Supreme Court

New South Wales

Case Name:	Sarah White v The Local Health Authority & Anor
Medium Neutral Citation:	[2015] NSWSC 417
Hearing Date(s):	13 March 2015
Date of Orders:	13 April 2015
Decision Date:	13 April 2015
Jurisdiction:	Common Law
Before:	Slattery J
Decision:	Plaintiff released from detention in mental health facility.
Catchwords:	MENTAL HEALTH – habeas corpus application -- operation of Guardianship Act 1987 and Mental Health Act 2007 -- whether applicant voluntarily admitted to a mental health facility under Mental Health Act 2007 can be detained within that facility against her will – where Mental Health Review Tribunal had ordered the discharge of person – whether Public Guardian's decision could displace plaintiff's decision regarding her accommodation – whether Public Guardian submitted valid Mental Health Act s 7(1) request for the plaintiff to be voluntarily admitted into a mental health facility --applicant released. WORDS AND PHRASES -- "admitted to a mental health facility"
Legislation Cited:	Guardianship Act 1987, ss 3, 3C, 4, 8, 9, 12, 14, 16, 17, 18, 19, 21, 21A, 21B, 21C, 25C, 77 Mental Health Act 2007, ss 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 15, 18, 84, 109, 162, 163, 164, 166

	Mental Health (Forensic Provisions) Act 1990 Supreme Court Act 1970, s 61
Cases Cited:	Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37 Antunovic v Dawson (2010) 30 VR 355 Ruddick v Vadarlis [2001] 110 FCR 491
Category:	Consequential orders (other than Costs)
Parties:	Plaintiff: Sarah White First Defendant: The Local Health Authority Second Defendant: NSW Public Guardian
Representation:	Counsel: Plaintiff: Kennett SC; J. Gatland First Defendant: S. Woods Second Defendant: N. Sharp
File Number(s):	2015/62353
Publication Restriction:	No

JUDGMENT

1 Sarah White (not her real name) is being kept against her will in an Adult Mental Health Unit in suburban Sydney ("the facility"). She has been there since November 2013. Ms White is neither a "mentally ill person" or a "mentally disordered person" within the *Mental Health Act* 2007. Assisted by her tutor in these proceedings, she now seeks an order in the nature of *habeas corpus* under *Supreme Court Act* 1970, s 61 for her release and alternatively under *Mental Health Act*, s 166.

2 Ms White contends that no statutory authority warrants her detention within this facility. The Public Guardian has been appointed as Ms White's guardian under *Guardianship Act* 1987, Part 3. Both the Local Health District ("the Local Health Authority") that administers the facility, the first defendant and the Public Guardian, the second defendant oppose the relief Ms White seeks. They contend that provisions of the *Mental Health Act* and the *Guardianship Act* authorise her continued detention.

3 The proceedings were heard over approximately three hours in the Equity duty list on Friday, 13 March 2015. The parties provided supplementary

submissions and material to the Court up to 18 March 2015. Some of the parties to these proceedings were parties to proceedings before the Mental Health Appeal Tribunal ("the MHR Tribunal"). To avoid the publication of the names of any person involved in those MHR Tribunal proceedings in contravention of *Mental Health Act*, s 162, this judgment uses pseudonyms for all parties and witnesses.

4 Mr Kennett SC and Ms Gatland appeared for Ms White, instructed by Legal Aid NSW. Mr Woods of counsel appeared for the Local Health Authority, instructed by Curwoods Legal Services Pty Ltd. Ms Sharp appeared for the NSW Public Guardian, instructed by Crown Solicitor for NSW.

Background

5 Even a compressed narrative of Ms White's more recent years shows the intense hardships of her life. Ms White has been diagnosed with alcohol related damage, borderline personality disorder, depression, anxiety and has previously been homeless for extended periods of time. She has a history of self-harm and suicidal behaviour. The origins at least in part of her present condition are a long history of chronic alcoholism, including the consumption of methylated spirits and many incidents of binge drinking, which have led her to multiple hospital admissions and times where she has placed herself at significant personal harm. Ms White's left leg has been amputated below the knee and she now mobilises with a wheelchair.

6 Ms White's general cognitive ability has been assessed as "within the borderline range of intellectual functioning". Ms White has had multiple mental health unit admissions at hospitals throughout the Blue Mountains and Sydney metropolitan areas since 2006. A police report from January 2012 states that police action had been required at Ms White's residence some 35 times over the 12 months before that date.

7 The recent procedural history relevant to Ms White may be shortly summarised. An order of the Guardianship Tribunal made on 12 November 2012 made in respect of her was extended on 11 March 2015. The order in its original form and as renewed appoints the Public Guardian as Ms White's guardian, declares itself to be a "limited guardianship order" and gives the

guardian "custody of Ms [Sarah White] to the extent necessary to carry out the functions referred to below". The relevant functions of the guardian order for present purposes relate to Ms White's accommodation. These functions are described in the order as follows:

> "5. The guardian has the following functions:
>
> (a) Accommodation
>
> To decide where Ms Sarah White may reside.
>
> The guardian may authorise others including members of the NSW Police Force and the Ambulance Service of NSW to:-
>
> (i) take Ms White to a place approved by the guardian;
>
> (ii) keep her at that place; and
>
> (iii) return her to that place should she leave it."

8 The order also gives the guardian functions in relation to Ms White's health care, medical and dental consent and the capacity to decide what other services are to be provided to her.

9 It is common ground in the proceedings: that Ms White was admitted to the facility which is accepted to be a facility declared under the *Mental Health Act* on or about 13 November 2013, and that she requested her own admission under *Mental Health Act*, s 5(1) at that time, even though she had been under guardianship since November 2012. Her signature and her then request for admission was in conformity with the Public Guardian's then plans for her accommodation.

10 Late in 2014 the Public Guardian sought to formalise Ms White's continued admission to the facility by the following steps, taken on 19 December. The objective of the staff of the Public Guardian in December 2014 was to replace her request form with one signed on behalf of the Public Guardian.

