 6. This is perhaps not surprising when considering that the fact that a

[94] Across the entire dataset.

[95] As demonstrated in the final column of Appendix 6. The final column shows the confidence levels on a test of equality between A and B (a "t-test"). The critical level of confidence used by statisticians in such tests is normally 95%. If less than 95% confident that A and B are not equal, they accept the "null hypothesis" that A and B are indeed equal.

claim that has a value of >£1m is not of itself a reason to award higher than the GHR.

3.70. One large firm of solicitors which acts for paying parties, was more moderate in its critique of the Interim Report. They had concerns about the sample size and the fact that it would exclude the vast majority of cases which settle without an assessment of rates, they suggested that the sample would be skewed towards exceptional cases and also made the point that uplifts for inflation, complexity and expertise would be intermingled in the assessment data. Further, they noted the effect of changes in working practices, in particular because of the Covid-19 pandemic and proposed that the working group somehow take these into account.[96] They also said:

> *"New GHRs based on a comprehensive analysis of rich data on expense of time - rather than based on limited data from DAs - would, in our view, have been the optimal basis for moving forward. However we recognise, as the report does, that that ship has sailed: it has become apparent that the holy grail of rigorous, fully evidence-based precision, sought but not achieved by the Foskett committee, is simply not possible.*
>
> *Faced with this impossibility, we fully understand the adopted alternative of examining data from DAs and we note the analysis of the limited DA dataset which is presented in the report."*

3.71. Many paying parties made further made points about the impact of changes on technology and of the Covid-19 pandemic on working practices. As to the latter, the working group is of the opinion that it is too early to assess this. As to the former, NHSR referred to the ASHE data already mentioned and concluded in a table showing data from 2011 to 2020[97] that the ratio of fee earners to solicitors has increased, the ratio of legal PAs and secretaries to solicitors has decreased and the

[96] They also noted that Foskett recommended that some rates increase and some decrease – a point not lost on other paying parties - while the working group's proposed GHRs were all increased from 2010 rates. They also said that if, despite their concerns, some rate adjustment was considered necessary, ASHE and PwC suggest that the proposed increase of 18% is at the very least at some variance with other sources of data. In fairness, they concluded: "*We are aware that neither the ASHE data nor the PWC report relates to DA cases as sampled by the CJC, but we consider both to be helpful sources which could act as a wider sense check when controlling for limitations in the DA sample. We would not go quite as far as saying that the increases are not supported by these additional data sources but, as above, we suggest that the CJC should address the signals from these data sets as it takes matters forward."*

[97] It was accepted by NHSR that the data is not perfect, but said that the statistics are the most comprehensive data available.

ratio of owners to solicitors has increased. From that, it was said to be suggested, that technology has significantly reduced the costs of running a successful practice, that profitability has increased and that specialisation has resulted in economies of scale and concentration of expertise that lead to increased profitability. The working group has already commented on ASHE and other indices and does not accept that the data can be used as a factor of real significance in the present exercise of re-evaluating GHRs.

3.72. The Medical Defence Union supplied data in support of their argument that in terms of recovery of damages in cases under £250,000, costs are already disproportionate, such that GHRs should not be increased. The working group does not accept this point as relevant to the re-evaluation of GHRs. It is one which may well be for consideration in expanding the Fixed Recoverable Costs regime.

Conclusions

3.73. Having rehearsed and responded to the main criticisms of the methodology in the Interim Report, and taking into account all the responses, including the many which supported it, the working group has concluded that, though capable of some valid criticism, it is the best available in all the circumstances and is a sufficiently sound basis on which to make recommendations.

3.74. In conclusion, on the overall question of methodology, the working group considers that there is wisdom in the area of GHRs in the aphorism that: *"He who seeks perfection will never be content."*[98]

3.75. The working group would add that the hourly rate for a litigant in person, who cannot prove financial loss for doing the legal work, is £19 per hour,[99] having been increased from £18 per hour on 1st April 2015. The Civil Procedure Rule Committee may wish to consider this rate in the light of the recommendations in this report.

Recommendations:

R1. The Civil Justice Council accept that the methodology used in the Interim Report is a sufficiently sound basis upon which revised Guideline Hourly Rates should be based.

---

[98] Said by Natalie in Anna Karenina, albeit in a very different context.

[99] CPR Rule 46.5(4)(b) and PD 46 para 3.4

R2. The Civil Procedure Rule Committee is respectfully requested to consider whether to increase the hourly rate allowable for litigants in person.

Section D: Recommended Changes to London 1 & 2

4.1. The recommended changes in London 1 and London 2 were explained in the Interim Report at [4.8] - [4.11] and the recommendation is to be found in [4.10] as follows:

> *"…The working group concluded that the proper approach to London 1 and London 2 was to re-define London 1 by nature of work by centrally based London firms, rather than by geographical location in the City, and to use the BPC data as the recommended GHRs for such work. London 1 would primarily be for very heavy commercial and corporate work, whether undertaken by firms geographically located in the City or central London. London 2 would be for all other work carried out by firms geographically located in either the City of London or the area at present covered by London 2. Reasons for this can be summarised in this way:*
>
> *It reflects the present practice whereby the very heavy commercial work attracts London 1 rates wherever in central London the solicitors are geographically located. This is evidenced by comparing the data results for London 1 in tables 2, 5 and 6 (BPC), the experience of the Senior Costs Judges, the remarks of the Master in Shulman*[100] *and the comments of Senior Costs Judge Hurst in King v Telegraph Group Limited.*[101]
>
> *Conversely, it reflects the present practice for rates for other work, again whether the solicitors are in the City or in the present London 2 area.*
>
> *The confusion in the data for London 1 and London 2 (and lack of data for London 2) if attempts are made to assess the evidence on the traditional geographical areas. This is exemplified by comparing the results in tables 1c and 2c on the one hand with table 6 on the other.*
>
> *The data, obtained primarily from BPC judges, for London BPC work reflects a somewhat larger percentage increase over present GHRs*

[100] *"Whilst Canary Wharf may be located in a postcode outwith those allowed by the Guideline Rates for the City (EC1 to EC4), the presence of firms such as Skadden and Clifford Chance as well as many multinational financial institutions inevitably leads to the conclusion that rates equivalent to those to be found in the City are much more appropriate."*

[101] [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."*

than in other areas, but that is to be expected by the redefinition of London 1 and London 2."[102]

4.2. There was considerable support for defining London 1 by reference to very heavy commercial and corporate work by centrally based London firms, and London 2 for other work carried out in the City of London and Central London. For example, the Council of HM Circuit Judges[103] said, *"We agree the recommended changes to area London 1 and London 2"* and an SCCO Master wrote: "*I agree that identifying London 1 and 2 by reference to the nature of the work undertaken rather than geographical location reflects real practice. It is consistent with my own approach and with what I understand to be the approach of other costs judges. It is more logical than a focus on postcode."*

4.3. It was pointed out that some firms do very heavy commercial and corporate work as well as other work and some of those have offices in the City of London and elsewhere. The result of the changes proposed is that such firms will attract different GHRs depending on the work and location. So, very heavy corporate and commercial work carried out by a London-based firm will attract London 1 rates, while all other work will depend on location.

4.4. A minority of respondents, primarily from paying parties (or their representatives) challenged the proposed change. One said it overcomplicated the issues and undermined the basis of GHR. The Association of British Insurers ('ABI') (and others) said that it undermined the fundamental basis of GHR which is that the work should be linked to where the work is undertaken, and indicated that a more fundamental review is required and that traditional zoning is no longer relevant to home working. The working group accepts that this may be necessary in the future, but now is not the time to assess this. DWF said: "*It is subjective what falls into the category of "very heavy commercial and corporate work"….it is also unclear what the definition of 'centrally based London firms' is……If the London 1 rate is reserved for the 'very heavy commercial and corporate work by centrally based London firms' are the London 1 rates the*

[102] Though not statistically significant in themselves, the BPC data on London 2 in table 6 are, as one would expect, in line with the BPC data for London 1.
[103] Civil sub committee

maximum hourly rates that can be recovered?". In relation to this, the working group accepts that there is a certain degree of subjectivity in the term 'very heavy commercial and corporate work by centrally based London firms', but the view of the Senior Costs Judge and the responses from the SCCO Masters reinforced the working group's view that in reality there will be little difficulty in recognising the work and the location which qualifies for London 1 GHRs.[104] As to London 1 and paragraph 29, this is (and was) answered in the Revised Guide in Appendix 2 as follows:

> *"As stated in paragraph 29 of the Guide: …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."*

4.5. Others said that London 2 data does not comprise London 2 data at all but comprises personal injury cases dealt with by London 1 firms and FOCIS large loss London 1 cases, thereby inflating the recommended London 2 GHR. This is not accepted. It received no backing from any of the SCCO Masters who responded, the majority of whom positively supported the working group's proposal as reflecting the present status quo.[105] Personal Injury work should fall within London 2, not London 1 rates, even if the firm is located in the present London 1 area. Further, on the information available, the proposed London 2 rates reflect the work carried out. One would expect a somewhat higher proportion of higher value personal injury claims in central London than out of central London. Also, as the Interim Report makes clear[106] the proposed London 2 rates are *"a) broadly in line with the increase in rates in London 3 and the regions and (b) are not dissimilar to the present London 1 data in tables 1a-1c and 2a-2c, that data covering a very wide range of work but with little very high-level commercial work."*

---

[104] The City of London Law Society also submitted that '*very heavy*' should be substituted by *'heavy',* saying that the former was uncertain. However, so is the latter. Any attempt at definition is doomed to fail. There will always be room for argument, but London 1 should be defined by 'very heavy' work. Cf *King v Telegraph Group Limited* [2005] EWHC 90015 (costs) at [92].

[105] FOIL referred to footnote 42 of the Interim Report where it is recorded that the Senior Costs Master noted that some personal injury firms located in the City of London ask for London 1 rates. However, London 1 rates are (overwhelmingly) not awarded for this type of work.

[106] At [4.11]

4.6. It was said (by receiving parties) that in other work which can be very complex and substantial (e.g. in clinical negligence and defamation/privacy)[107], receiving parties may be limited to London 2 rates. One major claimant firm provided a number of examples of international claims, clinical negligence, human rights and discrimination claims, adding that insurers are regularly represented in such claims by leading commercial firms, and that the same goes for leading personal injury cases which go to appeal. They said that the proposed definition of London 1 risks inequality of arms. The response to this is that paragraph 29 of the Revised Guide and Rule 44.4 should adequately cater for such work. There should be no risk of inequality of arms. If the work is of such a high order, there is plenty of scope for judicial discretion to allow rates equivalent to London 1. Meanwhile, any insurers, or other defendant's costs, if allowed, will be assessed by exactly the same criteria.

4.7. Other concerns can be summarised in this way:

i. A firm of solicitors based in London 3 said that London 2 should be expanded to cover firms in central London postcodes not currently within the London 2 area. They cited the Interim Report which said:[108] *"The working group recognised that there are anomalies in the present boundaries for London 2 and London 3, partly because of the London 2 boundaries being so circumscribed."* However, the working group, in the absence of evidence and consultation, does not feel able to go further than it did in the Interim Report when it added: "*A future review should carefully consider evidence based on geographical location, particularly within London."*[109]

ii. There should be one national band. Type of work is a better guide than geographical location. If necessary, work needs to be transferred to lawyers outside London rather than attracting higher rates in London.

[107] Reference was made to the decision of the Senior Costs Judge in Various Claimants v MGN Limited [2018] WL 07627871

[108] At [4.12]

[109] This is particularly so, given the anticipated working practices changes due to home working and court reforms which will need to be assessed at the same time.

iii. It is unfair to use different methodology for London 1 and 2 solicitors than for national firms. It assists London firms in preventing national firms from gaining work from London based firms or from regional clients who are forced to use London based firms to obtain better cost recovery from the paying party.[110]

iv. One insurer said that, given that the (Revised) Guide allows for departure from GHR in complex cases, having a London 1 rate seems unnecessary.

