IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Citation: **[2024] EWCOP 59 (T2)**

Case No: 11322934

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF BJB

Before: Her Honour Judge Hilder

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 24 October 2024

GILLIAN ANN KNIGHT
as property and affairs deputy for BJB

Applicant

and

(1) BARNSLEY HOSPITAL NHS FOUNDATION TRUST
(2) NHS RESOLUTION

Respondents

Hearing: 4th April 2024

Mr. Karim KC and Ms. Collinson (instructed by Andrew Isaacs Law) for the Applicant
Mr. Kennedy KC (instructed by Weightmans LLP) for the Respondents

The hearing was conducted in public subject to a transparency order made on 16th November 2023 [**149**]. This judgment was handed down on 24 October 2024 at a hearing where attendance had been excused. It consists of 19 pages and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle. Where the number is preceded by 'Au', the reference is to the page in the authorities bundle.

JUDGMENT

A. The Issue

1. On 7th May 2009 an order was made in the Queen's Bench Division of the High Court approving settlement of a damages claim brought on behalf of BJB, on terms which included:

    a. reverse indemnity undertakings, whereby 98% of sums received by BJB in state provision are to be deducted from her periodical payments; and

    b. provision for release from the reverse indemnity undertakings by the Master of the Court of Protection or his successors, if that person is satisfied that BJB does not have sufficient resources to meet her reasonable needs.

2. BJB's property and affairs deputy has made an application to the Court of Protection for release from the reverse indemnity undertakings. That application is opposed by the Hospital Trust which was the Defendant to the damages claim, and by NHS Resolution which is the NHS Litigation Authority, an arms' length body of the Department of Health and Social Care.

B. Matters considered

3. I have considered all the documents in the bundle for this hearing, including:

a. on behalf of the Applicant deputy:
   i. statements by the Deputy, dated 29th May 2023 [**25**], 28th November 2023 [**118**]
   ii. a statement by Suzanne Froggett of UK Case Management Limited, dated 9th March 2024 [**135**];
   iii. a position statement dated 21st March 2024;

b. on behalf of the Respondents:
   i. a statement by Samuel Harland, dated 28th September 2023 [**131**];
   ii. a position statement by Weightmans LLP dated 25th March 2024;
   iii. a 'Note' by Mr. Kennedy KC dated 3rd April 2024.

4. I heard oral submissions from Mr. Karim KC and from Mr. Kennedy KC.

C. The background facts

5. The damages claim related to a hypoxic brain injury sustained by BJB at birth on 17th June 1994, causing dystonic cerebral palsy. BJB grew up, after her mother passed away, in the care of her father and with her sisters. She is now 30 years old and has lived in her own home since October 2020. She uses a powered wheelchair, relies on communication aids, and needs help with all activities of daily living but, with determination and support, she presently leads "a rich and varied social life", including drama groups and trips away with her care staff. With appropriate care, she has a life expectancy into her 70s.

6. Whilst BJB lived with her father, he provided a significant amount of her care. Now, having moved into independent living arrangements, she has a team of paid carers. Her needs were assessed by Barnsley Metropolitan Borough Council on 5th April 2022 as requiring 24-hour care, which the local authority funds by direct payments.

7. By orders made on 19th December 2005 and 7th December 2007 respectively, Gillian Knight (solicitor, now of Andrew Isaacs Law Limited) – "the Deputy" - was appointed first as receiver [**35**], then as property and affairs deputy [**38**], for BJB. Nothing in either of these appointment orders makes reference to the terms of BJB's damages award.

The damages settlement

8. The damages claim was brought on 7th July 2003, with BJB's father acting as her Litigation Friend. The claim succeeded as to liability but was then appealed. On 7th May 2009, an agreed settlement was approved [**43**] on a "98% liability" basis. The Deputy understands [**122**] that the 2% deduction was agreed "simply to avoid the risks and costs attendant on the appeal".

9. The approved award was constructed in two parts:

a. a lump sum payment of approximately £1.4 million (inclusive of interim payments and CRU); and

b. periodical payments index linked, so currently in the region of £132 000 per year.

10. The undertakings which are the subject of this judgment are set out at Schedule 2 of the approval order [**60**]. In summary, the Deputy is required to inform the Trust in September each year of the amount of "state provision" received by BJB, 98% of which is then offset against the periodical payment due to be paid the following December. In full, the wording of the undertaking is as follows:

> "**AND UPON** the Claimant's Litigation Friend undertaking, on behalf of the Claimant, by Counsel, that the Claimant, and those acting on her behalf (including her Deputy from time to time), shall:
>
> 1. within 14 days of receiving notice that any re-assessment of her community care needs pursuant to s.47 of National Health Service and Community Care Act 1990 (or such comparable legislation as may hereinafter be enacted) is intended, inform the Defendant of that fact;
> 2. promptly, and in any event within 14 days of receipt thereof, provide to the Defendant the details of any assessment of the Claimant's needs carried out pursuant to s.47 of the National Health Service and Community Care Act 1990, including all relevant documentation deriving from or related to it emanating from the local authority;
> 3. by 15th September of each year notify the Defendant of any State Provision received during that calendar year ('the relevant period'), provided that there shall be no requirement to notify the Defendant when there has been no such State Provision; and
> 4. account to the Defendant for the value of any State Provision received:
>   a. by submitting to abatement in accordance with the undertakings of Periodical Payments otherwise due by the value of any State Provision during the immediately preceding relevant period;
>   b. within 12 months of the death of the claimant, by paying the Defendant out of the Claimant's estate any State Provision for which the Claimant has not already accounted;
>
> provided that
>
> c. any direct payments under s.57 of the Health and Social Care Act 2001 shall be accounted for in the amount of 98% of those direct payments.