11 On the morning of 19 December 2014 Officer 1, a social worker employed by the Health Administration Corporation requested Officer 2 at the office of the Public Guardian that the Public Guardian provide a *Mental Health Act*, s 7(1) admission form in respect of Ms White in these terms, "Re our telephone discussion yesterday. Will [Sarah] require another voluntary form signed by the guardian instead of the existing form signed by [Sarah]?" She then provided her facsimile details so the form could be provided before the onset of the

summer holiday break. On the afternoon of the same day Officer 2 forwarded to Officer 1 an admission form in the following terms:

> "NSW DEPARTMENT OF HEATH
>
> MENTAL HEALTH ACT 2007
>
> Section 7(1)
>
> APPLICATION FOR VOLUNTARY ADMISSON TO A DECLARED MENTAL HEALTH FACILITY OF A PERSON SUBJECT TO A GUARDIANSHIP ORDER UNDER THE GUARDIANSHIP ACT 1987
>
> 1, Officer 3 (name of Guardian in full)
>
> being the appointed Guardian under section 14 of the Guardianship Act 1987 of
>
> [Sarah White] (name of intended patient in full)
>
> request that he/she be admitted to [the facility] (name of Declared Mental Health Facility)
>
> for treatment as a Voluntary Patient.
>
> A copy of the Guardianship Order, upon which this application relies, is attached.
>
> Guardian's signature
>
> Date: 19/12/14"

12 Under *Mental Health Act*, s 9 the MHR Tribunal has an obligation to review the situation of voluntary patients every 12 months. Such a review occurred here.

13 On 27 January 2015 the MHR Tribunal, after its review, ordered the discharge of Ms White from the facility under its s 9(3) power to so order on review. But the MHR Tribunal directed that Ms White's discharge be deferred until 10 February 2015. The reasons given for the determination of the Tribunal on 27 January were:

> "Patient is under guardianship and is no longer requiring care and treatment in hospital. And the evidence disclosed does not require a CTO [Community Treatment Order] if discharged. Patient has been requesting discharge for some time. The Panel determined on review that such was appropriate and in accordance with the *Mental Health Act* 2007"

14 The MHR Tribunal ordered the deferral until 10 February with the following reasons:

> "The discharge was deferred to assist in discharge planning and arrangements and to enable the OPG [Office of the Public Guardian] to be included in the process".

15 The treating psychiatrist, Dr A, through his registrar, Dr B had advanced evidence before the MHR Tribunal to the effect that they did not think that Ms White "currently has a mental illness that requires a mental health in-patient hospital admission". Dr B said "we are keeping [Sarah] against her will at the request of her state guardian in order to find her an appropriate accommodation, given her risks due to alcohol consumption and impulsive actions coupled with poor executive functioning and cognitive impairment". Dr B further expressed concerns that Ms White had gone absent after a recent Guardianship Tribunal hearing and was found intoxicated at Central Station and brought to St Vincent's emergency department with a blood alcohol level of .26. In these reasons the Guardianship Division of the New South Wales Civil and Administrative Tribunal is referred to as the "Guardianship Tribunal".

16 Since the late January decision of the MHR Tribunal Ms White's solicitors wrote on several occasions pressing for her release from the facility. The precise effect of the determination of the MHR Tribunal on 27 January was, in accordance with the MHR Tribunal's order, "that the patient [Ms White] be discharged from the mental health facility but the discharge was deferred until 10 February 2015".

17 Ms White submits that as a result of this order she was no longer being held as a voluntary patient at the facility on and from 10 February 2015.

18 But Ms White was not released on 10 February. On 24 February 2015 Dr C, the clinical director of the Local Health Authority described her current situation in the facilty to the solicitors for the plaintiff as follows:

> "Ms [White] is not a patient under the *Mental Health Act* although she is currently an admitted patient in a declared mental health facility".

19 Dr C also described Ms White's status in his 24 February letter in the following terms:

> "Ms White was discharged from her voluntary patient status under the *MHA* 2007 on the 11th February, as required by the MHRT. She is no longer subject to the *MHA* 2007".

20 Dr C explained the reasons for the delay in her discharge. He pointed out that Ms White's treating clinical team were proposing to the Public Guardian that the Public Guardian consent to Ms White being admitted to hospital as a

general health patient under the provisions of her guardianship order. He recorded that this plan has been agreed to by the Public Guardian in principle. The plan was that Ms White would be admitted as a general hospital patient to a nearby general hospital under guardianship. But this was subject to adequate preparations being made for her admission to the hospital. This was being proposed as an interim measure whilst a longer term community placement for Ms White was to be found.

21 Ms White has not been permitted to leave the facility despite the letters from her solicitors seeking her release.

22 The relevant events after Dr C's letter are best analysed in light of the parties' respective legal arguments.

The Mental Health Act and the Guardianship Act

23 The *Mental Health Act* provides the statutory framework for the care, treatment and control of persons in New South Wales who are mentally ill or mentally disordered. The Act regulates both the voluntary admission of persons (*Mental Health Act*, Chapter 2) and their involuntary admission and treatment (*Mental Health Act*, Chapter 3) in mental health facilities.

24 The *Mental Health Act*, Chapter 1 declares the Act's objects and provides definitions of voluntary and involuntary patients. *Mental Health Act*, s 3 defines the objects of the Act as follows:

> "3 Objects of Act
>
> The objects of this Act are:
>
> (a) to provide for the care, treatment and control of persons who are mentally ill or mentally disordered, and
>
> (b) to facilitate the care, treatment and control of those persons through community care facilities, and
>
> (c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
>
> (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care, and
>
> (e) to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care, treatment and control."

25 *Mental Health Act*, s 4 defines “involuntary patients”, the “medical superintendent”, “mental illness”, “person under guardianship” and “voluntary patient” in the following way:

> “involuntary patient” means:
>
> (a) a person who is ordered to be detained as an involuntary patient after a mental health inquiry or otherwise by the Tribunal, or
>
> (b) a forensic patient who is re-classified as an involuntary patient under section 53 of the *Mental Health (Forensic Provisions) Act 1990*, or
>
> (c) a correctional patient who is re-classified as an involuntary patient under section 65 of the *Mental Health (Forensic Provisions) Act 1990*.
>
> “medical superintendent”:
>
> (a) of a declared mental health facility, means the medical practitioner appointed, under section 111, as medical superintendent of the facility, or
>
> (b) of a private mental health facility, means the medical practitioner appointed, under section 124, as medical superintendent of the facility.
>
> “mental illness” means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:
>
> (a) delusions,
>
> (b) hallucinations,
>
> (c) serious disorder of thought form,
>
> (d) a severe disturbance of mood,
>
> (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).
>
> “person under guardianship” means a person under guardianship within the meaning of the *Guardianship Act 1987*.
>
> "voluntary patient" means:
>
> (a) a person who has been admitted to a mental health facility under Chapter 2, or
>
> (b) a person who has been re-classified as a voluntary patient under this Act.”

26 *Mental Health Act*, Chapter 2 “Voluntary Admission to Facilities” regulates admission to a mental health facility as a voluntary patient. Provisions for voluntary admission in Chapter 2 contrast the Chapter 3 provisions governing involuntary admission.