4.8. The working group does not accept that there should be one national band or that it is unfair to use a different methodology for London 1 and 2. Historically London rates have been higher because of higher overheads. In addition, the work covered by the proposed London 1 rate is rarely carried out outside central London. To the extent it may be, a party may claim a higher rate than the GHRs suggest, in accordance with paragraph 29 of the Revised Guide. Defining London 1 by the type of work carried out by some central London firms recognises that there is a particular category of work which is almost exclusively done by those firms. Whether this differential will continue in the future, taking into account the court reform programme and increased remote working, may be addressed on a future review. A client is entitled to use local London solicitors where appropriate, and is also entitled to use London solicitors for specialist work which is not properly catered for by regional solicitors. Of course, it is always open to a paying party to contend, and for a court to find, that a receiving party has unreasonably instructed over-expensive solicitors.

4.9. A SCCO Master was concerned that the description 'very heavy commercial and corporate work' may lead to an argument that such work is all transactional/non-contentious in nature. The working group does not share the concern and believes that it is clear from the context of the Interim Report and

[110] One firm of solicitors commented that the methodology suited London firms, that recovery of lower costs by choosing a solicitor in the north rather than in London is an anachronism and out of date with current government policy seeking fairness and competitiveness across all areas. The firm said that under the recommended GHRs: *"…we will have to give serious consideration to transferring a considerable amount of our work to London and opening a London office simply because of the guideline hourly rates and not because it is more efficient to do so. This cannot be right. It also drives a brain drain from the national locations to London as it is harder for national firms to compete on salary.."*

the Revised Guide that the description is specifically aimed at very heavy commercial and corporate litigation.

4.10. Apart from these comments, there was no real opposition to the concept of defining London 1 by the nature of the work, rather than (simply) by geographical location.[111]

Recommendation

R3. The recommended changes to London 1 and 2 as reflected in the Interim Report at [4.10] and in the Revised Guide should be adopted.

[111] One respondent (non-commercial) noted that the rates were based on a significant amount of high value commercial litigation and said that the rates were originally intended to guide the summary assessment of costs at the conclusion a fast track trials. They questioned the applicability of GHRs across all manner of case types and values. However, (i) Summary Assessment according to the Rules is <u>not</u> limited to low value cases – see PD 44 paras 9.1 and 9.2 and Section C above, (ii) GHRs are used and needed in very heavy commercial work – see the BPC data gathered and the fact that a number of relevant cases have been BPC cases, (iii) GHRs are in practice regularly used as a cross-check on detailed assessment.

Section E: The Recommended Guideline Hourly Rates (GHRs)

5.1. The GHRs recommended in the Interim Report[112] are reproduced here for ease of reference:[113]

	Grade A	Grade B	Grade C	Grade D
London 1[114]	£512 (25.2%)	£348 (17.6%)	£270 (19.5%)	£186 (34.8%)
London 2[115]	£373 (17.8%)	£289 (19.5%)	£244 (25%)	£139 (10.4%)
London 3[116]	£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%)

5.2. Responses to the proposed GHRs which are covered in other sections of this Report are not repeated. Many of the relevant points were made in respect of the methodology and have been treated in Section C.

5.3. Those who supported the methodology of the Interim Report were generally supportive of the recommended GHRs, examples being: (i) *"The recommended rates are a sensible and welcome change which I fully support"* – a firm of solicitors and (ii) *"Broadly happy with the proposed increases, which are more consistent with rising costs and more reflective of practice in 2021"* – local authority legal services.

[112] At [4.18]
[113] The figures in brackets are the % increase over the 2010 GHRs
[114] Table 6 in Appendix H to the Interim Report.
[115] Table 5c in Appendix H to the Interim Report.
[116] Tables 1c and 2c for London 3, National 1 and National 2 in Appendix H to the Interim Report.

5.4. The majority of those who criticised the rates fell broadly into the expected categories, namely receiving parties thought they were too low, whereas paying parties thought them too high.

5.5. There were comments that the rates proposed for London 1 and 2 are far too high, and, on the other hand, comments that they are way below some charged in Commercial Court matters.

5.6. There appeared to be some misunderstanding, though limited, about the proposed London 1 rate. For example, it was thought that it comprised only the City of London and the area of central London covered by London 2 postcodes. That is not the proposal. As the Revised Guide makes clear, London 1 is defined by type of work and carried out by 'centrally based' London firms, with the footnote stating: *"Not restricted to any particular London postcode"*, thus recognising that heavy corporate and commercial work is carried out by firms located (e.g.) in SE1, E14 etc.

5.7. The Council of HM Circuit Judges, Civil Sub-Committee, urged that GHRs should be rounded up or down to the nearest £10, or at least, to the nearest £5, on the basis that attendances and work done on documents tend to be charged out in 6 minute units so the hourly rate should be readily divisible by 10 for ease of calculation. It was said that this would make it simpler, easier and cheaper for the solicitors or cost draftsmen, and for judges when they have to adjust the figures on summary assessment often under considerable pressure of time at the end of a hearing; also that in practice, chargeable hourly rates are expressed to the nearest £10 or £5.

5.8. It may be that rounding up or down would have a 'swings and roundabouts' effect. However, this was not something on which consultation had been requested. There were concerns that even the small changes introduced by rounding might have a serious and disproportionate effect in some areas, perhaps particularly on the insurance industry. Further, the GHRs have never hitherto been rounded up or down. It is a suggestion which might be thought appropriate for proper consideration and consultation on the next review.

5.9. A respondent commented that CoP work is largely restricted to the GHRs, and is mostly done at grade C and grade D. He said that a 10% and 6.8% increase in the

rates for N1 for grade C and D is too low, especially when compared with the increase of 21.3% and 13.5% for N2. Nevertheless, these are the results which the data yielded. That said, they may diverge further in the future in favour of N1, this being an argument in favour of retaining two national grades at this stage.

5.10. Some respondents criticised the lack of a proposal to distinguish outside London between high level commercial work and other types of work, adding that this did not reflect the very wide range of different types of work undertaken nationally and the quality of the cases that are heard in the major centres outside London in the BPC, and which are encouraged to be heard there. The obstacle to this submission is that the specific analysis of BPC work outside London did not support a separate GHR.[117] To reiterate the recognition of the working group to the work done in the BPC outside London, an important extract from the Interim Report is reproduced here:

> *"..The Judges who assess regional BPC rates are experienced BPC practitioners and can properly take into account the GHRs in deciding whether to award higher rates according to the provisions of paragraph 29 of the proposed new Guide; also if a case comes within the definition of a (new) London 1 case, those rates may also properly be considered so as to justify a yet higher rate. A concern is that solicitors may issue a regional BPC case in London so as to attract higher GHRs. In that regard the working group reproduce here paragraph 30 of the (proposed new) Guide as follows:*
>
> *"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*

[117] See Interim Report at [4.15].

pursuing the claim in that regional court (and see Practice Direction 29 para 2.6A)."[118]

5.11. Reference was also made by a respondent to the decision in *ABS Company Limited v Pantaenius UK Limited & ors.*[119] In it the judge said in respect of existing GHRs:

> *"First of all, the rates are significantly out of date. They were fixed in 2010 and they, therefore, reflect the position as it was in 2010, not as it was in 2020. Although Mr Watthey submits that it is wrong simply to look at inflation, because solicitors' rates have suffered commercial pressure, particularly in respect of work carried out for big institutional clients such as insurers. Whilst that submission is made, as it seems to me, that is a difficult submission for me to act on without real evidence upon which to arrive at a judgment. The conventional approach in relation to guideline rates is to uplift them by about 25 per cent in order to reflect the effects of inflation on the figures previously arrived at."*

So, in this Commercial Court decision, the judge accepted that he had no evidence upon which to act and applied what he described as a 'conventional rate', albeit the working group members were not aware of such a conventional rate and it may therefore have been limited to a particular cadre of judiciary. There is thus nothing in this decision which could have any real impact on the working group's recommendations.

5.12. The key points in the Association of Consumer Support Organisations' letter were:

i. *A rise in the GHRs will reduce the gap between a consumer's legal costs on an indemnity basis and the legal costs that their solicitor will recover from their opponent on the standard basis. Reducing this shortfall helps reduce barriers to access to justice. It is important therefore that any increase realistically reflects market rates. Greater consideration should therefore be given to appropriate inflationary measures.*

---

[118] Paragraph 30 of the Revised Guide is recommended to be subject to a minor amendment – see Section H below.

[119] [2020] EWHC 3720 (Comm). Although the judgment was handed down on 1st October 2020, it is understood that it was not published until after the Interim Report was published.

The working group responds to this by mentioning that the 2010 GHRs are not a sound baseline for the then market rates such that applying an inflationary index (the identity of which is also difficult to choose) will reflect current market rates. Current market rates are otherwise difficult to ascertain with any accuracy, once the rates claimed in the data on detailed assessments are not accepted as a proper representation of market rates – see Section C above, in particular in relation to the FOCIS response.

ii. *There is a disparity in the proposed GHRs for different grades of fee earners, grades C and D having a more modest increase over the 2010 GHRs than grades A and B. This may have the unintended consequence of reducing the amount of work undertaken at grades C and D; the GHRs for lower grades should be increased so as to encourage solicitors to allocate more work to them, thereby benefiting consumers.*

The working party notes that this reflects what some receiving parties' solicitors submitted and the point is responded to in section C. However, the evidence base supports the proposed GHRs and does not permit of changes to accommodate the concern.

iii. *The higher increases in London than nationally may inadvertently reduce the availability of specialist solicitors outside of London and appears not to reflect regional centres of expertise; this could adversely impact choices available to the consumer.*

The working group responds that the major increases are in London 1, an area now defined primarily by the nature of the work, this type of work not being normally carried on outside central London. The national increases are well in line with London 3, and not much different from London 2. The slightly unusual feature, which was recognised in the Interim Report[120] is that National 2 increases came out on the data substantially higher than

[120] At [4.13]

National 1. Also, the data from BPC courts outside London[121] did not justify a greater increase.

iv. *The GHRs should be reviewed regularly and adjusted according to an appropriate inflationary index such as SPPI.*

This is covered in section J of this Report

5.13. IRLA[122] noted that the increases would have a substantial impact upon them, for example where there are Conditional Fee Agreements in mesothelioma claims and in their bulk legacy claims, primarily noise-induced hearing loss with a low value but exempted from Fixed Recoverable Costs. The working group is not able to take account of such factors. Legacy claims, their funding and lack of inclusion in Fixed Recoverable Costs, have been the subject of specific policy decisions which cannot affect recommendations on GHRs.

5.14. Tyburn Film Productions Limited ('Tyburn') said, based on their experience, that:

i. The proposed rates for London 1, though they rarely use such solicitors, are in excess of those customarily charged on a normal commercial basis. They suggested as absolute maxima: Grade A £450, Grade B £325 and Grade C £235.

ii. The proposed Grade A-C rates, apart from London 1, were just acceptable.

iii. They strongly condemned any increase in any Grade D rate in any area. If Grade D were confined to trainee solicitors and 'genuine paralegals' only, the matter would be far simpler to address. However, given that the only qualification for some Grade D earners is that they do not fall within Grades A-C, the costs should be included in overheads.[123]

5.15. The working group has carefully considered Tyburn's concerns, particularly since they were the only non-legal or non-insurer limited company which responded. However, Point (i) cannot be accepted since it is just one piece of anecdotal evidence against the backdrop of the evidence as a whole. Point (iii) is also

[121] Interim Report at [4.15]

[122] Insurance and Reinsurance Legacy Association

[123] Tyburn's letter said that one of its associated companies recently came across a claim where the claim for 3 hours' Grade D work exceeded the individual's entire weekly salary.

impermissible for recommendation, since the Grades and the evidence base do not permit the suggestion to be followed. Tyburn's more fundamental submissions, which it acknowledges are for another review, are summarised below. Tyburn say:

i. Various Government departments have a template for the calculation of hourly rates for in-house lawyers.[124] These should be adopted or imposed after full consultation with the CJC.

ii. The geography of the 5 bands has not kept up with the financial aspects of various areas and the CJC should conduct a major consultation and consider re-designating the boundaries on National 1 and National 2, possibly considering the introduction of a National 3.

iii. The entire costs system should be subject to a root and branch enquiry, *"with genuine and thorough investigation_ - in effect, reverting to 'square one' with no lucid ideas rejected at the initial discussion stage."*[125]

Recommendation

R4. The Guideline Hourly Rates proposed in the Interim Report should be implemented in full.

