

## A POTPOURRI OF ISSUES

I propose to address this evening a few areas in which there has been recent authority or discussion in the authorities that may be of interest from a legal and/or practical view to those practising in the area of elder law, namely ademption; the issue of capacity; notional estate; and questions of standing.

### ***Ademption***

- *Legal Principle*

Ademption occurs when no property that meets the description of the subject matter of a specific bequest is found amongst the property of the deceased at the time of his or her death (*Harrison v Jackson* (1877) 7 Ch D 339 at 341; *Fairweather v Fairweather* at 129, 136, 142; *Brown v Heffer* at 348).

Subject to the exception in *In Re Slater* [1907] 1 Ch 665, the donee of the gift does not receive that property even if it is possible to identify property into which the specifically given item has been converted (*Harrison v Jackson* at 343–344; *Fairweather v Fairweather* at 136, 142; *In Re Bridle* (1879) 4 CPD 336). The exception in *Re Slater* was where “a testator has at the time of his death the same thing existing, it may be in a different shape, - yet substantially the same thing.”

Campbell JA in the Court of Appeal this year (*RL v NSW Trustee and Guardian* [2012] NSWCA 39) has published a seminal judgment considering in detail the authorities in relation to ademption and the principles applicable to dealings with an incapable person’s estate. His Honour in that judgment dispelled doubt as to the correctness of the reasoning in *Re Viertel* (though his Honour noted that no question arises as to whether *Re Viertel* should be followed in New South Wales because

s 22 of the *Powers of Attorney Act 2003* now addresses the type of situation there considered).

His Honour noted that *Re Viertel* had been followed in several first instance decisions (*Mulhall v Kelly* [2006] VSC 407; *Ensor v Frisby* [2009] QSC 268 ; [2010] 1 Qd R 146; *Moylan v Rickard* [2010] QSC 327; *Simpson v Cunning* [2011] VSC 466; *Public Trustee v Lee* [2011] QSC 409) but that in other first instance decisions the conflict in the authorities concerning the correctness of *Re Viertel* had been recognised (*Re Blake* [2009] VSC 184 ; (2009) 25 VR 27 at [55]; *Power v Power* [2011] NSWSC 288 at [36]).

Campbell JA confirmed in the clearest terms (at [173]) that, subject to any statutory provision to the contrary:

the **only** circumstance in which it is legitimate for the proceeds of sale of a specifically given item of property to pass to the intended donee of that property, **other** than where the sale has been effected without authority or in some other fashion wrongfully, is where the specifically given asset has not been changed in substance. (my emphasis)

That is the law as stated in the passage from *Re Slater* at 672 that I have quoted at [132] above, as stated in the High Court in *Harrison v Jackson*; *Fairweather v Fairweather* and *Pohlner v Pfeiffer* ([130] and [135] above) and as accepted in this court in *Perpetual Trustees Co v Robbins* ([134] above).

At [183], his Honour said that:

Absent matters such as dishonest dealings, a principal is bound by the acts of his attorney within the scope of the authority conferred, even if the principal has no intention to carry out the specific act that the attorney has carried out. This is no different to the way in which an incapable person is bound by acts, performed with proper legal authority, of whoever is administering his or her affairs, whether that administration is occurring under a court or Guardianship Tribunal management order or an enduring power of attorney.

and at [186] that:

When one is considering whether the disposition of an asset of an incapable person has adeemed a specific gift made by that person's will, there is no legitimate basis of principle on which a disposition effected pursuant to an enduring power of attorney should operate in any different way to a disposition effected pursuant to the authority of the court, or of the NSW Trustee.

In substance, the vice identified by Campbell JA in the reasoning of *Re Viertel* was that it accepted the sort of argument that had been put, and rejected, in *Re Freer*.

In *Re Freer; Freer v Freer* (1882) 22 Ch D 622, where the question was whether a sale by court order of shares the subject of a specific bequest had adeemed the legacy, the specific legatee argued (at 624–625) that the doctrine of ademption did not apply to a case where, after a testator has given a specific thing (and without his knowledge and perhaps against his wishes), another person has sold it or altered its character (referring to *Jenkins v Jones* Law Rep 2 Eq 323) or where the nature of the legacy has been changed by mere act or operation of law (citing *Roper on Legacies* 3rd Ed vol i p 289 and *Partridge v Partridge* Cas t Tal 226).

