Practico

Virtual Roundtable with Ben Williams KC — Hourly Rates, Damages Based Agreements, and Group Actions

30 May 2022

Guideline Hourly Rates

[Begins at 2:40]

Ben, Jeremy and Andy consider the effect of last year's changes to Guideline Hourly Rates (GHRs) following the 2021 Civil Justice Council Review.

Before the review, in relation to high value commercial work, GHRs were generally mentioned only to dismiss them as irrelevant.

By 2020, some judges were commenting that the GHRs were positively unhelpful. In Cohen v Fine, HHJ Hodge QC, a commercial judge in Manchester, decided that an increase on the GHRs 'in the order of 35% would be justified as a starting point.'

As a result of the review, the 2010 GHRs were updated, but the 2010 rates themselves had not been based on any examination of the market. Even though there are plenty of summary assessments in the commercial courts and there could have been some investigation into the rates being claimed, there was no serious inquiry into market rates.

It will be interesting to see what commercial judges at first instance will do. Based on the summary assessment schedules, which they see frequently, will they conclude that an hourly rate of £500 is out of sync and is simply not available in the market for work done by a partner in a top firm? If they reach that conclusion, the real question will be whether the case merits the instruction of a top law firm. If it does, then it would not be unreasonable to recover the hourly rates that a top law firm charges.

Judgments are beginning to emerge where the market rates claimed have been reduced quite substantially.

In Samsung v LG, the Court of Appeal indicated that a litigant will need to make a strong case if it wants to recover rates higher than GHRs.

All of this will be an issue for firms in or at the threshold of the magic circle, because GHRs are a long way away from the rates that solicitors are charging for commercial work. For serious commercial work, partner rates are rarely below £600, rates as high as £900 per hour can be seen and the sterling equivalent of some US firms' partner rates can top £1,000 per hour. The London 1 Grade A GHR of £512 seems out of step with the market.

The effects of the review will be unwelcome to the commercial clients who have negotiated hard to agree hourly rates with their law firm of choice. The client will be confident that they could not have secured hourly rates which are any lower and may be startled to hear that the rates being claimed by their law firm will be cut by more than 25% on assessment because a policy committee has said that GHRs are the reasonable rates to recover between the parties.

The review has detached the hourly rates allowed on assessment from the market. Detailed assessment is not supposed to entail setting an arbitrary tariff of the rates which can be recovered inter partes, almost like an extension of the fixed costs regime. It is meant to involve a determination of what is a reasonable market rate. But the current reality is that even a blue-chip company which is used to negotiating a tough deal on rates with its law firm will not be able to negotiate them down to the level of GHR.

There have been suggestions that cases with a significant international element could expect to see a departure from GHRs. We may also see the current high level of inflation being used as a smokescreen to allow increased hourly rates. For cases which are document heavy/go to trial etc, the expectation is that successful parties will continue to seek a significant uplift for care and conduct for Grade A and possibly Grade B fee earners.

There will need to be a granular process for requests to exceed GHRs. The courts will be asked to look at the factors which make a case exceptional compared to the generality of commercial litigation.

There must be a certain amount of schadenfreude amongst lawyers involved with routine county court litigation, particularly personal injury litigation, where GHRs have been applied more routinely. Until now, commercial work has largely been insulated from this approach.

Tensions between solicitors and clients may rise and it is likely that client care letters will need to reflect the possibility that clients might only recover 50%/60% of their costs if they win. Will clients start leaning on their lawyers? If the court says that the rates being charged are unreasonably high, will lawyers be expected to absorb the difference?

We could even see the perverse situation where solicitors are better off in terms of fees if their clients lose!

The discussion ends with an important reminder of the effect of CPR 46.9(3) – on an assessment of costs as between the solicitor and the client, costs will be assumed to have been unreasonably incurred if they are 'of an unusual nature or amount' and the solicitor did not tell the client that, as a result, the costs might not be recovered from the other party. There may well have to be specific warnings in retainers about hourly rates to explain that they will not necessarily be fully recovered on assessment.

[Ends at 18: 30]

Damages Based Agreements

[Begins at 18:30]

Ben provides his views on the reform of Damages Based Agreements (DBAs) and considers why the position is different for defendants and whether that will ever change.

The current Damages-Based Agreement Regulations 2013 (the Regulations) are not working as well as they could. That much was acknowledged by the government in the 2019 Review of the Jackson reforms – "DBAs are rarely used and [...] the current DBA regulations are not effective".

