A cut above

It is now more difficult to recover sums above the guideline rates, reports **Andrew Roy**

Samsung Electronics Co. Ltd & Ors v LG Display Co. Ltd & Anor (Costs) [2022] EWCA Civ 466 is a short but important judgment in which the Court of Appeal considered and applied the 2021 Guideline Hourly Rates (GHRs) in conjunction with the 2021 Guide to Summary Assessment of Costs.

THE CASE

The substantive appeal concerned a price-fixing cartel. Both Samsung and LG were members of the cartel. UK local authorities brought a claim against Samsung for £5.4m. The claim settled for £1.6m plus costs. Samsung then sought to bring a contribution claim against LG.

At first instance Sir Michael Burton GBE held that England was not the appropriate forum and dismissed the claim for want of jurisdiction. Samsung appealed. The appeal was dismissed. LG was therefore entitled to its costs of the appeal. The Court of Appeal summarily assessed these.

LG submitted a schedule totalling £72,818.21. The Hourly Rates (HRs) which were billed in dollars equated to:

(a) Between £801.40 and £1,131.75 for Grade A fee-earners, as compared to the London 1 GHR of £512.

(b) Between £443.27 and £704 for Grade C fee-earners, as compared to the London 1 GHR of £270.

The court was not persuaded the rates claimed, which were above the GHRs, were justified.

Marks LJ (with whom Snowden and Lewison LJJ agreed), observed that London 1 GHRs applied to 'very heavy commercial and corporate work by centrally based London firms'. He continued: '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".'

GUIDELINE RATES

The judge was singularly unimpressed with LG's unconvincing attempt to support the high mark-ups sought, holding: '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".

'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.

'There is nothing in the present appeal to justify doing so. This was a one-day appeal, where the only issue was the appropriate forum for the trial, the documentation was not heavy, and the amount claimed (£900,000) was modest by the standards of commercial cases.'

As a result, LG's costs were reduced to £55,000.

ANALYSIS

Samsung suggests that the courts will be more reluctant to allow departures from the 2021 GHRs than was the case with their 2010 predecessors. The basis for this is that factors which under the old rates could have been deployed to justify a mark-up (complexity, value, etc.) will in many cases be already to baked into the new rates, at least to a degree.

There are sound reasons why this should be so. There are important material differences between the 2021 GHRs and their predecessors.

As explained by Master Rowley in *Shulman v Kolomoisky & Anor* [2020] EWHC B29 (Costs), the GHRs 'were originally provided to judges when the Civil Procedure Rules arrived in April 1999 and the concept of summary assessment of costs first came into being. Many judges had little or no experience of costs and the guideline rates were there to provide assistance on summary assessment.'

However, over time they have been increasingly relied upon in detailed assessment hearings. As observed in *Shulman*: 'When the master of the rolls considered a report proposing to vary the Guideline Rates in 2014, he accepted the conclusion that they could be used as a starting point in detailed assessments even though they had originally only been intended to be used in summary assessments. That was, in my view, a reflection of the fact that there is rarely any other starting point offered by the parties to the court when considering the appropriate level of hourly rates.'

The 2021 GHRs reflect this trend. Indeed, they are a culmination of it. The Working Group's report stated at §2.8 that: '… there should be no difference in hourly rates allowed on detailed or summary assessment.'

In light of this and other related factors, it: '… resolved 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. Cases which go to a detailed assessment hearing will be predominantly multi-track and perhaps towards the more complex end of the multi-track spectrum*.' (Emphasis added)

This approach and the figures it generated were adopted in full. The 2021 GHRs reflect the Working Group's recommendations precisely and without qualification.

The 2021 GHRs are, thus, far removed from the original conception of the guidelines which were only directly relevant to summary assessments, predominantly in fast-track claims. They reflect the reasonable and proportionate rates allowed in detailed assessment in multi-track claims, and indeed if anything towards the more complex end.

It follows that, while mark-ups to the 2010 GHRs would often be appropriate in multi-track cases to reflect that the rates were tailored to fast-track cases, that is not so with the 2021 GHRs. It would appear to follow that significant mark-ups will normally only be justified in cases which are at the higher end of the multi-track.

That said, there are arguments available to distinguish *Samsung*.

- First, and most obviously, on the available material *Samsung* concerned a case which was entirely run of the mill for the cohort covered by the GHRs in question. It will often be possible to show that there are features of a given case which take it outside (or at least towards the upper end of) the relevant cohort. It should be noted that the Guide [at §29] (as cited in *Samsung*) states: '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.'
- Second, this was an appeal. High solicitors' costs will generally be more difficult to justify on appeal. As per §41 of the Guide: 'On appeals where both counsel and solicitors have been instructed, the reasonable fees of counsel are likely to exceed the reasonable fees of the solicitor. In many cases the largest element in the solicitors' reasonable fees for work on an appeal concerns instructing counsel and preparing the appeal bundles. Time spent by the solicitor in the development of legal submissions should only be allowed where it does not duplicate work done by counsel and is claimed at a rate the same or lower than the rate counsel would have claimed.'

While this guidance is predominantly directed at solicitors' time, it arguably is also relevant to the HRs claimed. The scope for a solicitor to bring significant added value on an appeal will often be much more limited as compared to first instance litigation, where many of the most important and challenging tasks (e.g. obtaining evidence) will be performed by the solicitors.

- Third, and most importantly, Samsung was a summary assessment. While the GHRs are now much more important in detailed assessments than was historically the case, they do not carry the same weight in that process as they do for summary assessments. As per §28 of the Guide: '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.'

It therefore remains to be seen whether, and to what extent, this type of argument would prevail on detailed assessment. Certainly, the author's attempts to deploy such arguments on detailed assessments have up to now (albeit without being able to cite *Samsung* in support) met with limited success.

TAKEAWAY PRACTICE POINTS

- It is likely to be more difficult to recover a significant, or indeed in some cases any, mark-up on the 2021 GHRs as compared to their predecessors, at the very least on summary assessment.
- Paying parties should deploy *Samsung* and the points identified above to keep the rates down.
- Receiving parties seeking HRs significantly above the GHRs should adduce 'clear and compelling' material to justify their mark-ups.

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