Supreme Court

New South Wales

Case Name:	P v NSW Trustee and Guardian
Medium Neutral Citation:	[2015] NSWSC 579
Hearing Date(s):	26 March 2015
Date of Orders:	18 May 2015
Decision Date:	18 May 2015
Jurisdiction:	Equity Division - Protective List
Before:	Lindsay J
Decision:	(1) ORDER that any requirement, under the Uniform Civil Procedure Rules 2005 NSW or otherwise, for the plaintiff to have conducted these proceedings by a tutor be dispensed with. (2) ORDER that the orders made by the Guardianship Division of the NSW Civil and Administrative Tribunal on 17 June 2014 (committing management of the estate of the plaintiff to the NSW Trustee as her financial manager) be confirmed. (3) DECLARE that the plaintiff is not capable of managing her own affairs. (4) ORDER that subjection of the estate of the plaintiff to management under the NSW Trustee and Guardian Act 2009 NSW be confirmed. (5) ORDER that committal of management of the estate of the plaintiff to the NSW Trustee be confirmed. (6) DECLARE that the instrument dated 20 December 2013, entitled “Enduring Power of Attorney”, executed

by the plaintiff in favour of [KM], is of no force or effect.

Catchwords:

GUARDIANSHIP – Guardians, committees, administrators, managers and receivers – Appointment – Capacity for self-management – Meaning – Governed by nature and purpose of protective jurisdiction

APPEALS – Appeal to Court from Guardianship Division of NSW Civil and Administrative Tribunal – Construction and operation of Civil and Administrative Tribunal Act 2013 NSW, Schedule 6, clause 14

PRACTICE – NSW Trustee and Guardian Act – Capacity for self-management – Person incapable of managing affairs – Meaning – Utility and limitations of practice "tests" for assessing incapacity – Test of capacity to manage one's affairs involves consideration of subjective circumstances of individual in question – Concept governed by nature and purpose of protective jurisdiction

Legislation Cited:

Australian Courts Act, 1828
Civil and Administrative Tribunal Act 2013 NSW
Guardianship Act 1987 NSW
Interpretation Act 1987 NSW
Mental Health (Forensic Provisions) Act 1990 NSW
Mental Health Act 2007
New South Wales Act of 1823
NSW Trustee and Guardian Act 2009 NSW
Powers of Attorney Act 2003 NSW
Protected Estates Act 1983 NSW
Supreme Court Act 1970 NSW
The Third Charter of Justice 1823
Uniform Civil Procedure Rules 2005

Cases Cited:

A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4) [2014] NSWSC 31
Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB [2014] NSWSC 245
Allen & Ors v TriCare (Hastings) Pty Ltd & Anor [2015] NSWSC 416
Allesch v Maunz (2000) 203 CLR 172
BPY v BZQ [2015] NSWCATAP 33
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616

CAC v Secretary, Department of Family and Community Services [2014] NSWSC 1855
CCR v PS (No 2) (1986) 6 NSWLR 622
CDJ v VAJ (1998) 197 CLR 172
CJ v AKJ [2015] NSWSC 498
Collins v Urban [2014] NSWCATAP 17
Crago v McIntyre [1976] 1 NSWLR 729
David by her tutor the Protective Commissioner v David (1993) 30 NSWLR 417
Eastman v The Queen (2000) 203 CLR 1
EB & Ors v Guardianship Tribunal & Ors [2011] NSWSC 767
Ex parte Cranmer (1806) 12 Ves Jun 445 33 ER 168
Ex-parte Warren (1805) 10 Ves Jun 622; 32 ER
Finance Facilities Pty Limited v Federal Commissioner of Taxation (1971) 127 CLR 106
GAU v GAV [2014] QCA 308
Gibbons v Wright (1954) 91 CLR 423
Gibson v Jeyes (1801) 6 Ves Jun 266; 31 ER 1044
GNM v ER [1983] 1 NSWLR 144
GPG v ACF [1983] 1 NSWLR 54
Hall v Nominal Defendant (1966) 117 CLR 423
Harris v Caladine (1991) 172 CLR 84
Holt v Protective Commissioner (1993) 31 NSWLR 227
House v The King (1936) 55 CLR 499
In Re Holmes (1827) 4 Russ 182; 38 ER 774
In the Matter of Case (1915) 214 NY 199
JMK v RDC and PTO v WDO [2013] NSWSC 1362
K v K [2000] NSWSC 1052
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390
M and the Protected Estates Act 1983 (1988) 12 NSWLR 96
M v M [1981] 2 NSWLR 334
M v M [2013] NSWSC 1495
Maria Saravinovska v Krste (Chris) Saravinovski [2015] NSWSC 128
Marion’s Case (1992) 175 CLR 218
McD v McD [1983] 3 NSWLR 81
MN v AN (1989) 16 NSWLR 525
O’Sullivan v Farrar (1989) is 168 CLR 210
P v R [2003] NSWSC 819PY v RJS [1982] 2 NSWLR 700

PB v BB [2013] NSWSC 1223
Perpetual Trustee Company Ltd v Fairlie-Cunninghame (1993) 32 NSWLR 377
Pilbaro Infrastructure Pty Limited v Australian Competition Tribunal (2012) 246 CLR 379
Protective Commissioner v D (2004) 60 NSWLR 513
PY v RJS [1982] 2 NSWLR 700
Re an alleged incapable person (1959) 76 WN (NSW) 477
Re Application for partial management orders [2014] NSWSC 1468
Re B (No 1) [2011] NSWSC 1075
Re Baby S [2014] NSWSC 871
Re C [2012] NSWSC 1097
Re D [2012] NSWSC 1006
Re Estate Gowing; Application for Executor's Commission [2014] NSWSC 247; 17 BPR [98635]
Re Eve [1986] 2 SCR 388
Re Fenwick (2009) NSWLR 222
Re Frieda and Geoffrey [2009] NSWSC 133; 40 Fam LR 608
Re GHI (a protected person) [2005] NSWSC 581
Re R [2000] NSWSC 886
Re R [2014) NSWSC 1810
Re Victoria [2002] NSWSC 647; 29 Fam LR 157
Re W and L (Parameters of protected estate management orders) [2014] NSWSC 1106
Ridgeway v Darwin (1882) 8 Ves Jun 66, 32 ER 275
S v S [2001] NSWSC 146
SAB v SEM and Ors [2013] NSWSC 253
Scott v Scott [2012] NSWSC 1541; (2012) 7ASTLR 299
Secretary Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218
Sherwood v Sanderson (1815) 19 Ves Jun 280; 34 ER 521
Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW) (2011) 245 CLR 446
Tomko v Plasty (No 2) (2007) 71 NSWLR 61
Turnbull v NSW Medical Board [1976] 2 NSWLR 281
Walsh v Law Society of New South Wales (1999) 198 CLR 73
Ward v Williams (1955) 92 CLR 496

	Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492 Wellesley v Duke of Beaufort (1827) 2 Russ 1, 38 ER 236 Wellesley v Wellesley (1828) 2 Bli. NS 124; 4 ER 1078
Texts Cited:	HS Theobald, The Law Relating to Lunacy (Stevens and Sons, London, 1924), pp 5-6, 37, 41-44, 47-49 59-60, 50-53, 54, 61, 362-363, 380, 381, 382, 401-403, 462, 511-513 Philip Powell, Forbes Lecture: The origins and development of the protective jurisdiction of the Supreme Court of New South Wales (Forbes Society, Sydney, 2004), pp 23-33 Leonard Shelford, A Practical Treatise on the Law concerning Lunatics, Idiots and Persons of Unsound Mind (Sweet and Stevens & Sons, London, 1833), pages 25-27
Category:	Principal judgment
Parties:	Plaintiff: Protected Person First Defendant: NSW Trustee and Guardian Second Defendant: Son of Protected Person
Representation:	Counsel: Plaintiff: R Henderson First Defendant: K Bozinovska, solicitor Second Defendant: D Christofis Solicitors: Plaintiff: Geoff Williams & Associates First Defendant: NSW Trustee and Guardian Second Defendant: Attwood Marshall
File Number(s):	2014/00259237

JUDGMENT

INTRODUCTION

1 These proceedings are ultimately, and centrally, about the welfare of an elderly woman (the plaintiff) in transition from independent living to residence in an aged care facility.

2 The plaintiff was born in 1923 and is presently aged nearly 92 years. The events which triggered proceedings in the Guardianship Division of the Civil and Administrative Tribunal of NSW ("NCAT" or "the Tribunal"), now under appeal, arose in the context of her being required, for her physical welfare, to move from her home in regional New South Wales to a local aged care facility. She is a widow. Her husband died, on her birthday, in 2012. She subsequently suffered ongoing grief and social isolation. She is frail and unable, by reason of her frailty, to live alone or independently. She has two adult sons. Neither lives near her. One, the second defendant, ordinarily lives in New Zealand. The other, who suffers from a disability, lives in a care facility in Sydney.

3 In the process of arranging for her to move into an aged care facility, a friend upon whom she appears to be socially dependent ("KM") was granted an Enduring Power of Attorney, ostensibly expressed in terms larger than any formal authority he may have needed, and (until the Tribunal's intervention) he was poised to buy her home at a $100,000 discount on current market value.

4 The plaintiff complains of decisions of the Tribunal, the effect of which was to order (under the *Guardianship Act* 1987 NSW) that:

(a) pursuant to sections 25E and 25H, the estate of the plaintiff be subject to management under the *NSW Trustee and Guardian Act* 2009 NSW; and

(b) pursuant to section 25M(1)(b), management of the estate be committed to the NSW Trustee and Guardian ("the NSW Trustee"), the first defendant in the current, Supreme Court proceedings.

5 On 14 February 2014 the Tribunal, *inter alia*, made an interim financial management order (under the *Guardianship Act*, section 25H) affecting the plaintiff and an order (under section 25M(1)(b) of the Act) committing management of her estate to the NSW Trustee.

6 On 17 June 2014 those orders lapsed when the Tribunal made a financial management order (under the *Guardianship Act*, section 25E) in respect of the plaintiff and, consequentially upon that order, committed management of her estate to the NSW Trustee under section 25M(1)(b).

7 The plaintiff contends that she is, and was at all material times, capable of managing her own affairs, without any need of a financial management order.

8 By these Supreme Court proceedings, she challenges both sets of orders but, accepting that the interim financial management order has lapsed, she seeks only an order that the orders of 17 June 2014 be set aside.

9 The proceedings, when commenced, took the form of an application for judicial review, elaborating grounds for an administrative law challenge to the Tribunal's orders; namely:

(a) an alleged denial of procedural fairness: essentially an alleged denial of a reasonable opportunity to give or call evidence relating to matters described by the Tribunal as "unresolved issues relating to management of [the plaintiff's] financial affairs", including evidence from the plaintiff's doctor and solicitor of long-standing;

(b) an alleged failure to take into account relevant considerations, including evidence suggesting that urgency earlier attending the Tribunal's deliberations was no longer operative;

(c) an alleged taking into account of irrelevant considerations, relating to a Will made or to be made by the plaintiff in favour of her friend (KM) suspected, by the able-bodied son of the plaintiff, of taking advantage of the plaintiff; and

(d) errors alleged to have been made by the Tribunal in the construction and application of section 25G of the *Guardianship Act*.

10 During the course of several directions hearings, the plaintiff abandoned her application for judicial review and recast the proceedings as an appeal (including an application for leave to appeal on the merits) pursuant to clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act* 2013 NSW.

11 These are the first proceedings in which the Court has been called upon to consider the proper construction, and operation, of clause 14, the legislative predecessor of which was section 67 of the *Guardianship Act.*

12 Earlier proceedings between different parties (numbered 2014/00219933), the first appeal instituted under clause 14, were discontinued without any necessity for a judgment to be published.

13 Procedurally, the proceedings call for a consideration of the intersection between:

(a) the provisions of the *Civil and Administrative Tribunal Act* (particularly Schedule 6, clause 14) governing an appeal from a decision of the Guardianship Division of NCAT to the Supreme Court;

(b) the jurisdiction of the Court on an application for administrative law relief by way of judicial review of such a decision; and

(c) an exercise of the Court's inherent, protective jurisdiction.

14 In the context of a clause 14 appeal, the proceedings also call for a consideration of:

(a) the character to be attributed to an interim financial management order (under the *Guardianship Act*, section 25H) and an unqualified financial management order (under the *Guardianship Act*, section 25E) for the purpose of clause 14(1), governing a party's entitlements to appeal from a decision of the Guardianship Division of the Tribunal to the Court;

(b) the criteria to be applied by the Court in deciding whether or not to grant leave to appeal under clause 14(1);

(c) the criteria to be applied by the Court in making decisions, under clause 14(3), about whether to deal with an appeal by way of a new hearing, and whether to permit evidence to be given (in addition to or in substitution for evidence received by the Tribunal at first instance) in any new hearing; and

(d) the relationship between clause 14 and "rules of court" governing an appeal to the Court.

15 Upon a consideration of the proper construction and operation of Part 3A of the *Guardianship Act* (comprising sections 25D-25M inclusive), entitled "Financial Management", the proceedings require consideration of:

(a) the meaning of references in section 25G to a person's "capability to manage his or her own affairs" in light, *inter alia*, of:

(i) the statement of "general principles" contained in section 4 of the *Guardianship Act*; and

(ii) the definition of "a person who has a disability" in section 3(2) of the Act;

(b) whether incapacity for management of one's own affairs, within the meaning of section 25G, is (as counsel for the plaintiff contends):

(i) limited to *mental* incapacity; and

(ii) governed by a requirement (expounded by Powell J in *PY v RJS* [1982] 2 NSWLR 700 at 702C-D) that there appear to be an incapacity for "dealing, in a reasonably competent fashion, with *the ordinary routine affairs of man*";

(c) whether (as posited by *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [134]) the plaintiff can, and should, be characterised as incapable of managing her affairs if her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made about those affairs, which action or decision she is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

16 There is no real dispute that, if the plaintiff's estate is to be subject to management, the NSW Trustee is the appropriate manager. As often happens the plaintiff, as a protected person, vents her frustration by criticism of the NSW Trustee (which she does not distinguish from the Tribunal); but that criticism is not entirely fair, and no alternative manager has been proposed or is readily available.

17 The second defendant's strained relationship with his mother, and his residence in New Zealand, rule him out for the time being. KM's preparedness, whilst a fiduciary, to receive substantial benefits at the expense of the plaintiff disqualifies him from characterisation as a "suitable person" to be the plaintiff's protected estate manager.

18 Although these proceedings provide the first occasion upon which the construction and operation of the *Civil and Administrative Tribunal Act*, Schedule 6 clause 14 must be considered, the Court is not without the assistance of judicial consideration of legislation closely analogous to clause 14(1).

19 In *Collins v Urban* [2014] NSWCATAP 17 at [80]-[84], an Appeal Panel of NCAT, led by the President of the Tribunal (Wright J), articulated criteria to be applied by an Appeal Panel under section 80(2)(b) of the *Civil and Administrative Tribunal Act* when considering whether to grant leave to appeal on the hearing of an "internal appeal" from a Division of the Tribunal.

20 In *BPY v BZQ* [2015] NSWCATAP 33 at [33]-[34] and [37], another Appeal Panel (including Malcolm Schyvens, a Deputy President of the Tribunal, the Division Head of the Guardianship Division) applied those criteria in the context of an appeal, from the making of a financial management order, governed by the "general principles" for which the *Guardianship Act*, section 4 provides.

21 The criteria enumerated in *Collins v Urban* drew heavily on White J's judgment in *SAB v SEM and Ors* [2013] NSWSC 253 at [7]-[10] relating to the law and practice of the Court governing appeals under the *Guardianship Act*, section 67.

22 There White J summarised jurisprudence going back to seminal judgments of Young J in *Re R* [2000] NSWSC 886 at [15]-[19], *K v K* [2000] NSWSC 1052 at [9]-[10] and [12]-[15] and S v S [2001] NSWSC 146 at [12]-[13], including his own instructive judgment in *Re B* (No 1) [2011] NSWSC 1075 at [58]-[61] and that of Hallen AsJ in *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [181]-[210].

23 Each of these judgments of the Court proceeded on the basis that a section 67 appeal was not intended to serve as a second trial of an issue litigated in the Guardianship Tribunal, the predecessor of the Guardianship Division of NCAT. Together with the Court's general, protective and administrative law jurisdictions, section 67 provided a means for supervision of work undertaken by the Guardianship Tribunal as a statutory tribunal entrusted with a primary task of deciding factual questions relating to guardianship, financial management and ancillary topics affecting persons in need of protection.

24 A correct approach to a clause 14 appeal from a decision of the Guardianship Division of NCAT requires an appreciation of a broader context. In NSW the institutional structure for an exercise of protective jurisdiction, in discharge of the State's long acknowledged obligation to take "care of those who are not able to take care of themselves" (*Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259), involves statutory tribunals – in this case, NCAT – working under the judicial supervision of the Supreme Court. That being so, there is a foundational need for familiarity with the legislative scheme governing the work

of statutory tribunals and the Court, and an appreciation of how the current scheme of legislation is integrated with the Court's inherent, protective (*parens patriae*) and administrative law jurisdictions.

25 The efficacy of the administration of the State's legal system for the protection of those in need of protection depends, in large part, on adoption by the Court of practice conventions in exercise of the jurisdiction it enjoys as a superior court. Reserving all its powers for cases in which they may be needed, the practice of the Court is to exercise purposeful restraint in deployment of its inherent jurisdiction, with the object of facilitating the work of statutory tribunals, and channelling appeals from tribunal decisions through the regulatory framework for which legislation (including clause 14) specifically provides. A recent confirmation of this approach can be found in *CAC v The Secretary Department of Family and Community Services* [2015] NSWCA 105 at [15]-[16].

26 The work of the Court in its administration of protective jurisdiction is, and for the due administration of justice in New South Wales must be, integrated with that of statutory authorities which bear the heavy burden of routine cases: in the finding of facts, in the making and revocation of orders, and in the day-to-day management of an elaborate administrative regime designed to protect the person and estates of individuals in need of protection.

27 Of these statutory authorities, three are quasi-judicial bodies staffed with personnel with specialist expertise, supported by administrative arrangements dedicated to the performance of specialist functions:

(a) NCAT's Guardianship Division focuses upon individuals unable, independently, to manage their person or property.

(b) the Mental Health Review Tribunal focuses on forensic patients and, more generally, the care and treatment of people with a mental illness or mental disorder.

(c) the Children's Court of NSW focuses on individuals under the age of 18 years, variously described as "minors", "infants", "children" and "young persons" depending on context.

28 By its nature, the protective jurisdiction has a strong administrative flavour. Historically, its origins are found in delegations from the Crown to the Lord Chancellor, and much of the Lord Chancellor's work was necessarily

performed by his delegates or administrative staff: HS Theobald, *The Law Relating to Lunacy* (Stevens & Sons, London, 1924), page 61; Leonard Shelford, *A Practical Treatise on the Law concerning Lunatics, Idiots and Persons of Unsound Mind* (Sweet, and Stevens & Sons, London, 1833), pages 25-27. The work of the Court, as the local repository of jurisdiction historically exercised by the Lord Chancellor in England, cannot, functionally, be entirely separated from executive government in one form or another: *cf, M v M* [2013] NSWSC 1495 at [10]-[20]: *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [55]-[58]; *PB v BB* [2013] NSWSC 1223 at [10]-[16], [61]-[64] and [66]-[72]; *W v H* [2014] NSWSC 1696 at [54]-[63].

