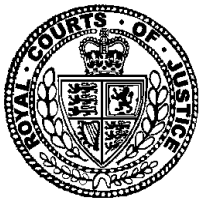

Neutral Citation Number: [2021] EWCOP 38

Case No: COP 13115978

COURT OF PROTECTION

APPLICATION FOR PERMISSION TO APPEAL THE ORDER OF HER HONOUR JUDGE HILDER SITTING IN THE COURT OF PROTECTION ON THE 11 AUGUST 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

ANDREW JAMES RIDDLE

Appellant

and

PUBLIC GUARDIAN

Respondent

- -
- -

Miss Claire van Overdijk (instructed by **Blake Morgan LLP**) for the **Appellant**
Miss Emma Sutton (instructed by the **Public Guardian**) for the **Respondent**

Hearing dates: **19 May 2021**

- -

Approved Judgment

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a case in the Court of Protection in the matter of Andrew James Riddle and the Public Guardian and is an application for Permission to Appeal from the two judgments of Her Honour Judge Hilder. The two judgments are dated 11 August 2020 and 4 September 2020 and they are reported as *The Public Guardian v Andrew Riddle (No1) and (No2)* [2020] EWCOP 41. Miss van Overdijk appears on behalf on behalf of the Appellant, Mr Riddle, and Miss Sutton appears on behalf of the Respondent, the Public Guardian.

2. Mr Riddle applied for Permission to Appeal on 24 September 2020. I refused permission on the papers on 19 March 2021, and this is the renewed oral application. I have considered the skeleton arguments prepared by both parties, and the evidence filed by Mr Riddle in support of his application. Mr Riddle also filed renewal grounds which I will deal with under the grounds below.

3. The appeal covers four core issues, which are:

    (1) The decision of the Judge to refuse Mr Riddle's application for authorisation to charge specified remuneration rates in selected Schedule 1 and 2 cases;

    (2) The decision of the Judge to refuse Mr Riddle permission to seek SCCO assessment in selected Schedule 1 and 2 cases;

    (3) The decision of the Judge to refuse Mr Riddle's application for relief from liability for past charging in selected Schedule 4 cases;

    (4) The decision to refuse Mr Riddle's application for the Public Guardian to pay his costs associated with responding to the revocation application, save for the costs associated with Mr Riddle paying his legal fees from the estates of protected parties and restoring the estates in this regard.

4. There are three grounds of appeal, the first of which is split into two parts, and I will refer to the grounds of appeal below.

Summary of the proceedings below

5. In the proceedings below, there were some 40 cases, set out in 4 schedules:

    (1) Schedule 1 applications: Mr Riddle had applied to be appointed property and affairs deputy/had been appointed interim property and affairs deputy and sought authority to charge fees at solicitor rates or a specified rate.

    (2) Schedule 2 applications: Mr Riddle had been appointed property and affairs deputy and sought authority to charge fees at solicitor rates or a specified rate.

    (3) Schedule 3 application: Mr Riddle had been appointed interim property and affairs deputy and sought authority to charge fees at

solicitor rates or a specified rate and the Public Guardian had cross applied to revoke the appointment.

(4) Schedule 4 applications: Mr Riddle had been appointed property and affairs deputy and the Public Guardian applied to revoke the appointment.

6. There were a number of hearings before the Judge including a 3 day hearing between 19 – 21 August 2019, followed by further written submissions, and a further 1 day hearing on 11 August 2020. It follows from that that the Judge had a very detailed knowledge of the case. It is also relevant that Her Honour Judge Hilder is the Senior Judge of the Court of Protection and has a specialism in this field, namely property and affairs. It is also correct to record that the issue in respect of specified fees seems to have emerged during the hearing. An identified issue for determination was whether Mr Riddle should be authorised to charge fees at solicitor rates (both general and on a case specific basis), then during the final hearing, he varied his case so that he was arguing in the alternative (i.e., solicitor fees, or a midway point between solicitor fees and public authority rates).

Legal framework

7. In respect of the appeal before me, pursuant to rule 20.8(1) of the Court of Protection Rules 2017, permission to appeal shall only be granted where:

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason why the appeal should be heard.