11. The mechanism for release from these undertakings is set out at clause 5 of Schedule 2 of the approval order [**61**], as follows:

> "The Claimant and Defendant are agreed that the Claimant may be released from any of the undertakings given within this schedule at the discretion of the Master of the Court of Protection or his successor in the event that he is satisfied that the

Claimant does not have sufficient resources to meet his *(sic)* reasonable needs, provided that:-

(a) The Claimant, or those acting on his *(sic)* behalf, gives the Defendant 3 months' notice in writing that he *(sic)* intends to ask the Master of the Court of Protection or his successor so to exercise his discretion and gives the Defendant the information which will be considered by the Master before any exercise of his discretion: and
(b) The Master of the Court of Protection or his successor has given the Defendant the opportunity to make representations as to the appropriateness of such an exercise of his discretion;"

12. The key part of this agreed mechanism is the requirement that I am *satisfied that BJB does not have sufficient resources to meet her reasonable needs.* The subparagraphs of clause 5 set out procedural requirements before that point can be reached. It is agreed that those procedural requirements have been met in this matter.

13. There are two other provisions in the settlement approval order to which reference has been made in these proceedings:

a. firstly, the preliminary recitals include [**45**] the following explanation, which I shall refer to as "the 30+ recital":

"**AND UPON** The Claimant and the Defendant having agreed that no allowance has been made for possible enhanced needs after the age of 30 years (so that any increased payments made as a result of such enhanced needs shall not be repaid in full) the Claimant and the Defendant undertaking to perform their respective obligations under Schedule 2 annexed to this order."

b. secondly, paragraph 1(c) of the order provides as follows:

"(1) **IT IS ORDERED** that the Defendant has made or shall make payments to or for the benefit of the Claimant as follows in full and final settlement of the claim together with the sums set out at paragraphs 9 and 10 of schedule 1 to this order

….

(c) Further, the sums as specified in the attached [periodical payments] Schedule to be paid by the Defendant as stipulated in the Schedule and be funded in accordance with section 2(4)(c) of the Damages Act 1996 with the sums payable to comprise damages for future care and case management"

<u>These proceedings</u>

14. By letter dated 18th July 2022 [**64**] the Deputy informed the Trust that she intended to make an application for release from the reverse indemnity undertakings. Mr. Karim KC has confirmed that the application is only *prospective* ie there is no application for reimbursement of sums which have already been deducted from periodical payments in previous years.

15. The Deputy duly made the application by COP1 dated 1st June 2023 [**1**]. At that point the Deputy was anticipating [**4**] that, from December 2023 (when BJB would be just 6 months short of her 30th birthday), the amount received from direct payments would exceed BJB's periodical payment, which would therefore be extinguished under the terms of the settlement order.

16. By order made on 30th August 2023 [**142**] I noted that:
    a. the successor beneficiary to the undertakings is NHS Resolution; and
    b. the Senior Judge of the Court of Protection (so at present myself) is the successor to the Master of the Court of Protection

    and gave directions for notification of the application.

17. By COP5 Acknowledgment dated 12th September 2023 [**21**] Barnsley Hospital NHS Foundation Trust indicated its objection to the application, on the basis that "if the claimant were to be released from the reverse indemnity undertaking as she seeks then it appears that there would almost certainly be double recovery…"

18. By order made on 16th November 2023 [**146**], I dispensed with any requirement for a Dispute Resolution Hearing, joined the Trust and NHS Resolution as parties, and listed the matter for hearing on 19th December 2023.

19. By COP9 application dated 23rd November 2023 [**16**] the Deputy applied to vacate that hearing because of Counsel's non-availability. By order made on 15th December 2023 by consent [**154**], the matter was relisted for hearing on 4th April 2024. (The Respondents subsequently applied to vacate this hearing [**181**], also because of Counsel's non-availability, despite having previously agreed the date. That application was refused by order made on 18th March 2024.)

BJB's financial circumstances

20. In giving her account of BJB's income the Deputy's approach is to leave out consideration of both periodical payments and local authority direct payments, and to identify BJB's other income as made up of Employment Support Allowance, Personal Independence Payment and rental income from two properties. I can see why she takes that approach – it simplifies the matter to focus on the income which is *additional* to the currently interconnected sources at the heart of this dispute. She has explained [**123**] that any income generated from the portfolio is added back to the investment, and so not received or counted as income. She has also explained [**123**] that BJB has recently become employed, in a role specially created to enhance her independence, to assist at a day centre for 4 hours per week at minimum wage. Using rounded figures, her income on this basis is approximately £2 600 per month [**127**].

21. However, another way of looking at BJB's income is not to leave out consideration of the periodical payments and the direct payments, but to consider their combined effect as currently provided in the settlement order ie including the reverse indemnity. Mr. Kennedy's Note set this out in the following table, using figures from the Deputy's statements:

Year	Periodical payment	Direct payment	Net periodical payment paid	Total annual payment to BJB
2021	£116 000	£11 249	£104 751	£116 000
2022	£123 605	£95 892	£29 670	£123 605
2023	£132 218	£159 880	£0	£159 880

22. On this way of looking at it, BJB's income from periodical payments has been reduced for each of the last three years but her total annual income from periodical payments and direct payments together has not; and then she has the Employment Support Allowance, Personal Independence Payment and rental income in addition.