27 A person may be admitted into mental health facilities as a voluntary patient on his or her own request, whether or not mentally ill, as *Mental Health Act*, s 5 provides:

> "5 Admission on own request
>
> (1) A person may be admitted to a mental health facility as a voluntary patient.
>
> (2) An authorised medical officer may refuse to admit a person to a mental health facility as a voluntary patient if the officer is not satisfied that the person is likely to benefit from care or treatment as a voluntary patient.
>
> (3) A person may be admitted to a mental health facility as a voluntary patient whether or not the person is a mentally ill person or a mentally disordered person."

28 Specific provision is made for the voluntary admission of a person under guardianship in *Mental Health Act*, s 7, which provides as follows:

> "7 Voluntary admission of persons under guardianship
>
> (1) A person under guardianship may be admitted to a mental health facility as a voluntary patient if the guardian of the person makes a request to an authorised medical officer.
>
> (2) A person under guardianship must not be admitted as a voluntary patient if the person's guardian objects to the admission to the authorised medical officer.
>
> (3) An authorised medical officer must discharge a person under guardianship who has been admitted as a voluntary patient if the person's guardian requests that the person be discharged."

29 All voluntary patients may discharge themselves at any time in accordance with s 8, which provides as follows:

> "8 Discharge of voluntary patients
>
> (1) An authorised medical officer may discharge a voluntary patient at any time if the officer is of the opinion that the patient is not likely to benefit from further care or treatment as a voluntary patient.
>
> (2) A voluntary patient may discharge himself or herself from or leave a mental health facility at any time.
>
> (3) An authorised medical officer must give notice of the discharge of a voluntary patient who is a person under guardianship to the person's guardian."

30 Any voluntary patient who has been receiving care or treatment in a mental health facility for more than 12 months must be reviewed by the Mental Health Review Tribunal in accordance with s 9, which provides as follows:

> "9 Review of voluntary patients
>
> (1) The Tribunal must review, at least once every 12 months, the case of each voluntary patient who has been receiving care or treatment, or both, as a voluntary patient in a mental health facility for a continuous period of more than 12 months.

(2) In addition to any other matters it considers on a review, the Tribunal is to consider whether the patient consents to continue as a voluntary patient.

(3) The Tribunal may on a review order the discharge of the patient from the mental health facility.

(4) The Tribunal may defer the operation of an order for the discharge of a patient for a period of up to 14 days, if the Tribunal thinks it is in the best interests of the patient to do so.

(5) The medical superintendent of a mental health facility must notify the Tribunal of the name of any voluntary patient whose case the Tribunal is required to review."

31 There is some cross-over between voluntary admission, under *Mental Health Act*, Chapter 2 and involuntary detention, under Chapter 3. Persons voluntarily admitted may be detained under Chapter 3, upon the decision of an authorised medical officer, as provided for in s 10:

"10 Detention of voluntary patients in mental health facilities

(1) An authorised medical officer may cause a voluntary patient to be detained in a mental health facility under Part 2 of Chapter 3 if the officer considers the person to be a mentally ill person or a mentally disordered person.

(2) Any such patient is taken to have been detained in the facility under section 19 when the authorised medical officer takes action to detain the patient."

32 Decisions made under Chapter 2 by an authorised medical officer are reviewable by the medical superintendent: *Mental Health Act*, s 11.

33 *Mental Health Act,* Chapter 3 provides for the involuntary admission and treatment of persons in and outside facilities. Chapter 3, Part 1 – Requirements for Voluntary Admission, Detention and Treatment sets out general restrictions on the detention of persons in mental health facilities and the criteria for involuntary admission, as follows:

"12 General restrictions on detention of persons

(1) A patient or other person must not be involuntarily admitted to, or detained in or continue to be detained in, a mental health facility unless an authorised medical officer is of the opinion that:

(a) the person is a mentally ill person or a mentally disordered person, and

(b) no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.

(2) If an authorised medical officer is not of that opinion about a patient or other person at a mental health facility, the officer must refuse to detain, and must not continue to detain, the person.

(3) An authorised medical officer may, immediately on discharging a patient or person who has been detained in a mental health facility, admit that person as a voluntary patient.

13 Criteria for involuntary admission etc as mentally ill person or mentally disordered person

A person is a mentally ill person or a mentally disordered person for the purpose of:

(a) the involuntary admission of the person to a mental health facility or the detention of the person in a facility under this Act, or

(b) determining whether the person should be subject to a community treatment order or be detained or continue to be detained involuntarily in a mental health facility,

if, and only if, the person satisfies the relevant criteria set out in this Part.

14 Mentally ill persons

(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

(a) for the person's own protection from serious harm, or

(b) for the protection of others from serious harm.

(2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

15 Mentally disordered persons

A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

(a) for the person's own protection from serious physical harm, or

(b) for the protection of others from serious physical harm."

34 Chapter 3, Part 2 governs aspects of the involuntary detention and treatment of persons in mental health facilities. Section 18 describes the various circumstances in which a person may be detained in a declared mental health facility:

"18 When a person may be detained in mental health facility

(1) A person may be detained in a declared mental health facility in the following circumstances:

(a) on a mental health certificate given by a medical practitioner or accredited person (see section 19),

(b) after being brought to the facility by an ambulance officer (see section 20),

(c) after being apprehended by a police officer (see section 22),

(d) after an order for an examination and an examination or observation by a medical practitioner or accredited person (see section 23),

(e) on the order of a Magistrate or bail officer (see section 24),

(f) after a transfer from another health facility (see section 25),

(g) on a written request made to the authorised medical officer by a primary carer, relative or friend of the person (see section 26).

(2) A person may be detained, under a provision of this Part, in a health facility that is not a declared mental health facility if it is necessary to do so to provide medical treatment or care to the person for a condition or illness other than a mental illness or other mental condition.

(3) In this Act, a reference to taking to and detaining in a mental health facility includes, in relation to a person who is at a mental health facility, but not detained in the mental health facility in accordance with this Act, the detaining of the person in the mental health facility.

Note. A person taken to and detained in a mental health facility must be provided with certain information, including a statement of the person's rights (see section 74)."

35 Chapter 5 – Administration provides for the establishment of declared mental health facilities in s 109 as follows:

"109 Establishment of declared mental health facilities

(1) The Director-General, by order published in the Gazette:

(a) may declare any premises to which this section applies and that are specified or described in the order to be a declared mental health facility, and

(b) may, in the same or another order so published, name the premises so specified or described, and

(c) may, in the same or another order so published, limit the provisions of this Act or the purposes under this Act for which the facility is a declared mental health facility.

