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# Hourly rates and detailed assessment

## *Cost Litigation Newsletter*

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CHAMBERS

*If you can fill the unforgiving minute. With sixty seconds' worth of distance run, Yours is the Earth and everything that's in it, And—which is more—you'll be a Man, my son!*

### **- Rudyard Kipling**

It seems only yesterday, that slowly and portentously the guideline hourly rates were finally updated and a new set of guidance for the summary assessment of costs was finally adopted and published in 2021. Yet a lot of water has flowed under the bridge since then: the final end of the Covid pandemic (quaere: at least the end of the Covid restrictions), war in eastern Europe, and the implosion of two prime ministers. Moreover, the rates, so painfully harvested from the costs judges to provide the evidence for the "new" hourly rates, are looking increasingly out of date.

We live in a newly minted inflationary world. Thus, if we simply updated the national 2 band rates of £255, £218, £177 and £126, the Bank of England inflation calculator tells us they should be: £294.59, £251.85, £204.48 and £145.56.

There is meant to be a further updating of the guideline hourly rates in 2023, though at the moment there is no sign that the Powers That Be, are stirring into life to undertake such an exercise, whether a simple re-rating for inflation, or something more ambitious.

Of course, in addition to the hourly rates themselves, the role of guideline hourly rates on a detailed assessment remains controversial. Some judges seem to treat them as tramlines, others, that on the basis they are guidelines, simply as guidelines. The guidance itself notes:

*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.*

The note to the guideline rates also states:

*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.*

With those paragraphs in mind, is the position on a detailed assessment that the guideline rates are largely peripheral and irrelevant, or should they form a hard-edged starting point, with the evidential onus on a receiving party to set out a case for an increase judged by reference to the guidelines? The Court of Appeal in two significant judgments has indicated the latter. Thus in **Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 466** it was observed:

*4. The guide recognises that in substantial and complex litigation an hourly rate in excess of the guideline figures may sometimes be appropriate, giving as examples "the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element". However, it is*

important to have in mind that the guideline rates for London 1 already assume that the litigation in question qualifies as “very heavy commercial work”.

5. LG has not attempted to justify its solicitors charging at rates substantially in excess of the guideline rates. It observes merely “that its hourly rates are above the guideline rates, but that is almost always the case in competition litigation”.

6. I regard that as no justification at all. If a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided. It is not enough to say that the case is a commercial case, or a competition case, or that it has an international element, unless there is something about these factors in the case in question which justifies exceeding the guideline rate.

And in **Athena Capital Fund SICAV FIS v Secretariat of State for the Holy See [2022] EWCA Civ 1061** where the Court of Appeal stated:

10. I agree. It may be worth emphasising one aspect. In my experience there has been a view that the previous set of Guideline Hourly Rates (before 2021) were not directed to the heaviest work such as takes place in the Business and Property Courts. In part no doubt this was because they were so out of date. Whatever the position was or was thought to be, it changed in the current set of Guideline Hourly Rates, which were approved by the Master of the Rolls in August 2021. As my Lord pointed out in *Samsung v LG*, the current set includes a band called “London 1” which is a set of rates directed expressly to very heavy commercial and corporate work by centrally London based firms. I would add that the London 1 rates band in the current Guideline Hourly Rates is based on evidence from the Business and Property Courts themselves (see the Civil Justice Council’s Final Report of April 2021). Therefore the London 1 band is directly applicable to this case and so a justification for the much higher rates was needed.

But these cases concerned summary assessments of costs in the Court of Appeal: for appeals which lasted no more than one day. It may be thought that the decisions have little application to detailed assess-

ments of costs. Thus in the case of **Various Claimants v News Group Newspapers Limited [2023] EWHC 827 (SCCO)** Costs Judge Rowley observed:

70. I also accept the argument that the GHR may be a useful starting point in a detailed assessment as well as in a summary assessment. I do not, however, consider that the guidance given by Males LJ regarding the need for a “clear and compelling justification” for exceeding the GHR extends with any great force to this particular situation.

71. The GHR are provided predominantly to assist judges who do not specialise in costs cases to deal with a summary assessment of costs when faced with the successful party’s summary assessment schedule and competing arguments from the advocates.

72. The relevance to the GHR being a starting point in detailed assessments is no more than a reflection of the scarcity of any other starting point. Expense of time calculations or other potential starting points, as is demonstrated here, are invariably absent. But a starting point by its very name does not suggest it is the finishing point and that is particularly so where the court has the opportunity for the parties to address it in detail in respect of the CPR 44.4 factors.

In the case of **Harlow District Council v Powerrapid Limited [2023] EWHC 586 (KB)** a High Court judge, Mr Justice Choudhury noted the significance of the guideline hourly rates in these terms:

74. Issue is also taken with the application (or non-application) by the Judge of the Guideline Hourly Rates (“GHR”) contained in the 2021 edition of the Guide to the Summary Assessment of Costs (“the Guide”). In the Foreword to the Guide, the Master of the Rolls states:

“I am acutely conscious that questions have again been raised about the Guide itself and the methods and analysis that go into its production. In response, I would emphasise that the Guide is, as it has always been, no more than a guide and a starting point for judges carrying out summary assessment. This Guide is no different to its predecessors in that

it continues to offer assistance to Judges. In every case, a proper exercise of judicial discretion has still to be made, after argument on the issues has been heard.”

75. The Master of the Rolls’ emphasis on the Guide being “no more than a guide and a starting point for judges carrying out summary assessment” is important to bear in mind. I note that the Judge in the present case was not conducting a summary assessment, for which the Guide is principally intended, but was identifying, as a preliminary issue in a detailed assessment, the hourly rates that would apply. Mr Cohen drew my attention to paragraph 9 of the Guide, which provides that, “The general principles applying to summary and detailed assessment are the same”. That does not mean, however, that the Guide and, in particular the GHR, are as central to a detailed assessment as they are to a summary assessment. That is made clear by the following paragraphs of the Guide:

“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 de-

grees of complexity and this paragraph will still be relevant.” (Emphasis added)

76. Thus, whilst the GHR are intended to provide a starting point in a summary assessment, they may also be a helpful starting point on detailed assessment. Whether or not they are in fact considered to be such will be a matter for the costs judge having regard to all the circumstances of the case.

There is an interesting tension between the formulation adopted by the Court of Appeal, when assessing costs on a summary basis before it, and the approach that slightly further down the judicial hierarchy is being adopted in practice, with an emphasis on the discretion of the individual costs judge. The question of which approach should be adopted, remains open to argument.

It follows that despite guideline hourly rates being routinely pleaded in Points of Dispute (still) and claims for inflation based uprating being notable by their absence (still), it remains an open textured issue, as to the role that guideline hourly rates have in the context of a detailed assessment, it being open to both paying and receiving party to argue their weight should be minimal, or decisive.

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