

Applications for release from Peters reverse indemnities: the Court of Protection weighs in

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Civil Law

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Clinical Negligence



In the Matter of BJB [2024] EWCOP 59 (T2) 24 October 2024, Court of Protection Senior Judge Hilder considered an application for the discharge of a *Peters* reverse indemnity.

BJB suffered a negligent hypoxic brain injury at birth resulting in lifetime care needs. Her claim was settled in 2009 for a £1.4m lump sum and index-linked periodical payments for her care (now £132,000). The reverse indemnity was made in an undertaking to the QBD by BJB's father as litigation friend. BJB was obliged to remit 98% of any public funding received from the local authority to the NHS. The reverse indemnity stated an agreement between the parties 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...*' [11]

In 2023, BJB's deputy made such an application to the (now) Senior Judge of the Court of Protection, Judge Hilder. By 2024, BJB's direct payments (approximately £3000/week) were due to be higher than the periodical payments, and no further periodical payments would be received. The deputy estimated that BJB's outgoing expenses exceeded her income by £5000/month, and BJB continued to have capital of £1.09m. The deputy argued that using capital to 'top up' the difference in cost between the local authority's direct payments and the actual cost of care '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.' [29] The deputy argued that BJB's resources were not sufficient to meet her reasonable needs, and the condition for discharging the undertaking was met.

NHS Resolution opposition to the application was initially on the basis that there would be double recovery if the reverse

indemnity was discharged. NHS Resolution argued that BJB would have a surplus income of between £32,000 to £67,000 annually if she were no longer obliged to revert local authority payments to the NHS. However, NHS Resolution's case on whether she had sufficient resources to meet her reasonable needs was less obvious from the judgment, and no evidence was filed challenging either (1) the deputy's assertion that BJB required her full current package of care to meet her 'reasonable' needs or (2) the sufficiency of BJB's assets to meet those needs. NHS Resolution argued that the periodical payments were no longer required as the local authority was now paying an amount to meet BJB's needs in excess of the periodical payments. It was suggested (without evidence) that BJB's funds had not been effectively managed so as to provide her with a higher income from capital; this argument found no traction with the court. It was also argued that BJB's projections apparently allowed her to rely on both local authority funding and index-linked periodical payments without ever having to draw on her considerable capital, and it was not reasonable that she would be released from the undertakings without any obligation to draw on capital.

After reviewing relevant case law, Senior Judge Hilder considered her jurisdiction, which was accepted by both parties, was one of a jurisdiction by approved consent [59]: 'Capacitous disputants may agree to accept the determination of any third party if they so wish...The authority of that third party comes from the agreement of the disputants to accept what they decide.' Where BJB lacked capacity, '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.'

Senior Judge Hilder approached the application in two stages at [63]:

63...a. first...if I am satisfied that BJB does not have sufficient resources to meet her reasonable needs;

b. and then...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.

Senior Judge Hilder found that the only evidence before the court on how long BJB's 'funds will be able to sustain the needs which I have found to be reasonable' [73] was evidence from the deputy, which stated she would exhaust her funds in 10-12 years; it was not, apparently, disputed that BJB's current care provision was 'reasonable', and that she did not have a sustainable resources to continue to fund it. Senior Judge Hilder considered whether the application was premature, but accepted the deputy's argument 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.' [74] On this basis, the court concluded that BJB did not have sufficient resources to meet her reasonable needs, and the condition for release from the reverse indemnity undertaking was met.

Senior Judge Hilder readily found it was in BJB's best interests to have 'access to the widest possible resources to meet her needs.' [78]

Analysis

From the judgment, there is a clear criticism of how NHS Resolution conducted its case: the evidence which filed was late, and challenges to the deputy's evidence were run without evidentiary support. This case is a clear warning for any potential Respondent faced with an application for discharge of a reverse indemnity to take the matter seriously, reflect on the deputy's evidence, determine what is in dispute, and file any evidence in rebuttal if the deputy's contentions are not accepted.

In the absence of NHS Resolution contesting key aspect of the deputy's case or filing evidence on point, the value of this judgment as precedent appears to be limited. There are a number of points which may require consideration in future judgments.

1. Jurisdiction: Senior Judge Hilder did not appear to consider that the Court of Protection inherently had any power to discharge undertakings made in the KBD, and proceeded on the basis of jurisdiction by consent (which was accepted by both parties at the hearing). However, it is not obvious whether the intention of the parties when the agreement was made in 2009 was to delegate to the Senior Judge in his or her personal capacity, or as a judicial office within the Court of Protection, and what power the then-Master of the Court of Protection (or indeed, the QBD itself) would have to obligate any future judicial office holder to adjudicate this a dispute between parties in

the QBD.

2. Role of the Court of Protection: The concept of jurisdiction arising through agreement between the parties does not obviously square with the matter having come before the court '...via usual Court of Protection procedures and therefore within the framework of the Mental Capacity Act 2005.' [61] The Mental Capacity Act was not referenced within the settlement, and there is no requirement that it is in BJB's best interests to be released from the undertaking. The application for any determination under the MCA appears to have been unnecessary and it is not clear why the concept of 'best interests' or the MCA would come to bear.
3. Sufficiency of resources: There does not appear (on the face of the judgment) to be any criticism of the local authority's assessment of BJB's needs or its direct payments to meet those needs. This would appear to imply that (a) the local authority prepared some care and support plan which was capable of meeting BJB's Care Act-eligible needs and (b) provided direct payments in the amount required to provide this care and support plan. If BJB's needs are capable of being met by the direct payment, it is not obvious to why NHS Resolution did not attempt to argue that the local authority's care plan and corresponding level of direct payments were sufficient to meet her reasonable needs for care and support, rather than the more expensive package purchased by the deputy (particularly where BJB had resources for non-care related expenses through higher-rate benefit income and capital of £1.09m).
4. Periodical Payments: It does not appear to have been recognised by any of the parties in the case, the local authority or raised with the court that BJB's periodical payments are not generally exempt from charging for the purposes of adult social care, and she will likely be obligated to pay most of the amount of the periodical payments to the local authority. Unlike capital derived from personal injury awards, periodical payments are subject to a much more limited disregard under paragraphs 15 and 46 of Schedule 1 of the Care and Support (Charging and Assessment of Resources) Regulations 2014. BJB will likely be subject to very considerable charges for her care which will eliminate most of the theoretical 'gains' anticipated by the parties.

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