An independent review of the Regulations was undertaken by Nick Bacon QC of 4 New Square and Professor Rachael Mulheron of Queen Mary University. The result of their hard work was a set of draft regulations produced in 2019, which addresses the main issues identified in relation to the Regulations – providing for 'hybrid' DBAs, moving to a success fee model, providing clarity when a DBA is terminated and making DBAs

available in a broader range of claims as well as permitting them to be used by defendants.

So far, so good. Feedback on the draft regulations was sought by mid November 2019 and it was reported in the legal press at the time that the Ministry of Justice would consider the proposals for reform carefully.

And then ... nothing.

Why has progress stalled?

Ben emphasises that it is unclear whether there was ever any indication, formal or informal, that the MOJ was committed to progressing the new draft regulations. Was it an MOJ formally sponsored project at all – or was it born out of the difficulties which practitioners identified with the Regulations?

Ben's view is that there has been no official encouragement for DBAs to be made more user-friendly and that there is no real appetite in the MOJ for DBA reform. He suspects that a discussion is taking place in Whitehall between two separate factions. Some stakeholders in Whitehall have an 'access to justice' focus. They encourage innovation in the way that litigation is funded, with a view to broadening the litigation base. Others, and they are a powerful faction, do not want to encourage anything which makes it easier for claimants to sue businesses or for lawyers to speculate on the outcome of litigation and potentially receive very large returns.

This probably explains why we are beginning to see judicial intervention like last year's Court of Appeal decision in Zuberi v Lexlaw, which clarified that DBAs can provide for payment of costs in the event of early termination.

The courts are beginning to clear away some of the issues which have been preventing the wider adoption of DBAs under the Regulations.

Another example is a case that Ben has been involved in. In Tonstate Group Ltd & Ors v Candey Limited, Mr Justice Zacaroli ruled against recovery under a DBA where payment to the solicitors was linked to the preservation of an asset by a defendant. We know that the Court of Appeal has upheld the first instance decision, but we do not yet know the details of the judgment – click here. At first instance it was conceded that the primary legislation permitted defendant DBAs, but the Regulations themselves did not deal with them.

In the Court of Appeal that concession was withdrawn, and Ben's view is that the Court of Appeal may well say that the primary legislation does not permit defendant DBAs. It is certainly right to say that the primary legislation stresses recovery rather than preservation.

The situation is straightforward for a claimant. A pot of money moves from defendant to claimant and the claimant solicitor can intercept a portion of that money which has come into the claimant's hands as payment for legal fees pursuant to a DBA.

It is not as straightforward for a defendant. To take an extreme example, a client is sued for £10M, but the claim against the client was never realistic and the case was dismissed completely. Does the solicitor ask for 30% (or whatever percentage has been agreed) of £10M from the successful defendant under the DBA?

What about when a client is pursued for a sum of money which may or may not have a real-world risk? Or a client who is sued for £10M and there is a real-world risk as to £500,000, but not as to the remaining £9.5 million? Or a client receives a tangible benefit because a potential loss is mitigated to the level where it feels like a 'win'?

These types of situations can be provided for perfectly adequately when the defendant and the solicitor enter into a conditional fee agreement with a definition of a 'success' which is a tailored to some form of preservation or mitigation. A DBA could also work perfectly well when the trigger for payment is the preservation of an asset, but a mindset shift would be needed to reflect that in redrafted regulations.

When the Regulations were introduced, there was plenty of pressure in the market to allow solicitors to have skin in the game through a DBA for claims which are being brought. DBAs are popular with clients and solicitors. For solicitors, the potential appeal is obvious. In big money cases there may be very large returns.

Clients like the fact that DBAs are simple to understand. The client is entering into a joint venture with their solicitor who is sharing risk, and, in the commercial world, this leads to cases being pursued which probably would not have been pursued if DBAs didn't exist.

There are significant numbers of DBAs coming on-stream around alleged false prospectuses in share dealings. Investors might not bother if they had to pay their solicitors in the conventional way, but if solicitors are taking risk, financing the disbursements, and deducting 40%, say, if the client wins, that is quite appealing to clients who are able to litigate effectively risk-free.

When the current Regulations came into force there was no equivalent pressure from the defendant side. No one applied their minds to the concept of DBAs and asset preservation.

It is also telling that when the regulations for collective actions were amended to enable opt-out claims to be brought in the Competition Appeal Tribunal, at a relatively late stage an amendment was slipped in to say that DBAs are unlawful in such proceedings. An opt-out collective action is a classic big money claim which would be perfect for a DBA, yet the government ignored this opportunity. The government's actions are even more bizarre given that DBAs are allowed for every other kind of civil litigation apart from family cases [for obvious policy reasons].