29 The machinery of government through which the Court's protective jurisdiction is exercised – the administrative support provided to the Court by government – the rules of court and procedures through which business of the Court is transacted – changes from time to time without detracting from the operation of the Court's inherent and supervisory jurisdictions: *In re WM (a person of unsound mind)* (1903) 3 SR (NSW) 552 at 561, 567, 569 and 570. In practice, this means that an exercise of protective jurisdiction by the Court is able, in the interests of a person in need of protection, to call upon an optimal mix of inherent and statutory jurisdiction. In the language of an earlier generation the Court, as a superior court, does not work within the constraints within which an "inferior", statutory court or tribunal must operate. Nevertheless, the administrative regime of government within which the Court must act is important to an effective operation of its protective jurisdiction.

30 The overlapping work of the Supreme Court, the Guardianship Division of NCAT and the Mental Health Review Tribunal depends for its efficacy, in large measure, on the work of the NSW Trustee and Guardian (in particular) and other agencies of the State of NSW.

31 The work of the Children's Court depends for its efficacy, in large measure, on the work of the Department of Family and Community Services, its Secretary and Minister.

32 The statutory authority of the Guardianship Division of NCAT, the Mental Health Review Tribunal and the Children's Court is, to a large extent, modelled on the template of the Supreme Court's inherent, protective (*parens patriae*) jurisdiction.

33 Whereas the purposive character and functionality of the Court's jurisdiction emerged over time with comparatively little legislative intervention, the jurisdiction of the specialist statutory authorities, necessarily, has been articulated by comparatively recent legislation.

34 With the benefit of experience, and the development of the administrative infrastructure of modern government, that legislation has been adapted to provide supplementary powers to the Supreme Court. The Court has been a beneficiary of, as well as the template for, law reform. An example of this is the inclusion of a statement of "general principles" in section 39 of the *NSW Trustee and Guardian Act* based on experience derived from the operation of the *Guardianship Act*, section 4.

35 The Court's jurisdiction is generally broader than that of the statutory authorities whose work it supervises.

36 As a statutory authority, NCAT must work within the constraints of the legislation governing it. As the repository of broader powers, the Court must determine how best to deploy its powers when its work intersects with that of NCAT.

37 The relief the plaintiff seeks in these proceedings is an order that a financial management order made by NCAT's Guardianship Division be "set aside", "revoked" or "quashed", three different terms for the same substantive form of relief.

38 In substance, that relief could be granted by the Court, with only relatively slight adjustments in focus, by various means, principally:

(a) allowance of an appeal under the *Civil and Administrative Tribunal Act*, Schedule 6 clause 14.

(b) the making of an order for revocation of the financial management order under the *NSW Trustee and Guardian Act*, section 86.

(c) the making of a revocation order in exercise of the court's inherent protective jurisdiction, be that jurisdiction derived from the Third Charter of Justice 1823 and related Imperial legislation or from section 23 of the *Supreme Court Act* 1970 NSW.

(d) the granting of relief in the nature of a prerogative writ, under section 69 of the *Supreme Court Act* 1970 NSW, in exercise of the Court's administrative law (judicial review) jurisdiction.

39 In exercising the jurisdiction it has to grant relief to, or in relation to, a person such as the plaintiff (in respect of whom there is a contest about capacity for self-management) the Court must remain mindful of the purpose for which its jurisdiction exists, and the need to ensure the effective operation of the statutory authorities upon whose work it relies to deal with routine business.

40 In the context of the present proceedings that requires the Court to be mindful that, if it does not channel applications made to it for relief through the appeal structure for which clause 14 of Schedule 6 of the *Civil and Administrative Tribunal Act* provides:

(a) the limitation on appeals for which clause 14 (1) provides may be rendered nugatory.

(b) the choice of appeals from a decision of the Guardianship Division of NCAT for which clause 12 of Schedule 6 of the *Civil and Administrative Tribunal Act* provides (either to an Appeal Panel of NCAT or to the Court) may, to that extent, be undermined.

(c) the efficacy of NCAT would be undermined, generally, because of an ever present risk of interference *via* proceedings instituted in the Court.

(d) the efficacy of the Court itself, as well as that of the NSW Trustee and Guardian, would, consequentially also be adversely affected.

(e) to the extent that the validity of orders made by NCAT is called into question on an application for judicial review (administrative law relief), financial managers and those dealing with them may be driven (as in these proceedings), by uncertainty about their authority, to refrain from taking steps necessary in management of an estate to protect the interests of the person in need of protection.

41 Considerations of this nature require the Court to mould its procedures, practice and relief, both generally and in particular cases, to ensure that the beneficial, purposive character of the protective jurisdiction can be duly served.

CONTEXT : THE NATURE OF FINANCIAL MANAGEMENT ORDERS

42 The expression "financial management order" is defined by section 25D of the *Guardianship Act*:

> (a) to mean an order (made under section 25E of the Act) that the estate, or part of the estate, of a person "be subject to management under the *NSW Trustee and Guardian Act*"; and
>
> (b) to include an "interim financial management order" (made under section 25H of the *Guardianship Act*), for a specified period not exceeding six months, "pending the Tribunal's further consideration of the capability of the person to whom the order relates to manage his or her own affairs".

43 With emphasis added, section 25G of the *Guardianship Act* provides as follows:

> **25G Grounds for making financial management order**
>
> The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered **the person's capability to manage his or her own affairs** and is satisfied that:
>
> (a) the person is **not capable of managing those affairs**, and
>
> (b) there is **a need for another person to manage those affairs** on the person's behalf, and
>
> (c) it is **in the person's best interests** that the order be made.

44 If the Tribunal makes a financial management order in respect of the estate (or part of the estate) of a person, the Tribunal may, by order: (a) appoint a suitable person as manager of the estate; or (b) commit management of the estate to the NSW Trustee: *Guardianship Act*, section 25M (1).

45 The provisions of the *Guardianship Act* authorising the Tribunal to make a "financial management order" (particularly sections 25E, 25G and 25M) are, for the Tribunal, counterparts of similar powers (to appoint a "manager") conferred:

> (a) on the Court, by sections 40-41 of the *NSW Trustee and Guardian Act*; and
>
> (b) within a more limited ambit, on the Mental Health Review Tribunal, by Part 4.3 Division 1 (sections 43-52) of the *NSW Trustee and Guardian Act*.

46 Once a "financial management order" is made (under section 25E or section 25H of the *Guardianship Act*) or, to use a convenient label, a "management order" is made by the Court or the Mental Health Review Tribunal (under

section 41 (1) or section 46 of the *NSW Trustee and Guardian Act* respectively) so that, by means of such an order, the estate of a person is subject to management under the *NSW Trustee and Guardian Act*, the person is deemed by statute to be a "protected person": *Guardianship Act*, section 25D; *NSW Trustee and Guardian Act*, section 38.

47 NCAT's power to make an "*interim* financial management order" serves a similar purpose to that served by the Court's powers (under the *Supreme Court Act* 1970 NSW, section 67 and the Court's inherent jurisdiction) to appoint a receiver: Theobald, *The Law Relating to Lunacy* (1924), pages 54, 401-403 and 511-513; *JMK v RDC* and *PTO v WDO* [2013] NSWSC 1362 at [55]-[56].

48 Functionally, it may be immaterial whether a person appointed to manage the estate of a person incapable of managing his or her own affairs is called a "manager", "receiver" or (under the Court's inherent, protective jurisdiction) a "committee of the estate": *Ex-parte Warren* (1805) 10 Ves Jun 622; 32 ER 985 at 986. All such appointments are governed by the protective purpose they serve. All are provisional in the sense that they can be revoked if they lack utility: *Guardianship Act*, sections 25N-25U; *NSW Trustee and Guardian Act*, section 86; *Re W and L (Parameters of Protective Estate Management Orders)* [2014] NSWSC 1106 at [66] *et seq*.

49 A "receiver" appointed to manage a protected estate must, however, be distinguished from a receiver and manager appointed by the Court on an exercise of general equitable, or analogous statutory, jurisdiction: *Theobald*, page 397. The two offices are governed by the purpose for which an appointment is made. A receiver appointed on an exercise of protective jurisdiction is, functionally, an "interim" protected estate manager.

50 Functionally, a protected estate manager (whether appointed under a financial management order made under the *Guardianship Act* or by a management order made under the *NSW Trustee and Guardian Act*) is the modern, local equivalent of a "committee of the estate" appointed by the Court on an exercise of its inherent, protective jurisdiction. *Cf, Theobald*, pages 41-44, 47-49 and 50-53.

51 Historically, a person appointed as a committee of the estate of a person in need of protection was regarded as being in the position of a bailiff: *Theobald*, page 50. Labels aside, the office of a protected estate manager is unique, taking its colour from the terms of the manager's appointment, governed by the protective jurisdiction of the Court and informed by the nature, purpose and historical origins of that jurisdiction: *Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [174]-[175]. A protected estate manager owes the obligations of a fiduciary to the person whose estate is under management, and is subject to supervision by the Court and (if a private manager) the NSW Trustee.

CONTEXT : THE PURPOSIVE CHARACTER OF THE PROTECTIVE JURISDICTION

52 The purposive character of the protective jurisdiction (including that exercised by the Guardianship Division of NCAT, and the Mental Health Review Tribunal, by legislation) is governed by a central informing idea: that the jurisdiction exists for the care of those who are not able to take care of themselves (*Secretary Department of Health and Community Services v JWB and SMB (Marion's Case*) (1992) 175 CLR 218 at 258), and that an exercise of the jurisdiction affecting a person in need of protection must be for the benefit, and in the best interests, of that person as an individual, not for the benefit of the state, or others, or for the convenience of carers (*Re Eve* [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34). Implicit in the focus on a person in need of protection "as an individual" is respect for his or her autonomy.

53 The jurisdiction's central, informing idea (sometimes described as the "welfare principle" or the "paramountcy principle") finds legislative expression, in similar terms, in both the *Guardianship Act*, section 4 and the *NSW Trustee and Guardian Act*, section 39: *CJ v AKJ* [2015] NSWSC 498 at [17]-[29].

54 In the context of the current proceedings, this can be most conveniently illustrated by setting out section 4 of the *Guardianship Act* (with emphasis added):

> "**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."

55 With emphasis added, section 3(2) of the *Guardianship Act* defines, in the following terms, the concept of "a person who has a disability":

> "(2) In this Act, a reference to a person who has a disability is a reference to a person:
>
> (a) who is intellectually, **physically**, psychologically **or sensorily disabled**,
>
> (b) who is of **advanced age**,
>
> (c) who is a mentally ill person within the meaning of the Mental Health Act 2007 , or
>
> (d) who is **otherwise disabled**,
>
> and who, **by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation**."

56 The expression "with respect to" in the introductory words of section 4 is sufficient to require *an application* for a financial management order under section 25E of the *Guardianship Act*, or an application for an interim financial management order under section 25H of the Act, to be informed by the general principles set out in section 4 even if, ultimately, the Court finds that the respondent to the application is not, in fact, a "person who has a disability" within the meaning of section 3(2): *CJ v AKJ* [2015] NSWSC 498 at [44]-[48]. The *Guardianship Act* should be construed beneficially, having regard to its protective character: *Protective Commissioner v D* (2004) 60 NSWLR 513 at

543 [167]. As mandated by section 33 of the *Interpretation Act* 1987 NSW, the Court should construe the Act in a manner designed to promote its beneficial, protective purpose. That requires that section 4 be construed as informing consideration of an application for a financial management order in all eventualities.

57 This construction may be reinforced by reference to the *Civil and Administrative Tribunal Act*, Schedule 6, clause 5(1).

58 The attention of the Guardianship Division of NCAT is specifically drawn to the general principles set out in section 4 of the *Guardianship Act* by the interrelationship between that Act and the *Civil and Administrative Tribunal Act*, particularly Schedule 6, clause 5(1).

59 The jurisdiction to make a financial management order under the *Guardianship Act* is specifically, expressly conferred on NCAT. The functions of NCAT in relation to the *Guardianship Act* (as well as in relation to the *NSW Trustee and Guardian Act* and the *Powers of Attorney Act* 2003 NSW) are allocated to the Guardianship Division of the Tribunal by the *Civil and Administrative Tribunal Act*, Schedule 6, clause 3 (1).

60 Clause 5 of Schedule 6 provides as follows:

> **"5. Certain principles under Guardianship Act 1987 to be applied**
>
> (1) The Tribunal, when exercising its Division functions for the purposes of the Guardianship Act 1987 in relation to persons who have disabilities, is under a duty to observe the principles referred to in section 4 of that Act.
>
> Note : Section 4 of the Guardianship Act 1987 sets out principles that everyone must observe when exercising functions under that Act with respect to persons with disabilities.
>
> (2) The provisions of this clause are in addition to, and do not limit, the provisions of section 36 (5) of this Act."

61 Section 36 of the *Civil and Administrative Tribunal Act* is in the following terms:

> **"36. Guiding principle to be applied to practice and procedure**
>
> (1) **The 'guiding principle' for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings**.
>
> (2) The Tribunal must seek to give effect to the guiding principle when it:
>
> (a) exercises any power given to it by this Act or the procedural rules, or

(b) interprets any provision of this Act or the procedural rules.

(3) Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal:

(a) a party to proceedings in the Tribunal,

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

(4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

(5) **However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions**."

62 The effect of section 36(5) and Schedule 6 clause 5 is to confirm the centrality of section 4 (read with section 3(2)) of the *Guardianship Act* in the exercise by the Guardianship Division of NCAT of the jurisdiction conferred upon it relating to the making of financial management orders.

THE COURSE OF NCAT PROCEEDINGS

63 Proceedings in the Tribunal were instituted by the second defendant to the current proceedings, the able-bodied son of the plaintiff ordinarily resident in New Zealand.

64 By an application filed in the Tribunal on 10 February 2014, he applied under section 36 of the *Powers of Attorney Act* 2003 NSW for a review of the making, operation and effect of the Enduring Power of Attorney granted by the plaintiff to her friend, KM, on 20 December 2013.

65 The decisions of the Tribunal the subject of complaint in the current proceedings were made on two occasions: first, on 14 February 2014, when orders having an interlocutory flavour were made by the Tribunal; and, secondly, on 17 June 2014, when the Tribunal made orders more distinctly final in character.

66 The plaintiff, personally, participated in both Tribunal hearings. She participated in the first hearing (on 14 February 2014) by telephone. For the second hearing, on 17 June 2014, the Tribunal (with the same legal and professional

members, but a different community member) travelled to the plaintiff's region. She attended that hearing in person. She had no legal representation on either occasion. On both occasions, she was accompanied by KM.

67 A representative of the NSW Trustee (the current first defendant) and the plaintiff's son (the second defendant) participated in the hearing of 17 June 2014 by telephone. The son had also participated in the hearing of 14 February 2014 by telephone.

68 On the first of the two hearings, on 14 February 2014, the Tribunal decided:

(a) under section 36 (1) of the *Powers of Attorney Act*, to review the making of the Power of Attorney;

(b) under section 36 (2) of the *Powers of Attorney Act*, to make no orders under section 36 of the Act (upon a review of the Power of Attorney) but, under section 37 (1) of the *Powers of Attorney Act*, to treat the application for review of the Power of Attorney as an application for a financial management order under Part 3A (sections 25D-25U) of the *Guardianship Act*;

(c) to adjourn the application for a financial management order for six months and (pursuant to sections 25F(d), 25H and 25M(1) (b) of the *Guardianship Act*) to make an interim financial management order, committing management of the plaintiff's estate to the NSW Trustee; and

(d) to reserve liberty to apply for a restoration of the Tribunal proceedings for an earlier hearing.

69 No transcript of the proceedings before the Tribunal on 14 February 2014 is in evidence.

70 On or about 25 March 2014 the Tribunal provided to the plaintiff (in accordance with clause 11 of Schedule 6 to the *Civil and Administrative Tribunal Act*) a statement of reasons for the decisions made on 14 February 2014.

71 By a letter dated 9 April 2014 addressed to the Tribunal, the solicitor for the plaintiff applied for the proceedings before the Tribunal to be restored to the list for an early hearing.

72 On that application, the proceedings came before the Tribunal for hearing on 17 June 2014.

73 Evidence before the Court in the current proceedings includes a full transcript of the proceedings before the Tribunal on that date.

74 On 17 June 2014 the Tribunal made orders to the effect that:

(a) pursuant to section 25E of the *Guardianship Act*, the estate of the plaintiff be subject to management under the *NSW Trustee and Guardian Act*; and

(b) pursuant to section 25M(1)(b) of the *Guardianship Act*, management of the plaintiff's estate be committed to the NSW Trustee.

75 Subsequently (on or shortly after 5 August 2014), in conformity with clause 11 of Schedule 6 to the *Civil and Administrative Tribunal Act*, the Tribunal provided to the parties (the plaintiff and the second defendant) a written statement of reasons for the decisions made on 17 June 2014.

THE COURSE OF THESE, SUPREME COURT PROCEEDINGS

The Summons

76 By a summons filed in the Administrative Law List of the Common Law Division of the Court on 3 September 2014, the plaintiff applied for judicial review of "the decision" of the Tribunal, described as "the committal of the estate of the plaintiff to the management of the NSW Trustee".

77 The summons named the NSW Trustee as the only defendant to the proceedings. It sought an order that "the decision" of the Tribunal be quashed on the grounds of a denial of natural justice and an error in law.

78 On the return of the summons (on 12 September 2014) a registrar ordered that the plaintiff be granted leave to file an amended summons, and that the proceedings be transferred to the Equity Division. The intention of the registrar, not immediately given effect, was that the proceedings be dealt with in the Equity Division's Protective List.

The Amended Summons

79 Pursuant to the leave granted, the plaintiff filed an amended summons on 19 September 2014. Essentially, it refined the plaintiff's case in two respects.

80 First, it reconstituted the proceedings: the NSW Trustee became the first defendant; the plaintiff's son (the applicant to the Tribunal) was joined as the second defendant; and the Tribunal itself was joined as the third defendant.

81 Secondly, it set out the grounds (already here elaborated) for an administrative law challenge to the decision(s) of the Tribunal.

82 In the Equity Division, the proceedings came before a registrar of the Court, in the Division's general list, on 8 October 2014, 3 December 2014 and 4 February 2015. On the first two occasions the parties agreed to a timetable and the registrar gave directions conforming to their agreement. On the third occasion the registrar referred the proceedings to the duty judge, essentially because of difficulties experienced in management of the plaintiff's estate during pendency of the proceedings in the Court.

83 In resolving an impasse that had led to indecision on the part of the NSW Trustee as to what (if anything) it could do in management of the plaintiff's estate pending the plaintiff's application for judicial review, the Chief Judge in Equity, as duty judge, drew to the plaintiff's attention that:

(a) clauses 12 and 14 of Schedule 6 to the *Civil and Administrative Tribunal Act* provide an avenue of appeal to the Court from decisions of the Tribunal; and

(b) sections 84 (1)(b) and 84 (3) of the *Civil and Administrative Tribunal Act* provide that the Tribunal cannot be made a party to such an appeal.

84 Her honour subsequently ordered that the proceedings be listed before me, as Protective List Judge, for directions.

The Further Amended Summons

85 When the proceedings came before me on 27 February 2015 the principal contestants (the plaintiff and the second defendant) were represented by counsel. The NSW Trustee (the first defendant) appeared, by a solicitor in its employ, to assist the Court. Having earlier (on 8 October 2014) filed a submitting appearance, the Tribunal (the third defendant) played no part in the proceedings.

86 After engaging the parties in an extended directions hearing, I made notations and orders, *inter alia*, to the following effect:

(a) Order that the plaintiff be granted leave to amend her amended summons by filing a "further amended summons".

(b) Order that, for the purpose of regularising the constitution of the proceedings, the plaintiff be granted such leave as may be necessary to discontinue proceedings against the Tribunal and that, accordingly, that the Tribunal be removed from the record of the Court as the third defendant.

(c) Note that no party in the proceedings as now constituted has any objection to the Court exercising its inherent protective jurisdiction in the proceedings should the Court form the view that it is in the interests, and for the benefit, of the plaintiff that it do so.