8. It is also worth referring to the judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 where at paragraph 114 – 115 the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges was explained, and he said this:

> *"[114] Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include*
>
> *i) The expertise of a trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*

> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*
>
> *[115] It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted.*
>
> *These are not controversial observations: see Customs and Excise Commissioners v A [2002] EWCA Civ 1039 [2003] Fam 55; Bekoe v Broomes [2005] UKPC 39; Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] UKCLR 1135."*

The Judgments

9. The judgments are long and very detailed. The first runs to over 100 paragraphs and there are a number of schedules where the Judge has gone through each of the cases in considerable detail, setting out the factual position, and her reasons for her rulings. The second judgment is shorter, but still runs to 26 paragraphs.

10. In respect of the judgments, it is important to emphasise the basic point that judgments must be read as a whole and that it is wrong to focus on extracts of a judgment without seeing the broader context. The importance of the judgment 'as a whole' is particularly great here as the judge came to a number of conclusions about Mr Riddle's conduct which set the context for many of the concluded judgments she then made. As summarised by Miss Sutton in her skeleton argument, the Judge set out the following in her first judgment:

> *"(1) 'It is a serious matter that Mr Riddle received any commission at all for discharging his functions as deputy' [paragraph 126];*

(2) 'Setting up a system which left the individual protected persons liable for bank charges at all when there was an option for charge-free banking amounts to a clear failure to act in each person's best interests' [paragraph 127];

(3) 'I do not accept Mr Riddle's assertion that using the services of an Independent Visitor is akin to 'an expense for performing deputyship duties' [paragraph 130];

(4) 'A deputy cannot fail to meet their obligations and then complain that questions are asked about their management of a protected person's estate. The onus is on the deputy to demonstrate that he is acting properly, and not on the Public Guardian to enforce compliance. Inadequate staffing resources is not an acceptable reason for failing to comply with reporting obligations but rather itself a cause for legitimate concern' [paragraph 134];

(5) 'The Public Guardian raises a network of concerns which together give a clear impression of commercial imperative in Mr Riddle's approach to deputyship, at the expense of diligent observation of his duties' [paragraph 136];

(6) ' .... at the final hearing of these applications it became apparent – not because Mr Riddle felt any compulsion to put the full facts before the court but only because of the Public Guardian's continuing supervision – that Mr Riddle had used further funds of persons to whom he owes fiduciary duties, to meet his own costs. (The total amount so used was £118,359.60, of which £58,359.60 remains unrepaid.) It is hard to imagine a clearer example of a deputy 'us[ing] their position for personal benefit' [paragraph 138];

(7) 'in my judgment there is simply no basis on which Mr Riddle could reasonably have considered it acceptable to use protected persons' funds to meet the costs of his legal representation. I reject firmly any argument to the effect that he was merely taking an 'advance payment' of funds which he would be able to recoup on account of the general rule as to costs in property and affairs proceedings. The general rule is not an entitlement' [paragraph 139];

(8) 'in so far as Mr Riddle excuses his conduct by reference to the stress of litigation, it must be borne in mind that these proceedings are entirely the result of his own actions. It was his actions and omissions which lead to the Public Guardian's revocation applications, and his decision to pursue his own applications for costs at the solicitors' rate (long after it became clear that it would be contentious)' [paragraph 140];

(9) 'Such a clear breach of deputyship obligations points very clearly towards revocation of Mr Riddle's appointment as deputy' [paragraph 141]."

11. I set out the above quotations as they are important to put the thrust of the court's concerns regarding Mr Riddle's conduct into context when coming to the grounds of appeal.

12. The law on the remuneration of deputies is quite complex but is agreed between Miss Sutton and Miss van Overdijk.

A. Deputy remuneration

13. S.19(7) of the Mental Capacity Act 2005 ('MCA 2005') provides that a deputy is entitled (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and (b) If the court so directs when appointing him, to remuneration out of P's property for discharging them.

14. Although a deputy has a statutory right to remuneration of expenses, it is the court order that provides legal authority for remuneration. As noted by the then Vice President, Charles J in *Re AR* [2018] EWCOP 18 at [24], the authorisation of remuneration is a "best interests" decision by the court, made by reference to the individual facts of the particular case.