23. Notably, the middle row of Mr. Kennedy's table is the year in which BJB's care needs were assessed by the local authority and direct payments commenced. The last column demonstrates that the Deputy's expectation that direct payments would be extinguished was correct.

24. In terms of BJB's expenditure, the Deputy's latest 'budget' [**127**] sets out costs - *additional to* what is covered by the periodical payments/local authority direct payments as at present, and in rounded figures - of £7 600 per month, including:

    a. contributions to direct payments of £282.36 per month,
    b. therapies of £850 per month, and
    c. additional staff costs of £1 765.50 per month.

25. The Deputy's approach in evidence is to take BJB's expenditure of £7 600 per month from her monthly income of £2 600, and conclude that BJB's expenditure now exceeds her income by £5 000 per month / £60 000 per year.

26. BJB's capital consists of an investment portfolio and some properties. In rounded figures, her investment portfolio was valued at £836 000 as at 23rd November 2023 [**129**]. BJB lives in one of her properties, and her father continues to live in another. The two other properties are either in the process of being, or have been, sold in accordance with financial advice. The Deputy's intention is to add the proceeds of sales, expected to be in total approximately £250 000, to the investment portfolio [**29**].

27. The Deputy has provided a cash flow plan [**89**] from Beverley Hughes of ABRDN Financial Planning and Advice Limited, with a covering letter [**87**] from Nick Butcher, Senior Financial Planner of the same firm. This evidence sets out that, on current expenditure levels, BJB's capital is likely to be exhausted, depending on assumptions about inflation

rate, sometime in her early 40s. That is the basis for the Deputy's assertion that, given her life expectancy, BJB's resources are not sufficient to meet her reasonable needs.

D. The Deputy's position:

28. The Deputy has provided an independent assessment of BJB's care and therapy needs, by Suzanne Froggett, Clinical Lead Case Manager of UK Case Management Ltd [**135**]. Ms. Froggett concludes that BJB "leads a modest lifestyle", with "inexpensive hobbies and interests" and "appropriate therapies." She notes that BJB has worked hard, with resilience and determination, to achieve her goal of living alone. She considers that the current level of care and therapy provision is reasonable.

29. Both the local authority and Ms Froggett have considered BJB's care needs, and a 24-hour 1:1 care need is accepted by both. Meeting the cost of those needs currently requires £60000 per year more than BJB has in annual income, and that shortfall is likely to increase. Resorting to capital does not provide a solution because it will be exhausted in around ten to twelve years, leaving BJB, then at a relatively young age, reliant exclusively on benefits. Her modest quality of life would dramatically fall. "In the circumstances, without the periodical payments each year, [BJB]'s resources are not sufficient to meet her reasonable needs" [**ps para 34**].

E. The Respondents' position

30. The Respondents' interest in the current application is "in avoiding double recovery" [**ps para 10**]. They have not challenged the reasonableness of BJB's current arrangements. They have not filed any financial evidence. Their objection to the application is in essence objection to BJB having recourse to *both* state provision *and* periodical payments to meet the costs identified by the Deputy.

31. The Respondents' argument is that:

    a. paragraph 1(c) of the settlement approval order demonstrates that the periodical payments provided for in the settlement order "are to cover care and case management solely" [**ps para 5, 132**];
    b. the lump sum element of the damages award "was made up of the capitalised value of all heads of loss *other than* future care and case management" [**Note para 1(b),** emphasis added];
    c. the presumption which underpins lump sum awards of damages is that a claimant will invest the award in such a fashion that she will be able to use the income and draw down the capital over her lifetime to fund her needs, such that by the end of her life the award will have dissipated [**Note para 2**];
    d. all the outgoings identified by the Deputy except contributions to direct payments "will have been provided for in the calculation of the lump sum" approved in the settlement order [**Note para 5**].

32. The Respondents point to the assessment and payments by Barnsley Metropolitan Borough Council and invite the Court to conclude that "the entirety of the periodical payment is

payment to meet those same needs and is therefore no longer required." [**ps para 8**] The point of the agreed reverse indemnity is that:

a. whilst state provision (the direct payments) is *less than* the periodical payments, to limit BJB's annual payments to the level of the indexed periodical payment;
b. once state provision (the direct payments) *exceed* the periodical payment, BJB receives the higher amount.

So, the Respondents say that the reverse indemnity is not a disadvantage to BJB. It would only become so if she was required to repay the excess of the direct payment over the periodical payment, which is not the position. [**Note para 3**]

33. In evidence the Respondents relied on the 30+ recital in the following terms: "the Claimant and the Defendant agreed that no allowance was made for possible enhanced needs after the age of 30 years, so that any increased payments made as a result of such enhanced needs shall not be repaid in full. Therefore, any enhanced care need from 17 June 2024 were always intended to be drawn from the Claimant's other financial resources." [**133**]

34. Similarly, in evidence the Respondents asked the Court to consider "whether the Claimant's funds have been effectively managed, and why it is considered that the Claimant's portfolio will not meet her needs." [**133**] (Mr. Kennedy made no submissions on this point.)