(d) Note that, by operation of clause 14(5) of Schedule 6 to the *Civil and Administrative Tribunal Act*, the decision of the Tribunal under appeal in these proceedings is stayed subject to any interlocutory orders made by the Court.

(e) Note that the first defendant has taken steps, so far as it can, to ensure that the plaintiff receives the whole of her pension for her own use and benefit, under her own management.

(f) Note that, subject to any further order of the Court, it is the intention of the Court that the plaintiff continue to receive the whole of her pension on that basis.

(g) Order, subject to further order, that the NSW Trustee:

(i) be directed to liaise with the solicitor for the plaintiff, should he invite the NSW Trustee to do so, as to management of the estate of the plaintiff; and

(ii) be at liberty to take such steps as to the NSW Trustee seems appropriate, in consultation with the solicitor for the plaintiff, to ensure that reasonable provision is made for, or available to, the plaintiff out of her estate.

87 The plaintiff's further amended summons refined her case in two respects. First, it removed the Tribunal from the proceedings. Secondly, with an implicit reliance on clauses 14(1)(b) and 14(3) of Schedule 6 to the *Civil and Administrative Tribunal Act*, it sought an order that the court "permit fresh evidence to be given at the hearing of this appeal".

Another Directions Hearing

88 Because of time constraints and a continuing need to refine the parties' respective cases in order to ensure that the real questions in dispute could be accurately stated for determination, a hearing scheduled for 4 March 2015 necessarily took the form of a directions hearing. Earlier hopes of a final hearing proved too sanguine, a bridge too far.

89 After further engagement of the parties in discussion on that occasion, I made notations and orders, *inter alia*, to the following effect:

(a) NOTE that the evidence to be relied upon by the plaintiff in support of her further amended summons now includes (in addition to that recorded in earlier notations) a purported revocation of the power of attorney executed by the plaintiff in favour of KM on 20 December 2014 (now Exhibit P2).

(b) NOTE that, unless the plaintiff advises the Court and the other parties to the proceedings to the contrary, in writing, no later than (a specified time) the Court will proceed on the basis that:

(i) the plaintiff has abandoned her claim for administrative law relief.

(ii) the only order of NCAT under challenge is the financial management order.

(iii) the interim financial management order having been spent, no relief is sought by the plaintiff with respect to it.

(iv) the plaintiff's case is grounded on an appeal under clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*, together with reliance by the plaintiff on the Court's powers (under the inherent protective jurisdiction and section 86 of the *NSW Trustee and Guardian Act*) to order that a financial management order be revoked.

(c) NOTE that the plaintiff seeks, and no party to the proceedings opposes, such extension of time (if any) as may be necessary to ensure that her appeal (under clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*) is competent.

(d) NOTE that the second defendant contends that, if the Court were otherwise minded to make an order revoking the financial management order affecting the plaintiff, it should refrain from doing so without the benefit of some independent medical examination of the plaintiff.

90 For the avoidance of doubt in management of the plaintiff's estate, the Court should in due course make a formal declaration that the power of attorney executed by the plaintiff in favour of KM is of no effect.

An Aborted Final Hearing

91 By the time the proceedings returned to me on 9 March 2015, the plaintiff had acquiesced in characterisation of her case as set out in paragraph 89 (b); the plaintiff and the second defendant had filed written submissions; and the NSW Trustee had served a formal affidavit outlining the course of proceedings, its management of the plaintiff's estate and the nature and size of the estate.

92 An occasion reserved for a hearing of the plaintiff's appeal became a further, extended directions hearing in which attention was given to the nature of the appeal process, the decisions required to be made in giving effect to it and the character of the Court's protective jurisdiction. Frustrating though this was, it is not altogether uncommon in contested Protective List proceedings, in which parties take, and often need, time to work through practical, life management issues beyond the ken of formal legal process.

93 At the end of a discussion between bench and bar, counsel for the plaintiff: (a) applied for an adjournment so that the plaintiff might personally attend before the Court; and (b) announced that the plaintiff agreed to orders being made to enable the NSW Trustee, as financial manager, to sell her residence free of any preferential arrangement formerly proposed by her for the benefit of her friend and attorney, KM.

94 Accordingly, notations and orders were made, *inter alia*, to the following effect:

> (a) Upon the application of the plaintiff, ORDER that the hearing of these proceedings be adjourned, with directions designed to accommodate the convenience of the plaintiff in her attendance at court on a date convenient to her.
>
> (b) NOTE that, upon an assumption that the evidence remains substantially as hitherto foreshadowed, no party objects to the proceedings being conducted, primarily, by way of an appeal under clause 14 of Schedule 6 of the *Civil and Administrative Tribunal Act*, attended by the following orders under clause 14:
>
> (i) an order, under clause 14(1)(b), that the plaintiff be granted leave to appeal from the financial management order made by the Tribunal on 17 June 2014 on "all grounds" so as to allow a merits review;
>
> (ii) an order, under clause 14(2)(c), that the plaintiff be granted such, if any, extension of time as may be necessary to enable her to institute an appeal under clause 14;
>
> (iii) an order, under clause 14(3)(a), that the plaintiff's appeal be by way of a new hearing; and
>
> (iv) an order, under clause 14(3)(b), that the parties be permitted to adduce "in addition to the evidence received by the Tribunal at first instance" evidence specifically identified by the Court.

(c) NOTE that the plaintiff confirms that the case sought to be advanced by her in these proceedings bears the character attributed to it in paragraph 89(b) above.

(d) NOTE that the plaintiff and the second defendant agree that the NSW Trustee (as the plaintiff's financial manager) can, and should, proceed to sell the plaintiff's former residence, free of any preferential arrangement formerly proposed by her for KM.

(e) ORDER, subject to further order, that the NSW Trustee be at liberty to sell the plaintiff's former residence, free of any preferential arrangement for KM or any other person.

(f) ORDER, subject to further order, that the NSW Trustee be at liberty to apply funds forming part of the plaintiff's estate in maintenance of property owned by her and in the preparation of her former residence for sale.

(g) ORDER, subject to further order, that the solicitor for the plaintiff, within a specified time, account to the NSW Trustee for $25,000 received by him from KM as a reimbursement of funds drawn down by KM, with the consent of the plaintiff, as her attorney.

(h) ORDER that the NSW Trustee and the solicitor for the plaintiff liaise about existing and prospective arrangements for payment of aged care fees by or on behalf of the plaintiff, whether out of her pension or her estate generally.

The Final Hearing

95 Although broad patterns may be discernible in the exercise of protective jurisdiction (including appeals under clause 14 of Schedule 6 of the *Civil and Administrative Tribunal Act*), the protective purpose of the jurisdiction requires, and enables, the practice and procedures of the Court to be adapted to the needs of each particular case: Theobald, *The Law Relating to Lunacy* (1924), pages 59-60, 362-363, 380-381, 382 and 462.

96 The plaintiff's appeal came on for hearing on 26 March 2015, at which time the plaintiff attended court personally (accompanied, she said, by KM, who remained outside) and was represented by counsel. The NSW Trustee (the first defendant) was represented by an in-house solicitor. The plaintiff's able-bodied son (the second defendant) was represented by counsel.

97 At the outset of the hearing, by way of a final directions hearing, the ambit of the evidence sought by each participant to be adduced was expressly identified, as was the procedure to be followed in the Court's engagement with the plaintiff personally. All were in agreement about the task at hand.

98 That consensus having been reached, without objection from any quarter:

(a) orders were made under clause 14 as earlier foreshadowed, and noted in paragraph 94(b) above; and

(b) all the affidavit and documentary evidence, duly identified, was formally recorded as having been adduced.

99 This structured approach to the conduct of the appeal was necessary: (a) to ensure that the appeal could be contained within reasonable limits if permitted to go beyond the appeal on a question of law for which clause 14(1)(b) provides; (b) to make sure that the plaintiff and her counsel were comfortable with the procedure to be followed; and (c) to ensure that any engagement with the plaintiff personally could be conducted with as little formality as due process and procedural fairness allow.

100 Procedural formalities having been addressed, all participants in the appeal (bench, bar and the plaintiff personally) congregated around the bar table for an informal discussion with the plaintiff. That discussion was led by me, subject to the possibility of objections (of which there were none), followed by short questions from counsel for the second defendant, and closed by counsel for the plaintiff. The plaintiff was given free rein, throughout, to express her views. She did not hold back.

101 The discussion proceeded for about one hour, as events turned out. The plaintiff is a charming, outspoken woman – disinhibited – with whom care must be taken in conversation because she patently suffers from deafness. In some things, she is mentally acute. In others, not. Despite displays of bravado, she is vulnerable to exploitation, but lacks insight into her vulnerability. She is overconfident about her ability to manage her own affairs. It would not be difficult, through friendship, to conquer her will by charm.

102 At the conclusion of the discussion I returned to the bench; shared some “first impressions” of the plaintiff with the lawyers; received short oral submissions from the representatives of the defendants; and, at her request, gave a direction for counsel for the plaintiff to file and serve supplementary written submissions in lieu of oral submissions.

103 Supplementary directions included a direction that the NSW Trustee, in consultation with the other parties, file and serve a short affidavit: (a) verifying the plaintiff's date of birth; and (b) deposing to the current arrangements presently in place for care of the plaintiff's disabled son. The evidence before the Court, in light of statements made by the plaintiff personally, was attended by uncertainty which, it seemed to me, should be removed, if reasonably possible.

104 Unexpected delays occurred in verifying the plaintiff's date of birth. In retrospect, a substantial part of the problem was that the plaintiff, more than once, mis-stated her age. NCAT proceeded on an assumption that she was born in 1930. The "Aged Care Client Record" produced to the Tribunal by her aged care facility recorded a date of birth in 1931. The doctor's report tendered in her case described her as an 84 year old, understating her age by eight years. In her oral (unsworn) evidence before the Court, in conversation with me as the judge and the lawyers appearing before the Court, she claimed to have been born in 1933. In subsequent written submissions made by her counsel, and correspondence sent to the Court by her solicitor, the 1933 date was, on her instructions, adhered to by her lawyers.

105 When a birth certificate was finally obtained upon a search of the records of the Registrar of Births, Deaths and Marriages, it revealed a date of birth in 1923. Confronted with this evidence, the plaintiff acknowledged its correctness.

106 In supplementary written submissions her counsel explained: "[The plaintiff] confirms that her correct year of birth is 1923, rather than 1933. She has instructed her solicitor that she has been evasive about her age because she '*did not want to be 92 years of age*' and '*all girls lie about their age*"'.

CONTEXT : INSTITUTIONAL FRAMEWORK OF A CHALLENGE IN THE SUPREME COURT TO A FINANCIAL MANAGEMENT ORDER MADE BY THE GUARDIANSHIP DIVISION OF NCAT

The Guardianship Tribunal replaced by NCAT Guardianship Division

107 NCAT was established on 1 January 2014 (*Civil and Administrative Tribunal Act*, section 7) and, on its establishment several tribunals, including the Guardianship Tribunal as constituted under the *Guardianship Act*, were

abolished (*Civil and Administrative Tribunal Act*, Schedule 1, clauses 2 (1) and 3).

108 To all intents and purposes, as a practical matter, the business formerly conducted by the Guardianship Tribunal is now conducted by the Guardianship Division of NCAT. It can fairly be said, colloquially, that the Guardianship Tribunal has been reincarnated as a Division of NCAT.

109 A practical consequence of this is that legislative provisions governing the constitution and operation of the statutory tribunal formerly exercising jurisdiction under the *Guardianship Act*, formerly found in Part 6 of that Act, are now found, relocated, in Schedule 6 to the *Civil and Administrative Tribunal Act.*

110 The provisions of the *Guardianship Act* regulating the making of financial management orders remain substantially unaltered. However, as it bears upon the current proceedings, notice should be taken that the right of appeal from the Guardianship Tribunal to the Court for which section 67 of the *Guardianship Act* once provided is now found, in substance, in clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*.

Preservation, Reservation and Deployment of Inherent Protective (Parens Patriae) Jurisdiction

111 Nothing in the *Civil and Administrative Tribunal Act*, the *Guardianship Act*, the *NSW Trustee and Guardian Act* or the *Powers of Attorney Act* deprives the Court of its inherent, protective jurisdiction. Nevertheless, in its exercise of that protective (*parens patriae*) jurisdiction, the Court is vigilant against allowing overly free access to the jurisdiction in circumstances in which parties might seek to circumvent, or set at nought, a process of appeal from a statutory court or tribunal established as a specialist jurisdiction designed to bear the burden of routine cases.

112 Conforming to a model found in several common law jurisdictions, the Court's *parens patriae* jurisdiction is generally reserved for dealing with uncontemplated, or exceptional, situations where it appears necessary for the jurisdiction to be invoked for the protection of those who fall within its ambit: *Re Eve* [1986] 2 SCR 388 at 411; 31 DLR (4th) 1 at 17.

113 In the exercise of *parens patriae* jurisdiction over minors, the Children's Court of NSW exercises specialist, statutory jurisdiction, subject to an appeal to the District Court of NSW. In those cases, the Court exercises caution in entertaining *parens patriae* jurisdiction lest it undermine the integrity of the procedure for appeals to the District Court. The standard approach is that of Palmer J in *Re Victoria* [2002] NSWSC 647; 29 Fam LR 157 at [37]-[40], supplemented by that of White J in *Re Frieda and Geoffrey* [2009] NSWSC 133; 40 Fam LR 608 and cases cited therein. Recent examples are *Re Baby S* [2014] NSWSC 871 at [19]-[23] and *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [79]-[95]; [2015] NSWCA 105 at [15]-[16].

114 The Court's predisposition to respect the integrity of a statutory appeal process requires reorientation in the context of an exercise of *parens patriae* jurisdiction over a person, incapable of managing his or her affairs, amendable to an exercise of jurisdiction by the Guardianship Division of NCAT.

115 That is because clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*: (a) provides an avenue of appeal *to the Court*, not the District Court; and (b) that appeal procedure is able to be adapted, by orders of the Court, to embrace different appellate models.

116 The *Re Victoria* line of cases remains relevant (as illustrated by the reference to *Re Victoria* in *Re B (No 1)* [2011] NSWSC 1075 at [59]) but (as is illustrated by *Re B (No 1)* at [58] and [60]) the Court's *parens patriae* jurisdiction may be called in aid specifically to reinforce a statutory appellate procedure, not only to circumvent it. The essential point, here, remains, however, a concern on the part of the Court to maintain the efficacy of statutory procedures in the service, generally, of those in need of protection.

Recognition, Reservation and Deployment of Administrative Law (Judicial Review) Jurisdiction

117 Building upon the traditional discretionary character of the jurisdiction of the Court to grant administrative law relief, on an application for judicial review, the *Civil and Administrative Tribunal Act* also recognises that the Court has a discretion to entertain an application for judicial review rather than an appeal;

but the Act encourages parties to channel challenges to Tribunal decisions through the appeal procedures for which the Act provides.

118 Section 5(2)(b) provides that a decision of the Tribunal that *purports* to be made under enabling legislation or the Act is taken to be a decision under that legislation or the Act (as the case may be) if the decision was beyond the power of the decision-maker to make. Section 34 provides, *inter alia*, that the Court can, but is not required, to refuse to conduct a judicial review of a decision of the Tribunal "if an internal appeal [to an Appeal Panel of the Tribunal] or an appeal to a court could be, or has been, lodged against the decision".

119 Clause 14 of Schedule 6 provides an ample, albeit regulated, appeal procedure to the Court: *cf, Allen & Ors v TriCare (Hastings) Pty Ltd & Anor* [2015] NSWSC 416 at [60], [62], [64] and [65].

A Practical Consequence of Different Perspectives of Protective and Administrative Law Jurisdictions

120 In administration of the law relating to management of the affairs (whether concerning the person or estate) of a person who is, or may be, incapable of managing his or her own affairs, it can be, as this case illustrates, important to bear in mind the different character of the Court's administrative law and protective jurisdictions, inherent or statutory.

121 The administrative law jurisdiction (largely focused, now, on section 69 of the *Supreme Court Act* in lieu of prerogative writs), invoked by the plaintiff in both her initial summons and her amended summons, is directed to ensuring that NCAT acts within its jurisdiction, as it must, as a statutory tribunal: *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [80]-[81]; *Re Henry v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [4], [142]-[156], [229]-[230] [233] and [264]-[268]; *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88 at [110]-[116]. An exercise of that jurisdiction may, deliberately but perhaps only incidentally, serve the interests, and be for the benefit, of a person who is, may be or is alleged to be, in need of protection. It is not specifically dedicated to that end.

122 An exercise of protective jurisdiction (whether by the Court in exercise of its inherent jurisdiction, or by an exercise of a power conferred on the Court or a statutory tribunal by legislation) *is* specifically dedicated to service of a person in need of protection.

123 In the current case, a practical effect of a primary focus on the Court's administrative law jurisdiction was that, until the Court drew attention to the statutory right of appeal from NCAT to the Court, and the associated inherent jurisdiction of the Court, and the plaintiff had then shifted her focus towards the protective jurisdiction, management of the plaintiff's estate was paralysed by indecision on the part of the NSW Trustee. The plaintiff's attack on the validity of its appointment as her financial manager left both the plaintiff and the NSW Trustee uncertain who, if anybody, was empowered to make day-to-day decisions.

124 This paralysis could have been constructively addressed, as it ultimately was, by focussed consideration being given to the legislation governing an appeal from the Guardianship Division of the Tribunal (particularly, the *Civil and Administrative Tribunal Act*, Schedule 6, clause 14 (5)) and the broader jurisdiction of the Court (under the *NSW Trustee and Guardian Act* and the Court's general jurisdiction) over the estates of persons who are, or may be, in need of protection.

The Broad, Flexible Character of the Clause 14 Statutory Appeal Regime

125 The broad, flexible character of the appeal procedure for which clause 14 provides carries the practical consequence that, in all likelihood, it will only be in a rare case that an administrative law challenge to a decision of the Guardianship Division of NCAT can add anything to *either* protection of the rights of a person in need of protection *or* supervision of the work of that Division of the Tribunal.

126 The availability of the Court's independent, general protective jurisdiction (principally, the inherent jurisdiction derived from the *Third Charter of Justice* 1823 and related Imperial legislation; the jurisdiction conferred by section 23 of the *Supreme Court Act* 1970 NSW; and the jurisdiction conferred by the *NSW*

Trustee and Guardian Act) reinforces that engaged by an appeal under clause 14.

127 The hallmarks of the Court's protective jurisdiction, in all its manifestations, are, primarily, its purposive (protective) character and, consequentially, its subordination of procedure to the (protective) purpose served.

APPEALS FROM A FINANCIAL MANAGEMENT ORDER MADE BY NCAT (GUARDIANSHIP DIVISION)

The Constitution of the NCAT Guardianship Division

128 When exercising its substantive Division functions (as it does when it makes financial management orders under the *Guardianship Act*) the Guardianship Division of the Tribunal is generally (as it was in the current proceedings) constituted by three members of the Division (*Civil and Administrative Tribunal Act*, Schedule 6, clause 4): one member who is an Australian lawyer; a second member with a professional qualification; and a third member with a community-based qualification.

129 The member with a "professional qualification" is "a person (such as a medical practitioner, psychologist or social worker) who has experience in assessing or treating persons to whom [the *Guardianship Act*] relates": Schedule 6, clause 1 (2) (a). A member who has a "community based qualification" is a "person who has experience with persons to whom [the *Guardianship Act*] relates": Schedule 6, clause 1 (2) (b).

Avenues of Appeal from NCAT's Guardianship Division

130 Clause 12 of Schedule 6 provides two avenues of appeal for a party to proceedings in which the Guardianship Division of the Tribunal has made a financial management order. A choice can be made either to pursue "an internal appeal" to an Appeal Panel of NCAT (in accordance with Division 2 of Part 6, including section 80, of the *Civil and Administrative Tribunal Act*) or an appeal to the Supreme Court in accordance with Part 6 (clauses 12-14) of Schedule 6 to the Act.