Perhaps this shows us who the winner in the stakeholder battle at Whitehall is likely to be. If that is the case, the hard work which went into preparing draft amended regulations may well be wasted.

[Ends 28: 55]

Group Actions

[Begins at 28:55]

Ben, Jeremy and Andy looked at two recent cases and reviewed the history of group actions as well as discussing the differences between traditional opt-in group litigation and its statute created opt-out near relative.

Representative actions have been around since Victorian times. If a group of individuals has the same interest and can be formed into a readily defined class, one member of the group is able to act as the representative for that class. The class members are given collective representation through the class representative and, if the representative's claim is successful, the outcome is binding on the other members of the class. Historically, representative actions were used for relatively small and closely defined classes of claimants, for example a group of shareholders.

Prior to the introduction of the Civil Procedure Rules in 1999, there existed forms of group litigation under the inherent jurisdiction of the courts. Since 1999 CPR 19 permits group litigation orders (GLOs) to be made where there are claims which "give rise to common or related issues of fact or law". GLOs are 'opt-in', claimants must be identified, and their names must be added to the claim form. Their details must appear in the group register and the group register must be maintained and updated. It is a labour-intensive process and even with high profile litigation such as the diesel emissions litigation, only a fraction of the total number of possible claimants come forward to join an opt-in group.

For a long time, it was seen as a fault of our justice system that there was no means of obtaining collective redress on an opt-out basis. There was significant interest in the market and among 'consumer champions' in introducing a mechanism which would allow businesses to be held to account in a way which does not require individuals to come forward and actively participate. Whilst the government has said that it does not support an opt-out mechanism across the board, The Competition Act 1998 as amended by the Consumer Rights Act 2015 filled that gap in relation to cases proceeding in the Competition Appeal Tribunal (CAT). The initial inertia in taking forward a collective action is much easier to overcome, there is no need for book building, or any of the bureaucracy associated with creating and maintaining a group register, and the mechanism produces larger damages pots for distribution amongst all eligible class members (other than those who have expressly opted out), not just the few who would have come forward and joined an opt-in group action. Crucially, there is also no need to identify every individual claimant.

Mr Lloyd, the representative claimant in Lloyd v Google, wanted to use the representative action mechanism to bring a very large data breach claim against Google. The claim failed at first instance, succeeded on appeal, and then failed in the Supreme Court on technical grounds relating to the nature of the tort.

One of the concerns in the case was that different claimants had different potential damages and measures of recovery. The Supreme Court did not accept Mr Lloyd's offer to reduce the level of damages for all members of the group to the level of the lowest common denominator.

Looking beyond the judgment, the Supreme Court made very encouraging noises about the importance of access to justice and consumer redress and

the possibility of using Rule 19 representative actions to bring opt-out representative claims if the right case can be identified. In this context the right case would have a clearly identifiable class with a common interest, and the remedy for all members of the group would have to be the same.

Notwithstanding the encouragement of the Supreme Court for possible future representative actions, some difficult issues will need to be considered, particularly in relation to funding.

How will a representative action involving litigation funders and solicitors be structured where the individual members of the class have no relationship with each other, the solicitors, the funders, or any ATE providers? How does everyone get paid?

Solicitors acting on a post Jackson CFA will receive their basic charges and disbursements if there is a win, but no success fee is recoverable inter partes. DBAs are not helpful, because although the DBA will provide for the solicitor to take a percentage of the damages, the only party to the DBA will be the class representative. With a maximum percentage deduction of 50% of the class representative's damages (which might only be £1,000 or less), that is clearly unworkable for the solicitors.

If a representative action produces a declaration that a right has been infringed, but a second stage of litigation is needed to establish the level of damages, litigation funders will not want to fund an undoubtedly expensive first stage if there is no guaranteed recovery of damages. Litigation funders will also not be able to bind the whole class to an agreement with the class representative to pay litigation funding costs.

It is ironic that everything which makes these actions attractive for individuals stems from their opt-out nature, but it is their opt-out nature which makes them problematic for lawyers and funders.

A mechanism is needed in representative actions to ensure that solicitors and funders are properly compensated for the risks they are taking. Other jurisdictions already provide this. In the United States and Australia charges can be deducted before the distribution of damages and, in this jurisdiction, the CAT provides for the payment of charges before the damages are distributed. The CAT also has a mechanism for dealing with unclaimed damages. All of this has been achieved through primary legislation, but none of these mechanisms are available to Rule 19 claims, where lawyers and litigants are shoehorning a modern consumer collective action into a slightly ramshackle 19th century procedure.

Representative actions are only going to work if third party funding is available, and solicitors and funders are willing to take the risk of getting involved in these sorts of claims.