(2) Without limiting subsection (1), an order may do any of the following:

(a) designate a declared mental health facility as a facility of a specified class,

(b) designate the purposes for which a mental health facility of a specified class may be used,

(c) impose restrictions on the use of a mental health facility for specified purposes,

(d) impose any other conditions in relation to the operation of the facility as a mental health facility.

(3) This section applies to the following premises:

(a) premises that belong to or are under the control of the Crown or a person acting on behalf of the Crown,

(b) premises that are under the control of a public health organisation within the meaning of the *Health Services Act 1997*,

(c) premises that the owner or person who has control of the premises has agreed, by an instrument in writing given to the Director-General, to being premises to which this section applies."

36 Chapter 6 provides for the constitution of the MHR Tribunal and for aspects of its procedures.

37 Finally, the jurisdiction of the Supreme Court in relation to determinations of the MHR Tribunal and to order the discharge of persons from mental health facilities are provided for in Chapter 7. The Court's power on appeal from the MHR Tribunal is set out in ss 163 and 164.

38 The Court's jurisdiction to order the discharge of transfer of detained persons is provided for in s 166 as follows:

"166 Jurisdiction of Court to order discharge or transfer of detained person

(1) The Court must order the medical superintendent of a mental health facility to bring a person before the Court for examination at a time specified in the order if the Court receives information on oath or has reason or cause to suspect:

(a) that the person is not a mentally ill person or a mentally disordered person and is detained in the facility, or

(b) that the person is a mentally ill person or a mentally disordered person detained in the facility and that other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person, or

(c) that the person is a forensic patient or correctional patient who is wrongly detained in the facility.

(2) The Court must order that a person (other than a forensic patient or correctional patient) examined under this section be immediately discharged from the mental health facility in which the person is detained if, on examination, the medical superintendent is unable to prove on the balance of probabilities:

(a) that the person is a mentally ill person or a mentally disordered person, or

(b) if the person is a mentally ill person or a mentally disordered person, that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.

(3) The Court must order that a forensic patient or correctional patient examined under this section be immediately transferred to a correctional centre (within the meaning of the *Crimes (Administration of Sentences) Act 1999*) if, on examination under this section, the medical superintendent is unable to prove that the patient is not wrongly detained in the mental health facility."

39 The issues in contest also require analysis of the *Guardianship Act* 1987 and its interaction with the *Mental Health Act*.

40 *Guardianship Act* sets up a legislative regime for guardianship of persons who have disabilities. The regime sufficiently overlaps with the *parens patriae* jurisdiction of the Supreme Court that the *Guardianship Act* declares that nothing in *Guardianship Act*, Part 3 (the power to make guardianship orders) "limits the jurisdiction of the Supreme Court with respect to the guardianship of persons": *Guardianship Act*, s 8.

41 *Guardianship Act*, s 3(1) defines:

> "*guardian* means a person who is, whether under this Act or any other Act or law, a guardian of the person of some other person (other than a child who is under the age of 16 years), and includes an enduring guardian.
>
> *guardianship order* means an order referred to in section 14.
>
> *person under guardianship* means a person who has a guardian within the meaning of this Act."

42 It is not in contest that Ms White is a "person under guardianship" within s 3(1).

43 A starting point in the construction of the *Guardianship Act* is the general principles defining the duty of all those exercising functions under the Act with respect to persons who have disabilities: *Guardianship Act*, s 4 (and relevantly particularly with respect to the freedom of action of persons under guardianship):

> "4 General principles
>
> It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:
>
> (a) the welfare and interests of such persons should be given paramount consideration,
>
> (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
>
> (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
>
> (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
>
> (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
>
> (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation,

(h) the community should be encouraged to apply and promote these principles."

44 *Guardianship Act*, Part 3 deals with the application for, making, content of and review of guardianship orders.

45 Under *Guardianship Act*, Part 3, Division 2 applications for guardianship orders are made to the Guardianship Tribunal by the person concerned, the Public Guardian or any other person that in the opinion of the Guardianship Tribunal "has a genuine concern for the welfare of the person": *Guardianship Act*, s 9. The legislation places emphasis on an individual's right of access to the benefits of guardianship orders. Law enforcement authorities are authorised to issue search warrants in respect of "a person in need of a guardian" to the following extent, as *Guardianship Act*, s 12(1) and (2) provide:

"12 Power of search and removal of persons

(1) An officer or a member of the police force may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* for the issue of a search warrant if the officer or member of the police force has reasonable grounds for believing that there is in any premises a person who appears to be a person in need of a guardian and who:

(a) is being unlawfully detained against his or her will, or

(b) is likely to suffer serious damage to his or her physical, emotional or mental health or well-being unless immediate action is taken.

(2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an officer or member of the police force named in the warrant:

(a) to enter any premises specified in the warrant,

(b) to search the premises for the person, and

(c) to remove the person from the premises."

46 *Guardianship Act*, Part 3, Division 3 provides for the making, content and enforcement of guardianship orders. Subject to certain restrictions in s 15, the Guardianship Tribunal may make guardianship orders on the basis of the considerations identified in s 14, as follows:

"14 Tribunal may make guardianship orders

(1) If, after conducting a hearing into any application made to it for a guardianship order in respect of a person, the Tribunal is satisfied that the person is a person in need of a guardian, it may make a guardianship order in respect of the person.

(2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:

(a) the views (if any) of:

(i) the person, and

(ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and

(iii) the person, if any, who has care of the person,

(b) the importance of preserving the person's existing family relationships,

(c) the importance of preserving the person's particular cultural and linguistic environments, and

(d) the practicability of services being provided to the person without the need for the making of such an order."

47 Guardianship orders may be either plenary or limited, as described in s 16(1) and (2):

16 Guardianship orders

(1) A guardianship order:

(a) shall appoint a person who is of or above the age of 18 years as the guardian of the person of the person under guardianship,

(b) shall specify whether the order is continuing or temporary,

(c) shall specify whether the order is plenary or limited, and

(d) may be made subject to such conditions as the Tribunal considers appropriate to specify in the order.

(2) A limited guardianship order shall specify:

(a) the extent (if any) to which the guardian shall have custody of the person under guardianship, and

(b) which of the functions of a guardian the guardian shall have in respect of the person under guardianship."

48 A person appointed as guardian of a person under guardianship should be a person suitable for such a close supervisory relationship over another, as s 17 provides:

"17 Guardians

(1) A person shall not be appointed as the guardian of a person under guardianship unless the Tribunal is satisfied that:

(a) the personality of the proposed guardian is generally compatible with that of the person under guardianship,

(b) there is no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and those of the person under guardianship, and

(c) the proposed guardian is both willing and able to exercise the functions conferred or imposed by the proposed guardianship order.

