

**Given the sea change in judicial attitude, what amounts to a "clear and compelling justification" for surpassing guideline hourly rates and which arguments will give your clients an edge in disputes?**

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# Introduction

- This is intended to be a review of:
- (a) How we got here – the Present;
- (b) Where guideline hourly rates are going – the Future.

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## Why Guideline Hourly Rates?

- Back in the mists of time, that is before 1986, costs in both the High Court and County Court were largely governed by a series of scales you consulted for each task completed, together with a bewildering number of bases on which costs were “taxed”;
- Costs draftsman, as they were then known, earned their salt by navigating their way through all this

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# Reasonable Costs

- In 1986, the scales in the High Court were swept away as were the bases of assessment save for two, the standard basis and the indemnity basis, and the rule referred simply to costs
- “*reasonably incurred and reasonable in amount*”.
- But how were these to be calculated?

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# The old calculation of Hourly Rates

- First you worked out how much it cost for the lawyer to do the work.
- The Law Society published “*The Expense of Time*” in order to calculate it, this was the “A” figure (although the average for the area was usually applied, often gleaned from surveys) and then...

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# Calculation of the old Hourly Rates

- Secondly you added a percentage of that figure for profit, your "B" figure.
- That usually ranged from 50% in a run of the mill case ( $1.5 \times A$ ) what it cost to do the work up to over 200% (i.e. a total of  $3 \times A$ ) in the most complex case.

## The Death of A+B

- The difficulty was that although it was highly logical, it did not reflect the way the client was charged, which was a single hourly rate
- So with the Woolf reforms in 1999, single guideline hourly rates came in, based originally on the old average A+ 50% B figures published before then
- These were then (fairly) regularly updated by some inflation measure each year up to 2010, not linked to any change in the actual cost of doing the work...

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## The lack of evidence base

- The regular updating then died on the basis that the evidence-base for the rates was non-existent by 2011.
- 
- Foskett J headed a working group reporting in 2014 attempting to obtain a new evidence-base of what it cost to do the work. i.e. an expense of time
- But almost no firm gave the Group that information...
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- So Lord Dyson MR rejected his report's recommendations for new rates as lacking an evidence-base, and there the 2010 rates lay, alive but moribund

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# The CJC 2021 Report

- Headed by Stewart J, it concluded:
- *“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.”*

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# The 2021 CJC Report

- *“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...”*

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# The 2021 CJC Report

- How?
- 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*”
- And on summary assessment too.
- It was acknowledged to suffer from circularity, but it was better than nothing...

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# The 2021 Guideline Hourly Rates

- The Stewart J CJC Report was accepted by a grateful Sir Geoffrey Vos, Master of the Rolls and implemented from October 2021.
- A full decade since the last guideline hourly rates were published...
- Note: London 1 was not so geographical but applied to “*very heavy commercial and corporate work by centrally based London firms*”

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# 2021 Guideline Hourly Rates

	<b>Grade A</b>	<b>Grade B</b>	<b>Grade C</b>	<b>Grade D</b>
<b>London 1<sup>62</sup></b>	£512 (25.2%)	£348 (17.6%)	£270 (19.5%)	£186 (34.8%)
<b>London 2<sup>63</sup></b>	£373 (17.8%)	£289 (19.5%)	£244 (25%)	£139 (10.4%)
<b>London 3<sup>64</sup></b>	£282 (13.7%)	£232 (15.8%)	£185 (11.9%)	£129 (7%)
<b>National 1</b>	£261 (20.2%)	£218 <sup>65</sup> (13.5%)	£178 (10.7%)	£126 (6.8%)
<b>National 2</b>	£255 (26.78%)	£218 (23.2%)	£177 (21.3%)	£126 (13.5%)

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# The Courts' Reaction to the new GHRs

- In *Samsung Electronics v LG Display* [2022] EWCA Civ 466; [2022] Costs LR 627,
- Summary assessment in CA in a competition case
- Substantially higher rates than London 1 GHRs claimed there on basis simply that it was a competition case and “*its hourly rates are above GHRs, but that is almost always the case in competition litigation*”.

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# Samsung Electronics

- Males LJ: *“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...”*

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# Athena Capital

- *Athena Capital v Secretariat of State* [2022] EWCA Civ 1061 per Birss LJ [Note]
- *“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.”*

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# Clear and Compelling Justification

- This **can** be provided:
- In *Kent v Apple Inc* [2022] Costs LR 1433 (CAT), hourly rates of, for instance, £700 for Grade A sought in competition claim vs GHR £512.
- Chair Ben Tidswell held applications amounted to serious attack on a substantial part of the Applicant's case which had to be taken with considerable seriousness
- But 5% reduction (£665 ph Grade A) applied.

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# Application on Costs Management?

- *Associated Newspapers v Buckingham Group* [2022] Costs LR 1659, Roger Ter Haar KC
- Building contract dispute
- Although not fixing hourly rates, proper to have regard to them
- Grade A charging £801ph, guideline rate £512, reduction of 15% in the budgets, mainly on the basis of hourly rates (i.e. hourly rate of £681)...

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## The Right approach?