[124] The templates were attached to Tyburn's letter.

[125] A similar opinion was shared by a couple of other respondents, one a former litigation solicitor with 35 years' experience, who said (among other things) *"The reality is that the whole system of costs assessment is utterly useless, unfit for purpose and needs to be scrapped. It should be replaced by a system whereby there are highly trained and experienced costs assessors, who would have a background as practising litigation solicitors…if parties were unable to agree costs then instead of the ludicrous 19th century process of having a 50 page bill prepared…the receiving party would be required to lodge their file with the costs assessor. The assessor would then go through the file and using the benefit of their own experience and judgment arrive at a suitable figure…."*

Section F: London 1 Grade D

6.1. In the Interim Report it was said:[126]

> *"….It can be seen that, despite the proposed redefining of London 1, apart from Grade D, the percentage increases for that area are not comparatively too high. The Senior Costs Judge's view is that for London 1 work, the rate to be allowed for Grade D should be in the region of £165-£170. That would represent an increase of 20%-23% on the present GHR which would be more in line with percentage increases generally in the table below. The working group was loath to depart from the evidence of the mean based on the data, but seeks consultation responses on this specific matter."*

6.2. The responses were fairly evenly split among those who thought the rate was too high, some responses suggesting it was far too high, and those who thought it was "perfectly reasonable" to use the words of one respondent.[127]

Recommendation

R5. The working group has not found this discrete problem an easy one to resolve. In the end the recommendation is that there is not a good reason for departing from the data produced for London 1 Grade D, noting that London 1 is now re-defined as *"very heavy commercial and corporate work by centrally based London firms."*

[126] At [4.18]

[127] There were some in National 1 bands who suggested that it was not too high, but demonstrated that Grade D rates in bands other than London 1 were too low. This is not borne out by the data.

Section G: Geographical Areas

7.1. Section 5 of the Interim Report considered geographical areas outwith London 1 & 2. In summary:

i. It was proposed to abolish National Band 3 and merge it into National Band 2.[128]

ii. Omissions in the National Bands were highlighted and, pending any further review, the proposed solution was:[129]

a. *The counties of Kent, East Sussex, West Sussex and Surrey should become Band 1 counties. Medway, Maidstone, Canterbury, Lewes and Guildford are the only identified centres in those counties and each is categorised as Band 1.*

b. *Existing Band 1 counties and other identified Band 1 centres will remain in Band 1.*

c. *All other areas will be/remain in Band 2.*

7.2. None of the respondents favoured the retention of National Band 3. Some respondents wholly favoured the recommendations in the Interim Report.

7.3. Some respondents suggested having one band for the whole of England & Wales, the emphasis being on perceived unfairness, lack of competitiveness in having London rates which are substantially in excess of rates in the regions and the effect of home working. The working group does not accept that now is the right time to consider any effect of home working and, in its recommendation that there should be London rates 1-3, repeats its observations in section D above.

7.4. There was a divergence of opinion on whether to retain two national bands. It will be recalled that this was considered in the Interim Report and the following comment made:

[128] [5.3]

[129] [5.4]-[5.7]

"4.13 The rates in National 1 and National 2/3 have substantially converged.[130] *The working group regarded the results as somewhat counterintuitive and wondered whether the results would be replicated on a future review. Therefore. on balance it was not considered appropriate to recommend merging National 1 and 2 into a single national band. However, this is a matter on which responses are particularly requested during the consultation period. If National 1 and 2 are to remain, it may be that on the next review the question of a single national rate can be revisited in the light of expected changes in working practice over the next few years."*

7.5. In favour of their retention were those who agreed generally with having two bands and those who were of the opinion that then proposed GHRs did not reflect the difference in overheads between National 1 and National 2. Once merged it would be very difficult to reinstate two national bands. As was also pointed out, the Interim Report (a) was not based on assessment of costs and overheads, (b) does not take into account changes such as remote working. This militates in favour of retaining two national bands at this stage.

7.6. In favour of merging National 1 and National 2 it was said that the difference in rates was such that there was little rationale for continuing with two national bands, it would be simpler and promote settlement to have one national band and that there are substantial anomalies in the geography of the banding.

7.7. The working group sees some force in those who favour one national band but it retains the concerns it expressed in the Interim Report and by some consultees as summarised above. On balance it has concluded that for the present National 1 and National 2 should remain.

7.8. Some potential anomalies were pointed out, for example:

i. A city centre firm may be in an inner-city area where overheads are substantially lower than in the commercial heart of the city.

ii. Some parts of the south and south-east of the country which are in National 1 may well have lower overheads than other parts of the country which are in National 2; also some parts of the north of the country which are in

---

[130] *Cf tables 1c and 2b. One factor is that on the judicial data in tables 1b and 2c there is a not insubstantial difference of Grade A rates, being £270 for National 1 and £247 for National 2. There was an anomaly in that Grade B rates for National 1 were £216 and for National 2 £220. The working group decided to rationalise these by recommending £218 for each.*

National 1 may have lower overheads than other parts of the country which are in National 2.

iii. APIL said that: *"Hertfordshire and Bedfordshire are excluded from National 1 so that smaller legal centres such as Milton Keynes (392 law firms) and Lowestoft (105 law firms) are entitled to the higher rate, but two larger legal centres, St Albans (4,376 law firms) and Luton (1,150 law firms), are excluded and therefore do not."*

7.9. These points may militate in favour of a future recommendation of one national band and some further changes in the future, assuming that geographical areas then remain. However, the working group's conclusion is that it did not have sufficient information or evidence to make more changes than those proposed. Nor had there been any consultation on some proposed changes. Whatever is proposed, there will always be the potential for such arguments. Finally, there is little difference between National 1 and National 2 on the present proposed GHRs.

7.10. An insurer expressed concern that no data had been gathered from law firms in regions where changes were suggested, adding that it would be extremely difficult to reach an informed decision in the absence of comparative data from each region as to the operational costs and overheads of law firms operating in these regions and how they would vary from other areas in the same band. The working group's response to this is: (i) The suggestions are assumed to be those anomalies and omissions covered in the Interim Report at [5.4] – [5.7]; (ii) The working group's recommendations at [5.7] are stated to be "…*pending any further review*…"; (iii) there were, nevertheless, logical, evidence-based reasons for the recommendations expressed; (iv) data on operating costs and overheads is not, and is unlikely ever, to be available to a satisfactory standard for the reasons given elsewhere; (v) geographical areas will always be based on a broad brush approach since precision across all areas of England & Wales is impossible to achieve and unnecessary for <u>guideline</u> rates.

7.11. Ms Shelmerdine, Assistant Secretary to the CJC, helpfully pointed out an error in the present Guide in that the London Borough of Kingston upon Thames was mistakenly put into National 1, whereas it should be in London 3.

Recommendation

R6. The proposals set out in section 5 of the Interim Report and summarised in paragraph 1 above - amended to remove the London Borough of Kingston upon Thames from National 1, as it should be in London 3 - be implemented.

Section H: The Revised Guide

8.1. The Revised Guide (Appendix J to the Interim Report) dealt with a number of changes required by developments since 2005, together with some suggested changes. These were:

i. Updating the references to the rules and practice directions, the numbering of many of which changed in 2013.

ii. Paragraphs 3 and 5 (now 4 and 5) have been rewritten to reflect the changes made by LASPO 2012 in relation to the recovery of additional liabilities and the costs of children and protected parties. Much of the text in the 2005 edition relating to recoverable additional liabilities has been removed and the current principles of recoverability are summarised at paragraphs 47 to 51.

iii. Paragraph 6 draws attention to a decision that summary assessment need not be carried out by the judge who heard the case or application.

iv. Paragraphs 7 and 8 (statements of costs) are new.

v. Paragraph 14 sets out the post-2013 test of proportionality and the guidance given by the Court of Appeal in *West*.[131]

vi. The section on litigants in person (paragraphs 21 to 26) has been extended by a more detailed explanation of the rules; attention is drawn to the fact that a litigant in person may reasonably be expected to spend more time than a legal representative.

vii. The reference to Designated Civil Judges providing more up to date figures for their areas (paragraph 41 of the 2005 edition) has been removed as, in practice, this is believed never to have happened.

viii. Paragraph 29 (formerly paragraph 43) emphasises that higher rates may be allowed for grade A, B and C fee earners (and not just A) in substantial and complex litigation and not just in high level commercial work. Higher rates may be appropriate, for example, in large and complex personal injury work.

[131] West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220

ix. There are new sections on instructing London solicitors (paragraphs 30 and 31), in-house lawyers (paragraph 32) and expenses which are not generally recoverable (paragraph 39). There is an additional paragraph on the ratio of junior counsel's fees to those of leading counsel (paragraph 37).

x. There is a longer explanation of the court's powers in fast-track cases to award more or less than the prescribed sums (paragraph 40).

xi. The section on the summary assessment of costs in the Court of Appeal has been shortened and broadened to set out the principles relevant to all appeals (now paragraphs 41 to 46).

xii. Appendix 2 sets out the proposed guideline rates. In accordance with the decisions made by Lord Dyson MR in July 2014: (a) the definition of grade A has been extended to include Fellows of CILEX with 8 years' post-qualification experience and (b) it is now provided that qualified Costs Lawyers will be eligible for payment at grades B or C depending on the complexity of the work done. The reference to "unqualified clerks" in the 2005 edition has been removed. While clerks without the equivalent experience of legal executives should be treated as being in grade D (as both the 2005 edition and proposed guide suggest), those with that experience may be allowed at grade C ("fee earners of equivalent experience").

xiii. For reasons explained elsewhere in the report, the geographical bands have been clarified and simplified.

xiv. Rates for counsel have been removed as the working group considered that they are hopelessly out of date and unhelpful.

8.2. The revisions proposed in the Revised Guide generally received a very favourable response. Particular approval from some was given to the emphasis that the GHRs are a starting point, that higher rates may be appropriate for Grades A-C fee earners (previously restricted to Grade A) were appropriate, and that higher rates were not restricted to high level commercial work.[132]

8.3. As from 6th April 2021, CPR Rule 44.3 (5) has been amended to add: *"(f) any additional work undertaken or expense incurred due to the vulnerability of a*

[132] Appendix J at [28] – [29]

party or any witness." This requires consequential amendment to paragraph 14 of the Revised Guide.

8.4. Some responses suggested that the discretion to award a higher rate under paragraph 29 of the Revised Guide should not be restricted to Grades A-C. The argument, put by one respondent in relation to costs lawyers in particular, but containing the main thrust of the point generally, was: (i) historically the judiciary has viewed cost drafting as simply grade D work unless complex, (ii) that may have been justified to some extent back in 2010 but now costs lawyers are dealing almost exclusively with multi-track cases, detailed electronic bills and multi-faceted cost budgets and cost arguments, (iii) costs lawyers should therefore be entitled to hourly rates according to experience, as per solicitors and chartered legal executives, and the GHRs should reflect this, (iv) there should be provision for Grade D GHRs to be departed from in large or complex work. By contrast, other responses objected to paragraph 29 being extended to Grades A-C.

8.5. It is right to emphasise, yet again, that the GHRs and the Revised Guide are just that, namely Guideline Hourly Rates and a guide.[133] There is nothing to prevent a Costs Judge awarding a higher rate than GHR to a Grade D fee earner, if appropriate. However, in the light of the definition of Grade D fee earners, the working group does not consider that they should be included specifically in paragraph 29 of the Revised Guide. Grade D fee earners can claim to be Grade C if they are 'fee earners of equivalent experience' to a Grade C, but, apart from that, there should be a distinction retained between those who are qualified and those who are not.