(2) Subsection (1) does not apply to the appointment of the Public Guardian as the guardian of a person under guardianship.

(3) If, at the expiration of the period for which a temporary guardianship order has effect, the Tribunal is satisfied:

(a) that it is appropriate that a further guardianship order should be made with respect to the person under guardianship, and

(b) that there is no other person who it is satisfied is appropriate to be the person's guardian,

the Tribunal may, in accordance with this Division, make a continuing guardianship order appointing the Public Guardian as the guardian of the person.

(4) The Public Guardian shall be appointed as the guardian of a person the subject of a temporary guardianship order."

49 Guardianship orders have effect, in the case of an initial order for a maximum period of three years, and where that order is renewed, for a maximum period of five years, depending on the prospects of the person under guardianship ultimately becoming capable of managing his or her person: *Guardianship Act*, s 18.

50 Not all persons in need of guardianship can find a guardian willing to act. The Public Guardian, constituted under *Guardianship Act,* s 77, performs a variety of functions under the legislation to act as guardian when no other person is available. The Public Guardian acts in that capacity in the present case. To facilitate this function all Guardianship Tribunal orders appointing a person other than the Public Guardian as a guardian are forwarded to the Public Guardian: *Guardianship Act*, s 19.

51 A series of key provisions in the *Guardianship Act* in ss 21, 21A and 21C govern a guardian's control over the person and the decision making of the person under guardianship.

52 *Guardianship Act*, s 21 provides for the guardian to have custody of the person under guardianship and may exercise all the functions of the guardian of that person at law in equity as follows:

> "21 Relationship of guardians to persons under guardianship
>
> (1) Subject to any conditions specified in the order, the guardian of a person the subject of a plenary guardianship order:
>
> (a) has custody of the person to the exclusion of any other person, and
>
> (b) has all the functions of a guardian of that person that a guardian has at law or in equity.
>
> (2) Subject to any conditions specified in the order, the guardian of a person the subject of a limited guardianship order:
>
> (a) has custody of the person, to the exclusion of any other person, to such extent (if any) as the order provides, and
>
> (b) has such of the functions of a guardian of that person's person, to the exclusion of any other person, as the order provides.
>
> (2A) Subject to any conditions specified in the order, the guardian of a person the subject of a guardianship order (whether plenary or limited) has the power, to the exclusion of any other person, to make the decisions, take the actions and give the consents (in relation to the functions specified in the order) that could be made, taken or given by the person under guardianship if he or she had the requisite legal capacity.
>
> (3) Section 49 of the *Minors (Property and Contracts) Act 1970* does not apply to a person the subject of a plenary guardianship order."

53 *Guardianship Act*, s 21A gives powers to a guardian to enforce guardianship orders against the person under guardianship as follows:

> "21A Power to enforce guardianship orders
>
> (1) Without limiting section 16, a guardianship order may specify that:
>
> (a) the person appointed as guardian, or
>
> (b) another specified person or a person of a specified class of persons, or
>
> (c) a person authorised by the guardian (the authorised person),
>
> is empowered to take such measures or actions as are specified in the order so as to ensure that the person under guardianship complies with any decision of the guardian in the exercise of the guardian's functions.
>
> (2) If a person referred to in subsection (1) (a), (b) or (c) takes any measure or action specified in the order in the reasonable belief that:
>
> (a) he or she is empowered by the guardianship order to take the measure or action, and
>
> (b) the measure or action is in the best interest of the person under guardianship, and

(c) it is necessary or desirable to take that measure or action in the circumstances,

the person concerned is not liable to any action, liability, claim or demand arising out of the taking of that measure or action."

54 The *Guardianship Act* confers ancillary powers on a guardian to give effect to the guardian's functions in relation to the person under guardianship: *Guardianship Act*, s 21B.

55 The guardian's decisions have effect in relation to the decisions of the person under guardianship under the command of s 21C, which provides as follows:

"21C Acts of guardian take effect as acts of person under guardianship

A decision made, an action taken and a consent given by a guardian under a guardianship order have effect as if:

(a) the decision had been made, the action taken and the consent given by the person under guardianship, and

(b) that person had the legal capacity to do so (if the person would have had that legal capacity but for his or her disability)"

56 *Guardianship Act*, Part 3, Division 4 deals with the assessment and review of guardianship orders at the request of all persons involved in the guardianship relationship and of other persons with genuine concern for the welfare of the person under guardianship. On review of a guardianship order the Guardianship Tribunal has power to vary, suspend, revoke or confirm the order: s 25C.

57 Finally the *Guardianship Act*, s 3C regulates aspects of the relationship between itself and the *Mental Health Act* including ensuring that becoming a "patient" within the meaning of the *Mental Health Act* does not operate to suspend or revoke the guardianship. Section 3C provides as follows:

"3C Relationship with Mental Health Act 2007

(1) A guardianship order may be made in respect of a patient within the meaning of the *Mental Health Act 2007*.

(2) The fact that a person under guardianship becomes a patient within the meaning of the *Mental Health Act 2007* does not operate to suspend or revoke the guardianship.

(3) However:

(a) a guardianship order made, or

(b) an instrument appointing an enduring guardian,

> in respect of a person who is, or becomes, a patient within the meaning of the *Mental Health Act 2007* is effective only to the extent that the terms of the order or instrument are consistent with any determination or order made under the *Mental Health Act 2007* in respect of the patient."

58 The provision also limits the effectiveness of guardianship orders by measuring them by their consistency with orders or determinations under the *Mental Health Act*: s 3C(3).

Ms White's Submissions

59 Ms White contends that by force of *Mental Health Act*, s 12 her continued detention is unlawful and she is entitled to *habeas corpus*. That remedy where available is not discretionary: *Ruddick v Vadarlis* [2001] 110 FCR 491, 514 [91] per Black CJ. Ms White submits the remedy is available because she is currently being detained in a locked ward, despite her request and despite the order of the Tribunal of 27 January, which permitted her release from 11 February.

60 Ms White submits that circumstances in which a person can continue to be detained in a mental health facility are limited by *Mental Health Act*, s 12(1) and (2): that an authorised medical officer is of the opinion that the person is mentally ill or mentally disordered. Ms White points out and the defendants have not sought to justify otherwise, that a medical officer has not provided such an opinion. Indeed it is common ground that the evidence is to the contrary. Ms White submits that s 12 contains a prohibition upon detention contrary to its terms.