- Leggatt J in *Kazakhstan Kagazy v Zhunus* [2015] EWHC 404 (Comm) had stated that:
- *“What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party’s own account and not recoverable from the other party.”*

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# Discovery Land v Axis Specialty Europe

- [2021] EWHC 2146 (Comm) where Peter MacDonald Eggers QC quoted this and then said:
- *“I have only one reservation. I am not certain why the “touchstone” of reasonable or proportionate costs must be the lowest amount which a party could reasonably have been expected to spend....”*

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# Discovery Land

- *...Certainly in the context of costs management, the court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure. Expenditure which is within a reasonable and proportionate range is still reasonable and proportionate even if it is not at the lower end.”*
- Take your pick...

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# *Merricks v Mastercard* hailshamchambers

- [2023] Costs LR 1563
- Very substantial class action in the CAT
- Roth J Chair
- Rates claimed £870 Grade A, £478 Grade B, 60% to 70% above GHR
- Allowed: Grade A £666, Grade B £351,
- A reduction of 30% but still allowed **30% above** GHRs

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# Application of “*Clear and Compelling*” test to Costs Judges on DA?

- In *Various Claimants v Newsgroup Newspapers* [2022] Costs Judge Rowley was unimpressed:
- [70]: “*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.*”
- GHRs? Nowt to do with me, guv!

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# Phone-Hacking

- Costs Judge Rowley [71-72]:
- *“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.*
- *The relevance to the GHR being a starting point [not the finishing point] in detailed assessments is no more than a reflection of the scarcity of any other starting point.”*

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# Contrast

## *Hughes Fowler Carruthers v Gubay*

- [2023] EWHC 2188 (SCCO) per Costs Judge Leonard (albeit a SA):
- *“In accordance with the guidance of the Court of Appeal in Samsung..., on a summary assessment I should allow the recovery of solicitors’ hourly rates in excess of the 2021 guideline rates only where there is a clear and compelling justification for doing so.”*
- Take your pick...

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# But is Samsung being over-interpreted?

- When Males LJ stated that there had to be a “*clear and compelling justification*” for exceeding the GHR: he was talking about London 1 which is not a specific geographical area of London but specifically relates to “*very heavy commercial & corporate work*”.
- So if your justification for exceeding London 1 is no more than this is “*very heavy commercial work*”, you must fail as that is what London 1 is for.
- Does it go any wider than that?

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# CJC Costs Review May 2023

- 4 areas covered – costs budgeting, GHRs, pre-action protocols and extension of FRC
- Responses broadly supportive of GHRs in principle

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## CJC 2023 Recommendations

- (1) Retention of GHRs – lack of call for abolition shows they are fit for purpose, subject to:
  - (a) Being kept up to date
  - (b) Keeping a careful eye on the market

# CJC Recommendations –

## Tweaks Required

- (1) the fact that the highest band is widely considered to be too low and unrepresentative of the fees charged for top flight commercial work (both in London and elsewhere) –
- *cf. Athena.*
- For a new Working Group on Costs to address.

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## Tweaks to GHRs

- (2) Counsel should be subject to GHRs –
- (a) real perception that counsel's fees not adequately addressed;
- (b) challenges as to how it is done but no good reason not to do it.
- Have they considered the Supreme Court's guideline figures to Counsel?
- How? What regional variation? What about hearings and trials?
- Working Group to address this too.

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## Tweaks to GHRs

- (3) Agreed need to have a test for when to depart from the GHR.
- But should it be:
- (1) only if there is a “*clear and compelling justification and it is in the interests of justice to do so*”;
- (2) GHR only applies to an average case, so will depart when it is “*just and proportionate*”; or
- (3) Whenever it is reasonable to do so?

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# Updated GHRs January 2024

## By Services Producer Price Index

Grade	London 1	London 2	London 3	National 1	National 2
A	<b>£546</b>	<b>£398</b>	<b>£301</b>	<b>£278</b>	<b>£272</b>
	(£512) +6.64%	(£373) +6.70%	(£282) +6.74%	(£261) +6.51%	(£255) +6.67%
B	<b>£371</b>	<b>£308</b>	<b>£247</b>	<b>£233</b>	<b>£233</b>
	(£348) +6.61%	(£289) +6.57%	(£232) +6.47%	(£218) +6.88%	(£218) +6.88%
C	<b>£288</b>	<b>£260</b>	<b>£197</b>	<b>£190</b>	<b>£189</b>
	(£270) +6.67%	(£244) +6.56%	(£185) +6.49%	(£178) +6.74%	(£177) +6.78%
D	<b>£198</b>	<b>£148</b>	<b>£138</b>	<b>£134</b>	<b>£134</b>
	(£186) +6.45%	(£139) +6.47%	(£129) +6.98%	(£126) +6.35%	(£126) 6.35%

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# What to do about GHRs

- If receiving, never rest on your laurels if you want more than the GHR.
- Explain in detail and in writing why this case was out of the ordinary run of cases whether the “clear and compelling” justification is requirement or not
- If paying, run the Males LJ argument and seek to suggest that the modern way (post 2021 updated guidelines) is to depart from GHRs rarely

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# The Future

- (1) GHRs are clearly here to stay, in some form or another, but might not be as we have known them.

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# The Future

- (2) Working Group to look into methodology –
- Should it be the amounts allowed by Costs Judges (as now)?
- Or what it costs to do the work, and, if the latter, how is that information to be gathered fairly and effectively?
- Guideline rates ever more rigidly applied?
- Or should the courts just impose their own GHRs as to what is considered reasonable and proportionate without reference to evidence?

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## The Future

- (2) If Counsel, why not experts per legal aid rates?
- (3) Trade-off between consistency/certainty and justice in any individual case.