8.6. The working group's recommendation remains that an extension to Grades A-C is appropriate for the type of case which attracts paragraph 29, while accepting (a) that such work naturally warrants more Grade A input generally, and (b) that the emphasis of the paragraph is more relevant to the higher grades.

[133] For this reason the working group does not accept (e.g.) FOIL's and BLM's comment that paragraph 29 should say "…and occasionally for Grade B and C fee earners, the argument being that otherwise the paragraph: "*implies that enhanced hourly rates will be routinely applied to Grade B & C rates".* There is no such implication. These are all matters for the discretion of the assessing judge.

8.7. As to qualified costs lawyers, the present Guide and the Revised Guide both make it clear that *"Qualified Costs Lawyers will be eligible for payment as grades B or C depending on the complexity of the work done".*[134] It is therefore open to a receiving party and a costs judge to remunerate a qualified costs lawyer at a higher grade than Grade D where appropriate.

8.8. The working group has referred in Section C of this Report to the suggested relevance of the proposed GHRs to detailed assessments. Therefore, it proposes amendment to paragraph 28 by addition of the words underlined:

> *"28. The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment."*

8.9. FOIL and other paying parties raised a particular concern in respect of paragraph 29 in that it recognises that an increase may be appropriate while not specifying that a reduction from GHR may be.[135] This was not an oversight by the working group. Paragraph 43 of the present Guide, albeit restricted to Grade A, is to the same effect. The reasons why a possible reduction are not specified is (a) if a costs judge considers that the work does not warrant a Grade A-C fee earner, the usual way of reflecting this is by allowing the work done at the rate of a lower grade fee earner, though (b) the judge always has a discretion to allow a lower rate than GHR. This matter has been canvassed in more detail in section C of this Report.

8.10. Leigh Day were concerned that the wording of the new paragraph 30 "*creates a weighted presumption that location (namely London) is the over-riding factor to be considered in determining appropriate hourly rates, out of the factors highlighted as relevant in Wraith..."* The working group does not accept that

[134] Given that costs lawyers are now a specific body of authorised lawyers, it may in the future be appropriate to align them with solicitors and legal executives across all Grades. However, the working group had not consulted on this and felt unable to recommend it.

[135] The MDU strongly believed that paragraph 29 was not needed as judges had sufficient discretion under Rule CPR 44.4. Paragraph 29 (and its predecessor, paragraph 44) are a guide to the use, in appropriate cases, of the principles in CPR 44.4.

there is such a 'weighted presumption' in paragraph 30. As *Wraith* makes clear[136] the central question is whether the litigant has acted reasonably.

> *"…in relation to broad categories of costs, such as those generated by the decision of a plaintiff to employ a particular status or type of solicitor or counsel, or one located in a particular area, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded plaintiff, a reasonable choice or decision has been made.."*

It is not the function of the Guide to set out factors which are relevant to reasonableness.

DWF pointed out that *Wraith* is not restricted to a claimant instructing London solicitors, but can apply where non-local solicitors are instructed. This is correct, though, particularly given the proximity of National 1 and National 2 rates, is unlikely in practice to be of much relevance if non-London solicitors are instructed. Nevertheless, to reflect this, paragraph 30 of the Revised Guide should be amended to add at the end of the paragraph:

> *"The principle in Wraith may apply also to litigants who instruct non-local solicitors outside London."*

8.11. Slater & Gordon, solicitors, commented on paragraph 31, saying that the: *"Current wording is too vague …particularly the use of the word 'location'."* This is related to the proposed amendment to the Form N260. For the reasons dealt with in Section I, the working group propose that paragraph 31 should be amended to read:

> *"Where all or part of the work on a case is done in a different location from that of the solicitor's office on the court record, the appropriate hourly rate for that part should reflect the rates allowed for work in that location, whether that rate is lower or higher (provided that, if a higher rate is claimed, a decision to instruct solicitors in that location would have been reasonable). The location of a fee earner doing the work is determined by reference to the office to which s/he is, or is predominantly, attached."*

8.12. One solicitors' firm wrote:

[136] [1998] 1 WLR 132 at 142 B-D

> *"The recommended revisions to the text of the Guide in Appendix J. Paragraph 39. The inclusion of 'telephone calls' is unhelpfully ambiguous. Telephone calls are a chargeable activity and so this should be removed from this section."*

The response to this it that the material section of paragraph 39 states:

> *"...the costs of postage, couriers, telephone calls, stationery and photocopying are not recoverable as they should be included in the hourly rate agreed between the solicitors and their client…".*

Thus the 'costs' of a telephone call are not generally recoverable, whereas the fee earner's time in making the call is. It is not believed that this is ambiguous since it essentially mirrors PD 47 para 5.22.[137]

8.13. A few respondents[138] raised concerns about paragraph 43 of the Revised Guide. This states:

> *"43. Although the solicitor may have spent many hours attending on the client, the client should have been warned that little of this time is recoverable against a losing party. Reasonable time spent receiving instructions and reporting events should not greatly exceed time spent on attending the opponents."*

The main objection was that it would impact on vulnerable clients as it is necessary to spend considerable time attending on clients in catastrophic injury claims and time far exceeding that spent on opponents should be properly recoverable. The first thing to note is that paragraph 43 is in the section dealing with 'The Costs of Appeals'. Secondly, the Guide is a guide. In an individual appeal it is of course open to a party to persuade a judge that the circumstances warrant greater time spent attending the client. This is particularly so in respect of vulnerable clients, having regard to the new Rule 44.3 (5) (f).

8.14. The categories of fee earners in the Revised Guide are described in this way:

> *"The categories of fee earners are as follows:*

---

[137] *"(4) The cost of postage, couriers, out-going telephone calls, fax and telex messages will in general not be allowed…"*

[138] Including the Association of Costs Lawyers

[A] Solicitors with over eight years post qualification experience including at least eight years' litigation experience and Fellows of CILEX with 8 years' post-qualification experience.

[B] Solicitors and legal executives with over four years post qualification experience including at least four years litigation experience.

[C] Other solicitors and legal executives and fee earners of equivalent experience.

[D] Trainee solicitors, paralegals and other fee earners."

The working group wish to comment on a point raised by an SCCO Costs Master who said:

"the definition of a grade A should simply have a "legal executive" in it - in the same way as for grades B and C. I have had at least one occasion where an advocate has sought to draw a distinction between qualified and unqualified legal executives based upon this sort of description."

The definition of legal executives for the purposes of Grades A-C is clearly stated in both the present and Revised Guides in this way:

""Legal executive" means a Fellow of the Chartered Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive."

Nevertheless, it is accepted that, for the sake of consistency, the categories of fee earners should be amended to:

"The categories of fee earners are as follows:

[A] Solicitors with over eight years post qualification experience including at least eight years' litigation experience and Fellows of CILEX with 8 years' post-qualification experience.

[B] Solicitors and Fellows of CILEX with over four years post qualification experience including at least four years litigation experience.

[C] Other solicitors and Fellows of CILEX and fee earners of equivalent experience.

[D] Trainee solicitors, paralegals and other fee earners."

8.15. Albeit in a slightly different context, one respondent raised the matter of employed barristers, particularly those employed by solicitors' firms, in a graphic statement, namely:

> *"…if Lord Goldsmith or Lord Falconer were to be claiming the cost of their time on a summary assessment, on the basis of appendix 2 as currently drafted, they would each have to claim as a grade D fee earner. I do not believe that this can have been the intention of the draftsperson responsible for appendix 2…"*

8.16. It is understood that there are substantially more barristers employed in litigation firms since 2010. On the Grades in the present Guide and the Revised Guide there is nothing which would allow employed barristers to claim at other than Grade C: "fee earners of equivalent experience". Paragraph 29 is not the answer as a qualified barrister should, depending on experience, be able claim A or B Grade as of right. It is therefore proposed to add to the Revised Guide a sentence as follows:

> *"Employed barristers' rates should be allowed at the grade which best reflects the length of their litigation experience."*

8.17. Criticism was made of the fact that the present Guide, after the definitions of the Grades of fee earners, contains a statement to this effect:

> *"Unqualified clerks who are fee earners of equivalent experience may be entitled to similar rates and in this regard it should be borne in mind that Fellows of the [Chartered] Institute of Legal Executives generally spend two years in a solicitor's office before passing their Part 1 general examinations, spend a further two years before passing the Part 2 specialist examinations and then complete a further two years in practice before being able to become Fellows. Fellows therefore possess considerable practical experience and academic achievement. Clerks without the equivalent experience of legal executives will be treated as being in the bottom grade of fee earner i.e. trainee solicitors and fee earners of equivalent experience. Whether or not a fee earner has equivalent experience is ultimately a matter for the discretion of the court."*

In the Revised Guide the underlined section has been omitted. Grade D fee earners are still defined as 'Trainee solicitors, paralegals and other fee earners'. In reality nothing of substance has changed. There is no good reason to single out 'unqualified clerks' as one of the Grade D practitioners who, if they have

equivalent experience, may be remunerated at Grade C which is defined as 'Other solicitors and legal executives and fee earners of equivalent experience' (Our underlining).

Recommendations

R7. The Revised Guide, Appendix J to the Interim Report, should be adopted, with:

i. provision in paragraph 2 to reflect para 9.1, as well as paragraph 9.2 of PD44;
ii. amendment to paragraph 14 to reflect the amendment to Rule 44.3(5) from 6th April 2021, namely to add *"(f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."*
iii. amendment to paragraph 28 by addition of the words underlined:

> *"28. The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment."*

iv. addition to paragraph 30 of the words: *"The principle in Wraith may apply also to litigants who instruct non-local solicitors outside London."*
v. addition to paragraph 31 of the words: *"The location of a fee earner doing the work is determined by reference to the office to which s/he is, or is predominantly, attached."*
vi. The categories of fee earners at Grades B and C should be clarified by replacing the words 'legal executives' with 'Fellows of CILEX'.
vii. addition in Appendix 2 under the heading: 'Grades of fee earner' of the entitlement of employed barristers to be properly remunerated at the grade which best reflects their litigation experience.

The Revised Guide with these additions is appended to this Report as Appendix 7.

Section I: Summary Assessment Form N260

9.1. The Interim Report stated:[139]

> *"…It appeared to the working group that the Civil Procedure Rule Committee might be requested to recommend a small but significant amendment to the summary assessment form N260 and to the information provided on the detailed assessment bill. The amendment would require the signatory to specify the location of the fee earners carrying out the work."*

9.2. The reasons for the recommendation were explained earlier in the same paragraph in this way:

> *"A reference was made by Foskett[140] to evidence concerning the way in which firms are charging for work at their Central London office rates, while much or all of the work is carried out in regional or outsourced offices. Foskett said:*
>
> *'This will, of course, always be a matter for close scrutiny at that costs assessment stage.'*
>
> *However, some members of the present working group were not convinced that such 'close scrutiny' takes place. The concern highlighted is one which, anecdotally, has existed for a number of years."*

9.3. Paragraph 8.1(vi) of the Interim Report sought comments on:

> *"Should the working group recommend that the Civil Procedure Rule Committee be requested 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"*

9.4. There were a number of very positive responses to the recommendation in the Interim Report. One example was:

> *"We support the proposal for the amendment so that the location of the fee earner carrying out the work must be specified on both form N260 and the bill, to try and put a stop to the practice*

[139] At [7.4]

[140] Paragraph 6.5.9.

recognised in paragraph 7.4 of the report of London Office rates being charged for work done in regional offices."

9.5. Interestingly, an SCCO Master said that he recalls that some 15 years ago, when he was in private practice, he had to explain to an external management consultant that *'..fronting work in one location whilst having it undertaken in another might well improve profitability but not, in his view, by a legitimate means."* He believed that the practice may be quite common. He suggested that Form N260 and bills for detailed assessment should identify by name the person who has undertaken each item of work or group of items of work claimed for, their grade and where they undertook the work.