131 Clause 13 of Schedule 6 governs the constitution of an Appeal Panel for the determination of an internal appeal.

132 Clause 14 of Schedule 6 governs an appeal to the Supreme Court.

The Terms of Clause 14

133 Clause 14 is in the following terms (with emphasis added):

> "**14. Appeals to Supreme Court under this Part**
>
> (1) A party to proceedings in which an appealable Division decision [including a financial management order under the *Guardianship Act*, section 25E and an interim financial management order made under section 25H] is made may **appeal** to the Supreme Court against the decision:
>
> (a) **in the case of an interlocutory decision of the Tribunal** - with the leave of the Court, or
>
> (b) **in the case of any other kind of decision** - as of right on any question of law, or with the leave of the Court, on any other grounds.
>
> (2) **An appeal** under this Part is to be instituted:
>
> (a) in the case of **an ancillary or interlocutory decision** of the Tribunal - within the period ending 28 days after the relevant decision has been made, or
>
> (b) **in any other case** - within the period ending 28 days after the day on which the written statement of reasons for the decision is given to the person seeking to appeal, or
>
> (c) within such further time as the Supreme Court may, in any case, allow.
>
> (3) The Supreme Court in **an appeal** under this Part may:
>
> (a) **decide to deal with the appeal by way of a new hearing if it considers that the grounds for the appeal warrant a new hearing, and**
>
> (b) **permit such fresh evidence, or evidence in addition to or in substitution for the evidence received by the Tribunal at first instance, to be given in the new hearing as it considers appropriate in the circumstances**.
>
> (4) **In determining an appeal**, the Supreme Court may make such orders as it considers appropriate **in light of its decision on the appeal**, including (but not limited to) orders that provide for any one or more of the following:
>
> (a) **the decision under appeal** to be confirmed, affirmed or varied,
>
> (b) **the decision under appeal** to be quashed or set aside,
>
> (c) **the decision under appeal** to be quashed or set aside and for another decision to be substituted for it,
>
> (d) the whole or any part of the case to be reconsidered by the Tribunal at first instance, either with or without further evidence, in accordance with the directions of the Supreme Court.
>
> (5) **Subject to any interlocutory order made by the Supreme Court**, **an appeal** to the Supreme Court operates to stay the decision under appeal."

The Nature of an "Appeal"

134 The nature of an "appeal" depends on the terms of the legislation that provides for an entitlement to appeal and governs the appeal. A right of appeal is a creature of statute: *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619; *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 400 [27].

135 Because there are various forms of procedure capable of description as an "appeal" (as illustrated in *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281 at 297C-298A), importance attaches to identification of the character of the process of "appeal" under consideration and the duties and powers of the Court conducting the appeal: *Walsh v Law Society of New South Wales* (1999) 198 CLR 73 at 90 [51].

136 At one end of what might, loosely, be called a spectrum of meanings attributed to the word "appeal" commonly lies the concept of an appeal *stricto sensu* ("in the strict sense"). That is taken to be a process in which the aid of the Court is sought to redress error in the decision, or process of decision-making, of a lower court or tribunal. No appealable error exists if the original decision-maker correctly found the facts on the material before it, and correctly applied the law to those facts, in the course of deciding issues raised before it for determination, the Court being required, and allowed, to do no more than to give such judgment as ought to have been given at the original hearing: *Eastman v The Queen* (2000) 203 CLR 1 at 33 [104].

137 An appeal *stricto sensu* is generally compared with an appeal *de novo* (an appeal "by way of a new hearing") at the other end of the spectrum. The critical difference between the two concepts is, generally, that in the former type of appeal the powers of the Court are exercisable only if an appellant can demonstrate that, having regard to all the evidence before the Court, the order under appellate challenge is the result of some legal, factual or discretionary error, whereas, in the latter type of appeal, those powers may be exercised regardless of error: *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [23].

138 A hearing *de novo* generally involves the exercise of original jurisdiction and may require the original informant or complainant to start again, and to make

out his, her or its case afresh: *Harris v Caladine* (1991) 172 CLR 84 at 124-125.

139 However, the distinction between "original jurisdiction" and "appellate jurisdiction" is not always helpful in tying down the nature of a particular "appeal" process engaged. That is particularly so in the context of a broad discretion in the Court to admit further evidence on appeal. In such a case, particular attention may be required to be given to the purpose of the substantive jurisdiction conferred on the original decision-maker and the Court respectively: *CDJ v VAJ* (1998) 197 CLR 172 at 201-204.

140 Somewhere in the middle of the spectrum (a label of convenience, not an acceptance that there is a linear range of meanings) can often be found, with different formulations, a "right of appeal" "on a question of law": *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [187]-[189]; *SAB v SEM & Ors* [2013] NSWSC 253 at [4]-[5].

141 Ultimately, there is no substitute for close examination of: (a) the legislation providing for, and governing, an "appeal"; and (b) the nature and purpose of the jurisdiction invoked before the original decision-maker and in the Court.

Clause 14 in the Context of the Supreme Court's "Rules of Court"

Intersection between Clause 14 and SCA s 75A

142 Clause 14 must be read with section 75A of the *Supreme Court Act* 1970 NSW although, by operation of section 75A(4), the clause largely displaces the section.

143 Section 75A applies to appellate review of administrative decisions as well as to appellate review of judicial decisions. Section 75A(4) directs attention to the particular appellate jurisdiction in aid of which the section is invoked; the limits of that jurisdiction, and of particular powers accompanying its grant; as well as the nature and purpose of the jurisdiction of the original decision-maker: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 399[27] - 401[30]; *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446 at 453 [16]-[17].

144 Section 75A is in the following terms (with emphasis added):

"**75A. Appeal**

(1) Subject to subsections (2) and (3), **this section applies to an appeal to the Court** and to an appeal in proceedings in the Court.

(2) This section does not apply to so much of an appeal as relates to a claim in the appeal:

(a) for a new trial on a cause of action for debt, damages or other money or for possession of land, or for detention of goods, or

(b) for the setting aside of a verdict, finding, assessment or judgment on a cause of action of any of those kinds,

being an appeal arising out of:

(c) a trial with a jury in the Court, or

(d) a trial:

(i) with or without a jury in an action commenced before the commencement of section 4 of the District Court (Amendment) Act 1975 , or

(ii) with a jury in an action commenced after the commencement of that section, in the District Court.

(3) This section does not apply to:

(a) an appeal to the Court under the Crimes (Local Courts Appeal and Review) Act 2001 , or

(b) to a case stated under the Criminal Appeal Act 1912 .

(4) **This section has effect subject to any Act**.

(5) **Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing**.

(6) **The Court shall have the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning**:

(a) amendment,

(b) **the drawing of inferences and the making of findings of fact**, and

(c) the assessment of damages and other money sums.

(7) The Court may receive further evidence.

(8) Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds.

(9) Subsection (8) does not apply to evidence concerning matters occurring after the trial or hearing.

(10) **The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires**."

145 By virtue of section 75A(4), clause 14 prevails over section 75A(5).

146 The discretionary powers conferred on the Court by clauses 14(1) and 14(3), informed by the range of orders authorised by clause 14(4) and the power of the Court under section 75A(6)(b) to draw inferences from evidence before the Tribunal, empower, and require, the Court to determine, in the particular case, the nature of the appeal process engaged when a party to a Tribunal decision institutes "appeal" proceedings in the Court.

147 The case is not *quite* like a "review" of a decision of a registrar of the Court, where a judge does not need to find error on the part of a registrar in order to intervene with the registrar's decision, but may, upon an independent exercise of discretion, decline to intervene if no error can be identified in the registrar's making of a discretionary determination: *cf, Tomko v Plasty (No 2)* (2007) 71 NSWLR 61 at [5]-[10]; *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247; 17 BPR [98635] at [99]-[108].

148 Nevertheless, as in that situation: (a) in exercising the broad discretions for which clause 14(1) and 14(3) provide, the Court's discretionary powers extend to a discretion as to whether, and if so, how to intervene; and (b) there is a forensic onus on a person seeking to have the Court set aside or vary the Tribunal's decision to make out a case that the Court, in the interests of justice (informed by the protective purpose of the Court's jurisdiction), should exercise its discretion to do so.

149 The Court's discretionary powers, in the exercise of protective jurisdiction, are unconfined except by the subject matter, scope and purpose of the (protective) jurisdiction: *Marion's case* (1992) 175 CLR 218 at 258; *Re Eve* [1986] 2 SCR 388 at 410-414 and 425-427; (1986) 31 DLR (4th ed) 1 at 16-19 and 28-29. *Cf*, *O'Sullivan v Farrar* (1989) 168 CLR 210 at 216; *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [41]; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

A Distinction between Clause 14 and Old Section 67

150 In one important, particular respect, clause 14 is, in form, different from its predecessor, section 67 of the Guardianship Act.

151 So far as is presently material, section 67 (with emphasis added) was in the following terms:

> "**67. Appeals to the Supreme Court**
>
> (1) A party to a proceeding before the Tribunal (whether under [the Guardianship Act] or any other Act) may **appeal to the Supreme Court from any decision of the Tribunal in that proceeding**:
>
> (a) **as of right, on a question of law, or**
>
> (b) **by leave of the Supreme Court, on any other question**….
>
> (3) The Supreme Court shall hear and determine the appeal and may make such orders as it thinks appropriate in the light of its decision.
>
> (4) Without affecting the generality of subsection (3), the orders that may be made by the Supreme Court on an appeal include:
>
> (a) an order affirming or setting aside the decision of the Tribunal, and
>
> (b) an order remitting the case to be heard and decided again by the Tribunal (either with or without the hearing of further evidence) in accordance with the directions of the Supreme Court.
>
> (5) Subject to any interlocutory order made by the Supreme Court, an appeal operates to stay the decision appealed against."

152 Section 67 was repealed on the commencement of the *Civil and Administrative Tribunal Act*.

153 Section 67(1) did not, as clause 14(1) does, distinguish between an "interlocutory decision" of the Tribunal and other kinds of Tribunal decisions.

154 The word "interlocutory" requires, in this context, an appreciation that all financial management orders made by the Tribunal are, in a sense, provisional because (to use deliberately neutral language) they can be modified or set aside. An interim financial management order (under section 25H of the *Guardianship Act*) carries, in its name, an express acknowledgement of its provisional character. Sections 25N-25R of the Act empower the Tribunal to review or revoke a financial management order. Sections 25S-25U of the Act empower the Tribunal to review the appointment of a financial manager.

155 Section 86 of the *NSW Trustee and Guardian Act*, by the generic terms in which it is expressed, empowers the Court to revoke either a "management order" (made under section 41(1)(a) or section 46(1) of that Act) or a financial management order made under the *Guardianship Act*.

156 The inherent, protective jurisdiction of the Court also extends to revocation of a management order, even if the protected person concerned remains incapable of managing his or her affairs: *Re W and L (Parameters of Protected Estate Management Orders*) [2014] NSWSC 1106 at [87]-[89] and [95].

157 The Court also has jurisdiction (by reference to section 41 of the *NSW Trustee and Guardian Act* in combination with section 47 of the *Interpretation Act* 1987 NSW and under the inherent, protective jurisdiction) to remove and replace a protected estate manager: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 237G-238A; *M v M* [2013] NSWSC 1495; *Re C* [2012] NSWSC 1097 at [61]-[67].

158 Although the plaintiff has, by her further amended summons, re-focused her challenge to the Tribunal's financial management orders affecting her, by abandoning her claim for administrative law relief and turning to an appeal for which clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act* provides, the general protective jurisdiction of the Court (including that found in the *NSW Trustee and Guardian Act* and the Court's inherent jurisdiction) remains available to her and, having regard to the welfare principle that informs any exercise of the protective jurisdiction, to the Court generally.

159 With emphasis added, section 86 of the *NSW Trustee and Guardian Act* is in the following terms:

> "**86. Revocation of orders by Supreme Court**
>
> (1) The Supreme Court, **on application by a protected person** and if the Court is satisfied that the protected person is capable of managing his or her affairs, may:
>
> (a) revoke any declaration made that the person is incapable of managing his or her affairs, and
>
> (b) revoke the order that the estate of the person be subject to management under this Act, and
>
> (c) make any orders that appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court or the manager and the discharge of any manager.
>
> (2) For the purposes of this section:
>
> (a) evidence of a person's capability to manage his or her own affairs may be given to the Supreme Court in any form and in accordance with any procedures that the Court thinks fit, and

(b) the Court may personally examine a person whose capability to manage his or her affairs is in question or dispense with any such examination, and

(c) the Court may otherwise inform itself as to the person's capability to manage his or her own affairs as it thinks fit."

Requirement of a Tutor, and Dispensation of the Requirement, in Supreme Court Proceedings

160 The need to recall legislative context, including rules of court governing the procedural framework of proceedings in the Court, reminds us that these things take their colour from the purpose of the particular proceedings, and that procedural rules are servants, not masters of the Court. This can be illustrated, in the context of the current proceedings, by an examination of the legislation governing the need for, and supervision of, a tutor for a person under legal incapacity. *Cf, Maria Saravinovska v Krste (Chris) Saravinovski* [2015] NSWSC 128 at [32]-[33].

161 On a literal reading of the *Civil Procedure Act* ("CPA") and the *Uniform Civil Procedure Rules* ("UCPR"), but subject to the stay for which clause 14(5) of Schedule 6 of the *Civil and Administrative Tribunal Act* provides, *prima facie* the plaintiff (a protected person within the meaning of the *NSW Trustee and Guardian Act* by virtue of the financial management order against her estate that is the subject of challenge in the proceedings) cannot commence or carry on the proceedings except by a tutor (UCPR rule 7.14 (1)) who, *prima* facie, should be the NSW Trustee (UCPR rules 7.15 (3)-(4)). A "protected person" within the meaning of the *NSW Trustee and Guardian Act* is "a person under legal disability" as defined by CPA section 3(1). For the purpose of the rules governing the appointment and removal of a tutor (UCPR Part 7 Division 4), the expression "person under legal incapacity" also includes "a person who is incapable of managing his or her own affairs": UCPR rule 7.13.

162 CPA section 80 provides express authority for the Court to give directions to a tutor in the conduct of proceedings. UCPR rule 7.18 provides express authority for the Court to appoint and removal a tutor. The Court also has express powers to dispense with requirements of rules of court and to mould procedures to accommodate particular cases.

163 Section 14 of the *Civil Procedure Act* provides that, "[in] relation to particular civil proceedings (defined in section 3(1) as "proceedings other than criminal

proceedings"], the Court may, by order, dispense with any requirement of rules of court if satisfied that it is appropriate to do so in the circumstances of the case."

164 Section 16 of the *Civil Procedure Act* provides as follows:

> "**16. Court may give directions in circumstances not covered by rules**
>
> (1) In relation to particular civil proceedings, the court may give directions with respect to any aspect of practice or procedure for which rules of court or practice notes do not provide.
>
> (2) Anything done in accordance with such a direction (including the commencing of proceedings and the taking of any step in proceedings) is taken to have been validly done."

165 In formal terms, the plaintiff should have, as she may technically require, an order dispensing with any need for a tutor in the conduct of her appeal. She has a contradictor, her son. Her protected estate manager, the NSW Trustee, is a party to the proceedings. There is no utility in imposing on her comparatively small estate the added expense of a tutor.

166 In reality, no objection may ever be taken (and, in these proceedings, no objection was taken) to the competency of proceedings commenced without a tutor where the plaintiff: (a) seeks to appeal, under clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*, against a financial management order affecting his or her estate; or (b) applies for an order, under section 86 of the *NSW Trustee and Guardian Act*, for revocation of a financial management order or management order affecting his or her estate. *Prima facie,* such an objection would not serve the protective purpose of the Court's jurisdiction. Nor would it promote coherence in principled administration of the Court's protective jurisdiction.

167 If the standing of a protected person to apply for revocation of a financial management order or a management order (*via* a clause 14 appeal, or otherwise), without a tutor, were to be challenged, the Court could reasonably be expected to address the problem so as to ensure that the application could be dealt with in a substantive way. That is particularly so because: (a) section 86 of the *NSW Trustee and Guardian Act* expressly contemplates that an application under the section must be made by a protected person; and (b) even a stranger may apply for the appointment of a protected estate manager

or for the revocation of management orders in an appropriate case: *McD v* McD [1983] 3 NSWLR 81 at 84D-E; *Re W and L (Parameters of protective estate management orders)* [2014] NSWSC 1106 at [92]-[94]. The question of standing in protective proceedings ultimately returns to the rationale for the protective jurisdiction itself: the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection. Clause 14(5) of Schedule 6 of the *Civil and Administrative Act* implicitly empowers the Court, in addition to its general powers, to make interlocutory orders in conduct of an appeal under clause 14.

Relief attuned to the Nature of the Case

168 Upon an exercise of protective jurisdiction, whatever the form of originating process, the Court must remain mindful of the need to protect a person in need of protection. Depending on the circumstances of the case, a need for judicial vigilance may attend proceedings in which a protected person seeks to be rid of a financial management order or management order no less than proceedings in which such an order is sought or might otherwise need to be made.

169 In proceedings of this character, section 90(1) of the *Civil Procedure Act* and rule 36.1 of the *Uniform Civil Procedure Rules* call attention to the Court's powers and duties.

170 Section 90(1) provides that "[the] Court is, at or after trial or otherwise as the nature of the case requires, to give such judgment or make such order as the nature of the case requires.

171 UCPR rule 36.1 provides that "[at] any stage of proceedings, the Court may give such judgment, or make such order, as the nature of the case requires, whether or not a claim for relief extending to that judgment or order is included in any originating process of notice of motion."

172 Upon an exercise of protective jurisdiction (howsoever arising) the Court is bound to remain alive to the nature of the jurisdiction invoked.

The Types of NCAT Decisions Appealable under Clause 14

173 In other legislative contexts, where a distinction is drawn between orders that are "final" or "interlocutory" for the purpose of a determination whether leave to appeal is required as a pre-requisite of appellate challenge to an order, the question whether an order is "interlocutory" is assessed by reference to *the degree of finality* attaching to the order *in the determination of legal rights*: *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440 and 443; *Licul v Corney* (1976) 180 CLR 213 at 220 and 225; and *Carr v Finance Corporation of Australia Ltd* [*No. 1*] (1981) 147 CLR 247 at 248 and 253-254.

174 A different approach than that taken in a context in which the contrast is simply between "interlocutory" and "final" orders is called for in clause 14 of Schedule 6 to the *Civil and Administrative Tribunal Act*, where:

(a) there is a contrast, in clause 14 (1), between "an interlocutory decision" and "any other kind of decision"; and

(b) clause 14 (2) marries together the concepts of "ancillary" and "interlocutory".

175 The *Civil and Administrative Tribunal Act* distinguishes between "an interlocutory decision", an "ancillary decision" and "other kinds of decision".

176 Section 5 governs the meaning of the word "decision". Section 4 contains definitions of the expressions "ancillary decision" and "interlocutory decision".

177 With emphasis added, section 5 is in the following terms:

> "**5. Meaning of "decision**"
>
> (1) **In this Act, "decision" includes any of the following**:
>
> (a) **making**, suspending, revoking or refusing to make **an order or determination,**
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
>
> (d) imposing a condition or restriction,
>
> (e) making a declaration, demand or requirement,
>
> (f) retaining, or refusing to deliver up, an article,
>
> (g) doing or refusing to do any other act or thing.
>
> (2) **For the purposes of this Act:**

(a) **a decision is made under enabling legislation or this Act if it is made in the exercise (or purported exercise) of a function conferred or imposed by or under the enabling legislation or this Act**, and

(b) **a decision that purports to be made under enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act even if the decision was beyond the power of the decision-maker to make**, and

(c) a refusal of a decision-maker to make a decision under enabling legislation or this Act because the decision-maker considers that the decision concerned cannot lawfully be made under the enabling legislation or this Act is taken to be a decision made under the enabling legislation or this Act to refuse to make the decision requested, and

(d) a failure by a decision-maker to make a decision within the period specified by enabling legislation or this Act for making the decision is taken to be a decision by the decision-maker at the end of the period to refuse to make the decision."

