



AnthonyGold

GHR Update

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CJC GUIDELINE HOURLY RATES WORKING GROUP REPORT FOR CONSULTATION

January 2020 (as revised)

“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 and] Deputy Head of Civil Justice and to the Civil Justice Council during [Trinity term 2021].”

<https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/>

The Working Group

Stewart J, Senior Master Gordon-Saker, HHJ Bird, DJ Middleton, DJ Gibson, Elizabeth Davies, Nick Bacon QC, David Marshall, Peter Causton, Jeff Lewis, David Cooper, Larry Shaw, Robert Wright

Advisors: Professors Fenn & Rickman

White Paper GHR



Guideline Hourly Rates

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“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.”



Why do we have GHRs?

- The English Rule (costs follow the event)
- The indemnity principle (you can't charge opponent more than your client)
- The A Rate and the B rate
 - $\frac{1}{3}$ overhead + $\frac{1}{3}$ salary (A) + $\frac{1}{3}$ profit (B)
 - $\frac{1}{3}$ = 50% uplift
 - Higher B rate for complex work (never lower!)
- The CPR (1999)
 - Abolished A & B rates – single hourly rate
 - Indemnity Basis/Standard basis
 - Summary assessment
 - Fixed Costs



What should the GHRs be? Cook on Costs

‘I used to say that Costs Judges fixed the rate by pulling open the third drawer down on the right-hand side of their desk and looking at a bit of paper showing “the hourly going rate” for a particular class of work but no one knew where it had come from.

A Costs Judge took issue with me: interestingly enough, he did not disagree that Costs Judges had bits of paper in the third drawer down but he said that they knew where they came from: they wrote them themselves, based on information learned from assessments.

“Sitting day in and day out, hearing other solicitors disputing or accepting them, we form a view as to market rates. We do not lay down the rates. We adjudicate on the opposing contentions of the parties.”

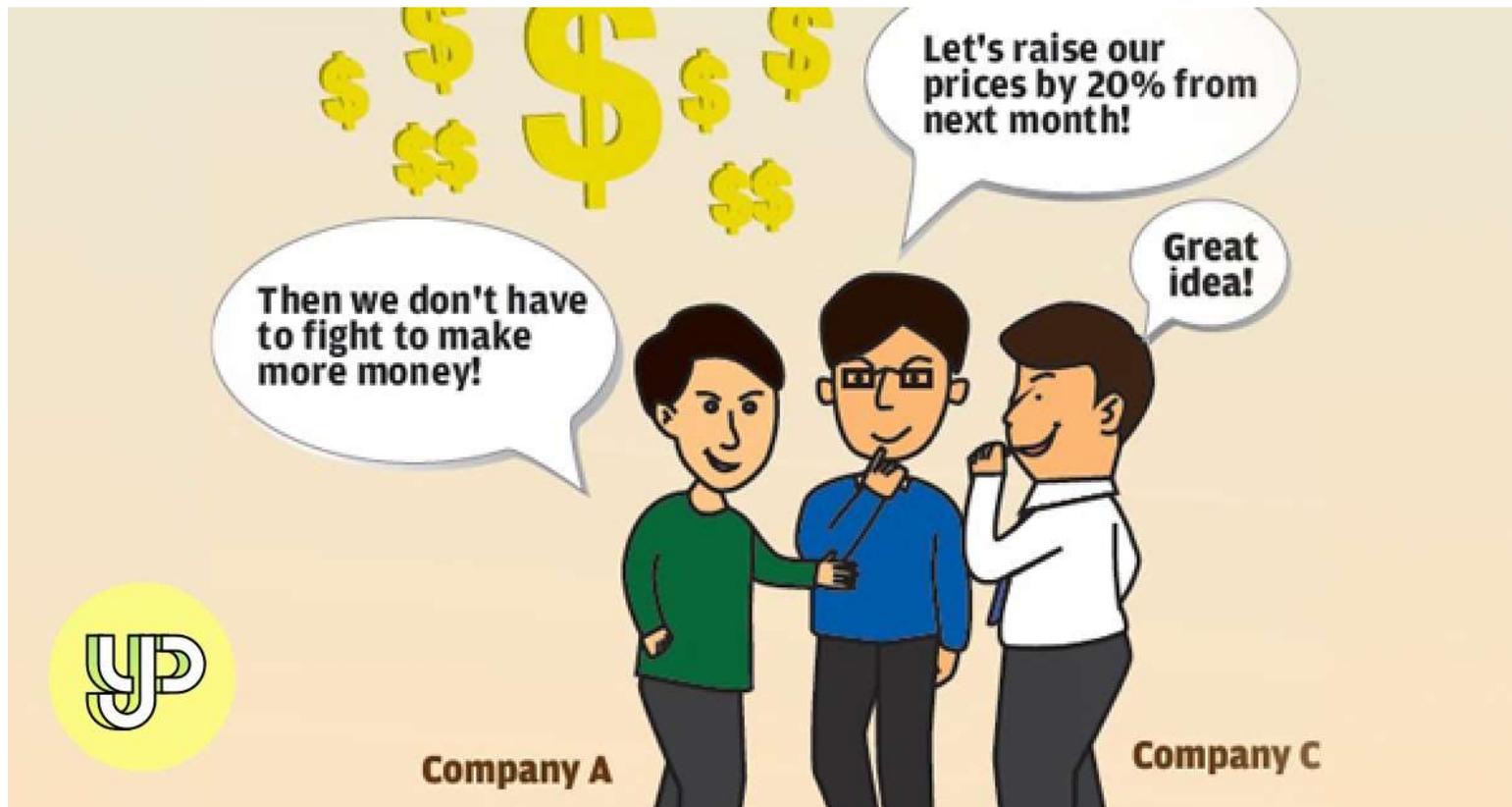
In other words, Costs Judges do not fix rates, they merely reflect them.’