9.6. Some responses, whilst in favour of the proposal, raised practical issues, such as:

i. It is possible for a fee earner to be nominally based in London (along with five other fee earners sharing the same 'hot desk' and support services) whilst undertaking one or more days a week from home. It was said that in a bill of costs, the narrative should set out specific locations whilst the body of the bill should use a code (e.g. L1 L2 L3 N1 N2) to identify the location in which the work was undertaken.

ii. Firms which have more than one location, for example, and a file might be transferred between offices for various reasons – this may lead to the certification being needed to span those various locations, which might be cumbersome.

iii. The Law Society who wrote:

> *"In theory this would be a useful addition, however we have concerns about how this would be applied in practice. Very clear guidance would be required to understand what is meant by 'location of the fee earner', especially during times when remote working is mandated by the government. It is understandable that the form is seeking to differentiate between a primary 'base' where hourly rates would be contributing to paying costs such as office space in that particular location, and fee earners who may be applying higher London rates when they are in fact operating out of a regional location, but there is great potential for confusion here if the definitions are not clear."*

9.7. The working group's reply to these practical issues is:

i. The intention would be to identify the location of the fee earner by reference to the office to which s/he is, or is predominantly, attached. It is not intended to cover work done from home. That question will remain for possible consideration in a subsequent review.

ii. The purpose of the recommendation is precisely to deal with files being transferred to a different office for work to be done there. It may be a little cumbersome, but the view of the working group, and the majority of the respondents, are in favour of this.

9.8. Another SCCO Master did not support the proposal, though primarily on the basis, now clarified, that he thought it would require information about people working from home. He said that if the proposal was to request information about the office from which the individual worked, then it did not reflect a change in working practice – that was not the feedback from a number of other responses and not the understanding of members of the working group as to how some may be completing the present N260. He was also concerned that N260s appear often late in the day and the question may not be answered correctly. Yet, it is the signatory's duty to ensure it is answered correctly.

9.9. One consultee said that the N260 needs to include lawyers/costs draughtsmen at Grade B/C. The Interim Report noted[141] that Foskett had recommended that suitably qualified costs lawyers should be eligible for Grades B and C and that this had been accepted by Lord Dyson MR. In fact what Lord Dyson said was:[142]

> *"I also accept the recommendations that Costs Lawyers who are suitably qualified and subject to regulation be eligible for payment at GHR Grades C or B, depending on the complexity of the work (section 6.2)… I propose to introduce these changes on 1 October 2014."*

9.10. The Guide and Revised Guide in Appendix 2 reflect this change. They both state:

> *"Qualified Costs Lawyers will be eligible for payment as grades B or C depending on the complexity of the work done".*

[141] At [7.1]

[142] https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf

9.11. It is correct that the Definitions of Grades on the N260 do not include this provision. It is unnecessary for them to do so, since the eligibility of costs lawyers to be assessed at Grades B or C is not as of right, but case dependent.

9.12. The civil sub-committee of the Council of HM Circuit Judges, apart from supporting the Interim Report recommendation, added that the form should expressly identify the geographical band and the grade of each fee earner, saying that identification of fee earners is not always done by reference to the grades in the GHR. As to the latter point, Form N260 does specifically require the grade of fee earner to be described by reference to grade. It is correct that terms such as 'Grade 1' are sometimes used. The working group therefore recommends that in the 'Description of fee earners' section at the beginning of Form N 260 instead of *'(grade)'* it should say '*(GHR grade)'.*

9.13. There were other matters of detail considered by some members of the working group as capable of improving Form N260. It was decided that the members of the working group who are also members of the Civil Procedure Rule Committee should raise these separately with that Committee for its consideration.

Recommendations

R8. The working group requests that the Civil Procedure Rule Committee consider whether form N260 should:

i. Require the receiving party to specify the location - i.e. the office to which a fee earner is, or is predominantly, attached – of the fee earner(s) for whose work claims are made.
ii. Replace, in the 'Description of fee earners' section of the form, the word (*grade)'* with '*(GHR grade)'.*

Section J: Other Matters

10.1. Some respondents used the section of the consultation form headed 'Comments on any other aspects' to reinforce points made earlier in response to specific questions for consultation. A few other matters were, however, raised.

10.2. FOIL and others expressed concern about the new rates being applied retrospectively and asked for guidance limiting the retrospective effect of any new rates. The working group does not recommend that any such guidance be given. The new rates (if approved) should be used on summary assessments which are carried out after the date of approval.[143] This is for the reasons expressed in the Interim Report[144] and reproduced here:

> "There is also the question of the implementation of the new GHR, if approved. The rates the working group has recommended are based on 2019-2020 data of what has been awarded or agreed. Therefore, the working group sees no justification for any phased introduction of the rates. Nor is it convinced, given the present turbulent economic times but where interest rates are extremely low, that there should be any increase on the rates because of time lag, assuming that they are implemented in the near future."

10.3. FOCIS disagreed with this recommendation, arguing that the mid-point of the data gathering exercise was January 2019 and from Q1 2019 to Q3 2020 (the latest available) SPPI Legal Services index had risen by 6.5%. Apart from the fact that the working group does not accept that this is the appropriate index, the judicial data was from the period September – November 2020; further, a number of items on bills to be assessed on the proposed GHRs would be historical and incurred prior to the date of data gathering. The working group stands by its conclusion in the Interim Report as a fair and simple 'swings and roundabouts' approach.

10.4. Many respondents wanted a regular review every 2-3 years. The working group repeats what it said in section 6 of the Interim Report, namely:

---

[143] For detailed assessments the use of the proposed GHRs will of course be a matter for the discretion of the costs judge, having regard to the fact that the data used was based on the most recent rate agreed or awarded.

[144] At [7.6]

> *"…there are a number of important changes affecting and expected to affect the provision of legal services. A further review by a working group should be considered once the need is considered by the CJC to have arisen. This may well be within, say, 3 years, though it is difficult to predict, especially given the impact of the Covid-19 pandemic and the HMCTS reform programme. That would be the appropriate occasion to examine the methodology, how effective this working group's work has been, and any appropriate, evidence-based amendments to geographical areas."*

And,

> *"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."*

10.5. Responses from receiving parties favoured annual updates in line with the SPPI Legal Index or CPI. The question of indices for annual updates is extremely controversial. It is understood by the working group that the Government has considered such matters in connection with its reviews of FRCs and IPEC capped costs.[145] These reviews should be available publicly before the time of any annual update of GHRs. The working group therefore recommends that the CJC's decision on annual update of GHRs should be guided by the outcome of these reviews.

10.6. An SCCO Master pointed out that allowing annual inflationary increases would inevitably complicate N260s and bills and would increase the time of assessment for marginal gain. He favoured a rigid review perhaps every 5 years. The working group accepts that annual increases would complicate bills. Its view is that this is a lesser evil than permitting GHRs to stagnate, particularly given that there is the possibility of somewhat higher inflation, following the pandemic, than has been customary in recent years. The working group considered the possibility of suggesting that assessments be made incorporating figures based only on GHRs which had been revised annually. This was rejected as being inappropriate. Any such annual revision would follow relatively soon after recommended GHRs based on this Report, whereas the GHRs in this Report follow a period of over 10

[145] Though the working group is not privy to such consideration.

years without any GHR changes. Therefore there would be not be the same 'swings and roundabouts' factor referred to earlier in this section.

10.7. One response, which praised the Interim Report's content, said that the provisional assessment cap on costs should be increased to a "more realistic £2,250 plus VAT". This is a reference to CPR 47.15 (5) which provides: *"In proceedings which do not go beyond provisional assessment, the maximum amount the court will award to any party as costs of the assessment (other than the costs of drafting the bill of costs) is £1,500 together with any VAT thereon and any court fees paid by that party."* Any change in the costs allowed for provisional assessment is not within the working group's terms of reference and is a matter for the Civil Procedure Rule Committee.

10.8. Finally, the working group would again wish to extend its huge debt of gratitude to Professors Fenn and Rickman for their expert assistance and to Ms Leigh Shelmerdine for the magnificent administrative support which she has provided.

Recommendations

R9. If the proposed GHRs are introduced they should applicable to all summary assessments from the date of their introduction.

R10. Any updates to the proposed GHRs (if adopted) should be guided by the outcome of the reviews of FRCs and IPEC capped costs.

Appendix 1 – Consultation Questions

Civil Justice Council consultation on guideline hourly rates

The consultation is open until 31 March 2021 at 4pm. Responses received after that time may not be considered. Please email the completed form to CJC.GHR@judiciary.uk

1. (First Name)
2. (Last Name)
3. (Your location)
4. (Your role or job title)
5. (Your organisation)
6. (Are you responding on behalf of your organisation? (yes/no))
7. (Your email address)

Comments on the methodology used by the working group.

(write answer here)

Comments on the recommended changes to areas London 1 and London 2.

(write answer here)

Comments on the recommended GHRs set out in paragraph 4.18 of the report.

(write answer here)

APPENDIX 1 – Consultation questions

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

(write answer here)

Comments on the recommended changes to the geographical areas in section 5 of the report and the recommendation to have two national bands.

(write answer here)

Comments on whether the working group should 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. (See paragraph 7.4 of the report.)

(write answer here)

Comments on the recommended revisions to the text of the Guide in Appendix J.

(write answer here)

Any other comments

(write answer here)

Appendix 2 – How the report for consultation was publicised

Individuals and organisations notified when the report was published for consultation from 8 January 2021

- ABI (Association of British Insurers)
- Access to Justice Foundation
- Acumension
- Advocate
- ACSO (Association of Consumer Support Organisations)
- Association of Costs Lawyers
- APIL (Association of Personal Injury Lawyers)
- AvMA (Action against Medical Accidents)
- The Bar Council
- Chancery Bar Association
- CILEx (Chartered Institute of Legal Executives)
- Citizens Advice
- Commercial Litigation Association
- Costs Lawyers Standards Board
- Evolution Costs
- FOCIS (Forum of Complex Injury Solicitors)
- FOIL (Forum of Insurance Lawyers)
- Housing Law Practitioner Association
- The International Bar Association
- Irwin Mitchell
- Law Centres Network
- The Law Commission
- The Law Society of England and Wales
- LawWorks
- Legal Services Consumer Panel
- Litigants in Person Engagement Group
- London Solicitor Litigation Association
- Manchester Law Society
- Birmingham Law Society
- NHS Resolution
- PIBA (Personal Injury Bar Association)
- Professional Negligence Lawyers Association
- R Costings
- RCJ Advice
- Society of Clinical Injury Lawyers (SCIL)
- Shelter
- Support Through Court
- Taylor Rose
- Thompsons

APPENDIX 2 – How the report for consultation was publicised

- Which? Legal
- Civil Justice Council
- Administrative Justice Council
- Family Justice Council
- Judiciary who provided evidence to the working group between September-November 2020 (30+)
- Practitioners/organisations who provided evidence to the working group between September-November 2020 (40+)

On social media, Judicial Office publicised the consultation through two tweets (8 January and 22 March 2021) to its 61,000+ Twitter followers and as well as a post on LinkedIn (22 March 2021).

Appendix 3 – Consumer interests

The following organisations were contacted by email in January 2021 to alert them to the consultation.

- Advocate
- Association of Consumer Support Organisations
- Citizens' Advice
- Law Centres Network
- LawWorks
- Legal Services Consumer Panel
- LIPEG (Litigants in Person Engagement Group)
- RCJ Advice
- Support Through Court
- The Access to Justice Foundation
- Which? Legal

The message to those organisations read:

> *"The Civil Justice Council has just published a report on guideline hourly rates and is holding a public consultation on that report until 31 March 2021 at 4pm. [report links]*
>
> *Guideline hourly rates are used as a starting point for judges carrying out summary assessment of costs. Summary assessment is the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or 'detailed assessment'. The rates are a guideline figure for a reasonable charge per hour for work on a case. (Detailed information about summary assessment can be found at Appendix J of the report beginning at page 84.)*
>
> *The guideline hourly rates may also be used as a reference point for the purposes of costs budgeting and management. They are not of relevance to cases being heard in the small claims court unless the court finds, exceptionally, that a party has behaved unreasonably.*
>
> *The general rule is that the loser in a case pays the winner's costs. In practice, the court has flexibility as to when one party may be responsible in whole or in part for the other party's costs. Therefore anyone involved in legal action, whether as a claimant or defendant, could be affected by changes to the guideline hourly rates.*
>
> *The guideline hourly rates were last updated in 2010 and have remained static since that time.*

The applicable rates vary according to geographic location. See section 5 of the report for details.