That argument was rejected by Chitty J who held that the legacy had been adeemed. At 627–628, Chitty J said:

The general law upon the subject is clear. If the testator himself not being a lunatic, had sold the stock and placed the proceeds to a separate account in his books, with a memorandum that for all purposes the proceeds were to stand in the place of the stock, the Wills Act would have stood in the way, and the memorandum would not have affected the rights of parties inter se : and to my mind, all that has been done in the present case under the lunacy jurisdiction amounts to nothing more than what I have stated; for the law places the estate of the lunatic in the same position as if there had been no lunacy, except for the 119th section of the Lunacy Regulation Act, 1853 , which provides that the proceeds of land shall, notwithstanding its conversion, preserve the character of land, and belong to the same persons who would have been entitled to the land if there had been no conversion.

In *NSW Trustee & Guardian v Bensley & Ors* [2012] NSWSC 655, White J applied *Re NL* and there held that the sale of the property in question (effected under a power of attorney created in 1998 and to which section

22 of the *Powers of Attorney Act 2003* did not apply) effected a change of the asset in substance and therefore that, since the property was not an asset of the estate at the date of death, the gift of that property failed by ademption. The proceeds of sale of the property fell to be dealt with as part of the residue of the estate.

What then was the reasoning in *Re Viertel* that has now been shown to be incorrect and what lessons should be learnt from *Re NL* in a practical sense.

### *Re Viertel*

In *Re Viertel* [1997] 1 Qd R 110, the specific devisees of a property, who had also been appointed as the testatrix's attorneys under an enduring power of attorney, exercised the power of attorney and sold the property after the testatrix became incapable (doing so in ignorance of the gift to them in the will.) Thomas J considered that this was a disposition of which the testatrix would, had she been aware of it, probably have disapproved. He held "with some hesitation" that there had been no ademption of the specific devise on the basis that the rule recognised by Stuart V-C in *Jenkins v Jones* (1866) LR 2 Eq 323 was an historical exception to the consequences of ademption.

Campbell JA proceeded to analyse *Jenkins v Jones* (and the cases to which Stuart V-C had there referred) and concluded that the cases in question were explicable as cases where the sale was without authority (as was the case in *Jenkins v Jones* itself) (such as *Taylor v Taylor*, *Re Larking*) or which otherwise turned on the construction of the will in question (*Re Pilkington's Trusts* (1865) 6 New Reports 246, *Re Dorman deceased* [1994] 1 WLR 282) or related to circumstances where the property in question was destroyed after the testator's death (*Durrant v Friend* (1852) 5 De G & Sm 343; 64 ER 1145).

The comment in *Jenkins* (on which Thomas J relied in *Re Viertel*) was that of Stuart V-C who (after referring to the general principles of ademption) said at 328 that “quite another consideration arises where, after the testator has given a specific thing, and without his knowledge, perhaps against his wishes, or tortiously, another person has sold it or has done enough to wholly alter its character”.

Campbell JA referred to subsequent English authority in which it was recognised that there was no requirement for knowledge or intention on the part of a testator before a specific gift can be adeemed (*Jones v Green; Re Freer*) and to authority in this country in which *Re Viertel* had been considered and/or applied (including *Re Hartigan; ex parte the Public Trustee* WASC, Parker J, 9 December 1997, unreported, that his Honour considered to be mistaken for the same reasons as *Re Viertel*). (His Honour noted that the purpose of legislation such as s 83 of the 2009 Act was to address the situation where the sale of the house by a person with authority to do so would have the effect of adeeming the specific devise).

Campbell JA adopted what was said in *Johnston v Maclarn* [2002] NSWSC 97 by Young CJ in Eq (as his Honour then was) as correctly reflecting the law in Australia:

*Roper on Legacies*, 4th ed (William Benning & Co, London, 1847) at pp 329 and following, sets out the general rule with respect to the ademption of specific legacies. The learned author says:

The word “ademption” when applied to specific legacies of stock or of money ... must be considered as synonymous with the word “extinction”. For it should be observed, that if stock, securities, or money, so bequeathed, be sold or disposed of, there is a complete extinction of the subjects, and nothing remains to which the words of the will can apply (a): for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be ... to convert a specific into a general legacy.

...

As Roper notes at p 331, this view of ademption means that the testator’s intention is irrelevant. The only thing to be ascertained is whether the testator possessed the property in the specific gift at

the time of his death. If he did not, the legacy is adeemed by annihilation of the subject.

Roper's approach has been followed ever since; see eg *In re Rudge* [1949] NZLR 752 at 761, where Callan J affirms that: In questions of ademption ... the primary inquiry is not for the testator's intention. The test appears to be whether at his death the property of which the testator has made a specific gift in his ... will still belonged to him.

