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Précis Paper

Putting Your Trust in Management

The Court has now developed a clear set of guidelines for protected estates being managed by private trustees.

Discussion Includes

- The facts of *Re S*
- The operation of the legislative regime and how the caselaw has developed for protective estate management
- When someone is likely to come in to a protective estate management
- The Taxation Issue
- Implications for practitioners

Précis Paper

Putting Your Trust in Management

1. In this edition of BenchTV, Bernard McHardy (Partner – McLaughlin and Riordan, Sydney) and Gregory Burton SC (Barrister – 5 Wentworth Chambers, Sydney) discuss the operation of the protective list in the NSW Supreme Court Equity Division and the management of protected estates by private trusts.

The facts of *Re S*

2. In *Re S, an incapacitated young person* [2017] NSWSC 859, the parents of the young person, S, came to their solicitor with concerns relating to the management of her protected estate. The matter had not come under the general protected estate's regime that operates in New South Wales. In *Re S*, instead of making an order under section 76 of the *Civil Procedure Act 2005* (NSW), the fund was already managed by a private trust.
3. This was due to the initial accident being very unusual in its facts and circumstances. An issue had arisen about the liability for the accident and, during negotiations for an interim payment, a proposition was made by the insurer to make such interim payment subject to a trust arrangement. The parties agreed to the implementation of a trust deed where property was bought in the name of the infant trustee and the infant's parents. Ordinarily, at that time, court ordered, supervised management would have occurred under the *Damages (Infants and Persons of Unsound Mind) Act 1929* (NSW) (repealed).
4. Later, when the matter settled, the Judge ordered that the agreed damages were to be paid into that trust. The trust was administered for years by an institutional licensed trustee who eventually had a relationship break down with the infant's parents, her main carers. At the same time, the trust partly owned the house that they were all living at.

The operation of the legislative regime and how the caselaw has developed for protective estate management

5. Historically, the protected business of the State has been such that, in the interests of ensuring protected people incapacitated by minority or mental illness, it was to be supervised by the court and that meant a public administration through the NSW Trustee or trustees licensed through the *Corporations Act* to administer it. Over time, people wanted private administrators or managers to enter in to the picture. That led to the court, in its protective role, to consider how private managers should be supervised.
6. In *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245, Ability One had been appointed the private manager of a number of estates and, without malfeasance, they were charging fees in a role which as a fiduciary they were not

entitled to charge for. Ability One was a private corporation not a licensed trustee. The fees were a question of remuneration. However, a fiduciary is not entitled, without order of the court, to be charging fees for the administration of the protected estate.

7. This meant that Lindsay J, somewhat after the fact, was being asked to address and validate the continued administration for remuneration in that fiduciary role.

8. The *NSW Trustee and Guardian Act 2009* (NSW) was prescriptive of how managers ought comply in terms of obtaining that court approval. In addressing this matter, Lindsay J looked essentially at the principle proposition that:

   (1) All of this must be in the interest of the protected person; and

   (2) If there is to be management, it must be by a suitable person.

9. Section 41(1) of the *Trustee and Guardian Act 2009* (NSW) provides as follows:

   41. Orders by Supreme Court for management of affairs (cf PE Act, s 13)

   (1) If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:

   (a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and

   (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.

10. Additionally, necessary securities to the to the trustee's satisfaction must be given such that the Probate and Protective List Judge is able to approve that the applicant as a suitable manager. The proposed manager has to propose a financial plan in relation to how the money is to be managed. The NSW Trustee then reports to the court as to the suitability of that financial plan and as to the applicant as a financial manager.

<u>When someone is likely to come in to a protective estate management</u>

11. The situations that prompt these investigations are contained within *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') Rule 7.13:

   (1) That a person is incapable of managing his or her affairs;

   (2) There be a need for another person to manage the affairs; or

   (3) It is in the best interests of the person that such an order be made

   This criteria comes out of the *Guardianship Act 1987* (NSW). Orders can be imposed by the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT"). Essentially the Court's role in implementing section 41 of the NSW *Trustee and Guardian Act* follows those same criteria.

<u>Appointing Private Managers</u>

12. Under section 41 of the *Trustee and Guardian Act* and its inherent, the Court has said that private trustees can be appointed.

13. In *Re S*, it was a trust situation. In relation to the term of the management and the life of the trust, the infant, by her tutor, had executed a deed of trust to operate until her majority at the age of 18.
14. The facts of the matter were complicated because there was a subsequent accident that involved a mild brain injury which resulted in both a minority and capacity question. The medical evidence suggested that the management should continue after the life of the trust, which was to her 18th birthday, and recommended that it continue until at least her 25th birthday.
15. There was a possibility that a change in trust would trigger a capital gains effect. The Court had to determine if it was going to end the trust at this point, and there was a real stress in the judgment on the factors that the court would take into account.
16. The Court's interest was essentially the protected person. Accordingly, any private or public manager is really there within this protective regime and should expect that their life is for as long as utility of that appointment is operating. If it was the family's perception that the relationship had broken down with the trustee, then the court was satisfied that the appointment should cease. In classic trust law, the trustee has to have done something wrong or have not been careful enough to be removed. Whereas, in *Re S*, that was irrelevant: it was in what was in the best interests of the child, S.