One way forward might be through judge-led law making, but many would say that this is a step too far and that primary legislation is needed. If the court does not consider the question of how damages will be distributed until the end of the case, funders will potentially be risking millions of pounds, not only because the claim might fail, but they also bear the risk that the claim will succeed, but the funder could still end up with nothing. Perhaps a funder who is willing to fund a representative action will need to grab the bull by the horns and ask for a pre-emptive decision that the legal mechanism for getting paid a share of the damages at the end of the case is acceptable to the court. Getting to this decision might cost hundreds of thousands of pounds rather than millions.

The second recent case discussed is one currently proceeding in the CAT. In FX, despite arguments put forward by both potential class representatives that an opt-in action would not work, the CAT held that the litigation was more suitable as an opt-in case (although that decision may be the subject to appeal).

Two rival possible class representatives, each with formidable legal teams fought it out, asking the CAT to appoint them as the class representative, while the defendants looked quietly on. Both potential representatives sought to persuade the CAT that they had the better funding position. The liability of the potential class representatives for costs was also considered. In terms of own costs, the indemnity principle has not been disapplied and the class representative is (theoretically) liable to pay, but any well-advised class representative will want the relationship to be non-recourse in nature. So far as adverse costs are concerned, whilst the class representative is notionally liable, there is an expectation that these costs would be indemnified by the funder and that the representative's solicitor and funder would undertake only to seek payment from the undistributed damages. To do otherwise would have a chilling effect on the collective action regime.

In FX the two unsuccessful class representatives now face claims for costs from the banks. Every bank had its own legal team. At the five-day interim hearing when the carriage dispute took up half the time and in respect of which the banks were neutral, the banks served no evidence of their own and their input was limited to legal submissions and picking apart the Claimants' evidence. The costs of the banks are nevertheless understood to be around £15M.

Each bank is entitled to instruct its firm of solicitors of choice, but it is an unsatisfactory position if that means that every firm can be active at the hearing with its own counsel and legal team. By contrast, in a traditional group action, there would be a lead solicitor and one counsel team. On detailed assessment, exotic arguments about funding and less exotic arguments about duplication will take place on a canvas which is infinitely larger than normal – because of the massive scale of these actions and the amounts at stake.

It is easy to see why businesses want to stop opt-out actions before the certification stage if possible. If they do get off the ground and are certified, the commercial pressure on businesses to settle as quickly as possible is huge because, as soon as a case settles, the defendant gets to keep the undistributed damages. Experience in the United States and Canada suggests that it is 'remarkable' if as much as 50% of the damages are distributed. In many cases only 5% or 10% of the damages are distributed. If a defendant settles they will get back 90% or 95% of the damages.

In the interests of balance, it should also be said that the behaviour of defendants in group actions is not always as good as it should be. The level of deductions from the damages pot in the Post Office litigation has recently received significant negative attention. The defendant behaved poorly during the litigation, litigating aggressively and employing every conceivable delaying tactic. The resulting increase in claimant costs produced deductions from the claimants' damages as high as 85%. It is troubling that the court currently has no power in these circumstances to force the defendant to contribute to the increased costs of the claimants.

It would represent an entirely new development in competition law to say, for example, that although these increased costs could not be recovered from the defendant as costs, they could be recovered as damages.

The recovery from a paying party of an item which could be claimed as costs or damages is not new for those who litigate in the business and property courts. Those litigants are familiar with the recovery of pre-judgment interest as either costs or damages. Blue chip commercial clients are routinely awarded interest on their costs from the date on which they pay an interim or final invoice. This contrasts significantly with an impecunious claimant in a personal injury case with a disbursement funding loan, trying to recover from the defendant the interest paid on that loan. Costs judges have not been keen, historically, to allow interest to be recovered from the defendant on assessment.

This discussion has taken in just a few of the potential difficulties ahead for opt-out actions, particularly in relation to the distribution of damages after costs have been deducted from the damages pot.

A feature of opt-out actions is that the distance between litigants and any liability for costs is even greater than in other group actions. It is surprising therefore that there does not yet seem to be any appetite in the CAT, other than at a very high level, to control costs via costs budgeting. Perhaps it is too soon to expect to see this in cases which have only recently been certified.

Looking further into the future, in the personal injury world an entire industry has developed which challenges the deductions made by litigators from their clients' damages. Could lawyers and funders face similar challenges in relation to unclaimed damages in opt-out group litigation? If the number of these actions rises as it is predicted to, then the answer may well be yes.

[Ends at 56:56]

Practico Limited
020 7442 3600
mail@practico.co.uk

9 Perseverance Works | Kingsland Road | London | E2 8DD