35. As to BJB's actual financial situation, in oral submissions Mr. Kennedy KC accepted that the Deputy's report from ABRDN is the only evidence before the Court as to the prospects for BJB's capital resources. He could do no more that criticise it. In particular:

a. he described as "opaque" the graph entitled "cash flow details [**101**] and the extrapolation from it that BJB's funds would be exhausted in 12 years or so;
b. he pointed out that the graph headed "Liquid Assets (Simple)" [**106**] is unreadable and unexplained;
c. in respect of the table headed "Cash Flow Details" [**102**], he said that it was "impossible to determine how one figure leads to the next…how it will all have gone in 10 to 12 years";
d. in respect of the underlying assumptions [**116**], he pointed out that in times of high inflation, the fund has actually grown. The growth assumptions of between 1.5% and 4.5% may not be valid; and the inflation assumption may be valid now but not longitudinally.

36. The Respondents contend that, if release from the undertakings is granted, "the state will be paying for the Claimant's care and case management twice over, first through the Council funded payments, and secondly via her periodical payments." [**133 & ps para 12**] With *both* periodical payments *and* care payments from the local authority, BJB would have a *surplus* income over expenditure of somewhere between £32 000 and £67 000 [**ps para 18**]. So, her expenditure would be met "without having to make any call on the lump sum". Using the same assumptions as in the ABRDN report, that fund would "increase by ~ £50 000 per annum on a compound basis", even ignoring the property assets, with potential to remain untouched for the next 40 years of BJB's life, by which time at a compound growth of 5% it would be valued at more than £7 000 000. [**Note paras 9 & 11**]

The Respondents call this "an extreme result" and, effectively, revaluation of the damages claim.

37. The Respondents make an alternative proposal [**Note para 12**] to give effect to the objectives of the settlement order. They propose that:

    a. any periodical payment is used only to meet BJB's care and case management needs as assessed under the Care Act 2014 or successor legislation, and accounted for;
    b. any periodical payment is paid into a separate bank account and accounted for on an annual basis, with repayment of any unused balance to be made at the end of the year to the relevant public body, namely NHS Litigation Authority;
    c. the Deputy expends the direct payments received from the local authority prior to drawing on the periodical payments.

F. <u>The Law</u>

38. The origins of the reverse indemnity mechanism lie in concerns about double recovery as considered by the Court of Appeal in *Peters v. East Midland Strategic Health Authority* [2009] EWCA Civ 145 [**Au 72**]. In that matter, at first instance the question to be determined was whether a claimant's care and accommodation costs should be borne by the tortfeasor or by the local authority that is charged with the statutory duty of making arrangements for providing care and accommodation for the claimant. Those representing the claimant had sought to overcome the perceived problem of double recovery by offering, through the property and affairs deputy, an undertaking not to seek statutory funding. The first instance judge was not satisfied that there was any proper legal basis for the undertaking offered, which in any event he considered impractical and undesirable. The Court of Appeal upheld the first instance decision that there was no reason in principle why the claimant should give up her right to damages to meet her wish to pay for her care needs herself rather than to become dependant on the state (para 56); and stated that the conclusions as to the offered undertaking were right (para 58). However, the Court of Appeal went on to conclude (para 63 & 64) that:

> " there is an effective way of policing the matter and controlling any future application by [the deputy] for the provision of care and accommodation by the Council. It can be achieved by amending the terms of the court order pursuant to which she is acting…. [The deputy] has offered an undertaking to this court in her capacity as Deputy for that claimant that she would (i) notify the Senior Judge of the Court of Protection of the outcome of these proceedings and supply to him copies of the judgment of this court and [the first instance court]; and (ii) seek from the Court of Protection (a) a limit on the authority of the claimant's Deputy whereby no application for public funding of the claimant's care under section21 of the NAA can be made without further order, direction or authority from the Court of Protection and (b) provision for the defendants to be notified of any application to obtain authority to apply for public funding of the claimant's care

under section 21 of the NAA and be given the opportunity to make representations in relation thereto."

39. The reasons why the Court of Appeal considered this approach to be effective are given as follows (para 65):

> "It places the control over the Deputy's ability to make an application for the provision of a claimant's care and accommodation at public expense in the hands of a court. If a Deputy wishes to apply for public provision even where damages have been awarded on the basis that no public provision will be sought, the requirement that the defendant is notified of any such application will enable a defendant who wishes to do so to seek to persuade that the Court of Protection should not allow the application to be made because it is unnecessary and contrary to the intendment of the assessment of damages."

40. It is to be noted that there is nothing in the settlement approval order for BJB's damages award which required BJB's deputy to seek from the Court of Protection a limit to the deputyship authorities, and in fact neither of the orders referred to at paragraph 7 above include any limitation in respect of applications for state funding of care costs.

41. It is also to be noted that the *Peters* judgment is dated 3rd March 2009, approximately a year and a half after implementation of the Mental Capacity Act 2005, so in the relatively early days of the modern Court of Protection.

42. On 5th January 2010 Senior Judge Lush gave judgment in *Re Reeves* 99328848, which is unreported but nonetheless widely known and a copy of which has been referred to me [**Au112**]. In that matter a local authority invited the Court of Protection to limit a deputy's authority to apply for statutory funding, on the basis that it was not in Mr. Reeves' best interest to pursue provision of care from the local authority when he had received a civil settlement. The deputy in *Reeves* had given no undertaking, so his authorities were not subject to any restrictions of the type placed on the deputy in *Peters*. Moreover, the deputy's application for public funding had been made more than 2 years before the *Peters* judgment. Senior Judge Lush noted that the local authority's stance was effectively to apply the order made in *Peters* retrospectively as a universal requirement.