Current Guide - expressed as a single figure

[except ranges for London 3 for Grades A & B - A: £229 to £267 B: £172 to £229]

BUT... Enter the competition authorities

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What has happened since 2006...

- 2006 – last review of GHRs by the Senior Costs Judge
- 2009 – Lord Chancellor’s Advisory Committee on Costs (‘market rates’)
- 2010 – Master of the Rolls sets GHRs with an interim inflation review
- 2010 – Jackson
 - “the aim of the GHR should be to reflect market rates for the level of work being undertaken”
 - “the rates which an intelligent purchaser with time to shop around for the best deal would negotiate.”
- 2014 – Foskett Committee (CJC Working Group) (‘costs plus’ analysis)
- 2015 – Dyson MR does not implement because insufficient data

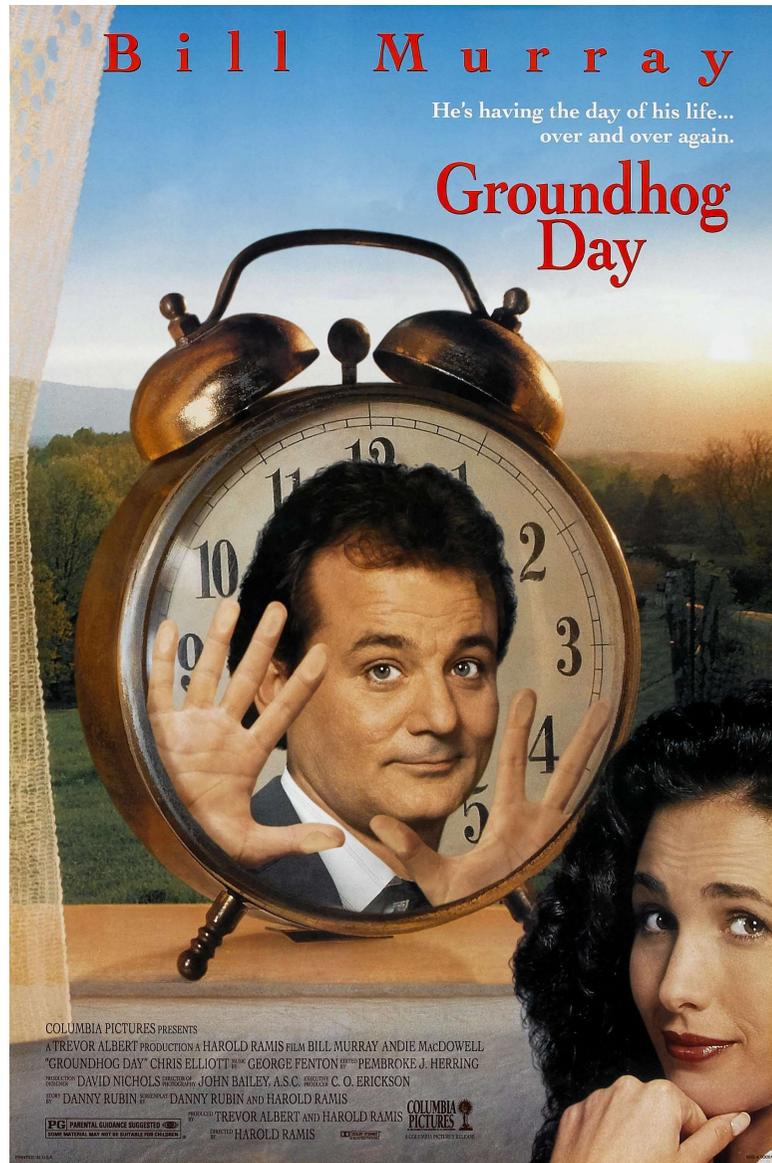
Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504