The proposed changes to the rates can be found at paragraph 4.18 of the report.

Of particular note to organisations which work with or represent consumers or lay court users are footnote 5 and paragraph 8.2.

The Civil Justice Council is keen to draw your attention to all of the above and invites you/your organisation to submit a formal response through the consultation process.

If you are aware of other organisations or individuals to whom this report and consultation would be of interest please forward it on."

Appendix 4 - Consultation responses

1. A commercial firm
2. A large commercial firm
3. Anonymous
4. Acumension Ltd
5. Admiral Group
6. Ageas Insurance Ltd
7. Alexander Wright
8. Allianz Insurance Plc
9. Amy Caves
10. Association of British Insurers - ABI
11. Association of Consumer Support Organisations - ACSO
12. Association of Costs Lawyers - ACL
13. Association of Personal Injury Lawyers - APIL
14. AXA UK
15. Birmingham Law Society
16. BLM
17. Bolt Burdon
18. Bridie Sanderson
19. Burges Salmon
20. Casey Mcgregor
21. Charlene Hughes
22. City of London Law Society - CLLS
23. Clarion - Helen Spalding
24. Clarion - Maidie Deighton
25. Clarion - Stephanie Kaye
26. Cost Law Services Ltd /Duncan Lewis Solicitors
27. Council of HM Circuit Judges, Civil Sub-Committee
28. HHJ David Hodge QC
29. Devonshires Claims
30. Direct Line Group
31. DWF
32. Elite Law Solicitors
33. esure Group
34. Evolution Costs
35. Forum of Complex Injury Solicitors - FOCIS
36. Forum of Insurance Lawyers - FOIL
37. Gadsby Wicks
38. Glynns Solicitors Ltd
39. Hill Dickinson LLP
40. Hogan Lovells International LLP
41. Howard Kennedy LLP
42. Insurance and Reinsurance Legacy Association - IRLA
43. Irwin Mitchell
44. Joanne Chase
45. John Appleyard
46. Joshua Sidding
47. Keoghs
48. Kia Foster
49. Kingsley Napley LLP
50. Kumari Hart Solicitors
51. Laceys Solicitors
52. Laura Gillin
53. Law Abroad Limited
54. Law Society of England and Wales
55. Legal and Risk Services
56. Leicestershire Law Society
57. Leigh Day
58. Lewis Grant
59. Linda Schermer
60. London Solicitors Litigation Association - LSLA
61. Lucy Robinson
62. Master Colum Leonard
63. Master Jason Rowley
64. Master Jennifer James
65. Master Mark Whalan
66. Master Simon Brown
67. Medical Defence Union - MDU
68. Medical Protection Society - MPS
69. Michael A Loveridge
70. Mid Kent Legal Services (Swale BC)
71. Mooneerams Solicitors
72. Nelsons Solicitors
73. Newcastle upon Tyne Law Society
74. NFU Mutual Insurance Society Limited
75. NHS Resolution
76. Olivia Goddard
77. Paul Lavender Legal Costs
78. Pinsent Masons LLP
79. R Costings
80. Rachel Wallace
81. Reed Smith LLP

APPENDIX 4 -Consultation responses

82. Royds Withy King
83. Russell-Cooke LLP
84. Ruth Meyer
85. Samantha Hamilton
86. Schillings LLP
87. Shoosmiths LLP
88. Slater and Gordon
89. Society of Clinical Injury Lawyers - SCIL
90. Solicitors for the Elderly and the Professional Deputies Forum
91. Stewarts
92. Sue Corbin
93. Surrey Law Society
94. Tanya Foran
95. Tesco Underwriting
96. Thompsons Solicitors LLP
97. Thomson Snell & Passmore LLP
98. Tyburn Film Productions Limited
99. Wake Smith Solicitors
100. Waring & Co Legal Ltd t/a Waring & Co Solicitors
101. Weightmans LLP
102. Winn Solicitors Limited
103. Zurich Insurance

Appendix 5 - Claimed rates data

While the committee's methodology was based on the presumption that the best guide to the underlying market rates were those arrived at by assessment or agreement, for comparison purposes Tables 8a to 8c replicate the results using data on rates claimed, which were also collected in the professionals and judicial spreadsheets. These tables are directly comparable with Tables 1a to 1c described above (para 5). We have also provided tables 9, 10 and 11 which are directly equivalent to Tables 5c, 6 and 7 respectively. Note that the sample sizes in all these tables are different because not all cases with claimed rates for a given band also had assessed rates for that band (this is particularly true for BPC cases).

Table 8a: Means, standard deviations and sample sizes of claimed rates by grade and regional band [Professionals data only]

	Region											
	London 1			London 3			National 1			National 2/3		
Grade	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N
A	450.21	104.31	119	340.81	92.94	100	303.30	51.49	192	288.83	62.27	131
B	315.46	52.50	82	267.67	53.68	77	259.66	38.04	133	258.94	50.88	75
C	260.95	43.06	98	218.32	58.71	83	207.55	32.27	155	206.22	44.09	82
D	173.84	37.74	113	152.42	33.38	99	142.30	23.78	174	146.16	32.58	119

Table 8b: Means, standard deviations and sample sizes of claimed rates by grade and regional band [Judiciary data only]

	Region											
	London 1			London 3			National 1			National 2/3		
Grade	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N
A	419.54	131.90	26	301.30	58.89	41	287.00	67.36	48	276.37	54.06	27
B	316.13	83.65	15	240.47	23.87	17	235.70	51.90	30	241.07	45.55	15
C	237.48	58.45	21	185.73	32.41	26	197.13	48.60	31	191.56	30.06	18
D	157.83	35.95	24	132.24	16.53	42	137.78	45.46	45	143.08	26.96	25

Table 8c: Means, standard deviations and sample sizes of claimed rates by grade and regional band [Pooled data]

APPENDIX 5 – Claimed rates data

	Region											
	London 1			London 3			National 1			National 2/3		
Grade	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N	Mean(£)	s.d.	N
A	444.71	109.89	145	329.32	86.16	141	300.04	55.26	240	286.70	60.97	158
B	315.57	57.85	97	262.75	50.64	94	255.25	41.81	163	255.96	50.24	90
C	256.81	46.73	119	210.55	55.27	109	205.81	35.57	186	203.58	42.16	100
D	171.03	37.80	137	146.41	30.75	141	141.37	29.48	219	145.62	31.61	144

APPENDIX 5 – Claimed rates data

Table 9: Claimed rates using pooled data revised to switch some City law firm cases and FOCIS cases from London 1 to London 2

Band	Grade	Mean claimed hourly rate	Current GHR	N
London1	A	£453.11	409	112
	B	£311.14	296	70
	C	£254.51	226	92
	D	£176.24	138	104
London2	A	£469.65	317	52
	B	£344.10	242	39
	C	£270.03	196	40
	D	£163.54	126	50
London3	A	£329.32	248	141
	B	£262.75	200	94
	C	£210.55	165	109
	D	£146.41	121	141
National1	A	£300.04	217	240
	B	£255.25	192	163
	C	£205.81	161	186
	D	£141.37	118	219
National2/3	A	£286.70	201	158
	B	£255.96	177	90
	C	£203.58	146	100
	D	£145.62	111	144

APPENDIX 5 – Claimed rates data

Table 10: Claimed rates for subsets of pooled data[1]; (a) FOCIS cases; (b) BPC cases

		FOCIS		BPC	
Band	Grade	Mean	N	Mean	N
London1	A	£462.22	9	£487.21	60
	B	£348.33	9	£316.73	49
	C	£286.11	9	£272.84	49
	D	£157.22	9	£206.14	52
London2	A			£620.38	13
	B			£411.67	9
	C			£301.11	9
	D			£190.83	12
London3	A	£386.94	9	£561.22	3
	B	£311.67	6	£262.50	2
	C	£237.22	9	£420.47	2
	D	£152.50	9	£171.98	3
National1	A	£346.14	21	£343.16	16
	B	£295.94	16	£250.45	10
	C	£237.63	19	£184.50	13
	D	£144.89	19	£120.96	12
National2/3	A	£366.67	9	£213.00	2
	B	£287.50	8	.	0
	C	£256.71	7	.	0
	D	£143.22	9	£111.00	1

[1] Note: some of these means are based on very small samples in each cell, and therefore should not be used to infer information about the true value of the population mean

APPENDIX 5 – Claimed rates data

Table 11: 95% confidence intervals around the mean claimed hourly rates, BPC cases in the London 1 band

Grade	Mean	Standard Error of Mean	Lower 95% confidence limit	Upper 95% confidence limit	N
A	£487.21	£18.05	£451.82	£522.59	60
B	£316.73	£9.83	£297.46	£335.99	49
C	£272.84	£7.60	£257.95	£287.74	49
D	£206.14	£4.65	£197.02	£215.25	52

Appendix 6 – Mean assessed rates

Table 5d: Mean assessed hourly rates for all pooled data compared with all cases in pooled dataset where claim value < £1m

		A: All pooled data (Table 5c)		B: Cases with claim value < £1m		B/A	Prob(B≠A)
Band	Grade	Mean assessed hourly rate	N	Mean assessed hourly rate	N		
London1	A	£374.93	74	£329.48	27	87.88%	0.9099
	B	£293.15	39	£256.47	17	87.49%	0.9744*
	C	£221.09	62	£211.30	19	95.57%	0.7521
	D	£145.12	72	£132.32	27	91.18%	0.9562*
London2	A	£373.42	43	£342.38	24	91.69%	0.9188
	B	£289.15	33	£273.90	21	94.73%	0.8853
	C	£244.41	34	£233.70	20	95.62%	0.7638
	D	£139.12	41	£136.46	24	98.09%	0.7251
London3	A	£281.80	121	£286.11	48	101.53%	0.6276
	B	£231.58	103	£238.81	37	103.12%	0.7452
	C	£184.50	111	£189.26	40	102.58%	0.7150
	D	£129.46	136	£131.48	49	101.56%	0.7558
National1	A	£260.72	195	£249.17	136	95.57%	0.9865*
	B	£216.42	154	£209.02	111	96.58%	0.9289
	C	£178.19	175	£174.13	129	97.72%	0.8394
	D	£126.01	202	£124.46	145	98.77%	0.7954
National2/3	A	£254.80	136	£241.19	93	94.66%	0.9826*
	B	£220.42	92	£212.29	65	96.31%	0.8876
	C	£177.14	103	£170.73	76	96.38%	0.9062
	D	£126.03	141	£125.49	98	99.57%	0.6184

GUIDE TO THE SUMMARY ASSESSMENT OF COSTS

SUMMARY ASSESSMENT

1. Paragraph 9 of Practice Direction 44 sets out the general provisions relating to summary assessment. Rule 44.1 defines "costs" and r.44.6 contains the court's power to carry out a summary assessment. (Appendix 1 to this guidance contains extracts from the relevant Rules and Practice Direction.)

WHEN A SUMMARY ASSESSMENT SHOULD BE MADE

2. The court should consider making a summary assessment whenever it makes an order for costs which does not provide only for fixed costs. The general rule is that the court should carry out a summary assessment of the costs:

(a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
(b) at the conclusion of any other hearing which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim.