43. Senior Judge Lush regarded the application in *Reeves* as "misconceived". He identified that the property and affairs deputy has a duty to act in the best interests of the person for whom s/he is appointed, and this duty includes claiming all the state benefits to which that person may be entitled. He confirmed that making such application is within the 'general authority' of a property and affairs deputyship appointment in standard terms.

44. Having identified at the beginning of his judgment the same paragraphs 64 and 65 of the *Peters* judgment as are set out above, Senior Judge Lush observed that, notwithstanding the undertaking that was there approved*:*

> "In [the *Reeves* matter] no such undertaking was given to the judge in the personal injury proceedings, and there is no obligation upon the Court of Protection to

adjudicate as between the claimant and the defendant, or the claimant and the local authority on the issue of double recovery.

Notwithstanding the undertaking that was approved in *Peters* and other undertakings of a similar nature, I am of the view that the Court of Protection is no longer really the appropriate forum to adjudicate on matters of this kind. Its primary function is to act in the best interests of a protected beneficiary and, even though it would strive to be impartial, there may be a perception of bias for this reason. Furthermore, the close links which the court had with personal injury litigants generally were effectively severed when the Mental Capacity Act 2005 came into force on 1 October 2007, and the court's approval was no longer required in cases involving settlements out of court on behalf of incapacitated claimants. Additionally, the court no longer supervises deputies: that is one of the functions of the Office of the Public Guardian."

45. I have been referred to the Court of Appeal's decision in *Tinsley v. Manchester City Council* [2017] EWCA Civ 1704 [**Au 99**]. In that matter the question to be determined was whether a person who had been detained under the Mental Health Act 1983 was entitled to require the local authority to provide after care services pursuant to section 117 of that Act *before* he had exhausted sums reflecting the cost of care awarded to him as damages. I note in particular the following observations of Lord Justice Longmore:

a. (at paragraph 26): "It is, of course, the case that courts will seek to avoid double recovery by a claimant at the time they assess damages against a negligent tortfeasor. If therefore it is clear at trial that a claimant will seek to rely on a local authority's provision of after-care services, he will not be able to receive the cost of providing such after-care services from the tortfeasor…. It does not follow from this that, if a claimant is awarded damages for his after-care he is thereafter precluded from making application to the local authority. Mr. Harrop-Griffiths appeared to accept that, if Mr. Tinsley's funds had indeed run out, then Manchester would have to provide after-care services…. It seems to be Manchester's position that they need to be satisfied that Mr. Tinsley's funds have indeed run out (or are about to run out). But there also seems to be some concern that Mr. Tinsley's funds may have been mismanaged. The question is whether those concerns entitled Manchester to refuse to consider Mr. Tinsley's application at all."

b. (at paragraph 31): "Four initial comments may be made about *Peters.* Firstly, the court's judgment on this point was *obiter*, since they upheld Butterfield J's finding of fact that there was no risk of double recovery, prefacing their remarks with the words "If it were necessary to do so." Secondly the court did not consider the position under section 117 of the 1983 Act but only the position under the 1948 Act where the words "otherwise available" were of critical importance. Thirdly the undertakings were taken by the court at the time of the award of damages in order to ensure that the tortfeasor was not subjected to the risk that the claimant would make a double recovery against both it and the local authority. The undertakings were not inserted to protect the local authority but the tortfeasor. Fourthly, there does not appear to have been made any argument…to the effect that there is a right on the part of the claimant, after an award has been made, to look to the local authority if he or

she prefers to do so. On the different wording of the 1948 Act any such argument may be debatable but it was never made."

c. (at paragraph 32): "I doubt if it can be right, by requiring the deputy to give undertakings of the sort proffered by [the deputy in *Peters*], to transfer the burden of deciding whether a claimant is entitled to claim local authority provision to the Court of Protection. That court looks after the interests of its patients and is not (usually) required to decide substantive rights against third parties. Indeed it could be said that to decide that a local authority is not obliged to provide after-care services would not be to promote the interests of the patient."

46. I have previously considered the limits of the Court of Protection's jurisdiction in respect of third party rights in *EG v. AP* [2023] EWCOP 15.

47. I have also been referred to the decision of His Honour Judge Robinson sitting as a judge of the High Court in the matter of *WNA v. NDP* [2023] EWHC 2970 (KB) [**Au 135**], in which the issue to be determined was "how most appropriately to deal with the problem of double recovery" (paragraph 6) where the possibility could not be ruled out that at some point in the future the claimant will apply for state funding. The claimant in that matter retained full capacity both to litigate and to manage her own financial affairs, so there was no question of needing court approval for any settlement. I note that the Respondents' proposals as set out in paragraph 35 above appear to reflect quite closely the arrangements made in *WNA*. I further note the following observations of the judge (across paragraphs 48, 49 and 50):

> "… at the heart of [defendant counsel's] submissions is the single proposition that the annual payment may only be used for care and case management. I agree with that, subject to one crucial qualification. The annual payment may be used only for care and case management *within the relevant accounting period* which in this case is a single year. …. in my judgment in this case the [periodical payments] are to be treated solely as damages relating to care (and case management) provided during the relevant year for which those services are provided. If the money is not wholly spent to meet the cost of care (and case management) provided during that year, there is no obligation to accumulate the surplus to pay for care (and case management) in subsequent years. … It also follows that in respect of any surplus at the end of any particular year, the Claimant is at liberty to deal with it as she sees fit: *Wells v. Wells* [1999] 1 AC 345 (HL) per Lord Clyde at p394H citing Lord Fraser in *Cookson v. Knowles* [1979] AC 556, 577D:
>
> > "It is for the plaintiff to decide how the award is to be applied. Whether he is proposing to invest it, or spend it, or more particularly, exactly how he is going to invest it or spend it does not affect the calculation of the award."