Campbell JA also cited *Christensen v McKnight* (NSWSC, Hodgson J, 2 March 1995, unreported) where Hodgson J said that ademption depends on the intention of the deceased as disclosed by the will but not upon any subsequent intention and that if "the intention disclosed by the will is to give particular real estate and nothing else, then it does not matter how the deceased ceased to have the real estate to give" as referring to the process of construction by which one identifies the intention of the deceased as disclosed in the will.

- *Practical context in which question arose*

The context in which consideration came to be given by Campbell JA in *Re RL* to the correctness of *Re Viertel*, was that questions had arisen as to the power of the NSW Trustee to direct the manner in which the manager of the estate of an incapable protected person should invest the net proceeds of sale of an asset that was the subject of a specific legacy in the last will that the protected person made before becoming incapable and the extent, if any, to which the manager was also to use the proceeds of sale of that asset for the benefit of the protected person.

In *Re NL*, the manager of the testatrix's estate had been directed to segregate part of the proceeds of sale of a property (the garage unit of which had been the subject of the specific legacy) and to resort to those proceeds of sale to pay expenses of the protected person only if no other assets were available for the payment of those expenses. Judicial advice was sought ultimately as to whether s 83 of the *NSW Trustee and*

*Guardian Act 2009* empowered such a direction or required the segregation of the proceeds of sale attributable to the property in question.

The relevant direction was to set aside the sale proceeds of the garage with the further statement that “however, this does not preclude the use of the funds for [PBL’s] ongoing care if required”. (There had been an earlier direction by the predecessor to the NSW Trustee and Guardian that approval was required for any dealing with the property of the protected person.)

Issue was taken by the manager (one of the residuary beneficiaries) with the validity of that direction. There was an internal review of that direction (a prerequisite to any appeal pursuant to s 70 of the 2009 Act and clause 43 of the NSW Trustee and Guardian Regulation 2008 to the Administrative Decisions Tribunal).

Campbell JA noted that by the time the internal review was sought, the disagreement that had emerged between the manager and the NSW Trustee was whether s 83 of the 2009 Act required the separate preservation of the sum of \$75,000. The internal review conducted by the NSW Trustee noted (correctly, in Campbell JA’s view) that the rationale for the original decision of the NSW Trustee proceeded on the premise that the original decision had been solely based on the mandatory need to give effect to the requirements of s 83 of the *NSW Trustee and Guardianship Act 2009* (there being no suggestion of any complaint as to the financial management by the manager).

The conclusion reached on the internal review was that:

a correct interpretation of section 83 of the NSW Trustee and Guardianship Act 2009 is that the section has immediate effect and that pursuant to subsection (5) of same the Court has reserved powers to make any orders that it sees fit to make following an application to it concerning the effect of its application on the applicant.

The NSW Trustee on the internal review affirmed the original decision:

In so doing however, I wish to make very clear to [RL] that Mr [A], in accordance with the Act is not entitled to any interest earned on the sum of \$75,000 and that [PBL] if required can draw down on this sum to meet her accommodation and support needs into the future and up to the time of her death and that it is only the residue (if any) remaining that may be claimable by Mr [A] under [PBL's] Will.

*I would however add a word of caution here. The \$75,000 impacted on by section 83 of the NSW Trustee and Guardianship Act 2009 cannot be used by [RL] as Private Manager as the first accounting "port-of-call" to fund such costs of [PBL]. The balance of [PBL's] funds must be used first to do this. (my emphasis)*

Campbell JA concluded that the intent of the word of caution made on the internal review was to vary the earlier direction namely to add to the requirement that the funds be set aside, and to redirect that those funds should be used to fund the protected person's expenses only after other available assets had been applied to that purpose. (His Honour noted ss 53(5) and (8) of the *Administrative Decisions Tribunal Act* in that regard.)

The manager did not exercise the right of appeal to the Tribunal, but instead commenced proceedings, *ex parte*, seeking judicial advice pursuant to s 63 *Trustee Act 1925* (NSW) or in the alternative under s 83(5) of the 2009 Act. Pursuant to directions made by the court, the NSW Trustee was joined as a defendant to those proceedings. (The legatee of the relevant device was given the opportunity to participate in the proceedings but did not do so.)

- *Judicial Advice*

Pausing there, (and this is one of the practical aspects to note from this decision) the Court of Appeal was critical as to the use of the judicial review procedure for determination of issues that had the capacity to affect interests of third parties.