The Taxation Issue

17. There was a potential that if the trust ended, where the money went and how it was moved would affect the exemptions in the Capital Gains Tax regime for compensation payments.
18. From the plaintiff's point of view, there was concern in relation to taxation because the numbers involved were significant, and a Capital Gains Tax event could mean the estate would need to pay a significant amount of tax such that there was a proposition that the trust be maintained and simply change the trustee to avoid the risk of paying Capital Gains Tax. Lindsay J had difficulty with that course because he saw it creating problems such as a "dual regime" which might, in its administrative requirements, complicate things.
19. Lindsay J saw the NSW Trustee's role being difficult in that situation because a pure management regime has the flexibility of a trustee to supervise the private manager's behaviour in charging fees and financial planning. Whereas, if it were left within a trust, that flexibility to the NSW Trustee and Guardian would have been compromised.
20. The resolution of that problem could not be immediate because the tax question required some resolution first and the tax expert called in the case called for a private ruling in relation to what would occur within the orders that the Court was contemplating.
21. Accordingly, time was needed to determine what the Australian Taxation Office's ruling would be, and what would occur in the Office of State Revenue due to the real property transaction that would have to occur.

22. Lindsay J dealt with this by, effectively, flagging the orders that he proposed to make which were, in effect, to bring the estate within the protected estate regime. Lindsay J made those orders so that they were subject to the rulings being obtained and, that in the interim, the estate continue with the existing trustee but with the supervision of the NSW Trustee to ensure that nothing was done outside of the regime that his orders contemplated.
23. This has still not been resolved as those rulings have not been made.

Implications for practitioners

24. Lindsay J's decision reflects a cultural change in the way that damages assessments and settlements were made 12 years ago and the advent of the *Trustee and Guardian Act 2009* and the protective regime that has become more overtly structured with the intervention and acceptance of private managers as part of the regime.
25. In *Holt v Protective Commissioner* (1993) 31 NSWLR 227, the NSW Court of Appeal recognised that private managers would be involved in the supervision of estates where damages were involved.
26. The High Court in *Willett v Futcher* [2005] HCA 47; 221 CLR 627; 221 ALR 16; 79 ALJR 1523 recognised that the notion of trustees was not confined to licensed trustees and the NSW Trustee. The High Court acknowledged that, in a court's assessment of damages amounts, the cost of management would arise and would be a matter for assessment in the trial. Accordingly, the High Court in *Willet v Futcher* held that there is a right to remuneration that should be built in to the settlement or verdict and considered how that is dealt with in terms of actual remuneration being subject to the report of the NSW Trustee and Guardian, their supervision, and what the court says of their report.
27. In the Guardianship Division of the NSW Civil and Administrative Tribunal ('NCAT'), there is no power to approve remuneration of a private manager and, if private management is contemplated in an NCAT application, then the appropriate course is to refer the applicant to the court to make such a private management remuneration order.
28. The court is very prudent about the way it allows people to charge for managing other people's money when those people are under a disability. The court will require the private manager to set out the basis and amounts to be charged and that will direct the NSW Trustee in its supervision of the private manager
29. Any solicitor that receives instructions to make one of these applications will be looking at the UCPR provisions that direct the damages settlement. The Court will need to see evidence from two medical practitioners as to that medical incapacity. Affidavits of at least two medical practitioners or other persons qualified to give an expert opinion on the condition of the person perceived to be in need of protection: UCPR rule 57.5(1)(b). The medical practitioner giving that evidence must record the opinion in his own hand. Also required is an affidavit setting out the names of the person's nearest relatives, so far as they

are known, and the attitude of each of those persons to the application: UCPR rule 57.5(1)(a)(iii).

30. Beyond those prescriptive requirements, the issue of the evidence that the court will need about the suitability of the manager is going to be particularly supervised. These requirements are to be submitted to the Protective List Registrar before the Protective List Judge deals with the application in chambers. The NSW Trustee also applies these guidelines in their own management guidelines.

BIOGRAPHY

Bernard McHardy

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Admitted in 1986, Bernard has been accredited by the Law Society of NSW as a specialist in personal injury law for over 20 years and has been providing legal services to the people of NSW for more than 30 years. Bernard is experienced in a wide range of jurisdictions in NSW including the Local, District and Supreme Courts. Bernard has significant expertise in dust diseases claims, professional negligence, insurance claims including motor vehicle and public liability actions, employment law and family provision claims.

Gregory Burton SC

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Greg was admitted to the bar in 1989 and admitted as Senior Counsel in 2004. He was admitted to the bar of Ireland in 1993. He specialises in trial and appellate advocacy primarily in commercial, equity, intellectual property and IT, competition, property and succession/family provision, insurance, administrative law and associations and charities, professional liability, torts and contracts/sale of goods and services, construction law. Gregory is an author and editor of and contributor to journals, books, legal encyclopaedias, including Journal of Banking and Finance Law and Practice.

BIBLIOGRAPHY

Focus Case

Re S, an incapacitated young person [2017] NSWSC 859

Judgment Link

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2017/859.html?context=1;query=%5B2017%5D NSWSC 859;mask_path=

Cases

Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB [2014] NSWSC 245

Holt v Protective Commissioner (1993) 31 NSWLR 227

Willett v Futcher [2005] HCA 47; 221 CLR 627; 221 ALR 16; 79 ALJR 1523

Legislation

Damages (Infants and Persons of Unsound Mind) Act 1929 (NSW)

Corporations Act 2001 (Cth)

Trustee and Guardian Act 2009 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)

Civil Procedure Act 2005 (NSW)

Guardianship Act 1987 (NSW)