48. Mr. Karim considered the basis on which the Senior Judge has jurisdiction to make the decision required by clause 5 of Schedule 2 of the settlement approval order, ie to be the mechanism for release from the reverse indemnity undertakings. He identified two possibilities: *either*

a. clause 5 of the settlement order "permits the Court to have jurisdiction to make a defined determination/declaration in relation to release under section 19 of

the Senior Courts Act 1981, that being applicable to the Court of Protection pursuant to s47(1) of the Mental Capacity Act 2005" [**ps para 18**]; *or*

b. the Court of Protection could make a decision under section 16(2)(a) of the Mental Capacity Act 2005 [**ps para 19**].

49. Section 19 of the Senior Courts Act 1981 provides as follows:

> **"19 General Jurisdiction of High Court**
>
> (1) The High Court shall be a superior court of record.
> (2) Subject to the provisions of this Act, there shall be exercisable by the High Court –
> (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and
> (b) all such other jurisdiction (whether civilor criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision).
> (3) Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is –
> (a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court; or
> (b) by rules of court made exercisable by a master, registrar or other officer of the court, or by any other person.
> (4) The specific mention elsewhere in this Act of any jurisdiction covered by subsection (2) shall not derogate from the generality of that subsection."

G. Discussion

50. I have noted over the last 12 months an increase in applications to the Court of Protection for discharge of *Peters* undertakings. When I questioned this, counsel in the present matter confirmed that there has been no change of policy by NHS Resolution to such applications as far as they are aware. If discharge applications are now being made in noticeable numbers, it was suggested that this is probably a reflection of time passed since *Peters* undertakings were first conceived and the natural evolution of the circumstances of persons bound by them. It is to be hoped that this judgment may be of some use if further applications are considered.

51. Unlike the *Reeves* situation, it seems to me that there *is* in the matter now before me some sort of obligation on the Court of Protection to "adjudicate as between the claimant and the defendant." That obligation comes from the High Court having made an order which incorporated the clause 5 mechanism agreed between the parties, and the Deputy's COP1 application properly made in the light of it.

52. In passing, I note the absence of any suggestion that reference was made to the Court of Protection *before* this obligation crystallised - unlike in *Peters*, where Senior Judge Lush's recollection was that the deputy had first sought his permission to give the undertaking she proposed [**Au118**, page 4 of the *Reeves* judgment].

53. Nonetheless, accepting that some sort of obligation has been placed on the Court of Protection, it is necessary to be clear about *how* that obligation is to be discharged.

54. Mr. Karim's position was that, by either of the jurisdictional routes he identified, the conclusion should be the same, namely that release from the undertakings should be granted. Unsurprisingly therefore, he was willing to accept that the Court of Protection's standing might actually involve *both* of the jurisdictional bases he identified.

55. In contrast, Mr Kennedy declined to set out a jurisdictional basis for the decision asked of the Court of Protection. His position was that there was no reason in principle, and nothing in clause 5 of the settlement approval order itself, which prevents me from making an order to give effect to his proposal. Clause 5 should be read, he said in oral submissions, as meaning release "on any terms the Master thinks is appropriate." It must be implicit in this position that the Respondents accept that the Court of Protection does have the necessary jurisdiction, even if they have not identified the basis of it.

56. I am not persuaded that s19 of the Senior Courts Act applies. I can see no grounds for concluding that Clause 5 of the settlement approval order was ever intended by the approving judge to be conferring on the Master of the Court of Protection or his successors a delegated High Court jurisdiction. Moreover, as Senior Judge of the Court of Protection, I am neither a judge of the High Court nor the beneficiary of any rule of court, as s19(3) requires.

57. Nor am I persuaded that section 47(1) of the Mental Capacity Act 2005 assists. That section provides for the Court of Protection to have "the same powers, rights, privileges and authority" as the High Court, but only "in connection with its jurisdiction" – that is, the jurisdiction of the Court of Protection, not the wider jurisdiction of the High Court.

58. So, where does my jurisdiction lie?

59. Capacitous disputants may agree to accept the determination of any third party if they so wish – a qualified arbitrator, an elder of their community, even the milkman. The authority of that third party comes from the agreement of the disputants to accept what they decide. In this matter, where BJB herself lacked capacity to take such an approach, the High Court has approved an agreement between her proper representatives and the defendant to her claim to accept the determination of the Senior Judge of the Court of Protection. I conclude that my jurisdiction is this matter is a jurisdiction by approved consent.

60. How do I exercise that jurisdiction?

61. The matter has come to me via usual Court of Protection procedures and therefore within the framework of the Mental Capacity Act 2005. It is a principle of that Act that an act done or a decision made under it for or on behalf of a person who lacks capacity must be done or made in their best interests.