61 In my view Ms White's construction of s 12 is correct. It does contain a prohibition upon the involuntary admission or detention contrary to s 12: s 12(1). Moreover, an authorised medical officer is commanded to refuse to detain a person and must not continue to detain a person if the officer is of not of the opinion the person is mentally ill or mentally disordered: s 12(2).

The Defendants' Submissions and Consideration

62 The defendants' principal contention is that the Public Guardian, which has the powers available under the guardianship order in this case, has the statutory authority to make the decision of Ms White for her to be admitted as a voluntary patient to the facility under *Mental Health Act*, Chapter 2, and

specifically s 7(1). The defendants submit that because Ms White has been admitted to the facility under s 7(1) that she is not an involuntary patient under *Mental Health Act*, Chapter 3, as Ms White contends.

63 The defendants' contentions raise two main issues for consideration. The first is whether the Public Guardian has the authority under the *Guardianship Act* and the *Mental Health Act* to make a decision to admit Ms White to the facility. The second question is whether that power has been validly exercised in this case on the evidence. These reasons deal with each of these questions in turn.

64 The Public Guardian has the statutory authority to make a decision for Ms White to admit her to the facility as a voluntary patient under *Mental Health Act,* Chapter 2. This conclusion flows from analysis of both the *Mental Health Act* and the *Guardianship Act*.

65 *Mental Health Act*, s 5 opens up a regime for admission to mental health facilities separate from Chapter 3 Involuntary Admission, by permitting admission to such a facility "as a voluntary patient whether or not the person is a mentally ill person or a mentally disordered person": s 5(3). Section 5(3) clearly contemplates that persons who are not mentally ill or mentally disordered may be admitted to a facility. Section 5(3) is an answer to any contention based on section 12 that mental health facilities declared under Chapter 5, Part 2 cannot be used for the admission of a "patient or other person" unless they are mentally ill or mentally disordered. The regime of Chapter 2 clearly exists for non-mentally ill and non-mentally disordered persons to continue in mental health facilities.

66 But only "a voluntary patient" may be admitted under Chapter 2. The *Mental Health Act* contains only a circular definition of "voluntary patient", as a person "admitted….under Chapter 2", or a person "who has been reclassified as a voluntary patient under this Act". The contrasting language of *Mental Health Act*, Chapters 2 and 3 reinforces the concept of voluntariness in ordinary usage, as a decision made with free will and without coercion. The Macquarie Dictionary defines "voluntary" in its primary meaning as (1)"done, made, brought about, undertaken etc…of one's own accord, or by free choice [for example]: a *voluntary contribution*" and (2) acting of one's own will or choice for

example]: a *voluntary substitute*". Chapter 2, s 8(2) reinforces this, declaring the general liberty for a "voluntary patient" that such a patient may "discharge himself or herself from or leave a mental health facility at any time". In contrast Chapter 3 is couched throughout in language denying free choice or the patient acting of his or her own accord: "involuntarily admitted", "detained in…a mental health facility", or "detention of…the person" (ss 12 and 13). In the face of this statutory language it is not possible to maintain any contention that no-one other than mentally ill or mentally disordered persons can be admitted to a mental health facility.

67 But can the Public Guardian decide under the *Guardianship Act,* in place of the exercise of free will of a person under guardianship, to admit the person to a mental health facility under Chapter 2? The defendants contend this is the combined effect of the *Mental Health Act* and the *Guardianship Act*. In my view the defendants' contention as to this is correct. *Mental Health Act*, s 7 provides a comprehensive regime for the admission to and discharge from mental health facilities of persons under guardianship. The command of s 7(1) is that it is the guardian who makes the "request to an authorised medical officer" to be "admitted to a mental health facility as a voluntary patient". It is inherent in the structure of s 7(1) that although the guardian makes the "request", (and is thus at least assumed to be responsible for the relevant decision making to initiate the request) nevertheless, once carried through, the request will result in the admission of the person under guardianship "as a voluntary patient". Thus the legislation permits what would otherwise be a contradiction: that the admission of a person may yet be "voluntary" within Chapter 2, even though it did not follow from that person's free choice or own will but by the choice or will of the guardian.

68 Section 7 also protects the guardian's authority over the person under guardianship by commanding the person under guardianship and the persons in charge of the mental health facility not to admit the person "as a voluntary patient" over the guardian's objection "to the authorised medical officers". This provision is significant for an understanding of how s 7 works. The legislation contemplates a situation that if the person under guardianship is making a s 7(1) request for admission to the authorised medical officer of a mental health

facility, the guardian may veto the request by communicating with the authorised medical officer.

69 The combined effect of s 7(1) and (2) is to allow the guardian to request the admission of a person under guardianship as a “voluntary” patient and to prevent a person under guardianship from being admitted as a voluntary patient against the guardian’s wishes.

70 Similarly s 7(3) commands an authorised medical officer to accept a guardian’s request for a voluntary patient discharge of a person under guardianship. The guardian has the power to request admission and end a period of admission as a voluntary patient of a person under guardianship.

71 But s 8(3) is at least consistent with the possibility that a person under guardianship may discharge himself or herself from a mental health facility without the prior approval of the guardian, provided notice of that discharge is given to the guardian. If that situation contradicts the guardian’s decision, then the question will arise about the guardian’s right to request admission again as a voluntary patient over the opposition of the person under guardianship.

72 The *Mental Health Act* is silent as the specific conflict when the person under guardianship wishes not to be admitted to the relevant mental health facility contrary to the wishes of the guardian. Section 7 does not expressly override the wishes of the person under guardianship in such circumstances, which are the present circumstances. The section is more concerned with the right of the guardian to intervene and deal with the mental health facility for the person under guardianship as a voluntary patient, rather than with overriding the wishes of the person.

73 It is not surprising that the *Mental Health Act* is silent on this question, because the issue is comprehensively dealt with under the regime of *Guardianship Act*, ss 21-21C. In my view the combined effect of these provisions allows the guardian, in this case the Public Guardian, to override the wishes of the person under guardianship, in this case Ms White. The guardian of a person the subject of a limited guardianship order, such as Ms White, “has the custody of the person to the exclusion of any other person, to such extent as the order provides”: *Guardianship Act*, s 21(2)(a). And the guardian has such of the

function of that person's person, to the exclusion of any other person, as the order provides: s 21(2)(b). A decision by a guardian to admit a person such as Ms White to a mental health facility under *Mental Health Act*, s 7(1) even against their will, is within the s 21(2) authority over their person, where as here, the guardian has control over accommodation.