15. The rules regarding remuneration of a deputy is set out in r 19.13 of the Court of Protection Rules 2017 ('COPR 2017'):

> *"(1) Where the court orders that a deputy is entitled to remuneration out of P's estate for discharging functions as such, the court may make such order as it thinks fit including an order that –*
>
> *(a) the deputy be paid a fixed amount;*
>
> *(b) the deputy be paid at a specified rate; or*
>
> *(c) the amount of the remuneration shall be determined in accordance with the schedule of fees set out in the relevant practice direction.*
>
> *(2) Any amount permitted by the court under paragraph (1) shall constitute a debt due from P's estate.*
>
> *(3) The court may order a detailed assessment of the remuneration by a costs officer in accordance with rule 19.10(b)."*

16. Further, r.19.14 provides that: *"a practice direction may make further provision in respect of costs in proceedings."*

17. "Detailed assessment" is defined in r.19.1(1). It means: *"the procedure by which the amount of costs or remuneration is decided by a costs officer in accordance with Part 47 of the Civil Procedure Rules 1998 (which are applied to proceedings under these Rules, with modifications, by Rule 19.6)".*

18. According to r.19.1(1), the term "fixed costs" is *"to be construed in accordance with the relevant practice direction."*

19. The "relevant practice direction" setting out the schedule of fees for the purposes of r.19.13(1)(c) is Practice Direction 19B ('PD19B'). Paragraphs 8 – 15, of the Practice Direction set out fixed rates of remuneration for "solicitors"; and at paragraphs 16 – 21 it sets out rates for "public authority deputies".

20. In *Re AR* Charles J considered (at [32]) that it was clear from r.19.13(1) that:

> *"i. There is no presumption that a deputy should be appointed on the basis that his charges are governed by PD 19B; and that*
>
> *ii. The adoption of this course is one of the options open to the COP when appointing a deputy."*

21. The overall legal position was summarised by DJ Eldergill in *The Friendly Trust Bulk Application* [2016] EWCOP 40 at [85]:

> *"85. The court order appointing the deputy may:*
>
> *a) Provide that the deputy is only entitled to the reimbursement of expenses and not include any power to charge remuneration (the usual arrangement in practice where a family member, such as a spouse, partner or child is appointed).*
>
> *b) Provide that the deputy may charge a rate (e.g. an hourly rate) specified in the order.*
>
> *c) Fix the amount which the deputy is to be paid.*
>
> *d) Provide that the deputy is entitled to remuneration at the rate fixed by the practice direction (where appropriate, extending the application of the fixed costs practice direction to other professionals acting as deputy including accountants, case managers and not-for-profit organisations).*
>
> *e) Provide that the deputy is entitled to remuneration at the rate fixed by the practice direction and also permit the deputy the right to elect to have a detailed assessment of their costs if the deputy considers that their costs exceed the amount fixed by the practice direction."*

22. There are two versions of PD19B relevant to this appeal, the current version and the version that was in effect from 1 February 2011 to 30 March 2017.

23. Over time, the wording of PD19B has changed. For present purposes, the following points are important to note:

    a. In all its iterations, the twin pillars of PD19B are solicitors and public authorities. (The PD prescribes two fixed rates of remuneration: one is headed "Remuneration of solicitors appointed as deputy for P", the other is headed "Remuneration of public authority deputies.")

    b. The original version, which was in force until 1st February 2011, made no provision for fixed costs and expenses in respect of anyone

other than solicitors and office holders in public authorities. The term "professional deputy" was used as a synonym for a solicitor deputy.

c. The second version, which was in force from 1 February 2011 until 30 March 2017, continued to include the phrase "professional deputy" in places and included the following "discretion" provision (which is repeated in the current version of the PD):

"2. The practice direction applies principally to solicitors or office holders in public authorities appointed to act as deputy. However, the court may direct that its provisions shall also apply to other professionals acting as deputy including accountants, case managers and not-for-profit organisations."

d. As per [61] of *The Friendly Trust* judgment, paragraph 2 of the PD indicates that (a) solicitors are distinguished from "other professionals" and (b) the court has a discretion ("may") to extend the solicitor and local authority fixed costs provisions in the practice direction to "other professionals". In other words, the court's order may at its discretion provide "other professionals" shall be entitled to fixed costs at the solicitor or local authority rate.

e. In the same judgment, DJ Eldergill further held that court deputy orders authorising a not-for-profit organisation deputy (such as the Friendly Trust, as an example of "other professionals") to have the benefit of fixed costs without specifying the rate are "defective" (see [62]), and that "all deputy orders which authorise fixed-costs, other than those which appoint a solicitor or a local authority as deputy, must explicitly state whether the solicitor's or local authority rate applies" (see [93e] of *The Friendly Trust* judgment).

f. As to detailed assessment of remuneration, the second version and current version of the PD include the following provisions:

"Claims generally

5. The court order or direction will state whether fixed costs or remuneration applies, or whether there is to be a detailed assessment by a costs officer. Where a court order or direction provides for a detailed assessment of costs, professionals may elect to take fixed costs or remuneration in lieu of a detailed assessment."