Where the receiving party is legally aided

3. The court should not make a summary assessment of the costs of a receiving party who is legally aided. However, the court may make a summary assessment of costs payable by an assisted person. Such an assessment is not in itself a determination of that person's liability to pay those costs under s.26(1) Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Where the receiving party is represented under a conditional fee agreement

4. Where an order for costs is made before the conclusion of the proceedings and a legal representative for the receiving party has been retained under a conditional fee agreement the court may summarily assess the costs. Although most conditional fee agreements provide that the client is liable to pay the legal representative only if the client succeeds in the proceedings, such agreements commonly provide that the client is also liable to pay the base costs of an interim hearing (but not the success fee) if the client wins at that hearing, whether or not the client ultimately succeeds in the claim. An order for the payment of the summarily assessed costs should not be made unless the court is satisfied that the receiving party is at that time liable under the agreement to pay to the legal representative at least the amount of those costs. If the court is not so satisfied, it may direct that the assessed costs be paid into court to await the outcome of the case or shall not be enforceable until further order.

Where the receiving or paying party is a child or protected person

5. The general rule is that costs payable by or to a child or protected party should be the subject of detailed assessment. The court may carry out a summary assessment of the costs of

a receiving party who is a child or protected party if the solicitor acting for the child or protected party has waived the right to further costs. If the costs payable consist only of a success fee or a payment due under a damages-based agreement to the child's or protected party's solicitor, the court may direct that the costs be assessed summarily: r.46.4(5). Such costs, if incurred in respect of a child in a claim for damages for personal injury, should be assessed summarily only where the damages do not exceed £25,000: r.21.12(1A). The court may carry out a summary assessment of the costs payable by a child or protected party if an insurer or other person is liable to and financially able to discharge those costs.

Summary assessment by a costs officer

6. The court awarding costs cannot make an order for the summary assessment to be carried out by a costs officer (i.e. a costs judge or district judge). If summary assessment of costs is appropriate but the court awarding costs is unable to carry out the assessment on the day it may give directions for a further hearing before the same judge or order detailed assessment. Rule 44.1 defines "summary assessment" as the procedure whereby costs are assessed by the judge who has heard the case or application. However, it has been held that there is no absolute bar on assessment by a different judge[1].

STATEMENTS OF COSTS

7. Statements of costs should follow as closely as possible form N260 and must be signed by the party or the party's representative: Practice Direction 44 para 9.5(3). Forms N260A and N260B may be used in paper, pdf and electronic spreadsheet versions for the costs of interim applications and trials respectively. Where a party files an electronic spreadsheet version it must also file and serve a paper/pdf form.

8. Statements of costs must be filed and served not less than 2 days before a fast track trial and, for other hearings, not less than 24 hours before the start of the hearing: Practice Direction 44 para 9.5(4). Failure to comply with those time limits will be taken into account in deciding what costs order to make and about the costs of any further hearing that may be necessary as a result of that failure: para 9.6. Any sanction should be proportionate. The court should consider what, if any, prejudice had been caused to the paying party and how that should be taken into account. Possible courses to take include a short adjournment to enable the paying party to consider the statement of costs, adjourning the summary assessment to another date, ordering a detailed assessment, disallowing some of the costs which might otherwise have been allowed, or making no costs order at all.

THE APPROACH TO COSTS

9. The general principles applying to summary and detailed assessment are the same. For the summary assessment to be accurate the judge must be informed about any previous summary assessments carried out in the case. This is particularly important where the judge is assessing all of the costs at the conclusion of a case.

10. The court should not be seen to be endorsing disproportionate or unreasonable costs. Accordingly:

(a) When the amount of the costs to be paid has been agreed the court should make this

[1] *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 1687 (TCC)

clear by saying that the order is by consent.

(b) If the court is to make an order which is not by consent, it will, so far as possible, ensure that the final figure is not disproportionate and/or unreasonable having regard to the overriding objective (r.1.1(2)). The court will retain this responsibility notwithstanding the absence of challenge to individual items comprised in the figure sought.

11. The costs which the paying party has incurred for its own representation may be relevant when considering the reasonableness and proportionality of the receiving party's costs. However, they are only a factor and are not decisive. Both parties may have incurred costs which are unreasonable and disproportionate, but only reasonable (and, on the standard basis, proportionate) costs may be allowed.

THE BASIS OF ASSESSMENT

The standard basis

12. Rules 44.3(1) and (2) provide that where the court assesses the amount of costs on the standard basis it will not allow costs which have been unreasonably incurred or are unreasonable in amount and will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred. The court will resolve in favour of the paying party any doubt which it may have as to whether the costs were reasonably incurred or were reasonable and proportionate in amount.

The indemnity basis

13. Rules 44.3(1) and (3) provide that where the court assesses the amount of costs on the indemnity basis it will not allow costs which have been unreasonably incurred or are unreasonable in amount and it will resolve in favour of the receiving party any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount. The test of proportionality does not apply on the indemnity basis.

Proportionality

14. Costs will be proportionate if they bear a reasonable relationship to (a) the sums in issue in the proceedings (b) the value of any non-monetary relief in issue in the proceedings (c) the complexity of the litigation (d) any additional work generated by the conduct of the paying party (e) any wider factors involved in the proceedings, such as reputation or public importance and (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness: rule 44.3(5).

15. The Court of Appeal gave guidance on the application of the test of proportionality in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220. Having considered the reasonableness of the costs claimed, the court should consider the proportionality of the total figure considered to be reasonable having regard to the factors in r.44.3(5) and, if relevant, any wider circumstances under r.44.4. In doing so it should ignore unavoidable items such as court fees. If the court considers the total to be disproportionate it should consider each category of costs claimed (such as time spent drafting witness statements) and consider whether those costs were disproportionate. If they are, then the court should reduce the costs

in that category to a figure that is proportionate. In that way, reductions for proportionality will be clear and transparent. However, the court may also consider the proportionality of a particular item when it considers the reasonableness of that item.

The amount of costs

16. Rule 44.4(3) sets out the factors to be taken into account in deciding the amount of costs. Those factors include: the conduct of the parties, including conduct before as well as during the proceedings; the efforts made, if any, before and during the proceedings in order to try to resolve the dispute; the value involved in the proceedings; the importance of the matter to the parties; the complexity of the proceedings; the skill and specialised knowledge of the lawyers; the place where the work was done; and the receiving party's last approved or agreed budget.

GENERAL PRINCIPLES TO BE APPLIED IN SUMMARY ASSESSMENT

The indemnity principle

17. A party in whose favour an order for costs has been made may not recover more than he is liable to pay his own solicitors: *Harold v Smith* [1865] H & N 381, 385; *Gundry v Sainsbury* [1910] 1 KB 645 CA. There are exceptions to the principle, notably costs funded by the Legal Aid Agency and fees payable under certain types of conditional fee agreement.

18. The statement of costs (N260, N260A and N260B)) filed for summary assessment must be signed by the party or its legal representative. That form contains the statement:
The costs stated above do not exceed the costs which the [claimant/defendant] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated and will be paid to the persons stated.

19. The signature of a statement of costs by a solicitor is, in normal circumstances, sufficient to enable the court to be satisfied that the indemnity principle has not been breached: *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570 CA. A solicitor is an officer of the court and as Henry L.J. stated:
In so signing he certifies that the contents of the bill are correct. That signature is no empty formality.... The signature of the bill of costs ... is effectively the certificate of an officer of the court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client...

Time for payment of the summarily assessed costs

20. As a general rule, a paying party should be ordered to pay the amount of any summarily assessed costs within 14 days. Before making such an order the court should consider whether an order for payment of the costs might bring the action to an end and whether this would be just in all the circumstances.

Litigants in person

21. Where the receiving party is a litigant in person r.46.5 governs the way in which the question of costs should be dealt with. A litigant in person may be allowed:

(a) where the litigant can prove financial loss (e.g. loss of earnings), the amount proved to have been lost for time spent reasonably doing the work; or
(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate of £19 per hour (the rate is fixed by Practice Direction 46 para 3.4).

22. A litigant in person who wishes to prove financial loss should produce written evidence and serve it on the other party at least 24 hours before the hearing: Practice Direction 46 para 3.2.

23. Generally, litigants in person may be expected to spend more time than would reasonably be spent by a legal representative. The time allowed to a litigant in person should therefore be measured against the time that would reasonably be spent by a person without legal training or specialist knowledge.

24. However, there is an absolute cap on the amount recoverable by a litigant in person, namely the reasonable costs of disbursements plus two thirds of the amount which would have been allowed if the litigant in person had been legally represented: r.46.5(2). The correct approach is therefore to assess the reasonable costs for the litigant to do the work at the appropriate rate, consider what a legal representative would have been allowed for doing that work, calculate two thirds of that figure, and allow the lower of the two figures.

25. Litigants in person are entitled to recover disbursements of the types which would have been made by a legal representative. They may also recover payments reasonably made for legal services relating to the conduct of the proceedings as well as the costs of obtaining expert assistance in connection with assessing the claim for costs. This does mean that a litigant in person may be able to claim both the cost of obtaining legal advice and services as well as the cost of doing the same work in person. Those qualified to give expert assistance in connection with assessing the claim for costs are listed in Practice Direction 46 para 3.1.

26. Although the definition of a litigant in person includes a lawyer, a lawyer who is represented in the proceedings by a firm in which that person is a partner, is not a litigant in person: rule 46.5(6)(b).

Guideline figures for solicitors' hourly rates

27. Guideline figures for solicitors' charges are published in Appendix 2 to this Guide, which also contains some explanatory notes. The guideline rates are not scale figures: they are broad approximations only.

28. The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment.

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.

Instructing London solicitors

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 principle in *Wraith* may apply also to litigants who instruct non-local solicitors outside London.

31. Where all or part of the work on a case is done in a different location from that of the solicitor's office on the court record, the appropriate hourly rate for that part should reflect the rates allowed for work in that location, whether that rate is lower or higher (provided that, if a higher rate is claimed, a decision to instruct solicitors in that location would have been reasonable). The location of a fee earner doing the work is determined by reference to the office to which s/he is, or is predominantly, attached.

In-house lawyers

32. The costs of in-house legal staff should be assessed as if they were in private practice, attributing to them a notional hourly rate based on the guideline rates for the relevant location. Unless it was reasonably plain that the indemnity principle would be infringed by this approach, it would not be practical to require a breakdown of the expenses of obtaining the services in-house: Re Eastwood [1975] Ch 112.

Solicitor advocates

33. Remuneration of solicitor advocates is based on the normal principles for remuneration of solicitors. It is not therefore appropriate to seek a brief fee and refreshers as if the advocate were a member of the Bar. If the cost of using a solicitor advocate is more than the cost of instructing counsel, the higher cost is unlikely to be recovered. The figures properly recoverable by solicitor advocates should reflect the amount of preparation undertaken, the time spent in court and the weight and gravity of the case.

34. Where the solicitor advocate is also the solicitor who does the preparation work, the solicitor is entitled to charge normal solicitors' rates for that preparation, but once the solicitor advocate starts preparation for the hearing itself the fees recoverable should not exceed those which would be recoverable in respect of counsel.

35. The fees of a solicitor acting as a junior counsel should not exceed the fee that would have been appropriate for junior counsel, as to which see below.

Counsel's brief fees

36. Counsel's fees for advisory work and drafting are properly chargeable at hourly rates. However work done preparing for and attending a court hearing should be charged as a lump sum brief fee and not at an hourly rate. A proper measure for counsel's brief fee is to estimate what fee a hypothetical counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief; but there is no precise standard of measurement and the judge must, using his or her knowledge and experience, determine the proper figure: *Simpsons Motor Sales (London) Ltd v Hendon BC* [1965] 1 WLR 112 per Pennycuick J.

37. As a rule of thumb, junior counsel's reasonable fee will be one half of the reasonable fee of leading counsel, unless the junior or the leader has done substantially more or less work than would normally be expected.

The time spent by solicitors and counsel

38. There can be no guidance as to whether the time claimed has been reasonably spent, and it is for the judge in each case to consider the work properly undertaken by solicitors and counsel and to arrive at a figure which is in all the circumstances reasonable (and, on the standard basis, proportionate).

Expenses which are not generally recoverable

39. Although the court may exceptionally allow the following in unusual circumstances, generally the costs of postage, couriers, telephone calls, stationery and photocopying are not recoverable as they should be included in the hourly rate agreed between the solicitors and their client. No allowance should be made for reading incoming routine correspondence as the time spent is included in the routine charge for replying to it. Similarly, counsel's travelling time and expenses will generally be included in the brief fee agreed.