The relief claimed in the Amended Summons was for the court's opinion advice and direction under s 63 of the *Trustee Act*, and/or s 83(5) of the 2009 Act , or in the court's inherent jurisdiction as to:

- (i) Whether the plaintiff as the financial manager of her aunt's estate would be justified in treating the whole of the net proceeds of sale of the protected person's former residence Darlinghurst as funds available without differentiation to be applied for the purposes authorised by s 59 and/or s 65(1) and (3) of the NSW Trustee and Guardian Act 2009; and
- (ii) Whether the plaintiff, again in that capacity, would be justified in treating the purported direction or requirement of the Office of the NSW Trustee and Guardian to treat \$75,000 of those funds as having been already appropriated by s 83 of the Act (for the purpose of satisfying a prospective claim by a beneficiary under the presumptive most recent will of the protected person) as being void and not authorised by the Act.

Alternatively, an order was sought under s 83(5) of the Act that s 83 of the Act does not operate to render any of proceeds of sale of the protected person's former residence attributable to the garage unit, liable to be set aside for the benefit of any person other than the protected person, or exempted from being immediately available to meet expenditure authorised by s 59 of the Act administered in accordance with s 39.

(Insofar as the Amended Summons also sought such directions as the court thought necessary under s 61(1) of the 2009 Act, Campbell JA noted that this was inappropriate since that section appears in Div 1 of Pt 4.5 of the 2009 Act and that that Division applies in respect of the estate of a managed person that is committed to the management of the NSW Trustee. However, he noted that s 64 of the 2009 Act conferred on the Supreme Court, in relation to estates managed by someone other than the NSW Trustee, a power (exercisable by order, rather than by direction) that was broadly comparable to s 61.)

Campbell JA noted that the parties had proceeded by consensus on the basis that this court had jurisdiction to resolve the substantial questions

before it, regardless of the precise source of that jurisdiction, but said that while this consensus explained it did not completely justify what would be the otherwise impermissible step of a summons seeking judicial advice resulting in the making of substantive orders and declarations.

The difficulty with that course (noted also by Sackville AJA in his Honour's concurring reasons) was that the declarations ultimately made seemed in their terms detrimentally to affect the interests of the other residuary beneficiaries under the will, yet they had not been parties to the proceedings. (Similarly, his Honour noted that the question of the specific legatee's entitlement to interest was not to be foreclosed where he had not been a party to the proceedings.)

Hence the Court of Appeal made clear that the declarations made in the court below were binding only as between the parties to the proceedings.

Sackville AJA noted that the financial manager could have sought review of the NSW Trustee's decision in the Administrative Decisions Tribunal, pursuant to s 70(1) and (3) of the *Guardian Act*, since the decision was a "reviewable decision" as defined in s 8 of the *Administrative Decisions Tribunal Act 1997* and said at [201]:

The ADT, upon an application for a review of a reviewable decision, is to decide what the correct and preferable decision is having regard to the material before it, including any relevant factual material and any applicable law: s 63(1) ADT Act. The ADT has power to join a person as a party to the proceedings if the ADT considers that the person ought to have been joined as a party or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings: s 67(4) ADT Act. Had an application for review been made to the ADT, it could have made an order joining Mr A as a party, since he clearly had an interest in the preservation of the fund representing the proceeds of sale of the garage.

and at [204]:

RL's decision to seek judicial advice rather than review by the ADT perhaps may have been influenced by a belief that the application was more likely to result in an order that RL's costs be paid out of

PBL's estate. In certain circumstances, the ADT has power to award costs in relation to proceedings before it: ADT Act, s 88(1A), (2). However, it is not entirely clear whether the statutory criteria the ADT is required to take into account would permit it to order that the costs of parties on the review of a decision of the NSW Trustee be paid out of the estate of the managed person.

His Honour said at [211] – [212]:

I do not doubt that the Supreme Court had jurisdiction to entertain RL's application for judicial advice. This is so notwithstanding that RL could have challenged the NSW Trustee's decision by seeking review of the decision in the ADT, perhaps at less cost. But the existence of the jurisdiction to entertain RL's application does not necessarily mean that this court should order that RL's costs should be paid out of PBL's estate, whether on an indemnity basis or otherwise. An applicant's choice of forum should not dictate a favourable costs order regardless of the outcome of the application.