g. There is no reference to detailed assessment in the sections dealing with "Remuneration of public authority deputies" in either the second version or the current version of the PD. Paragraph 16 of the current version (which is repeated in [15] of the second version) states:

"Remuneration of public authority deputies

> *16. The following fixed rates of remuneration will apply where the court appoints a holder of an office in a public authority to act as deputy..."*

h. The current version, also includes the following provisions:

> *"Outsourcing of work by public authorities*
>
> *19. Where public authorities outsource deputyship work, it is expected that the rates charged will be no more than that which would have been charged to the client if the public authority had remained as deputy."*

24. Further points of relevance in respect of PD 19B and the court and Public Guardian's practice during the time of the second version of the PD are as follows:

a. In July 2016 the Public Guardian confirmed to the Court (at the request of DJ Eldergill) that the Professional Deputy team had *"not been actively advising third sector deputies that they are permitted to charge fixed costs at the solicitor's rate. But when deputy reports have been received showing that costs have been taken at the solicitor's rate, the team have not challenged them as there is nothing in the court order to indicate this is not permitted"* (see [37] of *The Friendly Trust* judgment).

b. DJ Eldergill held at [38(i)] of *The Friendly Trust* judgment that: *"[t]he position adopted by the professional deputy team is likely to have given the impression that not-for-profit organisations could charge solicitor's fixed-costs. Furthermore, given that backdrop, the Public Guardian's introductory guide to applications fees and bonding is ambiguous in relation to who may and may not charge solicitor's rates. If OPG staff have not been adhering to the Public Guardian's position in relation to solicitor's fixed-costs that inevitably raises safeguarding issues."*

25. On 13 December 2016 the Public Guardian wrote to all professional deputies (including the Appellant) to inform them of *The Friendly Trust* judgment (particularly [78]-[100]) recommending *"that professional deputies, for each individual deputyship case they are managing, check the specific terms of the order in relation to costs; and to ensure that they are charging in line with the order."* In contrast with the information provided by the PG to DJ Eldergill in July 2016, this was a clear change of policy for the Public Guardian following *The Friendly Trust* judgment.

26. Approximately 2 years after *The Friendly Trust* judgment, HHJ Hilder handed down judgment in *London Borough of Enfield v Matrix Deputies Ltd & Ors (No2)* [2018] EWCOP 22 which sets out further guidance on remuneration of professional deputy fees which can be found at [38] and [79] as follows (in so far as is relevant):

a. If a deputy order authorises "fixed costs" without specifying at what rate, that necessarily implies the lower, public authority rate.

b. If an order authorises "fixed costs" without specifying at what rate but also authorises the deputy to seek assessment from the SCCO, that does not imply the higher, solicitors' rate.

c. There is nothing in the PD which requires the court only to provide for SCCO assessment if it applies the solicitors' rate of fixed costs. It is open to the court to apply the lower, public authority rate and also provide for assessment if the deputy prefers (see [51]).

d. An assessment obtained from the SCCO without authority is not sufficient to establish entitlement to claim the assessed fee. At best, the deputy may seek to rely on such assessment in support of an application for release of liability in respect of any fee charged at the assessed rate. Any lack of challenge from the Public Guardian to a report submitted to it by the deputy does not constitute authorisation to charge the reported fee.

27. HHJ Hilder also noted in the judgment at [55] (as she has done in *Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies* [2018] EWCOP 3 at [10]):

> *"[O]ver the course of the first decade of the Mental Capacity Act 2005 there has been rapid development of the legal and commercial landscape from which deputyship applications are made. Where once a binary conception of paid deputies as either solicitors or local authorities was a reasonable reflection of reality, the permutations are now significantly more varied. "Accountants, case managers and not-for-profit organisations" are recognised in the later versions of the Practice Direction but nowadays, the Court of Protection routinely receives deputyship applications from others, including Trust Corporations and individuals who offer deputyship services on a commercial basis."*

28. Further at [56] HHJ Hilder addressed the other options in r.19.13(1)(a) and (b), namely authorising a "fixed amount" or "specified rate" instead of fixed costs set by PD19B:

