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LITIGATION COMMITTEE response to the Civil Justice Council's Working Group Report for Consultation on Guideline Hourly Rates dated January 2021

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Introductory Comments

1. The Committee generally supports there being an evidence-based review of the basis and amount of the guideline hourly rates ("GHRs") given that the existing GHRs often provide an unhelpful and out of date starting point in cost assessments - particularly in relation to complex and/or substantial commercial disputes where the discrepancy between the existing GHRs and current actual market rates is likely the greatest. It also supports GHRs remaining as guideline rates only given the need for flexibility and discretion when required.

2. The following is a response to the request for comments at 8.1 (sub-paragraphs (i) to (vii) of the Working Group's Report for Consultation.

The methodology used by the Working Group

3. The Committee notes that GHRs are intended by the Working Group to be "*broad approximations of actual rates in the market*" (in accordance with the statement of Lord Dyson MR in July 2014). It is welcomed that the Working Group seeks to set GHRs against an average of *actual* rates, rather than seeking to impose a set of lower guideline rates (in an attempt to, for example, drive down the costs of litigation generally or to govern what winning parties ought to be able to recover from their losing opponent, akin to the fixed costs regime). The Committee respectfully disagrees with the comments of Lord Justice Jackson when he said in his report that the market rates would be the rates at which an intelligent purchaser with time to shop

around for the best deal would negotiate. This intelligent shopper test is a rather arbitrary concept and something which introduces an undesirable subjectivity into data that ought to be empirical.

4. The Committee supports the methodology being based upon *actual* market rates that are being charged to litigants. Those rates are themselves self-regulated as a result of the forces at play in what remains a competitive legal market. Those rates will often therefore already reflect the complexity of a matter, the expertise required, the scope to do the work differently using technology or flexible resourcing, what competing practices might charge, and so on. That is particularly so for complex and/or substantial commercial disputes which often involve sophisticated clients, clients with panel arrangements and/or clients which have the buying power to negotiate on rates.

5. As to its methodology to derive a representative and reliable data set for what those *actual* market rates may be, the Working Group appears to focus on tracking and collating the rates which have been allowed on detailed (or provisional) assessments. That methodology does go some way to doing that. Those rates will also have had the benefit of the judicial scrutiny within the assessment from which they arise, including a focus on proportionality (albeit any adjustments on proportionality grounds are often done in the round on the overall costs claimed, rather than focusing on the underlying hourly rates).

6. However, the Committee considers that only investigating the rates which have been allowed on detailed (or provisional) assessments is very likely unrepresentative given the very small percentage of disputes which result in such assessments. That sample may also be unrepresentative of actual rates given that the rates allowed within such assessments will have, more than likely, already been decreased because of the effect of the low existing GHRs which continue to apply as a notional starting point (as 2.9 of the Working Group's Report for Consultation recognises). Furthermore, reviewing rates upon detailed assessment may themselves be out of date and not reflect prevailing rates at the time of the detailed assessment, particularly for long running matters where a detailed assessment will often involve hourly rates agreed between solicitor and client some years prior.

7. That begs the question as to where a better source of data for *actual* market rates might be. The Committee would suggest that the hourly rate information contained within costs budgets and rates claimed on assessment (rather than being awarded) may provide a more representative sample. Although not all cases reach even that stage or are subject to the costs budgeting regime, far more do go through that process than the detailed (or provisional) assessment stage. The Committee's experience is that comments upon hourly rates at the costs budgeting stage is infrequent, but that does not mean that they are any less good a real time indication of *actual* market rates and tracking them ought to be possible. It should also be noted that the rates included in costs budgets and claimed on summary and detailed assessments have to be certified by a partner as the rate actually being charged to the client.