FAST TRACK TRIAL COSTS

40. The amount of fast track trial costs which the court may award (that is, the costs of the advocate preparing for and attending the trial) is set out in the table to r.45.38. Rule 45.37(2) provides definitions of "advocate", "fast track trial costs" and "trial". The court may not award more or less than the amount shown in the table except where it decides not to award any fast track trial costs or where r.45.39 applies. Rule 45.39 sets out the court's powers to award more than the amount of fast track trial costs where it was necessary for a legal representative to attend to assist the advocate, where a separate trial of an issue is ordered, or where the paying party has behaved improperly during the trial. It also sets out the court's powers to award less, where the receiving party is a litigant in person, where both a claim and a counterclaim succeed, or where the receiving party has behaved unreasonably or improperly during the trial.

THE COSTS OF APPEALS

41. On appeals where both counsel and solicitors have been instructed, the reasonable fees of counsel are likely to exceed the reasonable fees of the solicitor. In many cases the

largest element in the solicitors' reasonable fees for work on an appeal concerns instructing counsel and preparing the appeal bundles. Time spent by the solicitor in the development of legal submissions should only be allowed where it does not duplicate work done by counsel and is claimed at a rate the same or lower than the rate counsel would have claimed.

42. The fact that the same counsel appeared in the lower court does not greatly reduce the reasonable fee unless, for example, the lower court dealt with a great many more issues than are raised on the appeal. It is reasonable for counsel to spend as much time preparing issues for the appeal hearing as were spent preparing those issues for the lower court hearing.

43. Although the solicitor may have spent many hours attending on the client, the client should have been warned that little of this time is recoverable against a losing party. Reasonable time spent receiving instructions and reporting events should not greatly exceed the time spent on attending the opponents.

44. There is usually no reason for more than one solicitor to spend any significant time perusing papers. A large claim for such perusal probably indicates that a new fee earner was reading in. Reading in fees are not normally recoverable from an opponent.

45. Although it is usually reasonable to have a senior fee earner sitting with counsel on the appeal hearing, it is not usually reasonable to have two fee earners. The second fee earner may be there for training purposes only.

46. In most appeals it will be appropriate to make an allowance for copy documents. The allowance for copying which is included in the solicitor's hourly rates will already have been used up or exceeded in the lower court. An hourly rate charge is appropriate for selecting and collating documents and dictating the indices. If the paperwork is voluminous much of this should be delegated to a trainee. Operating the photocopying machine is secretarial work for which no allowance should be made. Note that for the copying itself, a fair allowance is 20p per page. This includes an allowance for checking the accuracy of the copying.

SUMMARY ASSESSMENT WHERE THE COSTS CLAIMED INCLUDE AN ADDITIONAL LIABILITY (SUCCESS FEES OR ATE PREMIUM)

47. Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, success fees payable under conditional fee agreements made after 1st April 2013 are not recoverable between the parties except in limited classes of cases for which the commencement of the Act was temporarily deferred. The transitional rules are set out in Part 48.

48. After the event insurance premiums are not recoverable unless either:

(a) the policy was taken out before 1st April 2013; or
(b) the policy covers liability for the costs of expert reports on liability or causation in clinical negligence claims.

49. Where an additional liability (a success fee under a conditional fee agreement or an after the event insurance premium) continues to be recoverable from the opponent:

(a) If a summary assessment is made before the conclusion of the proceedings, the court may assess the base costs, but not the additional liability (success fee or after the

event insurance premium): r.44.3A(1) as it was in force before 1st April 2013.

(b) If a summary assessment is made at the conclusion of the proceedings, or the part of the proceedings to which the funding arrangement relates, the court may summarily assess all of the costs including the additional liabilities, may order detailed assessment of the additional liabilities and summarily assess the other costs or may order detailed assessment of all of the costs.

50. Where the court carries out a summary assessment of the base costs before the conclusion of proceedings it is helpful if the order identifies separately the amount allowed in respect of: solicitors charges; counsel's fees; other disbursements; and any value added tax. If this is not done, the court which later makes an assessment of an additional liability, will have to apportion the base costs previously assessed.

51. In assessing an additional liability, the court will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

APPENDIX 1

CIVIL PROCEDURE RULES

Basis of assessment

44.3

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,
the costs will be assessed on the standard basis.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party;
(e) any wider factors involved in the proceedings, such as reputation or public importance; and
(f) any additional work undertaken or expense incurred due to the vulnerability of a party

or any witness..

(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974[2], the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.4.

(7) Paragraphs (2)(a) and (5) do not apply in relation to –

(a) cases commenced before 1st April 2013; or
(b) costs incurred in respect of work done before 1st April 2013,

and in relation to such cases or costs, rule 44.4.(2)(a) as it was in force immediately before 1st April 2013 will apply instead.

Factors to be taken into account in deciding the amount of costs

44.4

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –
    i. proportionately and reasonably incurred; or
    ii. proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis –
    i. unreasonably incurred; or
    ii. unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –
    i. conduct before, as well as during, the proceedings; and
    ii. the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(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;
(f) the time spent on the case;
(g) the place where and the circumstances in which work or any part of it was done; and
(h) the receiving party's last approved or agreed budget.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

[2] 1974 c.47

Procedure for assessing costs

44.6

(1) Where the court orders a party to pay costs to another party (other than fixed costs) it may either –

(a) make a summary assessment of the costs; or
(b) order detailed assessment of the costs by a costs officer,

unless any rule, practice direction or other enactment provides otherwise.

(Practice Direction 44 – General rules about costs sets out the factors which will affect the court's decision under paragraph (1).)

(2) A party may recover the fixed costs specified in Part 45 in accordance with that Part.

PART 44 PRACTICE DIRECTION

Summary assessment: general provisions

When the court should consider whether to make a summary assessment

9.1

Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs.

Timing of summary assessment

9.2

The general rule is that the court should make a summary assessment of the costs –

(a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
(b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,

unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily.

Summary assessment of mortgagee's costs

9.3

The general rule in paragraph 9.2 does not apply to a mortgagee's costs incurred in mortgage possession proceedings or other proceedings relating to a mortgage unless the mortgagee asks the court to make an order for the mortgagee's costs to be paid by another party.

(Paragraphs 7.2 and 7.3 deal in more detail with costs relating to mortgages.)

Consent orders

9.4

Where an application has been made and the parties to the application agree an order by consent without any party attending, the parties should seek to agree a figure for costs to be inserted in the consent order or agree that there should be no order for costs.

Duty of parties and legal representatives

9.5

(1) It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs in any case to which paragraph 9.2 above applies, in accordance with the following subparagraphs.

(2) Each party who intends to claim costs must prepare a written statement of those costs showing separately in the form of a schedule –

(a) the number of hours to be claimed;
(b) the hourly rate to be claimed;
(c) the grade of fee earner;
(d) the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing;
(e) the amount of legal representative's costs to be claimed for attending or appearing at the hearing;
(f) counsel's fees; and
(g) any VAT to be claimed on these amounts.

(3) The statement of costs should follow as closely as possible Form N260 and must be signed by the party or the party's legal representative. Where a party is –

(a) an assisted person;
(b) a LSC funded client;
(c) a person for whom civil legal services (within the meaning of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are provided under arrangements made for the purposes of that Part of that Act; or
(d) represented by a person in the party's employment,

the statement of costs need not include the certificate appended at the end of Form N260.

(4) The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible

and in any event –

(a) for a fast track trial, not less than 2 days before the trial; and
(b) for all other hearings, not less than 24 hours before the time fixed for the hearing.

9.6

The failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure.

No summary assessment by a costs officer

9.7

The court awarding costs cannot make an order for a summary assessment of costs by a costs officer. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court may give directions as to a further hearing before the same judge.

Assisted persons etc

9.8

The court will not make a summary assessment of the costs of a receiving party who is an assisted person or LSC funded client or who is a person for whom civil legal services (within the meaning of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are provided under arrangements made for the purposes of that Part of that Act.

Children or protected parties

9.9

(1) The court will not make a summary assessment of the costs of a receiving party who is a child or protected party within the meaning of Part 21 unless the legal representative acting for the child or protected party has waived the right to further costs (see Practice Direction 46 paragraph 2.1).

(2) The court may make a summary assessment of costs payable by a child or protected party.

Disproportionate or unreasonable costs

9.10

The court will not give its approval to disproportionate or unreasonable costs. When the amount of the costs to be paid has been agreed between the parties the order for costs must state that the order is by consent.

APPENDIX 2

GUIDELINE FIGURES FOR THE SUMMARY ASSESSMENT OF COSTS EXPLANATORY NOTES

Solicitors' hourly rates

The guideline rates for solicitors provided here are broad approximations only.

Localities

The guideline figures have been grouped according to locality by way of general guidance only. Although many firms may be comparable with others in the same locality, some of them will not be.

In any particular case the hourly rate which it is reasonable to allow should be determined by reference to the rates charged by comparable firms. For this purpose the statement of costs supplied by the paying party may be of assistance. The rate to allow should not be determined by reference to locality or postcode alone.

Grades of fee earner

The categories of fee earners are as follows:

[A] Solicitors with over eight years post qualification experience including at least eight years litigation experience and Fellows of CILEX with 8 years' post-qualification experience.
[B] Solicitors and Fellows of CILEX with over four years post qualification experience including at least four years litigation experience.
[C] Other solicitors and Fellows of CILEX and fee earners of equivalent experience.
[D] Trainee solicitors, trainee legal executives, paralegals and other fee earners.

Qualified Costs Lawyers will be eligible for payment as grades B or C depending on the complexity of the work done.

Employed barristers' rates should be allowed at the grade which best reflects the length of their litigation experience.

"Legal executive" means a Fellow of the Chartered Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive.

Clerks without the equivalent experience of legal executives will be treated as being in the bottom grade of fee earner i.e. trainee solicitors, paralegals and fee earners of equivalent experience. Whether or not a fee earner has equivalent experience is ultimately a matter for the discretion of the court.

Rates to allow for senior fee earners and for substantial and complex work

Many High Court cases justify fee earners at a senior level. However the same may not be true of attendance at pre-trial hearings with counsel. The task of sitting behind counsel should

be delegated to a more junior fee earner in all but the most important pre-trial hearings. The fact that the receiving party insisted upon the senior's attendance, or the fact that the fee earner is a sole practitioner who has no juniors to delegate to, should not be the determinative factors. As with hourly rates the statement of costs supplied by the paying party may be of assistance. What grade of fee earner did they use?

As stated in paragraph 29 of the Guide:
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.

Guideline hourly rates

Grade	Fee earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and legal executives with over 8 years' experience	£512	£373	£282	£261	£255
B	Solicitors and legal executives with over 4 years' experience	£348	£289	£232	£218	£218
C	Other solicitors or legal executives and fee earners of equivalent experience	£270	£244	£185	£178	£177
D	Trainee solicitors, paralegals and other fee earners	£186	£139	£129	£126	£126

London

Band	Area	Postcodes
London 1	(very heavy commercial and corporate work by centrally based London firms[3])	
London 2	City & Central London – other work	EC1-EC4, W1, WC1, WC2 and SW1
London 3	Outer London	All other London Boroughs, plus Dartford & Gravesend

National 1:

i. The counties of Bedfordshire, Berkshire, Buckinghamshire, Dorset, Essex, Hampshire (& Isle of Wight), Kent, Middlesex, Oxfordshire, East Sussex, West Sussex, Suffolk, Surrey and Wiltshire
ii. Birkenhead, Birmingham Inner, Bristol, Cambridge City, Cardiff Inner, Leeds

[3] Not restricted to any particular London postcode

Inner (within 2km of City Art Gallery), Liverpool, Manchester Central, Newcastle City Centre (within 2m of St Nicholas Cathedral), Norwich City and Nottingham City.

National 2:

All places not included in London 1-3 and National 1