62. There is an obvious tension between a jurisdiction based in best interest decision making, and an adjudication between claimant and defendant. Clause 5 of BJB's settlement was approved before that tension was spelled out either by Senior Judge Lush in *Reeves* or by Lord Justice Longmore in *Tinsley*, but I proceed on the basis that the High Court must have intended, and the parties in the High Court proceedings must have agreed to, the incorporation of the best interest principle into the determination of the clause 5 release mechanism.

63. So, I approach this matter:

a. first, by asking myself if I am satisfied that BJB does not have sufficient resources to meet her reasonable needs (the factual issue as spelled out in clause 5 of the settlement approval order);

b. and then, in the light of that conclusion, by asking myself whether it is in the best interests of BJB that her Deputy should be released from the reverse indemnity undertaking.

64. It should be clear from that approach that I am not determining any issue of 'double recovery.' If that is a deficiency, then in my judgment it is a deficiency to which the defendant in the damages claim consented and which the High Court approved. The place for addressing such deficiency is the court considering the damages claim, not the Court of Protection.

Does BJB have sufficient resources to meet her reasonable needs?

65. BJB's reasonable needs are clear. There is no evidence before the Court other than that supplied by the Deputy. Her expenditure budget is supported by the local authority's Care Act assessment in so far as it relates to care needs, and by the independent consideration of Suzanne Froggett in so far as it goes beyond that. The Respondents do not challenge, and I accept, that she has reasonable expenditure needs of approximately £7 600 per month / £91000 per year *in addition to* what is currently met by the direct payments.

66. Periodical payments to BJB are mandated by paragraph 1(c) of the settlement approval order. It is not entirely clear to me why the Respondents import the word "solely" into that paragraph – it is a gloss on the wording of the order. Perhaps it is imported from *WNA v. NDP,* as quoted at paragraph 47 above. If it is intended to suggest somehow that BJB's care needs should be considered "capped" to the level of the periodical payments, I do not accept that suggestion. It is an entirely standard aspect of damages awards that, once paid, it is up to the recipient how the sums are actually applied. There is nothing in the wording of paragraph 1(c) or otherwise which does or could prevent BJB or her deputy on her behalf from using funds received by way of periodical payment to meet an expense other than for care or case management. Equally, nothing in the order or the actual payment limits the care and case management costs which may in fact be incurred. If authority for that is required, then it is set out in the *WNA* quote above. Moreover, the Respondents accept this in their assertion (as set out in paragraph 32 above) that the reverse indemnity is no disadvantage to BJB because it imports no obligation to repay any excess of direct payments over periodical payments. The periodical payment as approved in the order, including at section 1(c), is simply what was agreed by the parties and approved by the Court as a settlement of particular heads of claim. I do not see that adding the word "solely" takes this matter any further.

67. Equally, BJB's income over and above the direct payments is clear. There is no challenge to the Deputy's evidence that, with the reverse indemnity in effect, it is approximately £2600 per month / £31 200 per year. I accept that evidence.

68. Mathematically then, it follows that there is an insufficiency in BJB's income of approximately £60 000 per year. That brings me to consideration of issues relating to her capital.

69. I accept Mr. Kennedy's description of BJB's lump sum award as "the capitalised value of all heads of loss *other than* future care and case management". I also accept Mr. Kennedy's description of the assumption underlying lump sum awards. However, I depart from Mr. Kennedy's reasoning in so far as he asserts (as set out at paragraph 32 above) that, because direct payments address the same needs as those for which periodical payments were approved, I should conclude that the periodical payment "is no longer required." It seems to me that:

    a. Mr. Kennedy's descriptions of the lump sum and the assumption underlying it go no further than explaining the civil litigation process. Civil litigation has to conclude but it does so without a crystal ball. In subsequent real life, expenditures may arise which are in fact different to what was calculated and approved. Nothing in the calculation or the approval prohibits BJB from actually having expenditure needs higher than were calculated. In reality there would be no way to do so: life happens, irrespective of what plans people make. The question to be answered is merely how the cost of actual needs is to be met.

    b. whether periodical payments are required or not depends on the overall levels of BJB's needs and resources. I must look to the full picture, not just one part of the two-part settlement structure. In fact Mr. Kennedy's own argument accepts as much in that he says I should look to BJB's capital at all.

    c. the settlement approval order includes recognition that periodical payments may still be required even in circumstances of state provision both in the inclusion of a mechanism for release from the reverse indemnity, and also in the 30+ recital.

70. It is necessary to consider that 30+ recital further. It is clear from the wording before the parenthesis both that the parties and the High Court recognised that there may be an upward shift in BJB's needs after the age of 30 (ie around now), and that the approved sums made no allowance for that. Thereafter the meaning of the recital is more opaque. I am not persuaded by Mr. Kennedy's argument, as set out in paragraph 33 above, that the recital is a record that "any enhanced care need from 17 June 2024 were always intended to be drawn from the Claimant's other financial resources." In my view, that interpretation overlooks the concluding part of the recital, namely the "undertaking to perform their respective obligations under Schedule 2 annexed to this order." In other words, rather than indicating agreement to pay for any enhanced needs post-30 from capital, I interpret the 30+ recital as very clearly pointing to the mechanism for release from the reverse undertaking, found in Schedule 2 of the settlement approval order.