> *"Clearly the court is not obliged to provide for authorisation of a deputy by reference to the fixed fees of the Practice Direction. Rule 19.13 expressly sets out alternative options of remuneration at a "fixed amount" or a "specified rate." However, each of these alternatives may be perceived as having some practical disadvantages. Authorisation of remuneration of a "fixed amount" means it is more likely that there will need to be future applications to court (with attendant cost to P) because in a particular year the vicissitudes of life present more demands on the deputyship than usual, or simply to update the amount to reflect rising costs over time. To some extent these difficulties can be addressed by index-linking (as in Re AR) but the orders, and the steps necessary to quantify authorised fee, necessarily become more complex. Authorisation of a "specified rate" on the other hand does not inherently carry any limit on how much of that specified rate would be reasonable. These disadvantages are mitigated if remuneration is by reference to the Practice Direction fixed rates, which are updated periodically."*

29. Lastly, on the issue of when it would be appropriate to discharge a local authority deputy and appoint a professional deputy, the Public Guardian identified a number of circumstances in which it might be appropriate in the case of *Cumbria County Council v A* [2020] EWCOP 38 at [24]:

> *"a. Value of P's estate. If there is no person willing to act as deputy without charge, then:*
>
> *i. where P has modest assets, it will generally be desirable for a local authority to act, rather than a professional deputy, owing to the difference in rates charged; and*
>
> *ii. where P has high value assets, it will often be desirable, and not disproportionate, for a professional deputy to act*
>
> *b. Complexity of P's estate (e.g. £100,000 in property or shares may be more difficult to manage than £200,000 in a bank account);*
>
> *c. Personal dynamics, e.g. between the deputy and P, or between the deputy and members of P's family;*
>
> *d. Unmanageable conflict of interest, e.g. where P has a potential claim against the authority, and where that claim cannot properly be investigated by the local authority deputy; and*
>
> *e. P's expressed wishes and feelings showing opposition to the authority acting as deputy."*

B. Retrospective authorisation

30. Although the MCA 2005 does not expressly provide that the court can ratify past acts of a deputy, s.19(4) does provide that *"a deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part."* This provision when read in in conjunction with s.15(c) MCA 2005 provides the court with jurisdiction to ratify past acts of a deputy.

31. In the context, the law of agency generally provides that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority, may rank as the act of the principal if subsequently ratified by him (*Suncorp Insurance and Finance Co Ltd v Milano Assicurazioni SpA* [1993] 2 Lloyd's Rep. 225; *Yona International Ltd v La Réunion Française Société Anonyme d'Assurances et de Réassurances* [1996] 2 Lloyd's Rep. 84, 103, 106). In this context, the doctrine of ratification presupposes that the principal could validly have done the act at the time it was done and the relevant act was voidable rather than void.

32. The court's practice demonstrated the application of the doctrine of ratification to LPA cases and deputyship cases alike. Example of this (where reported) include: *Re PP* [2015] EWCOP 93; *Re GM* [2013] EWHC 2966 (COP); and *WP (deceased) and EP* [2015] EWCOP 84.

33. In applying the common law doctrine of ratification in this context, the court in making the decision on behalf of P will ultimately be guided by the best interests of P having regard to all the circumstances surrounding the relevant act.

34. In the case of ratification in the context of LPAs, the court's powers pursuant to s.23(3) MCA 2005 are unrestricted and, unlike the statutory power to relieve trustees from breaches of trust, are not confined to cases where the donee has acted "honestly and reasonably"; a qualification set out in s.61 of the Trustee Act 1925. Given the similar nature and scope of the function of donees and deputies in the context of the MCA 2005, the same approach ought to be adopted when approaching the issue of ratification in cases concerning deputyship.

Grounds of appeal

35. Ground 1 is in two parts. The overarching ground is that the Judge erred in concluding Mr Riddle's qualification, experience, and business structure did not justify a specified rate. Ground 1.1 is that she erred in her general conclusions that Mr Riddle should not be afforded a specified rate. The essence of Miss van Overdijk's arguments (as put at the oral renewal hearing) was that the Judge should not have compared Mr Riddle to a public authority and that effectively she took the wrong starting point in doing that as a comparative exercise. Miss van Overdijk emphasises that Mr Riddle had, on his case, considerable advantages or things to offer and that the way in which the Judge approached the exercise was fundamentally flawed.

36. In my view this argument is bound to fail and doesn't come anywhere close to reaching the threshold for permission being granted to appeal. In deciding what weight should be given, the Judge needed to have some benchmark or comparator in undertaking the exercise. It was entirely reasonable for the Judge to look at a Local Authority and test against that, what rate would be reasonable in the circumstances. It seems to me to be significantly over forensic to argue that the Judge had to approach her analysis on what was the appropriate rate in any particular way, or that taking the comparison of the Local Authority was the wrong approach, or that she was starting in the wrong place. The judgment shows that the Judge had very carefully considered what services Mr Riddle was offering, and what rate was appropriate. I cannot see any arguable case on that point.