178 Each of a financial management order (made under section 25E of the *Guardianship Act*) and an interim financial management order (made under section 25H of the Act) is "an order or determination" within the meaning of section 5(1)(a) and attracts the operation of section 5(2)(a). For the sake of completeness it can also be said that each of those orders made by the Tribunal in the proceedings presently under challenge also falls within section 5(2)(b).

179 Section 4(1) of the *Civil and Administrative Tribunal Act* defines an "interlocutory decision" **of the Tribunal** in the following terms (with emphasis added):

"**4. Definitions**

(1) In this Act: …

"interlocutory decision" **of the Tribunal** means a decision made **by the Tribunal** under legislation concerning any of the following:

(a) the granting of a stay or adjournment,

(b) the prohibition or restriction of the disclosure, broadcast or publication of matters,

(c) the issue of a summons,

(d) the extension of time for any matter (including for the lodgement of an application or appeal),

(e) an evidential matter,

(f) the disqualification of any member,

(g) the joinder or misjoinder of a party to proceedings,

(h) the summary dismissal of proceedings,

(i) any **other interlocutory issue** before the Tribunal.

180 Neither the making of a financial management order nor the making of an interim financial management order falls within this definition. They do not fit comfortably within subparagraphs (a)-(h) of the definition. Subparagraph (i) does not accommodate them either because the word "other" takes its colour from the preceding subparagraphs and it does not seem apt to characterise a question about whether a financial management order or an interim financial management order should be made simply as an "issue before the Tribunal".

181 With emphasis added, section 4(1) defines an "ancillary decision" of the Tribunal in the following terms:

> ""ancillary decision" **of the Tribunal** means **a decision made by the Tribunal** under legislation (**other than an interlocutory decision of the Tribunal**) that is **preliminary to**, or consequential on, **a decision determining proceedings**, including:
>
> (a) a decision concerning whether the Tribunal has jurisdiction to deal with a matter, and
>
> (b) a decision concerning the awarding of costs in proceedings."

182 Within the meaning of this definition, the making of a financial management order is properly located as "a decision determining proceedings".

183 Having regard to the terms of section 25H(1) of the *Guardianship Act* (particularly the words "pending the Tribunal's further consideration of the capability of the person to whom the order relates to manage his or her own affairs") the making of an interim financial management order is an "ancillary decision" of the Tribunal because it is "preliminary to… a decision determining proceedings".

184 In characterisation of the making of a financial management order as "a decision determining proceedings", it matters not that an application made to the Tribunal might include an application for relief other than the making of a financial management order. Nor does it matter that a financial management order, once made, is liable to be reviewed or revoked. Within the contemplation of the *Civil and Administrative Tribunal Act*, read with the *Guardianship Act*, the making of a financial management order is a determination of proceedings on a

question whether a financial management order can, and should, be made. An application for revocation of such an order is a fresh proceeding.

185 Characterisation of a financial management order as neither an "interlocutory decision of the Tribunal" nor an "ancillary decision of the Tribunal", coupled with characterisation of an interim financial management order as an "ancillary decision of the Tribunal" provides a coherent explanation of how clause 14 of Schedule 6 of the *Civil and Administrative Tribunal Act* is intended to operate. Both types of financial management order attract the operation of clause 14(1)(b), but the time for institution of an appeal may commence to run, under clause 14(2), from an earlier time when an interim financial management order is made than when a financial management order is made under section 25E of the *Guardianship Act*.

186 That both types of financial management order should be appellable "as of right on any question of law" is appropriate given that they both involve a change in the legal status of a person in respect of whom they are made (rendering such a person a "protected person") and, by operation of section 71(1) of the *NSW Trustee and Guardian Act*, both have the effect of suspending the power of the person to deal with his or her estate. *Cf, David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417.

187 Characterisation of both types of financial management order as a form of decision other than an "interlocutory decision of the Tribunal" conforms to the legislative scheme of the *Civil and Administrative Tribunal Act* without impinging upon how a "management order" made under section 41 of the *NSW Trustee and Guardian Act*, or any similar order, might be classified for the purpose of provisions governing a right of appeal from a divisional judge of the Court to the Court of Appeal.

188 Clause 14(5) of Schedule 6 to the *Civil and Administrative Tribunal Act* demonstrates (in its reference to "any *interlocutory* order *made by the Supreme Court*) that the meaning of the word "interlocutory" depends on the context in which it is used. When section 101 (2)(b) of the *Supreme Court Act* provides that "[an] appeal shall not lie to the Court of Appeal, except by leave of the Court of Appeal, from… an interlocutory judgment or order in proceedings in

the Court…" it uses the word "interlocutory" in the sense established by the line of cases identified with *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440 and 443. In that context, the provisional character of an order for the appointment of a receiver, in exercise of the Court's protective jurisdiction, may, in particular, more readily be seen as "interlocutory" in character. Section 101(2)(b) serves the purpose of regulating the business of the Court of Appeal. Its meaning takes colour from that purpose.

189 Here, however, attention must be focused on the language and purpose of the *Civil and Administrative Tribunal Act* in combination, particularly, with the *Guardianship Act*.

CLAUSE 14(1) : THE GATEWAY TO AN APPEAL

General Principles

190 Subject to qualifications reflective of the Supreme Court's different institutional setting, I adopt as appropriate to a consideration of clause 14(1) of Schedule 6 of the *Civil and Administrative Tribunal Act*, the "general principles" identified by Wright J, the President of NCAT, in *Collins v Urban* [2014] NSWCATAP 17 at [84], read in the context of his Honour's prefatory remarks in [82]-[83] and an appreciation that section 80(2) of the Act is in substantially the same terms as clause 14(1).

191 The qualifications on my acceptance of Wright J's statement of general principles are five in number. First, there is a need to take section 4 of the *Guardianship Act* specifically into account, which need was recognised by NCAT in *BPY v BZQ* [2015] NSWCATAP 33 at [33]-[34]. Secondly, there is a need to take into account the jurisdiction of the Supreme Court broader than clause 14. Thirdly, in deciding how to proceed in dealing with any challenge to a decision of the Guardianship Division, the Court must be mindful of a need, characteristic of the protective jurisdiction but reinforced by statute, to administer a protected estate without strife, in the simplest and least expensive way; with informality of procedure; and in a manner calculated to facilitate the just, quick and cheap resolution of real issues: *Theobald*, pages 59-60, 380 and 382; *Civil and Administrative Tribunal Act*, sections 36 and 38; *Civil Procedure Act*, sections 56-63. Fourthly, given the broad evaluative or

discretionary content of most decisions made on an exercise of protective jurisdiction, guidance about what is or may be an error of principle may, in particular cases, be derived from *House v The King* (1936) 55 CLR 499 at 504-505. Fifthly, in reviewing an evaluative or discretionary decision of the Guardianship Division, the Court must make due allowance for the possibility that the Division's discretionary powers, in the exercise of protective jurisdiction, are unconfined except by the subject matter, scope and purpose of NCAT's jurisdiction (as has been noted, *vis á vis* the Court's powers, in paragraph 149 above).

192 In *Collins v Urban*, Wright J wrote the following:

> "82. The principles which govern the granting of leave to appeal by the Appeal Panel under s 80(2)(b) should generally be consistent with those which are applied by Courts when considering the question of leave to appeal. These have recently been summarised by the Court of Appeal in *BHP Billiton Ltd v Dunning* [2013] NSWCA 421. In addition, the Supreme Court has considered the principles which apply when granting leave to appeal to the Court from a decision of the Guardianship Tribunal in a number of cases including *SAB v SEM* [2013] NSWSC 253. The Guardianship Tribunal has now been absorbed into the Tribunal as the Guardianship Division. As there are alternate rights of appeal from decisions of the Guardianship Division to the Supreme Court or the Appeal Panel (see 12 to 14 of Schedule 6 to the Act) both by leave in the case of interlocutory decisions or on grounds other than a question of law, the same principles should apply in deciding whether to grant leave to appeal to the Court or to the Appeal Panel.
>
> 83. Further, the Appeal Panel has addressed the relevant principles to be applied when deciding whether to grant leave to extend an appeal to the merits of the decision (under s 113(2) of *Administrative Decisions Tribunal Act* 1997 (NSW)) in *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10. These principles may be applied by analogy when considering whether to grant leave to appeal under s 80(2)(b) of the Act.
>
> 84. The general principles derived from these cases can be summarised as follows:
>
> (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
>
> (2) **Ordinarily it is appropriate to grant leave to appeal only in matters that involve:**
>
> **(a) issues of principle;**
>
> **(b) questions of public importance or matters of administration or policy which might have general application; or**

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

BHP Billiton Ltd v Dunning [2013] NSWCA 421 at [20] and the authorities cited there, *SAB v SEM* [2013] NSWSC 253 at [8] and [9] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];

(3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21] and the authorities cited there."

193 Although the focus, here, is on section 80(2) and clause 14(1), passing notice should be taken of the fact that section 80(3) is in substantially the same terms as clause 14(3).

194 Due recognition must also be given to the fact that the character of an "internal appeal" from a Division of NCAT to an Appeal Panel of the Tribunal depends on the identity of the Division under consideration. There are different "special practice and procedure" rules for each Division, found in the various Schedules of the *Civil and Administrative Tribunal Act,* which establish the Divisions and regulate appeals from Division decisions.

195 *Collins v Urban* concerned an appeal from NCAT's Consumer and Commercial Division, governed by Schedule 4. Clause 12 of that Schedule confines the operation of section 80(2)(b), *inter alia*, to cases in which an Appeal Panel is satisfied that an appellant may have suffered a substantial miscarriage of justice because the decision under appeal was not fair and equitable, the decision was against the weight of evidence, or significant new evidence (not earlier reasonably available) has arisen. Those criteria do not apply to an appeal, either to an Appeal Panel or to the Court, from a decision of the Guardianship Division.

196 In the Guardianship Division the “special practice and procedure” provisions of Schedule 6 (which impact on the operation of an appeal to an Appeal Panel or, under clause 14, to the Court) include clause 5, the provisions of which have been earlier noted.

197 Clause 5, *inter alia*, requires the principles for which section 4 of the *Guardianship Act* provides to be applied by the Tribunal when exercising its Division functions for the purposes of the *Guardianship Act* in relation to persons who have disabilities.

198 In his articulation of the Court’s conventional practice in dealing with section 67 appeals, my immediate predecessor as the Court’s Protective List Judge (White J) recorded a need to take section 4 principles into account: *SAB v SEM and Ors [*2013] NSWSC 253 at [7]-[10] and *Re B (No 1)* [2011] NSWSC 1075 at [61]. I do likewise.

Application to this Case

199 In the current proceedings issues of principle, involving questions of public importance, arise for consideration. Bound up with those issues is a concern that the Tribunal’s evaluation of the plaintiff’s capacity for self-management may have miscarried, in substance, even if the nature of a particular error may not be discernible. The case calls for a general, critical review.

200 On one view of the evidence before the Tribunal the plaintiff might be said to have suffered a “reasonably clear” injustice because, *on the face of the Tribunal’s transcript for 17 June 2014*, she appears to have been not only mentally alert, but also both mentally agile and feisty in manner.

201 At a superficial level at least, *on the transcript*, her performance (because it appeared to manifest capability of mind) does not sit well with the Tribunal’s implicit reliance on Powell J’s observations in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E (modified by express reference to observations of White J in *Re D* [2012] NSWSC 1006 and Barrett J in *P v R* [2003] NSWSC 819) in the construction and application of the *Guardianship Act*, section 25G.

202 In its exposition of the elements of section 25G the Tribunal implicitly focused on Powell J's formulation of the test of whether a person is "incapable of managing his or her own affairs": namely (as the Tribunal expressed it):

(a) whether the plaintiff was incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and

(b) whether that caused a real risk of either: (i) disadvantage in the conduct of her affairs; or (ii) loss or dissipation of such monies or property that she may possess.

203 The Tribunal's exposition of the elements of section 25G made no reference to either the general principles set out in section 4, or the definition of "a person who has a disability" set out in section 3(2) of the Guardianship Act.

204 In the absence of an explicit, statutory definition of the concept of incapacity for self-management, these provisions, coupled with the elements expressly required by section 25G to be considered, are of critical significance in the current case.

205 That is because, by reference to the transcript, the plaintiff "is of advanced age" (section 3(2) (b)); she might arguably be described as "otherwise disabled" (within the meaning of section 3(2)(d)) by reason of her loss of capacity for independent living; and, by virtue of these facts, she might be described as "restricted in one or more major life activities to such an extent that [she] requires supervision or social habitation" (section 3 (2)).

206 On that account she is, *prima facie*, a person with respect to whom the *Guardianship Act* section 4 principles have to be observed by the Tribunal (and the Court) in making decisions under or by reference to sections 25E, 25G and 25RH.

207 The several paragraphs of section 4 inform the evaluative decision making required by reference to section 25G. It is not literally correct to regard them as a checklist, to be applied formalistically, but they provide important points of reference. They must not be elevated to such an extent that they are taken as a substitute for the primary concept of incapacity for self-management, which is the main focus of section 25G, but they may provide substantial guidance as to the meaning and application of the concept.

208 Accepting that the Tribunal was conscious of the need to give the plaintiff's welfare and interests paramount consideration, and to restrict her freedom of decision and freedom of action as little as possible, its reasons for decision, read as a whole, betray a concern that the plaintiff needed to be protected from exploitation.

209 That concern was apparently an incident, *inter alia*, of a specific concern by the Tribunal that, without fully appreciating the nature or scope of the formal authority she had ostensibly conferred on KM by executing an Enduring Power of Attorney in his favour, she had, literally, allowed him to take possession of her jewellery; she had invited, and allowed, him to take possession of her residence; she had proposed to enter into a contract for sale of her residence to him on terms which, an objective observer might think, were improvident; and she had demonstrated a lack of insight into her situation.

210 The plaintiff's proposal to confer on KM a commercial benefit of $100,000 would, if given effect, give to him a benefit representing approximately 20-25% of the value of her net estate, thereby significantly diminishing the resources available to her and her sons, particularly (one might, objectively, suspect) her disabled son.

211 In the perception of the Tribunal, it seems, another dimension to this display of debatable generosity on the part of the plaintiff was that KM, described as a "friend" of the plaintiff and her late husband, is apparently a healthcare professional (physiotherapist) who had treated the plaintiff professionally; he was the active party in arranging for the plaintiff to enter her aged care facility, as well as a beneficiary of her doing so; and he was the grantee of an enduring power of attorney which, ostensibly, went beyond any authority he could reasonably have required to assist the plaintiff's transition to an aged care facility. On top of that, he withdrew a substantial amount of money from the plaintiff's bank account and retained $25,000 of it (since returned) for anticipated expenses.

212 The plaintiff's strident, and in some sense able, defence of her independence appears to have struck the Tribunal not as evidence of an ability to manage her own affairs, but as evidence of a lack of insight into the possibility that she had

been, or was at risk of being, exploited by a person who could not reasonably be said to have had an entitlement to enjoy the preferential treatment she was poised to confer upon him at the expense of herself and her family.

213 Working through the plaintiff's case by reference to the template for which the legislation provides may make the Tribunal's decision more readily comprehensible than its focus on Powell J's gloss about incapacity for "dealing, in a reasonably competent fashion, with the ordinary routine affairs of man".

214 Recent revision, in *Re R* [2014] NSWSC 1810 at [94], of Powell J's "test" for assessment of incapacity for self-management renders the plaintiff's challenge to the Tribunal's decision ripe for appellate review by way of a new hearing.

THIS APPEAL : THE FRAMEWORK FOR DECISION

215 Having determined to decide the appeal "by way of a new hearing", the question of substance for the Court is not whether the Tribunal's financial management order should be set aside, but whether a financial management order can, and should, be made by the Court exercising the powers, and acknowledging the duties, of the Tribunal (*Supreme Court Act*, section 75A(6)) in exercise of the functions of the Tribunal under the *Guardianship Act*, Part 3A (sections 25D-25M).

216 In determining the appeal the Court is required to make such orders as it considers appropriate in light of its decision on the appeal, and as the nature of the case requires: *Supreme Court Act*, section 75A(10), *Civil Procedure Act*, section 90(1); *Uniform Civil Procedure Rules*, rule 36.1; *Civil and Administrative Tribunal Act*, Schedule 6 clause 14(4).

217 Although the broader, general protective jurisdiction of the Court is available in this case, if required in the administration of justice, the nature and ambit of the jurisdiction exercised by the Court by reference to clause 14, in context, is such that there is no necessity to invoke any other head of jurisdiction.

218 Accordingly, it is not necessary to exercise the jurisdiction available to the Court under:

(a) the inherent, protective jurisdiction conferred on the Court by the *Third Charter of Justice*, 1823 and related Imperial legislation (JM Bennett, *A History of the Supreme Court of NSW* (Law Book

Co, Sydney, 1974), chapter 7, especially pages 125-127; *In Re WM* (1903) 3 SR (NSW) 552 at 565; *PB v BB* [2013] NSWSC 1223 at [40]);

(b) the jurisdiction of the Court (as "may be necessary for the administration of justice in New South Wales") under the *Supreme Court Act*, section 23, sometimes (as in *Re C* [2012] NSWSC 1097 at [64]-[66], noted in *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [74]-[82]) described as a source of the Court's inherent protective jurisdiction; or

(c) the powers of the Court under the *NSW Trustee and Guardian Act* to appoint a protected estate manager (section 41) or to revoke a management order or financial management order (section 86).

219 That said, the jurisdiction exercised by the Court by reference to clause 14 and the *Guardianship Act* (and the jurisdiction exercised by the Tribunal under the *Guardianship Act*) is informed by the purposive character of the Court's protective jurisdiction, which provides the template for the legislative scheme for the appointment of financial managers by the Tribunal.

220 There is a coherence in that scheme which, subject to due consideration of particular legislative provisions, must be recognised in performance of the functions conferred on the Tribunal by reference to the *Guardianship Act.*

221 The particular provisions of the *Guardianship Act* engaged in the present case are sections 25E, 25G and 25M.

222 With emphasis added, as presently in force those provisions are in the following terms:

> **"25E. Tribunal may make financial management orders**
>
> (1) The Tribunal may, in accordance with this Part, order that the estate of a person be subject to management under the NSW Trustee and Guardian Act 2009.
>
> (2) The Tribunal may exclude a specified part of the estate from the financial management order.
>
> **25G. Grounds for making financial management order**
>
> The Tribunal may make a financial management order in respect of a person **only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that**:
>
> (a) **the person is not capable of managing those affairs, and**

(b) **there is a need for another person to manage those affairs on the person's behalf, and**

(c) **it is in the person's best interests that the order be made**.

25M. Tribunal may commit estate of protected person to management

(1) If the Tribunal makes a financial management order in respect of the estate (or part of the estate) of a person, the Tribunal **may, by order**:

(a) appoint a suitable person as manager of that estate, or

(b) commit the management of that estate to the NSW Trustee.

(2) Despite section 61 of the *Civil and Administrative Tribunal Act* 2013, an order under subsection (1) (a) does not authorise the person appointed as manager to interfere in any way with the estate concerned unless:

(a) such directions of the Supreme Court as are relevant to the management of the estate have been obtained, or

(b) the NSW Trustee has, under Division 2 of Part 4.5 of the NSW Trustee and Guardian Act 2009 , authorised the person to exercise functions in respect of the estate.