71. The Respondents have also suggested (although not in Mr. Kennedy's submissions) that I should consider whether BJB's funds have been effectively managed. Being made without any specific allegation or supporting evidence, I am unimpressed by this suggestion (and consider that Mr. Kennedy was right not to advance it.) It is nothing more than a 'wild card' allegation. Throughout her deputyship appointment Ms. Knight will have been subject to supervision by the Office of the Public Guardian. There is nothing before me to suggest that the Public Guardian has ever had any concerns. Moreover, both the local authority assessment of BJB's needs and the report by Ms. Froggett effectively corroborate the reasonableness of the Deputy's approach.

72. So, even accepting that all of BJB's expenditure except contribution to direct payments was in contemplation when the lump sum was agreed, when asking myself if I am satisfied that BJB has sufficient resources to meet her reasonable needs, what I consider is:

    a. all of her resources, including both capital awarded and other mechanisms in the settlement order; and

    b. her reasonable needs *as I have found them to be*, not as capitalised in the approved award.

73. There is *only* one piece of evidence before me as to how long BJB's funds will be able to sustain the needs which I have found to be reasonable, and that is the ABRDN report which indicates that they will be extinguished within 10-12 years, in the context of a life expectancy of a further 70+ years. That report was provided to the Respondents exhibited to the Deputy's statement of May 2023. They had plenty of time to consider it but chose not even to put questions to the author. The criticisms of the conclusions set out in the report came only in Mr. Kennedy's Note the day before the hearing. That is not sufficient for the Court to come to any conclusion other than acceptance of the evidence in the ABRDN report.

74. Since the report concludes that BJB's resources will meet her needs for another decade or so, I invited Mr. Karim to consider if the application had not been made prematurely – things may look different in the later stages of that decade. Mr. Karim's response was to the effect that, having already reached the point where resort to capital was needed, it would not be acceptable for the Deputy to wait any longer to make the application because, if it were to be refused, she would need to make adjustments to BJB's expenditure (and therefore lifestyle) *now* to ensure that BJB's resources went as far as they possibly could. I accept that this is a reasonable conclusion to have come to at this point in the development of BJB's life. I do not consider that it implies any complacency in approaches to expenditure at present. I do not criticise the Deputy for having made the application at this point.

75. I have considered carefully the "extreme result" which Mr. Kennedy says (as set out at paragraph 36 above) would follow if the Deputy's application is granted. Whilst the figures quoted are indeed startling, I note that they are not based on any evidence before me. Ultimately, as set out in paragraph 63 above, I conclude that - "extreme" or not - any outcome of double recovery is not a matter for me to adjudicate. If double recovery is a possible effect of the approved settlement terms, then I must and do accept that the High Court approved the settlement "warts and all." In so far as Mr. Kennedy asserts that the outcome of the Deputy's application to the Court of Protection may amount to a "re-evaluation of the claim", it seems to me that this offence would rather occur if I went beyond determination of the question posed in clause 5 of the settlement approval order by considering the *effect* of that determination. Accordingly, I decline to take into account the Respondents' submissions as to what *may* happen to BJB's capital.

76. In so far as the Respondents have made a proposal for specific terms of a new undertaking (as set out in paragraph 37 above), it seems to me that the proposal may have had merit if it had been considered by the parties and by the High Court when considering settlement of the claim. (I infer from its absence from the settlement approval order, that it was not. Indeed it seems only to have come from Mr. Kennedy in his Note, dated the day before the hearing in this application.) However, things being as they are I agree with Mr. Karim that the proposal

goes beyond the meaning to be gleaned from a straightforward reading of clause 5 of the settlement approval order. The approved mechanism for release from the reverse indemnity undertaking is binary only (release or not), on the single threshold of sufficiency of resources to meet reasonable needs. For the same reasons that I have declined to take into account submissions as to effect of exercising that mechanism, I also decline to read into it any more sophistication than a binary option.

77. So, accepting the Deputy's evidence of income and expenditure and the only evidence before me in respect of how far BJB's capital will stretch, it follows that I *am* satisfied that BJB does *not* have sufficient resources to meet her reasonable needs. It is therefore open to me pursuant to clause 5 of Schedule 2 of the settlement approval order to release the Deputy from the reverse undertakings of that Schedule. To consider that, I look to the best interests of BJB.

Best interests

78. It seems to me obvious to the point of there being no sustainable contrary argument, that BJB's interests are best served by access to the widest possible resources to meet her needs. If the Deputy is released from the reverse indemnity undertaking, there is no obligation to account for whatever state provision she receives and therefore no deduction from the periodical payments she will receive. I am satisfied that this outcome is in BJB's best interests, and I should release the Deputy from the undertaking.

H. Conclusions

79. I am satisfied on the evidence before me that BJB does not have sufficient resources to meet her reasonable needs if the reverse indemnity undertakings in her settlement approval order stand. I am further satisfied that it is in BJB's best interests for her property and affairs deputy to be released from those undertakings. I invite the parties to agree the terms of an order to give effect to these conclusions.

80. Along with Senior Judge Lush in *Reeves* and with Lord Justice Longmore in *Tinsley*, I too doubt that it is right for issues which arise in civil litigation to be transferred to the Court of Protection in the way that they were, some time ago, in this matter. When I asked counsel before me they confirmed that, to the best of their knowledge, orders with a *Peters* undertaking are no longer being made. I welcome that development.

HHJ Hilder

29th September 2024