37. In truth, Mr Riddle's argument is a result of being in disagreement with the Judges' evaluative judgement and the weight she attached to various evaluative matters. Those are things for the first instance judge, and subject to any misdirection (of which there was none), this is not a matter that the appeal court should interfere with. It is further relevant in this particular regard to consider the experience of Her Honour Judge Hilder and her expertise in this field, and how she very carefully considered the facts of the particular cases before her.

38. Miss van Overdijk further argues that the Judges' conclusions in the second judgment are untenable given that the relevant public authority was unwilling to act. However, this misses the point that it is entirely apparent from the judgment that the Judge was fully aware of the fact that the Local Authority were unable to act, she took it into account, but having taken into account, she still considered that it was inappropriate to allow Mr Riddle the higher rate. The most relevant paragraph of the Judgment is paragraph 107(a)(ii) which says:

> *"in the other six cases, the relevant public authority is not willing to act and the alternative deputy proposed is a solicitor from the Public Guardian's panel. Two cases (MF 13351659 and MW 13326558) involve estates such as might not uncommonly be managed by a solicitor, two cases (ML 13349488 and JM 1337112T) are at best marginal because they involve a property, and two cases (JK 13351106 and AA 13271495) are such as would commonly be managed by public authorities. If the only available options involve appointment of a deputy with authority to charge at the higher, solicitors' rate, then the additional safeguard of regulation by a professional body and the 'kitemark' of membership of the Public Guardian's panel – neither of which are offered by Mr Riddle – are factors which each protected person would be likely to consider if able to do so ....."*

39. Then in the second judgment, at paragraph 14(b)(ii), she returns to the same issues and explains her approach again as follows:

> *"Schedule 1 cases MF 13351659, MW 13326558, ML 13349488, JM 1337112T, JA 13351106 and AA 13271495: no public authority has confirmed its willingness to act in these matters so the alternative deputy proposed by the Public Guardian would be a solicitor from the Public Guardian's panel. The absence of a public authority willing to act is not itself sufficient to justify Mr. Riddle being authorised to charge fees at a rate higher than the public authority rate. If that were to be the case, the fees charged for his deputyship would effectively be more a reflection of a 'postcode lottery' than the service provided.*
>
> *In respect of MF 13351659, MW 13326558, ML 13349488 and JM 1337112T, if the alternative options are paying a solicitor at the solicitors' rate, or paying Mr. Riddle at a tailored/hybrid solicitor's rate someway higher than the public authority rate but lower than the solicitors' rate, then the additional safeguard of regulation by a professional body and the 'kitemark' of membership of the Public Guardian's panel would be factors which each protected person would be likely to consider if they were able to do so and, in my judgment, such factors would outweigh any relative saving in fees.*
>
> *In the matters of JK 13351106 and AA 13271495, the estates are so modest that the imperative to minimise costs of management is strong. Although neither of the relevant public authorities has confirmed their willingness to act in these two matters, they have not positively declined to act - they have simply not responded to the Public Guardian's request. If an alternative deputy needs to be identified for these persons, the next step would be to require the Public Guardian to renew his request to the relevant public authority. I am not satisfied that it is appropriate, necessary or in the best interests of JK or AA that a deputy be appointed with authority to charge higher than the public authority rate. (In reality, given Mr. Riddle's position today, it is not necessary to make further enquiry of the relevant public authority.)"*

40. The Appellant also relies on the judgment of Mr Justice Hayden in *Cumbria County Council v A* [2020] EWCOP 38 where, at paragraph 24, the Vice President sets out the submissions made to him as to a number of indicators as to whether it may be appropriate to appoint a professional deputy. However, one should also have regard to paragraphs 25 and 30, as follows:

> *"[25] These are not intended to be exhaustive but merely illustrative of the many factors that might fall to be considered in these highly fact sensitive cases …….*
>
> *[30] ……. Those factors identified in the passages above i.e. the complexity of P's estate; conflicts of interests; P's own wishes and feelings; the value of the estate etc, may be relevant considerations in any particular case. There can be no presumption of the outcome of the application, nor any fettering of the court's discretion. The guide will always be P's best interests, including his financial interests."*

41. From the above, it can be seen that the Vice President makes it clear that the decision is one for the court acting in the parameters of reasonable discretion, and the guidance provided in *Cumbria* is no more than guidance. It is clear from *Cumbria* that the Vice President was not seeking to mandate any particular outcome, but rather to provide indicators that a judge may have regard to. There is nothing arguable in this ground.