74 *Guardianship Act*, s 21C effects the substitution of the guardian's will and decision making within the scope of the guardianship order for that of the person under guardianship. Thus even if the person under guardianship objects, "a decision made and action taken…by a guardian" has effect as if (a) the decision had been made…and action had been taken…by the person under guardianship, and as if that person had legal capacity". As the decision/action of the guardian on any given subject is taken to be the decision/action of the person under guardianship, the will and decision of the latter are wholly displaced by the guardian's decision/action. That gives a statutory warrant to overcome the conflicting will and the objections of the person under guardianship.

75 The *Guardianship Act* leaves little doubt that this displacement of the wishes of the person under guardianship can occur. The conflicting decision/action of the guardian can be enforced by "such measures as are specified in the [guardianship] order" to ensure "that the person under guardianship complies with the decision of the guardian" in the exercise of the guardian's functions: s 21A(1). And s 21B provides further practical support to enforcement of the guardian's decisions/actions, allowing a guardian, such as the Public Guardian here to sign documents such as a *Mental Health Act*, s 7(1) request to an authorised medical officer to be admitted to a mental health facility.

76 Draconian as this *Guardianship Act* regime may seem, for a person under guardianship it is ameliorated to a degree by the requirement for guardians to exercise their powers in accordance with the objects of the *Guardianship Act* set out in s 4, all of which involve to the extent possible giving effect to the wishes of the person under guardianship.

77 Moreover, the *Guardianship Act* grants wide powers of assessment and review to guardianship order under Part 3, Division 4, which could result in variation or

revocation of the order if the Tribunal determined that the order was not operating in the best interests of the person under guardianship in accordance with the objects of the Act.

78 To pause in the reasoning for a moment, there can be no doubting the broad underlying principle of personal liberty which the writ of *habeas corpus* protects. It extends beyond imprisonment to cover other confinements and restraints on personal liberty not sanctioned by positive law; it is the duty of the Court to inquire into the legality of the restraints being imposed on the liberty of an applicant for the writ; there is always an initial presumption in favour of liberty; and because the liberty of the subject is at stake, strong, clear and cogent evidence and a high degree of probability is required: see *Antunovic v Dawson* (2010) 30 VR 355; [2010] VSC 377, where all the authorities underlying these principles have been comprehensively discussed.

79 But the next question is whether the Public Guardian has sought to have Ms White voluntarily admitted under *Mental Health Act*, s 7(1). Not surprisingly, the additional relevant events commence close to the expiry of the stay of the MHR Tribunal on 10 February. The short history of relevant events is the following.

80 On 9 February 2015, the day before the MHR Tribunal's order expired, Dr C, Director, Drug and Alcohol Mental Health Region telephoned Officer 2, the principal guardian within the Public Guardian, who has been the officer responsible for making guardianship decisions about Ms White since 19 November 2013. Officer 2 makes decisions about Ms White to give effect to the guardianship orders subsisting in relation to her in the exercise of the Public Guardian's functions for her.

81 In that telephone call Dr C expressed concern at the prospect of Ms White being discharged without suitable accommodation/support placement and proposed that she remain a patient at the facility in lieu of a potential rehabilitation placement at the nearby designated general hospital. Perhaps the best evidence of what Dr C said to Officer 2 is contained in Officer 2's file note at 2.57pm on 9 February which appears under the subject heading "Consent" for [Ms White] to remain in [the facility] until potential ..hospital admission:

> "[Dr C] requested consent for [Ms White] to remain at [the facility] under the Public Guardian's coercive accommodation function.
>
> [Dr C] advised that [the Local Health Authority] has indicated they are willing for [Ms White] remaining under the PG's accommodation function.
>
> Consent was given, with written confirmation to follow.
>
> [Dr C] said that the next task will be brokering [Ms White] entering [the general hospital] for rehabilitation.
>
> He advised that [the general hospital] have previously been resistant to this. Debate as to whether she's a core constituency. [Dr C] said that high level advocacy will occur and indicated that he believed there was a good chance of her being accepted for admission.
>
> A proposal will be forwarded to the PG when this occurs."

82 Officer 2 says the same day "I decided to consent to Ms White remaining an in-patient at [the facility] under the Public Guardian's coercive accommodation function, pending potential rehabilitation admission to [the general hospital]". The same day he wrote to Ms White notifying her of this decision.

83 His letter to Ms White on 9 February referred to the November 2012 guardianship order and informed Ms White that "the Public Guardian made a decision on 9/02/2015 under the Accommodation and authorised others function". In the same letter Officer 2 identified to Ms White what this was and the reasons for the decision in the following terms:

> "**The decision**
>
> Accommodation and authorise others – For [Ms White] to remain an impatient at [the facility], pending potential rehabilitation admission to [the general hospital].
>
> **Why we made this decision**
>
> We received a proposal from Dr C, Director, Drug and Alcohol
>
> We made this decision because [Ms White] is due for discharge on the 10/2/2015 and no suitable discharge options have been identified. [Ms White] is deemed to be at serious risk should she be discharged without a suitable accommodation placement and support arrangements."

84 The decision making process seems to have been completed by communication which Officer 2 made with Dr A, a principal doctor at the facility in the following terms:

> "Dear Dr A,
>
> As you know the Public Guardian has decision making authority for [Ms White] in relation to her accommodation. This includes the authority to over ride Ms White's objections to placement.

> As per our discussion this morning. The Public Guardian consents to [Ms White] remaining at [the facility] pending a potential rehabilitation placement at [the general hospital].
>
> I will forward a letter to this effect tomorrow.
>
> Regards,
>
> Officer 2"

85 This correspondence raises two questions: (1) was it a "request" within *Mental Health Act*, s 7(1); and (2) was it made to an "authorised medical officer". It is an agreed fact that Dr A is "an authorised medical officer" within the meaning of *Mental Health Act*, s 4(1). He is so authorised in the following way. Dr D is the clinical director and medical superintendent of the facility within *Mental Health Act*, s 4(1). There is no issue that he has been so nominated under s 111 and that he in turn has nominated Dr A as "authorised medical officer".

86 The Public Guardian relies upon the events of both 19 December 2014 and 9 February 2015 as constituting a "request" to an authorised medical officer under *Mental Health Act*, s 7(1). In my view the events of neither of these days qualifies as a s 7(1) request to an authorised medical officer. In my view s 7(1) operates under clearly assumed circumstances and does not authorise the mere production of paperwork that does not accord with what is in substance a "request" such that "a person…may be admitted" to a facility.