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Mrs Justice O'Farrell:

‘... the hourly rates of the defendant’s solicitors are much higher than the SCCO guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be welcome.’





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What about inflation since 2010 (or 2006)?

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- “A principal motivation for upgrading the GHRs is to allow them to reflect changes in the costs faced by solicitors: to the extent that inflation has increased these costs, GHRs that are not uprated will be increasingly unremunerative in real terms. A straightforward way to uprate the GHRs, therefore, is to use a price index. A number of possible indices are available.”
- CPI: 24% (2010 to 2020)
- SPPI (Service Producer Price Index)
 - All items: 13%
 - Professional Services: 17%
 - (Business to Business) Legal services: 34%
- Re PLK and others [2020] 9 WLUK 364 : [2020] Costs LR 1349
Master Whalan on appeal held that the procedure whereby costs officers regularly applied the GHRs in assessments of court of protection bills should change and that rates up to 20% higher than the GHRs should normally be accepted
- Cohen v Fine & Hermes [2020] EWHC 3278 (Ch)
Judge Hodge QC on appeal allowed an uplift for inflation of 35%.

BUT 2010 rates were not themselves based on firm evidence

The evidence

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- SCCO Judges & Costs Officers
- 26 Regional Costs Judges
 - Assessments 1/9/20 to 27/11/20
- Professions
 - Assessments 1/4/19 to 31/8/20
 - Assessments 1/9/20 to 27/11/20
- BPC Judges
- Datasets – Appendix H
- Professors Fenn & Rickman

‘The sample sizes are sufficient in most grade/band combinations to ensure that the sample means are reasonably precise estimates of the population means.

By “reasonably precise” we mean that they have sufficient statistical power to determine whether they differ from the current GHRs with conventional levels of confidence (i.e. 95%).’

Note:

Fairly small numbers (only National 1 above 100)

London 1 & 2 re-jigged

Graphic showing variations around the mean

The proposals

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- Recommendations for increases on the 2010 GHRs of between 7% and 35%, depending upon grade and locality.
- The working group also recommend merging National Rates 2 and 3 as the results were near identical
- (indeed the rates for National 1 are also the same except at Grade A which might suggest a single National Rate at some point in the future).
- The Working Group restate the principle that London 1 ('City rates') are for heavy and complex 'City' work.
- However, the report and the revised draft guide for summary assessment stress that:
 - the rates are guidelines only
 - post codes are only the starting point
 - complex litigation (expressly including some personal injury work) may be paid more.

The proposed rates

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

Guidelines

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“Judges who have to assess costs will have proper regard to the new GHRs but will

- (a) appreciate that they have been and always will be no more than a guide,
- (b) have due regard to para 29 of the proposed revised Guide and
- (c) exercise skill, care and common sense in the assessment of costs.”



New Guide for Summary Assessment – para 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.”

New Guide for Summary Assessment
– Appendix 2

- “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.”

What about SE1 or Canary Wharf?