42. Ground 1.2 of the permission to appeal I do not intend to go through in great detail. Miss van Overdijk has provided a detailed analysis, and there are the following common themes:

(1) That the estates would commonly be dealt with by solicitors: The Judge dealt with this in a reasonable way. She considered the relevant material and there is no reasonable prospect of success that would mean that an appellate court would interfere;

(2) That inadequate weight was placed on the benefit to P of having a professional deputy: In paragraph 107 of the first judgment, it is clear that the Judge considered the benefits and disbenefits and reached a decision.

43. A discrete point was also raised regarding Mr Riddle's applications for permission to seek SCCO assessment. Miss van Overdijk accepted orally that Mr Riddle had the right to apply for reconsideration of this decision by the Judge. The substantive issue she takes is that no reasons were provided by the Judge in her refusal of Mr Riddle's applications. However, if there is a route for reconsideration (which was specifically set out in the orders refusing the applications), the Judge plainly can give reasons if asked, and I am sure she would do so. This is not an appeal issue. If Mr Riddle challenges this, out of time, it would be sensible to ask the Judge to extend time for reconsideration so that she can give short reasons.

44. Ground 2 is that the Judge erred in her refusal to grant Mr Riddle's application for relief from liability for past charging in identified Schedule 4 cases by concluding that there would not be injustice to Mr Riddle to hold him to the terms of the authority he was granted.

45. The fundamental point made by Miss van Overdijk is that before the decision of District Judge Eldergill in *The Friendly Trust's Bulk Application* [2016] EWCOP 40, there was a lack of clarity regarding what charges could be made if the order was silent. She points out that no one told Mr Riddle that the approach he was taking was wrong and that the first notice, expressly given, was when the Public Guardian wrote to him and others in his position on 13 December 2016, and from that date, Miss van Overdijk accepts that the position changed.

46. Miss van Overdijk argues that the Judge has failed to give sufficient weight to the fact that the orders themselves failed to specify the rate, that was not the fault of Mr Riddle. In the *Friendly Trust* case, DJ Eldergill said that the position of the Public Guardian was likely to have given the impression that not-for-profit organisations could charge solicitor's fixed-costs and that the same applied to other deputies.

47. She further argues that the Judge has erred because, as I have already said, Mr Riddle was only communicated with on 13 December 2016, and further, that the *Friendly Trust* judgment said that the orders which authorised a deputy to have the benefit of fixed-costs without specifying the rate were defective, but did not say what should happen next, or how the defect could be remedied. It was only in September 2018 in *The London Borough of Enfield v Matrix Deputies Ltd* [2018] EWCOP 22 that the court concluded that silence implied the lower rates. Miss van Overdijk also argues that the Judge failed to see that authorisation had been given for SCCO in seven cases.

48. In my view, again, there is no reasonable prospect of success on this ground. The conclusions have to be seen in the overall context of Mr Riddles's conduct. In particular, from the first judgment:

> *"109. Should Mr. Riddle be relieved of any liability for past charging?*
>
> *110. Mr. Riddle's application for relief from liability rests on his assertion that there has previously been a lack of clarity in the meaning of remuneration authorisations, which means that he should be given "the benefit of the doubt" and makes it unjust now to penalise him for an approach adopted in those circumstances.*
>
> *111. I do not accept Mr. Riddle's assertion, for the following reasons:*
>
> *a. It has always been clear under the Act (see paragraphs 60 and 61 above) that the authority for remuneration rests in the court order.*
>
> *b. It has always been clear from the COP4 undertakings required of an applicant for deputyship that, if appointed, a deputy must act within the scope of the authority in the order and should make an application to the court if he feels that additional powers are needed (see paragraph 50 above.)*
>
> *c. The communications from the Office of the Public Guardian, in particular the e-mail from Angela Johnson (paragraph 15 above), at the time when Mr. Riddle was still setting up Professional Deputies cannot reasonably be interpreted as any kind of assurance that Mr. Riddle would*

be free to charge any particular rate of remuneration he chose or the fixed rate for solicitors.

d. Mr. Riddle's own e-mail communication of 1st July 2018 (paragraph 22(a) above) demonstrates his determination to charge fees at the rate which he considered appropriate even in the face of actual requirements being pointed out to him.

e. The charges raised in KT 13160251 and LC 13071671 were beyond the rates authorised in the deputyship orders, even though his application in each matter and therefore the order of appointment, had not been made until after he had specifically been alerted by the Office of the Public Guardian to requirements in respect of fee charging.

f. In seventeen of the cases, it is demonstrably possible that an alternative deputy could have been appointed at public authority charging rates or with no charges at all. In none of the cases was any application for relief from liability made until this was raised by the Court in the June hearing.