(3) However, the person appointed as manager may take such action as may be necessary for the protection of the estate (including action specified by the Tribunal) pending the directions of the Court or authorisation by the NSW Trustee."

223 The reference in section 25M(2) to section 61 of the *Civil and Administrative Tribunal Act* was recently inserted to correct a typographical error (noticed in Ability *One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [53]-[54]) but the reference is of no present consequence .

224 References in section 25G to a person's "capability to manage his or her own affairs" find resonance in other provisions of the *Guardianship Act* which require, at least, passing notice.

225 "Capability" for self-management is a core concept. It underpins section 25H, governing the making of interim financial management orders. It is found in section 25I(2), which provides that an application for a financial management order "must specify the grounds on which it is claimed that the person the subject of the application is not capable of managing his or her own affairs". It is found in section 25J, which provides that "[the] Tribunal may make a financial management order in respect of a person whose capability to manage his or her own affairs has previously been considered by the Tribunal even though there may have been no change in that capability since it was last

considered by the Tribunal". Section 25K provides that the Tribunal cannot make a financial management order "if the question of [a] person's capability to manage his or her own affairs is before the Supreme Court "or if "an order made under the *NSW Trustee and Guardian Act* 2009 or the *Mental Health Act* 2007 is in force in respect of any part of the persons' estate. Section 25L empowers the Tribunal, with the concurrence of the Court, to "refer a proceeding relating to a person's capability to manage his or her own affairs" to the Court.

226 Section 25P governs proceedings in the Tribunal on the conduct of a review of a financial management order under section 25N of the *Guardianship Act*. As recently amended, it is in the following terms (with emphasis added):

> ""**25P Action on review**
>
> (1) On reviewing a financial management order under section 25N, the Tribunal:
>
> (a) must vary, revoke or confirm the order, and
>
> (b) if it considers it appropriate to do so – may take such action with respect to the appointment of the manager of the protected person's estate as the Tribunal could take on a review of such an appointment under Division 3.
>
> (2) **The Tribunal may revoke a financial management order only if**:
>
> (a) **the Tribunal is satisfied that the protected person is capable of managing his or her affairs, or**
>
> (b) **the Tribunal considers that it is in the best interests of the protected person that the order be revoked (even though the Tribunal is not satisfied that the protected person is capable of managing his or her affairs)**.
>
> (3) In this section, *vary,* in relation to a financial management order, includes to exclude (or remove an exclusion of) a specified part of the protected person's estate from the order."

THE CONCEPT OF INCAPACITY FOR SELF-MANAGEMENT

Context : The Legacy of Powell J as the Court's "Protective Judge"

227 **The Importance of Legislative Context.** This language, centrally focused on a person's "capability" for "management" of "his or her own affairs", can be found in what are, broadly, comparable provisions of the *Guardianship Act* and the *NSW Trustee and Guardian Act.*

228 Although the terminology employed in this legislation is broadly similar, the concept of “capability for self-management” might involve subtle differences depending on context.

229 It is necessary to make that point because the work of the Mental Health Review Tribunal, in particular, involves a different focus in the making and revocation of orders for management of estates.

230 There is broad similarity between the work of the Tribunal (under sections 25E, 25G, 25M and 25P of the *Guardianship Act*) and the Court (under sections 40, 41 and 86 of the *NSW Trustee and Guardian Act*) in the making and revocation of orders subjecting an estate to management under the *NSW Trustee and Guardian Act*. That is largely because of the symmetry between section 4 of the *Guardianship Act* and section 39 of the *NSW Trustee and Guardian Act* in the articulation of “general principles” governing an exercise of functions under the legislation.

231 The different focus of the Mental Health Review Tribunal manifests itself in its distinctive rationale.

232 The MHRT is constituted by the *Mental Health Act* 2007 NSW, section 140. It is both guided, and constrained, by various legislative statements of objects to be achieved, principles to be applied and factors to be taken into account, including:

(a) in the *Mental Health Act*, sections 3, 68 and 105, read with section 195;

(b) in the *Mental Health (Forensic Provisions) Act* 1990 NSW, sections 40 and 74; and

(c) in the *NSW Trustee and Guardian Act*, section 39.

233 Implicit in those provisions, and in the legislation that governs the work of the Mental Health Review Tribunal generally, is the foundational idea common to all types of protective jurisdiction, that paramountcy should be afforded to the welfare and interests of a person in need of protection. However, in dealing with people who are mentally ill or mentally disordered and, particularly, with forensic patients, a decision-maker focused on what is in the interests, and for the benefit, of a person in need of protection may need to accommodate a

competing need for protection of others or the community generally: *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [144]-[166].

234 The legislative context in which Powell J was required to administer the Court's protective jurisdiction was materially different from that of today. As an illustration of that, one might notice that nothing like the statement of "general principles" found in section 4 of the *Guardianship Act* from the time of its enactment (initially as the *Disability Services and Guardianship Act*) in 1987 appeared in the *Protected Estates Act*, enacted in 1983. It was *via* section 39 of the *NSW Trustee and Guardian Act* 2009 Act that the Court's statutory jurisdiction to appoint a protected estate manager was closely aligned with the statement of principles found in the *Guardianship Act*, section 4.

235 **The Importance of Historical Context.** In NSW legal history, the concept of a person lacking capability to manage his or her own affairs dates back, at least, to the tenure of Lord Eldon (between 1801-1806 and 1807-1827) as Lord Chancellor of England.

236 When it established a new legislative scheme for the management of estates, still largely intact, in the 1980s (with the enactment of sections 13 and 22 of the *Protected Estates Act* 1983 NSW, now reflected in section 41 of the *NSW Trustee and Guardian Act*, and in establishment of the "Guardianship Tribunal", originally known as the "Guardianship Board", under the *Guardianship Act*) the NSW Parliament removed references in earlier legislation to mental illness, and conditioned the making of a management order, principally, on a finding of incapacity for self-management. In taking that course, Parliament made the legislative warrant for the appointment of a protected estate manager conform, in substance, to the Court's inherent jurisdiction, originally conferred by the *Third Charter of Justice* and related Imperial legislation, as administered by Lord Eldon and contemporary Lord Chancellors: *PB v BB* [2013] NSWSC 1223 at [38]-[58].

237 It was in the early years of the 19th century that Lord Chancellors accepted that the "lunacy" jurisdiction extended to protection of a person who, though not a lunatic, was as much in need of protection as a lunatic *because incapable of*

managing his or her own affairs. Powell J, correctly, held that that extended jurisdiction catered, *inter alia*, for those suffering from "senile dementia": *MN v AN* (1989) 16 NSWLR 525 at 533A-E.

238 In describing the nature of "the *parens patriae* jurisdiction" in *Marion's Case* (1992) 175 CLR 218 at 258-259, the High Court, directly and indirectly, drew upon that early jurisprudence.

239 It did so, directly, by citing the following passage from Lord Eldon's judgment in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243:

> [The jurisdiction] belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them."

240 The High Court drew on the same jurisprudence, indirectly, when it cited with approval the judgment of La Forest J in *Re Eve* [1986] 2 SCR 388 at 407-417; 31 DLR (4th) 1 at 14-21.

241 By reference to that jurisprudence, the purpose of the protective jurisdiction of the Supreme Court (in all its manifestations), and that exercised by the Guardianship Division of NCAT under legislation modelled on that jurisdiction, can be described as follows: To take care of those who are not able to take care of themselves (*Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243); to protect a person incapable of managing his or her own affairs (*Gibson v Jeyes* (1801) 6 Ves Jun 266 at 273; 31 ER 1044 at 1047; *Ex parte Cranmer* (1806) 12 Ves Jun 445 at 453-454; 33 ER 168 at 171) in a proper and provident manner, because he or she is liable to be robbed by anyone (*Ridgeway v Darwin* (1882) 8 Ves Jun 66 at 66-67; 32 ER 275 at 276; *In Re Holmes* (1827) 4 Russ 182; 38 ER 774), giving rise to a necessity of taking care of him or her (*Sherwood v Sanderson* (1815) 19 Ves Jun 280 at 289; 34 ER 521 at 524).

242 Sometimes the extended "lunacy" jurisdiction recognised by Lord Eldon and his contemporaries was described simply by reference to an incapacity for self-management. At other times, it was described by reference to "unsoundness of mind", coupled with an incapacity for self-management.

243 At about the time that: (a) the Supreme Court of NSW was established (by promulgation of the *Third Charter of Justice*, 1823 pursuant to 4 Geo IV c 96 (Imp), known colloquially as the *New South Wales Act* of 1823); and (b) 25 July 1828 was established as the date for reception of English law, so far as applicable, in the colony of New South Wales (by section 24 of 9 Geo IV c 83 (Imp), named the *Australian Courts Act*, 1828 by the *Short Titles Act* 1896 (UK)), that branch of the protective jurisdiction of the Court then known as "the lunacy jurisdiction" was treated as comprising a tripartite division between "lunatics", "idiots" and "persons of unsound mind". One sees that, for example, in the title of a still useful English practice book, Leonard Shelford's *A Practical treatise on the law concerning lunatics, idiots and persons of unsound mind* (London, 1833).

244 Under administrative arrangements for the exercise of protective jurisdiction, English statute law, from 1853, for a time directed inquiries to whether an alleged lunatic was "of unsound mind *and* incapable of managing himself or his affairs" at the time of inquiry: *Theobald*, pages 5-6.

245 Something similar, suggestive of a compound definition of incapacity, appeared in NSW legislation before enactment of the *Protected Estates Act* in 1982: Philip Powell, *Forbes Lecture: The origins and development of the protective jurisdiction of the Supreme Court of New South Wales (*Forbes Society, Sydney, 2004), pages 23-33.

246 When he became the Court's Protective Judge, Powell J drew attention to what he considered to be the unsatisfactory state of the law, agitating for legislative reform which, relevantly, found expression in the *Protected Estates Act*, sections 13 and 22, the predecessors of the *NSW Trustee and Guardian Act,* section 41.

247 **Powell J's Success in Law Reform.** His Honour's reform agenda was successful, at least to the extent that he was (to quote his *Forbes Lecture* at page 32) concerned "to remove from the law, at least in relation to applications for management orders, questions of 'mental illness' and 'mental infirmity' and to substitute as the ground for making a management order the subject person's process 'incapacity to manage his affairs'".

248 The observations of Sheller JA in *David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E-437C are apt:

> "The *Protected Estates Act* 1983 when it was introduced was novel in New South Wales in that it enabled the estate of a person incapable of managing his or her affairs to be made subject to management under the Act regardless of whether that person was mentally ill or suffered from mental infirmity, arising from disease or age; compare sections 38, 39 and 52 of the Mental Health Act 1958. In the language of the then Minister for Health:
>
> > 'The purpose of the Protected Estates Bill is to reform and modernise the procedures and powers relating to protective management. Clause 13 will allow the Supreme Court to order that a person's estate be subject to management where it is satisfied that the person is incapable of managing his or her affairs. This new section will not limit the making of management orders to situations of mental infirmity due to disease or age, [as] was the case under the old section 39 of the *Mental Health Act* 1958. That provision caused the Supreme Court great difficulties in certain cases such as where a person had been badly injured in a motor vehicle accident, or where a person was a victim of a stroke. The new clause 13 simply refers to a situation where a person is incapable of managing his or her affairs. It should not be thought that this provision is excessively wide. It is being enacted in the context of the traditional protective jurisdiction of the Supreme Court and is subject to judicial interpretation in terms of this traditional jurisdiction. It is not intended to cover, and will not cover, the merely eccentric or those who have trouble balancing their accounts each month. It only applies to those who are incapable in a narrow sense.'
>
> The need for the reform remarked upon by the minister is illustrated by the reasoning of the judge in the Protective Division, Powell J, in GPG v ACF [1983] 1 NSWLR 54 and GNM v ER [1983] 1 NSWLR 144. In these cases his Honour indicated that a person suffering mental retardation (in the sense of a state of arrested or incomplete development of mind or of subnormal intelligence) was not mentally ill and might not be suffering from mental infirmity arising from disease or age and that a person who had suffered a stroke as a result of which she was incapable of managing her affairs might not be suffering a disability constituting mental infirmity. I have no doubt that, supported by judicial experience, the legislature perceived a need to liberate the Court's power to protect the estates of persons incapable of managing their affairs from complicated questions of aetiology…."

249 Powell J's motivation for law reform was driven in part by his own overly technical approach to the law, but, also, in large part, by an appreciation (manifested in the *Forbes Lecture* at pages 28-29) that there was a need for greater flexibility, than he considered formerly to be the case, with people who were not "mentally ill in the strict sense" but were "commonly… aged, suffering dementia, and in a nursing home".

250 **Incapacity for Self-Management, Purpose and Functionality.** Although there has been a tendency in some quarters to require "something more" than

an incapacity for self-management (the modern equivalent of a perceived need for there to be an "unsound mind") to ground an exercise of protective jurisdiction, whether by the Court in exercise of its inherent jurisdiction or pursuant to an equivalent of section 41 of the *NSW Trustee and Guardian Act*, or by a statutory tribunal exercising jurisdiction under sections 25E, 25G and 25M of the *Guardianship Act*, such a requirement is an unnecessary constraint on the law.

251 The purposive character of the protective jurisdiction, confirmed by the High Court in *Marion's Case* (1992) 175 CLR 218 at 258-259, is not readily confined by reference to a requirement for "unsoundness of mind" or a similarly expressed qualification.

252 The protective jurisdiction of the Court, and that exercised in the making and revocation of financial management orders under the *Guardianship Act*, is focused, not on a person's "status" as somebody said to be "mentally ill", but upon the functional question whether he or she is capable of managing his or her own affairs: *PB v BB* [2013) NSWSC 1223 at [50]. If a person is functionally incapable of self-management, the jurisdiction to appoint a protected estate manager may arise whether or not the person's incapacity is attributed to a mental health problem.

253 Nevertheless, as expressly recognised by section 25G of the *Guardianship Act*, an incapacity for self-management is not enough to justify the appointment of a protected estate manager.

254 There is nothing new in this. Historically, the appointment of a committee of the estate, upon a finding of lunacy, was not essential; in a proper case, a lunatic could be left to manage his or her own affairs: *Theobald*, page 41; *Tomlinson, Broadhurst Ex parte* (1812) 1 Ves & Bea 57; 35 ER 22. The same is true in current practice of the Court's jurisdiction under the *NSW Trustee and Guardian Act*, section 41: *Re W and L (Parameters of protected estate management orders)* [2014] NSWSC 1106; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42]; *CJ v AKJ* [2015] NSWSC 498 at [50]-[51] and [56].

255 The mere fact that a person is incapable of managing his or her affairs is insufficient to justify the making of an order for protected estate management, or to sustain the continuation of such an order, absent a need for, or utility in, the existence of a protected estate manager.

256 Analysed in functional terms, a need for, or utility in, a protected estate manager may reside in a perceived need for systematic protection to deal with a systemic incapacity for self-management. If a vulnerable person is taken advantage of in a single transaction, equity can respond according to established doctrine, usually (but not always) after the event. If he or she is, presently and prospectively, lacking incapacity for self-management to such an extent that he or she is "liable to be robbed by anyone" (to borrow a colourful expression of Lord Eldon taken from *Ridgeway v Darwin* (1802) 8 Ves Jun 66 at 66-67; 32 ER 275 at 276) there may be an occasion for appointment of a protected estate manager in service of the person in need of protection.

257 The protective jurisdiction, in each of its manifestations, is intended to be administered in a purposeful, practical way.

258 It needs, also, to be responsive to the social needs of the day.

259 **Powell J's "Objective Test" of Incapacity for Self-Management.** That is what Powell J endeavoured to do in *PY v RJS* [1982] 2 NSWLR 700 when, upon an exercise of jurisdiction under section 18 of the *Mental Health Act* 1958 NSW, he had to consider whether a person detained in a mental hospital should be discharged.

260 Section 18 provided that the Court could discharge a person detained in a mental hospital if it appeared to the Court that "such person [was] not a mentally ill person".

261 At [1982] 2 NSWLR 701E-F, his Honour determined that the definition in the *Mental Health Act* 1958 of the expression "a mentally ill person" required that, before a person could be held to fall within its description, it must appear that: (a) he or she was suffering from mental illness; (b) a consequence of that illness was that he or she required care, treatment or control for his or her own good or in the public interest; and (c) a further consequence of the illness was

that he or she was, for the time being, incapable of managing himself or herself or his or her affairs.

262 It was in that context that his Honour, at [1982] 2 NSWLR 702B-E, made observations about capacity for self-management that have often since been repeated in a different context (namely, on an application for the making or revocation of protected estate management orders):

> "6. It is my view that a person is incapable of managing himself or herself if it appears that there is a real risk of:
>
> (a) his or her inflicting upon himself or herself serious injury;
>
> (b) his or her sustaining serious injury by reason of his or her being unable adequately to protect himself or herself against such a risk; or
>
> (c) serious deterioration in his or her general health or wellbeing by reason of his or her being unable to take reasonably adequate steps to prevent such deterioration occurring;
>
> 7. **It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at least, it appears**:
>
> (a) **that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man**; and
>
> (b) that, by reason of that lack of competence there is shown to be a real risk that either:
>
> (i) he or she may be disadvantaged in the conduct of such affairs; or
>
> (ii) that such monies or property which he or she may possess may be dissipated or lost (see *Re an alleged incapable person* (1959) 76 WN (NSW) 477); **it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner**: See *In the Matter of Case* (1915) 214 NY 199, at page 203, per Cardozo J… .[Emphasis Supplied]".

263 After enactment of the *Protected Estates Act* (on an application under section 35, the equivalent of section 86 of the *NSW Trustee and Guardian Act*, for revocation of a management order) Powell J adhered to this view of the meaning of the expression "incapable of managing his or her affairs": *M and the Protected Estates Act 1983* (1988) 12 NSWLR 96 at 99C-102E, especially at 101E-G and 102C-E.

264 In particular, in the context of the *Protected Estates Act*, his Honour embraced the view that:

> (a) a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears that he or she is

incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and

(b) conversely, if a protected person is able to demonstrate that he or she is able to manage the ordinary routine affairs of man in a reasonably competent fashion, he or she is entitled to an order revoking the management order affecting his or her estate.

265 As noticed by Campbell J in *Re GHI (a protected person)* [2005] NSWSC 581 at [5]-[10], this "test", although not a substitute for the statutory test, has been routinely followed or (as White J suggested in *Re D* [2012] NSWSC 1006 at [57]) formally recited, but honoured in the breach.

Revisionism : A Return to Legislative Test, informed by Legislative Purpose

266 With the benefit of full argument, in *Re R* [2014] NSWSC 1810 at [94], White J declined to follow *PY v RJS*, noting that the statutory test of incapacity to manage one's affairs (for which section 86 of the *NSW Trustee and Guardian Act* provides) involves consideration of the subjective circumstances of the individual in question, rather than (as Powell J's test suggests) an objective assessment of a person's ability to deal competently with "ordinary routine affairs of man". His honour wrote (with citations added):

> "94. My difficulty with the reasoning of Powell J in *PY v RJS* is that the test propounded by Powell J did not address the terms of the statute itself which speaks of a person being capable or incapable of managing his (or her) affairs, not the ordinary routine affairs of man. I need not repeat what I said in *Re D* [2012] NSWSC 1006 at [61]. The High Court has recently repeatedly stressed that the text of the statute is both the beginning and finishing point of statutory interpretation. Nonetheless, having regard to the course of authority, I considered that I should follow the test stated by Barrett J in *P v R* [2003] NSWSC 819 which more closely approximated the words of the statute. I think the "*subjective*" interpretation is in accordance with s 39 of the *NSW Trustee and Guardian Act 2009* that provides that the paramount consideration in the exercise of functions under Ch 4 is the welfare and interests of the person concerned (s 39(a)). It is supported by Lindsay J in *PB v BB* at [6] and [8] …."