8. It is noted that Mr Justice Stewart had also sought rates data in other ways, most notably from a number of professional organisations in the hope that those organisations might have their own trackers. The Committee commends that approach – both because (a) it sought rates data over a longer time period (1 April 2019 to 27 November 2020), and (b) because it sought rates data on what rates had been agreed, and not just those ordered on assessment, which together would reflect a broader approximation of actual rates in the market. However, that methodology still relies upon the sort of self-selection voluntary exercise employed by the Foskett Committee which drew criticism from Lord Dyson MR – and would likely not capture as broad a range of Court users as those who conduct costs budgeting.

9. Generally speaking, the Committee commends that the Working Group has sought data from several sources. The recognition, however, by the Working Group of its data's shortcomings, coupled with its admission that it received "*relatively little information…from City of London commercial firms*", and does not have sufficient volumes of data for areas London 1 and London 2, does suggest the analysis is not as representative as it could be. But, overall, the Committee considers that the Working Group's methodology and recommendations are a very marked improvement, and closer to actual market rates, than the current GHR dating from 2010. The fact that further improvements can be made in future should not prevent the Working Group's recommended rates being implemented now.

10. By way of some further specific observations:

10.1 **Covid-19 pandemic**: It is noteworthy also that working practices have undergone significant changes as a result of the global Covid-19 pandemic. What impact that may have on *actual* rates remains to be seen, but it is possible that some of the potential changes (for example, flexible working, less office space, resourcing from out of London etc) may have an impact. It is noted that the Working Group considered itself unable to delay its reporting despite that possibility, and thought it unnecessary to do so, in favour instead of re-reviewing GHRs "*within a relatively short period of time*". The Committee, however, considers that to be potentially short-sighted if it means any new GHRs will be outdated so soon after their adoption, and particularly so if the next review of GHRs is not for a number of years.

10.2 **Fee arrangements**: Whilst the Working Group's methodology seems focussed on hourly rates, it ought to be borne in mind that charging on an hourly rate basis is now less common than it once was given the market demand for more innovative charging structures. Where, for example, the market sought a piece of work on a fixed fee basis, that is what would be the *actual* price of that work, and should be the best guide as to what ought to be recoverable, subject to proportionality, rather than artificially pinning it down to the hourly rate framework which the market had specifically sought to avoid.

10.3 **Counsel**: Whilst potentially outside of the remit of the Working Group, it is noteworthy that clause 36 of the Guide to the Summary Assessment of Costs at Appendix J seeks to put little limit on the setting of brief fees, noting that there is "*no precise standard of measurement*". Although brief fees ought

also to be kept in check by forces at play in the separate (albeit increasingly overlapping) competitive market in which barristers' chambers operate, the Committee does frequently encounter brief fees which are not necessarily a function of the preparation time involved, and sees increased use of expensive brief fees for interlocutory hearings. The point is raised here as there is a knock-on effect on solicitor fees allowed on assessments as solicitor fees are often decreased the more the barrister fees are claimed on the presumed basis that the matter must therefore have been barrister-led. It is therefore potentially unrealistic to be using rates from detailed (or provisional) assessments without taking that into account, or indeed, setting GHRs at all without doing the same exercise for barrister fees (with regard to brief fees and hourly rates) at the same time.

10.4 **EOT**: It may be worth noting as a final point that 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.

The recommended changes to areas London 1 and London 2

11. The Committee agrees with the observation at paragraph 4.10 of the draft report that existing London 1 covers a vast range of work of varying complexity and size. It generally welcomes the conclusion therefore to re-define London 1 by the nature of the work being done by centrally based London firms, rather than by geographical location in the City (with London 1 being primarily for "*very heavy commercial and corporate work*", whether undertaken by firms geographically located in the City or central London, and London 2 being 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).