87 The events of 19 December do not answer the description of a "request" for admission required by s 7(1). On 19 December Ms White was already a voluntary in-patient in the facility. The ordinary and applicable meaning of the word "admit" is, according to the Macquarie Dictionary "(1) to allow to enter; grant or afford entrance to [for example] *to admit a student into college* (2) to give right or means of entrance to". It makes no sense to speak of "admitting" someone to a facility or a place in which they are not only already physically located but their presence there is already legally authorised. It is implicit in s 7 that the "request" must be for the relevant admission. The provision cannot work in my view if the person is already "admitted".

88 This is not just a matter of form. The submission of a s 7(1) request requires the authorised medical officer to whom it is addressed to make a decision on the basis that the person is not already in the facility and that the medical

officer may, upon that assumption, decide to "refuse to admit a person to a mental health facility as a voluntary patient" on the basis that the medical officer "is not satisfied that the person is likely to benefit from care or treatment as a voluntary patient". The legislation places in the hands of the medical officer a capacity to refuse requests from persons outside the facility who are seeking admission. The defendants' contention in this case is that somehow s 7 requests can be made when the person is in the facility.

89 Moreover the 19 December form became stale by 10 February 2015. A s 7(1) "request" must, in my view, be a request current at the time that the person is sought to be admitted to the facility. Between 19 December and the present time the MHR Tribunal has discharged Ms White. In my view the 19 December communication failed to answer the description of a "request" (if it had otherwise already answered that description) once the MHR Tribunal had ordered Ms White's discharge. Once that had occurred a new request, related to a current admission, was required.

90 The communications of 9 February 2015 also do not qualify as a "request". What happened on 9 February 2015 is the very reverse of what *Mental Health Act*, ss 5 and 7 authorise. Any relevant request on 9 February actually came from Dr C. Even if it be assumed that Dr C was an "authorised medical officer" for the purposes of considering a request from the Public Guardian in my view Dr C did not receive such a request but instead asked the Public Guardian to consent to his request for Ms White, to an extent for convenience, to stay in the facility. In some circumstances that reversal of role may be justified, if a proper request under s 5 could be implied. But the problem with the communication on 9 February 2015 is that it was not capable of leading to Ms White's admission under s 5, because it did not put the relevant authorised medical officer in a position to decide to admit or refuse to admit Ms White after being satisfied that the admission would be likely to benefit her from care or treatment as a voluntary patient. It is unlikely, in my view, that such a decision could have been made until the earliest on 10 February when the Public Guardian was genuinely seeking readmission. The language of s 7 is wholly absent from the request and Dr C is seen for good reasons to be trying to solve a problem. But

he was never put in the position where he could make a genuine decision to admit on the criteria set out in s 5(2) because of the way that the matter arose.

91 Ms White submitted that the Public Guardian had exercised the s 7 power for purposes extraneous to those which it had been conferred, relying upon *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37, 68-69, 77 and 84. But it is sufficient in my view to analyse this matter in terms of whether there has been any compliance with the provisions of *Mental Health Act*, Chapter 2. In my view the current situation is that Ms White is being detained in the facility without legal authority. As earlier indicated, the way s 12 operates is that unless a person is brought within Chapter 2, if they are not mentally ill or mentally disordered then the person cannot be "involuntarily…detained in or continue to be detained in" such a facility. In my view, in the absence of a request from the Public Guardian conforming with *Mental Health Act*, Chapter 2 Ms White is entitled to be discharged from the facility in accordance with the orders of the MHR Tribunal.

92 Various arguments were put as to the effect of s 8(2) and (3) of the *Mental Health Act*. It is not necessary to decide them, because there is already in place an order from the MHR Tribunal authorising her discharge. The authority for her discharge already exists. It need not be sought in s 8. Moreover, even if the Public Guardian attempted to make a decision on behalf of Ms White under s 8(2) to reverse her decision to discharge herself, it is doubtful that the Public Guardian's action under the guardianship order for Ms White's accommodation would be effective, because it would be inconsistent with the determination of the MHR Tribunal made in respect of Ms White on 27 January. Conduct of guardians inconsistent with determinations under the *Mental Health Act* is constrained by *Guardianship Act*, s 3C(3).

93 Some other matters should be mentioned in closing. There is no occasion to consider the Court's jurisdiction under *Mental Health Act*, s 166. The legal issues are made sufficiently clear under the *habeas corpus* application. One major purpose of s 166 is to allow the Court to determine for itself whether a person is not mentally ill or mentally disordered. It is not an issue in this case. Ms White is neither.

94 The defendants also argued that s 12 only applies to "involuntary patients" who are defined in s 4 as persons who are ordered to be detained in certain specific circumstances, such as for example persons receiving treatment under the *Mental Health (Forensic Provisions) Act* 1990: see *Mental Health Act*, s 84. But there are two answers to this argument. Firstly, the prohibition in s 12 is a general one applying to persons being "involuntarily admitted to or detained in" mental health facilities. It does not only operate in circumstances where there is someone called an "involuntary patient". As Ms White submits, the prohibition in s 12 is upon the use of facilities rather than limited to certain kinds of "involuntary patient". The other answer to this argument is that even if Ms White does not rely upon s 12, she still has the benefit of the MHR Tribunal order which requires her discharge, which is presently being prevented.

Conclusion

95 In the result therefore the Court has concluded that Ms White should be released from the facility. Whilst on the evidence before the Court, it has grave misgivings about the wisdom of releasing her without some plan for her in the immediate future, she is in my view entitled to be released now. If the parties wish to consult about such a plan for approximately 12 hours or so the Court will entertain an application for a stay for a very short period to allow that to occur.

96 *Upon the delivery of judgment the Court heard short argument in relation to a temporary stay of the Court's orders. Upon being told by the legal representatives of the plaintiff and the first defendant that satisfactory temporary arrangements to the plaintiff's accommodation had been made should she be released, after hearing the second defendant's arguments to the contrary, the Court declined to grant a stay.*

97 Therefore the orders of the Court will be:

(1) The first defendant to pay 50% of the plaintiff's costs of the proceedings on the ordinary basis.

(2) The second defendant to pay 50% of the plaintiff's costs of the proceedings on the ordinary basis.

(3) The Court notes it will provide to the parties the text of the Court's reasons for decision correcting errors under the slip rule and providing

suitable pseudonyms to provide anonymity for the parties to the proceedings to enable its publication.

(4) The Court further notes that upon the parties' response, the Court will publish the judgment in substantially the draft form provided.

****

Amendments

29 April 2015 - [83] amended date from 9/4/2015 to 9/2/2015.

15 March 2018 - Coversheet - s 3C reference moved to Guardianship Act