

Hourly Rates in Court of Protection Bills of Costs In the Matters of PLK, Aayan Ahmed Thakur, Nathania Chapman and Paul Nigel Tate [2020]

Master Whalan has recently allowed on assessment enhanced hourly rates in four Bills of Costs for Court of Protection work.

It had been submitted by the professional Deputies in each Bills of Costs that the Court's approach to rely upon Guideline Hourly Rates ("GHR"), last updated in 2010, was incorrect and unjust on the basis that they did not take into account the specialism or overheads of the work involved. It was suggested that Court of Protection work should be predicated by a more flexible exercise of the discretion set out in CPR 44.4 (3) which would lead to the GHR being a starting point when assessing hourly rates.

The Senior Court Costs Office consolidated the four cases for assessment as those cases were representative of costs claimed by Deputies throughout England in the management of the affairs of Protected Parties sustaining significant brain or birth injuries with damages being in excess of £2million for each case. Hourly rates ranged from £145.00 for grade D to £350.00 for grade A.

In assessing the applicable hourly rates, Master Whalan referred to the most prominent case law, namely *Re: Michael Ashton [2006]* which resulted in the convention that hourly rates of approximately 90% of the GHR would be allowed given that the general management work of a Deputy would usually have lower levels of urgency and adrenaline compared with other work. The case *Re: Smith and Others [2007]* was also considered in which Master Howarth determined hourly rates should fall in line with GHR as opposed to lower than, given that a Deputy takes on a greater, not lesser, level of responsibility and skill. Accordingly, since 2007 the Courts have utilised GHR unless there is exceptional circumstances to depart from the same. Master Howarth reiterated that approach in *Yazid Yahiaoui & Others* in 2014.

In PLK, the submissions were as follows:

1. The Court should assess the hourly rates with reference to CPR 44.4 (3) and should not just follow the GHR but instead, utilise those rates as a starting point as Court of Protection work should be considered esoteric and specialised and not run of the mill i.e. such work carried higher overheads and straightforward application of GHR is inappropriate;
2. If the Court does use the GHR as a starting point, it must allow an uplift to reflect inflation between 2010 and 2019 and be based on RPI inflation (approx. 31%) and not CPI inflation (approx. 21%).

In respect of the first submission, Master Whalan was not satisfied that the evidence supported a significant increase in overheads which would in turn give rise to a significant increase in the hourly rates. He observed that the approach adopted in the matters of *Smith* and *Yahiaoui* remained correct and applicable for the assessment of hourly rates in Court of Protection cases and that the

Costs Officers should continue to apply GHR unless there are good reasons to depart from such rates. The status and/or grade of fee earners would remain a matter of discretion for the assessing Costs Officer/Costs Judge, as had always been the case.

In respect of the second submission, Master Whalan made 3 preliminary observations:

1. That the Court has no power to review and/or amend the GHR;
2. That the application of an inflationary uplift when applying the GHR is not a "blunt tool" but an approach which endorses the application of a practice rejected since 2014 i.e. that the emphasis is on a comprehensive, evidence based review;
3. That the GHR cannot be applied fairly as an index of reasonable remuneration unless the rates are subject to some form of periodic upwards review.

In support of their submission, the applicants filed evidence of RPI inflation between 2010 and 2019 and following consideration, Master Whalan stated that he was satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift which recognised the erosive effect of inflation and other commercial pressures.

He concluded by providing guidance for Costs Officers assessing future bills. They should exercise their "broad, pragmatic flexibility when applying the 2010 GHR" and stated that if hourly rates fall within approximately 120% of the GHR from 2010, then prima facie those rates should be considered reasonable (but of course, still subject to Assessment). Master Whalan provided an extremely helpful table of GHR with the 20% enhancement added, which is set out below:

Guideline Hourly Rates				
Bands	A	B	C	D
London 1	£490	£355	£271	£165
London 2	£380	£290	£235	£151
London 3	£275 - £320	£206 - £275	£198	£145
National 1	£260	£230	£193	£142
National 2	£241	£212	£175	£133

A Practice Note by Senior Costs Judge Gordon-Saker has been published in which the approach advocated by Master Whalan is accepted for Bills covering the period from 2018 onwards for work done by Deputies and their staff. Costs incurred pre such date will be assessed in line with GHR save for in exceptional circumstances.

Costs Officers will still be required to have regard to the Deputy's terms and conditions of business, correspondence regarding hourly rates, Form OPG 105 and the solicitor's certificate on the bill of costs.

This briefing is prepared by Malcolm Goodwin and Laura Dear and not intended to be an exhaustive statement of the law and should not be relied on as legal advice.