12. The Committee notes that discretion is important here. Whilst the trend may be that the biggest cases are the most complex, that does not always follow and other reasons (such as strategic or reputational) may drive a client's decision-making as to why to choose a leading City practice on a case which may not be 'very heavy'. In that case, it should not necessarily follow that the right GHRs to be applied are London 2, rather than London 1. The inability to predict with any degree of certainty which cases might ultimately fall within the "*very heavy*" category does cause some concern. Even with different formulations of the definition, it may not be clear from the outset (when a client is choosing which firm to engage) what the value of a claim is, how complex the issues are, or how many court days it may occupy. Equally, the nature of the claim could change considerably over time. That could result in clients themselves being at an unfair disadvantage in not being able to recover costs reasonably and proportionately incurred because of a costs judge's differing view on the complexity of a matter so long after the matter had started. The Committee would therefore support a change in the definition from "*very heavy*" to "*heavy or complex*" which would avoid there being too restrictive a hurdle for London

1 and allow greater discretion to apply London 1 and London 2 on a case by case basis. The point is all the more important given the significant difference between the proposed GHRs between London 1 and London 2, at least for Grade A (£512 compared to £373) and Grade B (£348 compared to £289).

13. The Committee also notes the discrepancy between the description for London 1 (i.e. "*…very heavy commercial and corporate work by centrally based London firms*") and the GHRs proposed for it (Grade A: £512, Grade B: £348, Grade C: £270, Grade D: £186). The Committee, whose members routinely conduct matters which fall within that category, consider those rates to be low, and often very low, compared to the *actual* rates for that type of work. The fact that the Working Group had an unsatisfactory amount of data from London 1 and 2 may be the reason for those rates appearing unrealistic. Should the Working Group have in mind discouraging the use of City law firms for anything other than "*very heavy commercial and corporate work*" (for the good of access to justice, or otherwise), the Committee would note the variety of cases handled by such firms, all of which would ordinarily be worthy of serious representation, regardless of how 'heavy' they are, and consider it to be largely a client's prerogative to instruct whomever it sees fit without being penalised on its recovery.

The recommended GHRs set out in paragraph 4.18 of the draft report

14. The Committee commends the significant amount of work done by the Working Group in collating a substantial volume of data and carefully assessing it. However, the Working Group recognises that the data from London 1 and London 2 was lacking and that appears to have resulted in proposed GHRs which are low, or very low, compared to the *actual* rates Committee members experience through their own respective firms or from their work against other solicitor firms. That applies in particular to both Grade A and B in both London 1 and London 2.

Whether the rate of £186 for London 1 Grade D is too high

15. The Committee does not consider the proposed GHR to be too high for a London 1 Grade D fee earner. The Committee's experience is that the *actual* rate at which London trainees (though less so paralegals) are charged to clients does frequently exceed that sum. As above, there would need to be analysis from a representative sample of City law firms (doing work which would be categorised in London 1) in order to derive a more reliable figure. As above, the data compiled and scrutinised at the costs budgeting stage may provide a better data set.

The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national bands

16. The Committee's experience is in relation to London, and so does not comment on the national bands.

Specifying the location of the fee earners carrying out the work on form N260

17. The Committee does not support any drive to require the location of fee earners to be identified on the face of form N260. On a practical level, there will often be difficulty in checking where fee earners are doing their work, or it may be difficult to report accurately where fee earners are doing their work from a variety of locations, and particularly so in view of cultural shifts to working patters which will inevitably emerge from the pandemic.

18. Indeed, market forces by themselves are driving cultural change in the legal market, where clients support the use of flexible resourcing (e.g. 'north-shoring', or 'best-shoring' i.e. fielding the most cost-effective resources wherever they are based). Market forces are the better control in that respect to ensure the appropriate use of resources. It also goes hand in hand with the country's 'levelling-up' policy. The Committee considers there to be a risk that too great a focus on geography is likely instead to discourage use of trainees and paralegals outside London 1 if that means less favourable recovery for clients. The proper measure ought simply to be the amounts actually charged to clients.

The recommended revisions to the text of the Guide in Appendix J

19. The Committee does not at this stage have any specific comments to make on the text, save to note that the observations made in this response may themselves trigger the need for some changes.

If the Working Group have any comments please contact the Chair of the Litigation Committee, Gavin Foggo, at gfoggo@foxwilliams.com.

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THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

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