267 The passages from *PB v BB* [2013] NSWSC 1223 at [6] and [8], extracted in White J's judgment, are as follows:

> "6. Whether viewed through the lens of s 41 or the antecedent general law, the question whether a person is incapable of managing his or her own affairs focuses attention on the personal circumstances of that person.
>
> 8. Of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (a) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (b) particular reasons for an incapacity for self-management."

268 *Re R* provides a timely warning of a need, commonly experienced, to avoid encumbering the text of legislation with judicial gloss. A problem in itself, the problem becomes greater when a particular expression (such as "incapable of managing his or her affairs" or some variation thereof) is not read afresh in light of current legislation as a whole.

269 With the benefit of White J's judgments in *Re D* [2012] NSWSC 1006 and *Re R*, I have endeavoured, in *CJ v AKJ* [2015] NSWSC 498 at [14]-[49] and in the current judgment, to read the legislation afresh. Whether or not success attends that exercise, the text of the *Guardianship Act* has primacy in governing the work of NCAT's Guardianship Division.

270 When Powell J established a test of capacity focused on the "ordinary routine affairs of man" the legislation he was dealing with (initially, the *Mental Health Act* 1958, subsequently the *Protected Estates Act* 1982) did not include a statement of "general principles", such as those now found in the *NSW Trustee and Guardian Act*, section 39 and the *Guardianship Act*, section 4.Too great a focus on the meaning of a single expression can dim the light of other parts of a text intended to be read as a whole.

271 A person who is "incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man" may well be a person who, within the meaning of section 25G(a) of the *Guardianship Act*, is a person "not capable of managing" his or her "own affairs". However, the test is that for which the statute provides, not Powell J's gloss.

272 Although his Honour was well aware that a finding of incapacity for self-management does not compel the Court to make a management order, and that an exercise of the Court's protective jurisdiction must be measured against what is in the interests, and for the benefit, of a person in need of protection (*MS v ES* [1983] 3 NSWLR 199 at 203B; *RH v CAH* [1984] 1 NSWLR 694 at 706G), his approach to an assessment of capacity for self-management led to too great a focus on technical distinctions about what might or might not constitute "the ordinary routine affairs of man".

273 Viewed in broader perspective, a finding of incapacity for self-management is but one factor to be considered in the exercise of a jurisdiction that may require

large evaluative judgements to be made. The purposive nature of protective jurisdiction, involving consideration of the practical necessity for, and utility in, an appointment of a protected estate manager finds due expression in the *Guardianship Act*, section 25G(b) and 25G(c).

The Time Perspective(s) of a Finding of Incapacity for Self-Management

274 The evaluative character of the assessments to be made by reference to the several paragraphs of section 25G was dealt with by Powell J, at least in part, within the framework of an assessment of incapacity to self-management. As Hallen AsJ in *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [136] paraphrased Powell J's determination in McD v McD [1983] 3 NSWLR 81 at 86C-D:

> "The relevant time for considering whether a person is incapable of managing her, or his, affairs is not merely the day of the hearing, but the reasonably foreseeable future"

275 As a statement of principle, I accept that proposition: *cf, CJ v AKJ* [2015] NSWSC 498 at [27](e). However, it is implicit in the terms of section 25G, and other manifestations of the protective jurisdiction, rather than explicit. Any decision to make, or to revoke, a financial management order, by its very nature, requires a backward glance designed to elucidate the present and the future; a firm grasp of present realities; and an element of anticipation of future problems and solutions. Management of the estate of a person in need of protection involves an exercise in risk management.

The Text : The Guardianship Act, Sections 3(2), 4 and 25G

276 The *Guardianship Act* (like the *NSW Trustee and Guardian Act* and, before it, the *Protected Estates Act*) is both beneficial and protective, such that it should be construed so as to afford the "fullest relief which the fair meaning of its language will allow", taking into account the history and broader context of the protective jurisdiction as a whole: *Protective Commissioner v D* (2004) 60 NSWLR 513 at 521-522 [48]-[55], 532 [104], 540 [149]-[150], 543 [167] and 544-545 [173].

277 Although the legislation is informed by history and experience of the protective jurisdiction generally, particular importance attaches to respect for the text. Social legislation of this character is intended to be widely understood

throughout the community, by lay people as well as professionals, across a spectrum of callings. It is not written in language designed for lawyers, doctors or social workers alone. It must be comprehensible to individuals, and families, affected by its operation.

278 References to a "person's capability to manage his or her own affairs", and variants of that expression, are not expressly defined in the *Guardianship Act* or the *NSW Trustee and Guardian Act*, with which the *Guardianship Act* must be read to understand the implications of a financial management order being made.

279 References here to a person's "own affairs" should be read as references to the "affairs" of the particular person whose "capability" requires assessment: *Re R* [2014] NSWSC 1810 at [93]-[94]; *CJ v AKJ* [2015] NSWSC 498 at [27](c). This conforms to the language of the text evidenced by the word "own" in section 25G. It reflects the orientation of the "general principles" in section 4 towards each person as an individual. It accords with the Equity tradition, with which the protective jurisdiction has long been aligned, of insisting on an examination of particular facts ("all the circumstances") in individual cases.

280 Greater difficulty, both in the abstract and in practice, may attach to the meaning and operation of the word "capability" and its derivatives. That difficulty is not entirely avoided by resort to synonyms such as "able" or "fitness".

281 At the highest level of abstraction, the expression "(in)capable of managing his or her own affairs" may best be described by reference to the purpose for which the protective jurisdiction exists. A person is "incapable of managing his or her own affairs" if "not able to take care" of himself or herself: *Marion's Case* (1992) 175 CLR 218 at 258, citing Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243. This language and the idea it embodies inform, and are reflected, in the several paragraphs of section 25G, reinforced by sections 3(2) and 4, of the *Guardianship Act.*

282 The law, generally, does not prescribe any fixed standard of "capacity" required for the transaction of business. The level of capacity required is relative to the particular business to be transacted, and the purpose of the law served by an

enquiry into a person's capacity: eg, *Gibbons v Wright* (1954) 91 CLR 423 at 434-438; *Crago v McIntyre* [1976] 1 NSWLR 729 at 739C-F; *Scott v Scott* [2012] NSWSC 1541; (2012) 7ASTLR 299 at [194]-[206].

283 In the current proceedings the focus for attention is on the functionality of a person's management capacity, not: (a) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (b) particular reasons for an incapacity for self-management: *David by her Tutor the Protective Commission v* David (1993) 30 NSWLR 417 at 426E and 436E-437C; *Protective Commissioner v* D (2004) 60 NSWLR 513 at 529[93]; PB *v BB* [2013] NSWSC 1223 at [5]-[9].

284 On an application for a financial management order, the express, particular object of a review of a person's "capability to manage his or her own affairs" is manifest in the expression "to manage his or her own affairs", read in the context of sections 3(2) and 4 of the *Guardianship Act*.

285 Section 3(2) is a fulcrum provision upon which the operation of section 4, and other provisions of the *Guardianship Act* (including sections 25E, 25G and 25M), may depend. Section 3(2) informs the construction and operation of section 4. Section 4, in turn, informs the operation of the whole Act.

286 In the interpretation of section 3(2) the Court should, as mandated by section 33 of the *Interpretation Act* 1987 NSW, prefer a construction that promotes the purpose or object underlying the *Guardianship Act* to a construction that does not promote that purpose or object.

287 Apart from the "general principles" set out in section 4, there is no express statement in the *Guardianship Act* of the purpose or object of the Act. The Long Title of the Act is of little assistance because of its generality and use of terminology in common with that found in section 3(2): "An act with respect to the guardianship of persons who have disabilities; and for other purposes."

288 Ultimately, the best guide to the purpose or object of the *Guardianship Act* may be found in location of the Act in the State's legislative scheme for the administration of protective jurisdiction through statutory authorities, together with the confirmation of the purpose of the protective jurisdiction by the High

Court, in *Marion's case* (1992) 175 CLR 218 at 258, by reference to the judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243, extracted in paragraph 239 above.

289 Consistently with section 34(1) of the *Interpretation Act*, notice should also be taken of the history of the legislative scheme of which section 3(2) of the *Guardianship Act* is part, now including, especially, the *Guardianship Act* and the *NSW Trustee and Guardian Act*.

290 As noticed by the Court of Appeal in *David by her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E-437C (extracted in paragraph 248 above), Parliament's express purpose in enacting the *Protected Estates Act* 1983 (a predecessor of the *NSW Trustee and Guardian Act* and a companion piece to the *Guardianship Act*) was to remove a tether that had been thought, earlier, to tie the appointment of a protected estate manager to a finding of mental illness or mental infirmity.

291 Section 3(2) cannot lightly be construed as re-establishing a perceived jurisdictional restriction which was intended to be swept away by the legislative scheme of which the subsection forms part.

292 The ghost of any historical taint of mental illness, still hovering in the minds or methodology of some who read the *Guardianship Act* and cognate legislation, should be laid to rest. The text of the legislation does not require that there be a finding of mental illness or mental infirmity. No such requirement should, by a process of construction, be imposed on the text.

293 The word "disability" found in section 3(2) is not specifically, separately defined. Its meaning must be inferred from legislative purpose, history and context.

294 Although the words "with respect to" in section 4 justify a construction of section 4 that requires observance of the stated "general principles" upon consideration whether a person *is* "a person who has a disability", not merely *after* a finding of material "disability" is made, the operation of section 4 does ultimately depend, in terms, on the existence of "a person who has a disability" as defined by section 3(2); *cf, Re D* [2012] NSWSC 1006 at [65]; *CJ v AKJ* [2015] NSWSC 498 at [44]-[48].

295 The reference in section 3(2)(b) to a person "who is of advanced age" is important. "Age" is not, of itself, a disability. The concept of "advanced age" appears, deliberately, not to be tied to a particular, numerical age but to have a broader scope, depending upon the facts of the case. The frailty of old age, which descends on different people at different ages, appears to be implicitly at the core of any common meaning to be attributed to the expression "advanced age". Such a construction is consistent with the protective purpose of the legislation.

296 In section 3(2) the words "otherwise disabled" in section 3(2)(d) take colour from the preceding paragraphs, but not exclusively. *Semble*, a person under the legal incapacity of infancy (because aged less than 18 years) falls within the expression "otherwise disabled" although in peak condition.

297 In section 3(2) the concept of "disability" is measured against the possibility of a consequential "restriction" on the particular person "in one or more major life activities to such an extent that he or she requires supervision or social habilitation".

298 The concluding words of the subsection, which qualify subparagraphs (a)-(d) jointly and severally, provide a clue to the meaning of the subparagraphs. They refer to a state of being, status or condition potentially capable of giving rise to a "restriction" in "major life activities" to such an extent that a person "requires" supervision or social habilitation.

299 This is consistent with the embrace of Lord Eldon's identification of the purposive character of the protective jurisdiction, confirmed by *Marion's Case*.

300 A finding of mental illness is a sufficient, but not a necessary, requirement to satisfy section 3(2) (a)-(d), but even such a finding, of itself, is insufficient to satisfy section 3(2) read as a whole. The subsection, read as a whole and in context, focuses on a person who, by reason of a state of being, status or condition, is in need of "supervision" or "social habilitation".

301 In the context of sections 25E, 25G and 25M, that need is holistically related to an incapacity for management of the person's estate. The focus of the legislation is not upon a person's state of being, status or condition as such, or

upon particular reasons for an incapacity for self-management, but upon functionality; in the present context, the functionality of a person's management capacity.

302 The word "habilitation" found in section 3(2) is not a word commonly used, unlike its derivative "rehabilitation". Both have Latin roots. The prefix "re" in the word "rehabilitation" means "again, anew". The noun *habilitas* means "aptitude, ability". The verb *habilitare* means "to make fit". The adjective *habilis* means "easily handled, manageable, handy, suitable, fit, proper, apt, nimble, swift".

303 The expression "social habilitation" (in the context of references to "disability", "restricted", "major life activities" and the word "requires") may be taken to refer to a need for services to help a person to be, or become, able to function normally in community with others.

304 The expression "capability to manage his or her own affairs" in section 25G of the *Guardianship Act* should be accorded its ordinary meaning: *CJ v AKJ* [2015] NSWSC 498 at [26]-[27]. In operation, it takes colour from both section 3(2) and section 4 of the Act, but is not necessarily confined by either section 3(2) or section 4. A person might (perhaps exceptionally) be found "incapable of managing his or her own affairs" although not "a person who has a disability" within the meaning of section 3(2) and, accordingly, not be said necessarily to attract the general principles for which section 4 provides. Sections 3(2) and 4 inform the operation of provisions such as section 25G rather than, definitively, define their metes and bounds.

305 The concept of a person "incapable of managing his or her own affairs" remains a free standing idea governed, in context, by the purposive character of the jurisdiction to be exercised: *CJ v AKJ* [2015] NSWSC 498 at [27].

306 Without any gloss associated with "the ordinary affairs of man" Powell J's formulation, in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, of what it is to be "a person incapable of managing his or her own affairs" retains considerable merit. It is insightful rather than definitive.

307 On an inquiry (under sections 25E and 25G of the *Guardianship Act*) into whether a financial management order is needed, can be made or should be

made, further insight into the meaning of the expression “incapable of managing his or her own affairs” can be had by reasoning backwards from these procedurally ultimate questions to the elements required for a correct decision: Is a person reasonably able to manage his or her own affairs in a reasonably competent fashion, without the intervention of a protected estate manager charged with a duty to protect his or her welfare and interests?

308 In considering whether a person is or is not capable of managing his or her own affairs, the Court should be mindful not to divert attention away from the question by *any* elaborative gloss. Nevertheless, a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation.

309 In considering whether the person is “able” in this sense, attention may be given to: (a) past and present experience as a predictor of the future course of events; (b) support systems available to the person; and (c) the extent to which the person, placed as he or she is, can be relied upon to make sound judgements about his or her welfare and interests: *CJ v AKJ* [2015] NSWSC 498 at [38].

310 In common experience, whether a person is or is not “capable of managing his or her own affairs”, in the context of section 25G, may, more specifically, ordinarily depend upon:

(a) whether the person is “disabled” within the meaning of sections 3(2)(a)-(d);

(b) whether, by virtue of such a disability, the person is “restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation”; and

(c) whether, despite any need he or she has for “supervision or social habilitation” (section 3(2)):

(i) he or she is reasonably able to determine what is in his or her best interests, and to protect his or her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager (sections 4(a)-(c), 4(f), 25G(b) and 25G (c)).

(ii) he or she is in need of protection from neglect, abuse or exploitation (sections 4(a), 4(g), 25G(b) and 25G (c)).

311 Any attempt to summarise the elements of a finding as to whether a person is or is not "capable of managing his or her own affairs" without consulting the terms of the legislation (including each of the paragraphs of section 4, not merely those here selected for particular notice) is likely to be imperfect. The terms of the legislation must be viewed holistically, and bearing in mind that that the concept of "capability" is directed to the reasonably foreseeable future as well as to the present time. Counsel for the plaintiff, rightly, draws specific attention, in this case, to paragraphs (b), (c), (d) and (f) of section 4, with their strong emphasis on a person's autonomy and dignity.

312 Whether a person is to be found "capable of managing his or her own affairs", or not, ultimately requires a judgement-call grounded upon guidance available within the framework of the governing legislation and a close examination of the facts of the particular case. An exhaustive definition of the concept, applicable to all cases at all times, is not otherwise to be expected any more than the limits or scope of the Court's protective jurisdiction can be defined. *Cf, Marion's Case* (1992) 175 CLR 218 at 258, citing *Re Eve* [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) 1 at 16; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and *Wellesley v Wellesley* (1828) 2 Bli. NS 124 at 142; 4 ER 1078 at 1085.

313 It is inevitable that, in discussion of particular cases, insightful statements will be found, like those made in *EB and Ors v Guardianship Tribunal and Ors* [2011] NSWSC 767 at [134], to the effect that a person can be characterised as incapable of managing his or her affairs if his or her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made, which action or decision the person is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

314 In the absence of an exhaustive definition of a fundamental concept such as capacity for self-management, decision-making may be greatly facilitated by reference to illustrations of the law in action. Nevertheless, care needs to be

taken not to allow generalised statements of the law or fact-sensitive illustrations to be substituted for the text of governing legislation.

Discretion, Necessity, Best Interests, Benefit and Utility : Guardianship Act, sections 25E and 25G, read with sections 3(2) and 4

315 A finding of incapacity for self-management is a necessary, but not a sufficient, condition for the making of a financial management order under the *Guardianship Act*, section 25E.

316 The word “may”, twice appearing in section 25E, indicates that the powers conferred by the section may be exercised or not, at the discretion of the Tribunal: *Interpretation Act* 1987 NSW, section 9. It does not mean “must”: *Ward v Williams* (1955) 92 CLR 496 at 505-506; *Finance Facilities Pty Limited v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135 and 138-139.

317 Nevertheless, the discretionary powers conferred on the Tribunal are not at large. Generally, as earlier noted, they are confined by the subject matter, scope and purpose of the protective jurisdiction. In particular, they are confined by a need to consider whether there is a need for a protected estate manager (section 25G(b)) and whether it is in the subject person’s best interests that a financial management order be made (section 25G(c), read with sections 3(2) and 4 of the *Guardianship Act*).

318 Confirmation that a finding of incapacity for self-management is not a sufficient cause for the making of a financial management order can be found in section 25P(2)(b) of the *Guardianship Act*. That provision contemplates that the Tribunal may revoke a financial management order if it considers that it is in the best interests of a protected person that a revocation order be made, even though the Tribunal may not be satisfied that the protected person is capable of managing his or her affairs.

319 One illustration of a case where it may be appropriate to dispense with a protected estate manager despite a finding of incapacity for self-management may be, by analogy with the Court’s inherent jurisdiction, where there is no practical utility in burdening a person or his or her estate with the administrative infrastructure necessarily involved in protected estate management: *Re W and*

L (Parameters of protected estate management orders) [2014] NSWSC 1106 at [87]-[89] and [95]. Another, drawing specifically upon the liberal intent of the general principles set out in section 4 of the *Guardianship Act,* may be a case in which the Tribunal decides to take a risk in allowing a person in need of protection an opportunity to enjoy freedom of decision, freedom of action and the possibility of normal life living in community with an empathetic family: *cf, M v M* [1981] 2 NSWLR 334 at 336A-B, 336C-D and 337F-338D; *CJ v AKJ* [2015] NSWSC 498 at [50]-[51] and [54]-[58].

320 Ultimately, what is done or not done, must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection: *Guardianship Act*, section 4(a); *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48].

CONSIDERATION OF THE PARTICULAR CASE

Introduction

321 The current case can be appropriately addressed, and determined, within the parameters of the *Guardianship Act*, with special reference to sections 3(2), 4, 25E, 25G and 25M. It is not necessary, specifically, to invoke the assistance of the Court's inherent jurisdiction.

322 In moving towards an assessment of whether the plaintiff is, or is not, "capable of managing her affairs" within the meaning of section 25G(a) I here have specific regard to the legislative context in which that expression appears.

(1) The views of the plaintiff, personally

323 I pay regard to each of the general principles for which section 4 provides, noting especially (as contemplated by section 4(d)) the plaintiff's strong antipathy to her estate being managed by a protected estate manager of any description.

324 I acknowledge the importance of the views she has expressed and (as illustrated by her counsel's specific invocation of paragraphs (b), (c), (d) and (f) of section 4) the equally important value to be attributed to her personal autonomy and dignity.

325 Although the protective jurisdiction is, by nature, not a "consent jurisdiction" (*M v M* [2013] NSWSC 1495 at [50](c)), the welfare principle dictates that these factors have high priority.

(2) Is the plaintiff "disabled" within the meaning of the Guardianship Act, s 3(2)(a)-(d)?