- “4.12 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.
- A future review should carefully consider evidence on geographical location, particularly within London. Such future review should take into account changes in working practice brought about by new technology, the sequelae of the Covid-19 pandemic and the HMCTS reform programme.
- Meanwhile, costs judges will no doubt continue to take into account the nature, complexity and location of the work when assessing complex high-value work carried out by firms which are based in areas of central London but are located in London 3.”
- Other regional issues?



Location, Location, Location

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Shulman v Kolomoisky LTL 13/10/2020 [2020] 6 WLUK 620

- The paying party argued that the defendant’s solicitors Skadden Arps were based in E14 (Canary Wharf), so in ‘Outer London’ for the purposes of the GHRs.
- Master Rowley gave this argument short shrift describing the argument as “entirely opportunistic”, pointing out that the presence of Skadden Arps, Clifford Chance and many multinational financial institutions “inevitably leads to the conclusion that rates equivalent to those to be found in the City are much more appropriate.”
- He held “... one of the many issues that has arisen with the use of the Guideline Rates over time is the fact that there is a single figure for a particular level of lawyer in a particular locality. That figure takes no account of the size of the firm, the nature of the work undertaken et cetera in the particular case. It is described as a broad approximation and it is really the roughest of rough guides as to what might be allowed.”

Where does proportionality come into it?

- “It is, therefore, not intended to reflect proportionality in the GHRs which the working group recommends.
- Judges should be aware that they are required by the Rules to allow only proportionate costs once an initial assessment has been made based on hours worked and hourly rates.”
- **In practice, if a simple case has been handled by a Grade A FE, the judge will instead allow the GHR for an appropriate grade of FE for that case.**



The Good the Bad and the Ugly

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- Why not just set the rate in a CFA as high as possible? **Setting the rate too high is to be deprecated and leave the firm open to justified criticism by the court.**
- Good v SRA [2019] EWHC 817 (Admin) - Rapid Response Solicitors
 - charged with ‘rendering bills of costs which were and which they knew to be excessive and often grossly excessive as regards (a) hourly rates and (b) success fees and thereby acted without integrity...’.
 - So far as hourly rates were concerned the firm had set an hourly rate across the board of £400 per hour, which, for example, was almost four times the guideline hourly rate for a Grade D fee earner and which the SDT had found to be ‘grossly excessive’.
 - The SDT and the Divisional Court were critical of his defence that he was merely ‘testing the rate’, the Divisional Court agreeing with the SRA’s counsel that he ‘had set the rate at an artificially high level in the knowledge that the clients would not object, so that he could maximise costs without regard for the need for those costs to be reasonable and proportionate’ and that this was ‘wholly inconsistent with any belief that he was entitled to set such an artificially high rate being genuine’.
- NB The Consumer Rights Act 2015
- CPR 46.9 (3) (c) and ‘informed consent’.
- Overall percentage cap? Herbert v HH Law; Belsner v Cam.

*Questions for consultation: closed 31 March
2021*

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- (i) The methodology used by the working group.
- (ii) The recommended changes to areas London 1 and London 2.
- (iii) The recommended GHRs set out in paragraph 4.18 of this report.
- (iv) Specifically, whether the rate of £186 for London 1 Grade D is too high; if so, at what rate it should be set and why?
- (v) The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national bands.
- (vi) Should the working group recommend that the Civil Procedure Rule Committee be requested to consider amending the summary assessment form N260 and the information provided on the detailed assessment bill - the amendment would be to require the signatory to specify the location of the fee earners carrying out the work.⁷⁶
- (vii) The recommended revisions to the text of the Guide in Appendix J.

What next?

- These are proposals for consultation, so may be rejected or amended or ignored
- Final Report will go to the CJC and the MR and the Deputy Head of Civil Justice
- We should know by the Summer
- In the meantime:
 - **Check all CFAs/retainers**
 - **Is the headline rate more than the proposed GHR plus relevant enhancement**
 - **(but existing CFAs may have a limit on how much you can increase by)**
 - **(And not excessive)**
 - **The Indemnity Principle will limit you to the headline rate in the CFA/retainer wherever the GHRs end up**
 - **Use inflation, Ohpen, Re: PLK, and Cohen to argue for increases in current negotiations**
 - **Complex cases already justify more than the GHR**