....

112. Overall it is regrettably clear that, from the outset, Mr. Riddle charged fees at a rate which he personally considered to be appropriate. I am satisfied that he did so irrespective of information he had been given by the Public Guardian whilst he was still in the process of setting up Professional Deputies. At no point can he realistically claim to have been uninformed of the need for authorisation of fees which he charged. That he continued to charge in excess of authorisations even after the December 2016 letter and after the Matrix decision was published is, in my judgment, confirmation that he knew what he was doing all along, not mitigation of his earlier conduct. I have no doubt that Mr. Riddle felt justified in charging at the solicitors' rate but his own conviction is not sufficient basis for being given 'the benefit of the doubt.' Such conviction rests in his own estimation of himself and his firm, rather than any genuine lack of clarity or opportunity for clarification.

113. I do not accept that there would be injustice to Mr. Riddle in holding him to the terms of the authority he was granted. I do not consider it appropriate to relieve him of any liability for past overcharging."

49. From the second judgment:

"15. <u>Liability for past charging prior to the OPG letter dated 13th December 2016.</u>

My decision in respect of liability for past charging was set out in paragraphs 109-113 of the first judgment. For clarity, I now confirm that the decision to "hold [Mr. Riddle] to the terms of the authority he was granted" applies to charging both before and after the OPG sent him the letter dated 13th December 2016.

> *16. The reasons given at paragraph 111(a), (b) and (c) of the first judgment apply just as much to charging practice before December 2016 as afterwards. The overall impression of Mr. Riddle's approach set out in paragraph 112 of the first judgment specifically refers to his approach "from the outset". I do not accept that Mr. Riddle was ever – even before December 2016 – in such doubt as to charging authorisations as to justify relief from liability for excess charging. The OPG's letter of December 2016 did not make any difference to his approach because Mr. Riddle had already convinced himself that he could charge fees at the rate which he considered appropriate, irrespective of actual authorisations."*

50. I note in particular the sentence in paragraph 16 above: *"I do not accept that Mr. Riddle was ever – even before December 2016 – in such doubt as to charging authorisations as to justify relief from liability for excess charging"*, and I also refer back to the quotations set out earlier regarding Mr Riddle's conduct.

51. Mr Riddle may feel that this is unfair due to not having had written notice prior to December 2016, but the position of the appellate court is that the Judge was fully aware of this lack of express earlier notice and set out, in great detail, her reasons despite this fact for not granting relief in respect of past charging. The conclusion she reached was well within the breadth of her discretion.

52. Ground 3, on Mr Riddle's argument, is that the Judge erred in refusing his application for the Public Guardian to pay his costs associated with responding to the revocation applications (save for the costs associated with Mr Riddle paying his legal fees from the estates of protected parties and restoring the estates in this regard). The Judge's order was that each side should pay their own costs. Miss van Overdijk argues that in respect of the revocation applications, where she was successful, the Judge failed to have regard to the fact that the grounds raised by the Public Guardian did not reach the revocation threshold, and that in responding to those applications, Mr Riddle spent a great deal of work and legal costs, and that the approach of the Public Guardian had been unreasonable and disproportionate in this regard.

53. In my view this ground is bound to fail. The starting position is that Judge had a wide discretion regarding costs, and that the appellate court should be very slow to intervene. There is no suggestion that the Judge misdirected herself or failed to take into account relevant information, and the cost decision has to be seen in the overall context of the case. The Judge was extremely critical of Mr Riddle and the Public Guardian had succeeded on large parts of the case. The decision was well within the Judge's bounds of discretion.

54. I do accept that there was not a clear letter before action. However, I accept Miss Sutton's point that there was something of a changing situation in these cases as further information came to light about Mr Riddle's conduct, and that having regard to the nature of the litigation, it was not possible to set out all of the grounds in one overarching document before the action began. The costs decision of the Judge was wholly unexceptional and was within the Judges' discretion.

For all of the above reasons, I refuse permission to appeal on each of the 4 grounds, and affirm the order made on 19 March 2021.