326 At the age of 92 years; frail of body, with a substantial hearing deficit; vulnerable to exploitation; lacking insight into her vulnerability; and physically unable to live alone or independently, the plaintiff is "a person… who is … physically, sensorily disabled, and of advanced age… or who is otherwise disabled" within the meaning of sections 3(2)(a), 3(2)(b) and 3(2)(d).

(3) Is the plaintiff, by virtue of a disability, restricted in one or more major life activities to such an extent that she requires supervision or social habilitation within the meaning of section 3(2)?

327 The plaintiff *is* by virtue of her disability restricted in one or more life activities. Physically, she is incapable of living alone or independently. She was unable to organise her own admission to the aged care facility in which she currently resides. She was dependent on her friend KM to do that for her. She required assistance (as it happens, his) to travel to Sydney for her appearance before the Court. In my examination of her, she appeared not to appreciate the distinction (so far as it might bear upon the availability of resources to her) between a testamentary gift to KM and an immediate, commercial concession to him in the same amount. She seemed to imagine that she could, here and now, give away property or property's worth, and still be able to dispose of it by will. Despite her claim to business acumen, she appeared to me to have difficulty coming to terms with the detail of a relatively simple tax invoice presented to the Court by her solicitor, accounting for costs and disbursements he deducted (apparently without reference to section 71(1) of the *NSW Trustee and Guardian* Act, but relying upon the plaintiff's acquiescence) from the $25,000 paid into his trust account by KM by way of a refund of moneys earlier paid to KM on the plaintiff's account.

328 That the plaintiff's disability *is* of such a degree that, by reason of her disability, she requires "supervision" and "social habilitation" within the meaning of section 3(2) is confirmed, to my observation, by: (a) her apparent failure to

appreciate the distinction between a testamentary gift to KM and an immediate, commercial concession to him in the same amount; (b) the difficulty she experienced in reading, and comprehending, her solicitor's tax invoice; (c) her apparent dependency upon KM, her solicitor and her doctor to assist her with management of her affairs should management of her estate not be committed to the NSW Trustee; and (d) an apparent inability on her part to appreciate that her son (the second defendant) might, objectively, have had a reasonable foundation for his concern that she had agreed in principle to sell her residence to KM at a substantial undervalue.

329 In assessing the plaintiff's current attitude towards her son, allowance must be made for her angst at being subjected to proceedings in NCAT on his application, and her suspicion that he is motivated solely by a desire to grasp her property for himself. However, even allowing full measure for these factors as not unreasonable in themselves, the plaintiff is unable to see anything in him except the diabolical, and nothing of objective grounds for concern about her dealings with KM.

330 As amusing as may be her rationalisation of concealment of her true age in presentation of herself to the Court, I am not persuaded that it is correct. I doubt that, at the hearing, she did know her true age.

331 I have considered, as an alternative explanation, whether she was trying to mislead the Court as to her age. It is possible. She has a delightfully mischievous side to her personality. Nevertheless, however viewed, her evidence, and submissions made on the faith of her express instructions, point towards a fundamental lack of judgement. In reality, wittingly or otherwise, she misled both her solicitor and her barrister in discounting her true age by 10 years until such time as, by independent inquiry, the truth was discovered.

332 Given the transparent importance of the question of "age" (by reference to section 3(2)(b)) in the context of the current proceedings, the fact that she was, at the very least, unable to appreciate the significance of a correct identification of her age is indicative of an unreliability in statements made by her, supporting a need, in protection of her welfare and interests, to ensure she has the benefit of supervision in dealing with any substantial transaction.

(4) Despite any need the plaintiff may have for supervision or social habilitation, is she reasonably able (within the meaning of sections 4(a)-(c), 4(f), 25G(b) and 25G(c)) to determine what is in her best interests, and to protect her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager?

333 Having had the benefit of an examination of the plaintiff, I fear that she is *not* reasonably able to determine what is in her best interests, and to protect her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager.

334 That is because: (a) she appeared to me not to appreciate the distinction, so far as it might bear upon the availability of resources to her, between a testamentary gift to KM and an immediate, commercial concession to him in the same amount; (b) she appeared to me to be unable to grasp the detail of her solicitor's relatively simple tax invoice; (c) she appeared, emphatically, incapable of appreciating that her son, the second defendant, might reasonably have had concerns about her welfare and best interests in her dealings with KM; and (d) in her inability, or unwillingness, to disclose her true age to the Court and to her own lawyers, she displayed either ignorance about a fundamental fact or a complete lack of judgement about her duty of candour in dealing with the Court and about where her best interests lie.

(5) Despite any need the plaintiff may have for supervision or social habilitation, is she in need of protection from neglect, abuse or exploitation (having regard, particular, to sections 4(a), 4(g), 25G(b) and 25G(c))?

335 The plaintiff *is* in need of protection from neglect, abuse or exploitation because: (a) she is vulnerable to exploitation, but she lacks insight into her vulnerability, and she is over confident about her ability to manage their own affairs; (b) although she is capable of manifesting acute judgment about particular matters, her ability to do so is not consistent over time; (c) she has demonstrated, in her dealings with KM, an inability to appreciate the significance, to her let alone her family, of conferring upon him a substantial commercial advantage which would deplete the property available to her should she require it; and (d) after the sale of her residence, it is likely that (in addition to an investment unit) she will have a liquid fund of between $125,000 to $150,000 or thereabouts which she says she would simply leave in her account to buy "things from the chemist, clothes or just ordinary things",

apparently without a clear appreciation of the need to invest or otherwise protect such a large amount, more than she could use in day-to-day living. It can, and should, be available for everyday requirements; but, so far as practicable, it should be preserved as a fund to meet unforeseen contingencies, not lightly given away.

336 The plaintiff's apparent lack of appreciation of a need to safeguard this fund is consistent with her earlier, cavalier attitude to conferral of a substantial benefit on KM by her proposal (abandoned only by the intervention of protective proceedings) to sell her residence to him at a $100,000 discount on market value. Had she effected that sale, her possession of a contingency fund would, to that substantial extent, have been diminished.

337 **(6) What are the plaintiff's "affairs" to be managed (section 25G)?**

338 **Assets**. In broad terms, the plaintiff's gross estate comprises:

(a) her former residence, valued between $360,000 and $380,000, but say $370,000.

(b) an investment unit, valued at about $275,000.

(c) funds held in trust by the NSW Trustee, approximately $11,500.

(d) personal bank account credit balances, approximately $3,200.

339 From about $25,000 held in trust by the solicitor for the plaintiff, as a refund of moneys by KM, the solicitor (after deducting costs and disbursements associated with his conduct of these proceedings on behalf of the plaintiff) remitted to the NSW Trustee the balance of approximately $11,470.

340 On these figures, the plaintiff's estate has a gross value of about $671,170.

341 **Liabilities**. From that gross estate, the plaintiff has to pay her aged care facility and accommodation bond of approximately $225,000, together with accrued interest and other charges which bring her liability to the facility to about $235,000.

342 **Net Estate**. On these figures, the plaintiff's estate has a net value of about $436,170 and, should her former residence sell at or above valuation, she is likely (subject to any costs orders made in these proceedings) to have a cash

fund of not less than between $125,000 and $150,000 or thereabouts available to her.

343 The major challenge in management of the plaintiff's estate at this stage is to sell her former residence, at a reasonable price, to fund the payment of the accommodation bond and other charges due to the plaintiff's aged care facility. That is in hand, following orders made during the course of these proceedings, with the plaintiff's consent, authorising the NSW Trustee (as manager of her estate) to effect a sale.

344 The plaintiff's investment unit is apparently rented out for a modest rent, historically designed by the plaintiff to cover expenses without any substantial return. Income from it was applied for the benefit of the plaintiff's disabled son. The unit has been, and remains, managed by a real estate agent on the plaintiff's behalf.

345 **Income and expenditure**. The plaintiff's primary source of income is her pension. Her principal expense, now and prospectively, is her liability to her aged care facility, for the (partially refundable) accommodation bond and ongoing, recurrent fees.

346 She may have a liability to Centrelink arising from a failure on her part to declare her interest in her investment unit, but that requires further investigation.

347 Should the plaintiff wish, as she has earlier indicated, to execute a fresh Will in the light of these proceedings, there may be legal expenses associated with that. The currency of a financial management order is not, of itself, a bar to a will being made: *Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377. If, at the time a will is proposed to be made, by or on behalf of the plaintiff, she lacks testamentary capacity, the Court could authorise the making of a "statutory will" under sections 18-23 of the *Succession Act* 2006 NSW: *Re Fenwick* (2009) NSWLR 222. Either way, steps taken towards a will being made for disposition of the plaintiff's estate could require an expenditure of money from the estate.

(7) All things considered, is the plaintiff a person incapable of managing her own affairs within the meaning of section 25G?

348 In my judgement, the plaintiff *is* incapable of managing her own affairs within the meaning of section 25G having regard, particularly, to: (a) the course of events in the plaintiff's dealings with KM and her continuing, social dependence upon him; (b) her inability to appreciate that her son might reasonably have had concerns about her welfare and best interests in dealing with KM; (c) her inability to appreciate the distinction, so far as it might bear upon the availability of resources to her, between a testamentary gift to KM and an immediate, commercial concession to him in the same amount; (d) her inability to grasp the detail of her solicitor's tax invoice; (e) her inability, or unwillingness, to disclose her true age to the Court and to her own lawyers when candour and accuracy were both called for; and (f) a risk that, if not supervised in management of a large, liquid capital asset, she might part company with it, to KM for example, to the detriment of herself and her family, particularly her disabled son (presently under adequate care, as she reported to the Court, but at an age when his needs may become unpredictably greater), in part out of spite towards her able bodied son for his challenge of her capacity for self-management.

349 In making a finding that the plaintiff is incapable of managing her own affairs, I do not overlook contrary expressions of opinion by the plaintiff's solicitor (in an affidavit sworn 27 February 2015) and her doctor (in a single page report dated 27 February 2015, marked Exhibit P2). Having had an opportunity to examine the plaintiff personally, and the factual matrix of her life, I am confident in differing from them. The plaintiff managed to conceal her true age from her solicitor, despite his close attention to that question, and from her doctor. Neither the solicitor nor the doctor appears to have examined with a sufficiently critical eye the course of her dealings with KM, the prudence of those dealings or the risk that she might be open to exploitation.

350 Nor do I overlook the results of a "cognitive impairment test" administered by the plaintiff's aged care facility, in about December 2013, recording that she had "no/minimal impairment". Those results must be taken into account upon an assessment of the plaintiff's capacity for self-management, but they are not

determinative. Nor do they outweigh the factors that have led me to conclude that the plaintiff is incapable of managing her own affairs.

351 These proceedings are not an inquiry into the motivations or general character of KM or any person closely associated with the plaintiff. I expressly refrain from making any adverse findings of that nature about any such person. However, the proceedings do require a sober appreciation of the plaintiff's capacity for self-management and risks associated with unsupervised management of her estate; and KM's preparedness, as a fiduciary, to receive substantial benefits at the expense of the plaintiff rules him out as a prospective protected estate manager. He has manifested a lack of appreciation of conflicts between interest and duty. He could not be relied upon to discharge the duties of a protected estate manager in a sufficiently disinterested way.

352 The factors to which I have drawn particular attention persuade me that the plaintiff is not able, without supervision, to deal with (making and implementing decisions about) her own affairs in a reasonable, rational and orderly way, with due regard to her present and prospective wants and needs, and those of family or friends, without undue risk of neglect, abuse or exploitation. In combination, and viewed from a variety of perspectives, those factors point towards a finding of incapacity for self-management: *CJ v AKJ* [2015] NSWSC 498 at [27]-[43].

353 Within the aged care facility in which she presently resides, the plaintiff has a support system enabling her, with assistance, to cater for the daily demands of ordinary living. However, at least in dealing with capital assets (and with the prospect of having a large, liquid sum standing in a bank account to her credit) she cannot, in my assessment, be relied upon to make sound judgements about her welfare and interests without supervision.

(8) Is there a need for a financial manager (section 25G(b))?

354 In my assessment there *is* a need for another person to manage the plaintiff's affairs, on her behalf, within the meaning of section 25G(b).

355 In reaching that conclusion I put to one side her need (in common with many in the community) for *professional* assistance in effecting a sale of land or

managing a rental property. That she needs that assistance does not, of itself, carry the consequence that she has a "need" of the type described in section 25G(b).

356 I also accept, for the purpose of the current judgment, that it is within the plaintiff's capabilities to manage her pension income without *day-to-day* supervision, provided, at least, that regular arrangements are in place to ensure timely payment of recurrent fees due to her aged care facility.

357 The plaintiff's need for another person to manage her affairs focuses, principally, upon the risk that, without supervision, she cannot be relied upon not to give away capital assets (including, prospectively, the balance of proceeds of sale of her residence) without due regard to her welfare and interests. Incidentally, the fact that (as I have found) she has this need is *reinforced* by her need to effect a sale of her residence and to have her investment property duly managed.

358 A finding that there is a need for another person to manage the plaintiff's affairs, on her behalf, is not inconsistent with steps being taken to ensure that the plaintiff's freedom of decision and freedom of action are restricted as little as possible in management of her estate: *Guardianship Act*, section 4(b). As a matter of jurisdiction, section 25E(2) of the Act confirms that a specified part of the plaintiff's estate could be excluded from any financial management order made. By virtue of section 71 of the *NSW Trustee and Guardian Act*, a protected estate manager could, by instrument in writing, authorise the plaintiff to deal with a specified part of her estate notwithstanding that (by the virtue of section 71(1) of the Act) the power of a protected person to deal with his or her estate is suspended in respect of so much of the estate as is subject to management under the Act. Subject to the overriding jurisdiction of the Court (under the Act and in its inherent jurisdiction) to give directions relating to management of a protected estate, the NSW Trustee has broad and flexible powers under the Act to facilitate a beneficial and cost-effective form of management.

359 [The Guardianship Division of NCAT does not have the same powers as the Court has to give *directions* for the due management of a protected estate.

However, it can, in an appropriate case, publish in its reasons for decision a *recommendation* as to management of a protected estate for the consideration of a manager, the NSW Trustee or the Court in due course. Recommendations made by NCAT, or the NSW Trustee, are not lightly passed over or disregarded by the Court, for its part.]

(9) Is it in the plaintiff's best interests that a financial management order be made (section 25G(c))?

360 In my assessment, it *is* in the plaintiff's best interests that a financial management order be made so as to assist her in management functions she is unable to perform and to protect her, against herself, in the orderly management of her capital, including her investment property and, in due course, the proceeds of sale of her residence.

361 Provided she is protected against rash conduct in dispossession of her capital, I presently see no difficulty in: (a) her being fully consulted, personally, about any decisions that need to be made about the realisation of assets or the deployment of capital; or (b) her having free management of her pension, and a small but liberal contingency fund, subject only to secure arrangements being made for timely payment of her recurrent aged care facility fees.

362 I note, in passing, that section 72 of the *NSW Trustee and Guardian Act* imposes on the NSW Trustee a statutory obligation to proceed in a consultative way. The importance of such an obligation was emphasised in *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C.

(10) Should a specified part of the estate of the plaintiff be excluded from any financial management order (section 25E(2))?

363 Although section 25E(2) of the *Guardianship Act* (an analogue of section 40 of the *NSW Trustee and Guardian Act*) permits a specified part of an estate of a protected person to be excluded from a financial management order, the power to make a partial management order needs to be approached with caution, lest due management of a protected estate be prejudiced: *Re Application for partial management orders* [2014] NSWSC 1468.

364 I am sympathetic to the plaintiff being allowed to manage her pension income, and a small contingency fund, but I am not satisfied that a partial management

order (excluding that part of her estate to be managed by the plaintiff personally) is either necessary or appropriate, at least as matters presently stand. Far greater flexibility, coupled with administrative oversight, is likely to be available through leaving to the NSW Trustee an opportunity to exercise the powers it has, such as those under section 71 of the *NSW Trustee and Guardian Act*, to allow the plaintiff freedom of decision and action, consistent with maintenance of her estate, including payment of moneys due to her aged care facility.

(11) A final check against the welfare principle (section 4(a))

365 Touching base with the welfare principle (recognised by *Marion's Case* (1992) 175 CLR 218 at 258 and reflected, particularly, in section 4(a) of the *Guardianship Act*), and measuring the Court's orders against what is in the interests, and for the benefit, of the plaintiff (as required by *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 283D-F and 241G-242A and *GAU v GAV* [2014] QCA 308 at [48]), I am satisfied that:

(a) the plaintiff is not capable of managing her own affairs (*Guardianship Act*, section 25G(a));

(b) there is a need for another person to manage the plaintiff's affairs on her behalf (G*uardianship Act*, section 25G(b));

(c) it is in the plaintiff's best interests that a financial management order be made (*Guardianship Act*, section (25G(c));

(d) the plaintiff's estate should be subject to management under the *NSW Trustee and Guardian Act* (*Guardianship Act* section 25E(1));

(e) no part of the plaintiff's estate should be excluded from the financial management order (*Guardianship Act*, section 25E(2));

(f) in the absence of any other person suitable for appointment as manager of the plaintiff's estate, management of the estate should be committed to the NSW Trustee (*Guardianship Act*, section 25M); and

(g) although no formal directions should, at this stage, be given to the NSW Trustee so as to bind the course it may take in management of the plaintiff's estate, it should be encouraged to consider whether (subject to secure arrangements being made for the timely payment of the plaintiff's aged care facility fees) she can freely manage her pension and a small, but liberal, contingency fund on a day-to-day basis.

CONCLUSION

366 These findings carry the consequence that (in conformity with clause 14(4) of Schedule 6 to the *Civil and Administrative Tribunal Act*, the orders made by the Guardianship Division of NCAT on 17 June 2014 (committing management of the estate of the plaintiff to the NSW Trustee as her financial manager) should be confirmed by orders of this Court.

367 Accordingly, I make the following orders:

(1) ORDER that any requirement, under the *Uniform Civil Procedure Rules* 2005 NSW or otherwise, for the plaintiff to have conducted these proceedings by a tutor be dispensed with.

(2) ORDER that the orders made by the Guardianship Division of the NSW Civil and Administrative Tribunal on 17 June 2014 (committing management of the estate of the plaintiff to the NSW Trustee as her financial manager) be confirmed.

(3) DECLARE that the plaintiff is not capable of managing her own affairs.

(4) ORDER that subjection of the estate of the plaintiff to management under the *NSW Trustee and Guardian Act* 2009 NSW be confirmed.

(5) ORDER that committal of management of the estate of the plaintiff to the NSW Trustee be confirmed.

(6) DECLARE that the instrument dated 20 December 2013, entitled "Enduring Power of Attorney", executed by the plaintiff in favour of [KM], is of no force or effect.

368 Subject to allowing the parties an opportunity to be heard as to costs, I am inclined to make no orders as to costs, and not to require the solicitor for the plaintiff to account for the costs and disbursements he deducted from trust funds remitted to the NSW Trustee pursuant to an order made by the Court on 9 March 2015.

369 *Prima facie*, having regard to the modest size of the plaintiff's estate, as well as the course of the proceedings, the proper order as to costs seems to me to be that no costs orders be made: *CCR v PS (No 2)* (1986) 6 NSWLR 622 at 640; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [129]-[134]; *CAC v Secretary, Department of Family and Community Services* [2015] NSWSC 344 at [11]-[15].

370 In expressing that view, I am mindful that the outcome of the proceedings has been substantially that for which the plaintiff's son (the second defendant) has

contended; and equally mindful that, in the protective jurisdiction, costs do not routinely follow the event.

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Amendments

19 May 2015 - Paragraph 281 last line, section 25M amended to section 25G.

02 June 2015 - Paragraph 295 amended "advanced stage" to "advanced age".