RL is one of the three residuary beneficiaries under PBL's will (see the primary judgment, at [6]). She therefore has had a personal interest in pursuing the appeal, although she shares that interest with the other two residuary beneficiaries (her siblings). Bearing in mind that RL's appeal has been unsuccessful, if there was any risk that an order for the payment of RL's costs out of PBL's estate would leave PBL without adequate resources for her ongoing maintenance and welfare, I would not make such an order. However, in the particular circumstances of this case, there appears to be no risk that PBL will be left without adequate resources. Accordingly, I also agree with the costs orders proposed by Campbell JA.

- *Operation of 2009 Act*

Turning to the operation of s 83 of the 2009 Act, Campbell JA considered the historical development of equivalent provisions in England, and second, the adoption or adaptation of those laws in New South Wales.

His Honour noted that in one respect both s 48(1) and (2) of the *Protected Estates Act* and s 83(1) and (2) of the 2009 Act might be wider than their English models and New South Wales predecessors since the latter related only to surplus money but the provisions in the *Protected Estates Act* and the 2009 Act relate to "surplus money or other property arising". His Honour noted that:

The additional words assist in making clear that it is not only the “surplus money” that might arise from a dealing with the property of an incapable person, but also any traceable proceeds of that money on which s 83(3) operates.

His Honour also noted the separate principles that had been determined in practices of English courts concerning the administration of the estates of incapable people:

First, that if an asset of a lunatic was sold or converted into a different type of property under proper legal authority, then upon the death of the lunatic the assets devolved in accordance with the form that they had at the date of death (*Ex parte Annandale* (1749) Amb 80 ; 27 ER 50; *Ex parte Grimstone* (1772) Amb 706 ; 27 ER 458; *Oxenden v Lord Compton* (1793) 2 Ves Jun 69 ; 30 ER 527 per Lord Loughborough LC; *Ex parte Phillips* (1812) 19 Ves Jun 118; 34 ER 463 per Lord Eldon; *Holmes v Goodworth* (1829) 7 LJ (Ch) 128). His Honour noted that:

A particular application of that principle was that if the court authorised the sale of an item of property that had been the subject of a specific legacy or specific devise in the lunatic’s last will before losing capacity, the gift was adeemed. ... The act of the court in authorising the sale or conversion of the property was treated as though it was the act of the testator himself: *Holmes v Goodworth* at 129; *Jones v Green* (1868) LR 5 Eq 555 at 560. (*Jones v Green* is authority for this proposition because, even though it was decided in 1868, it concerned a sale of property that was not “land” within the meaning of the 1853 English Act). The gift in the will was adeemed even if the whole of the proceeds of sale was not expended for the purposes that had led the court to authorise the sale.

A specific legacy or devise was not adeemed if the property that was its subject matter was sold or otherwise disposed of without authority: *Taylor v Taylor* (1853) 10 Hare 475 ; 68 ER 1014; *Jenkins v Jones* (1866) LR 2 Eq 323; *In re Larking* (1887) 37 Ch D 310.

Second, his Honour noted the principle that in administering the property of an incapable person the court would seek to provide (including by sale of assets) that the incapable person “should have every comfort that his circumstances will reasonably enable him to enjoy, without any thought of

keeping property for the benefit of next of kin or other expectants”  
(*Mr Justice Dormer’s Case* (1724) 2 PWms 262; 24 ER 723 per Lord Macclesfield; *Oxenden v Lord Compton* (1793) 2 Ves Jun 69; 30 ER 527 at 72, 528 per Lord Loughborough; *Ex parte Chumley* (1791) 1 Ves Jun 296 ; 30 ER 352 per Lord Thurlow LC; *Ex parte Baker* (1801) 6 Ves Jun 8; 31 ER 911). Campbell JA noted at [80] that, in accordance with that principle, the “surplus” that remained after satisfying the purposes that caused the court to approve the sale or other dealing with the specifically bequeathed property might be eroded, or disappear, during the life of the incapable person.

Third, his Honour noted at [83]:

Notwithstanding the possibility that the last will made before becoming incapable might not be the last will made before death, *another principle that the court adopted in administering the estate of an incapable person was that the court would not vary or change the property of an incapable person, or alter rights of succession to it, beyond what was necessary for his or her maintenance: Ex parte Haycock* (1828) 5 Russ 154 ; 38 ER 985 at 155, 986 per Lord Lyndhurst LC; *Lord Leitrim v Enery* (1844) 6 IR Eq 357; *Attorney General v Marquis of Ailesbury* (1887) 12 App Cas 672 at 688–9 per Lord Macnaghten; *In re Ryder* (1882) 20 Ch D 514 at 515 per Jessell MR (Lindley LJ concurring); *In Re Alston* [1917] 2 Ch 226 at 231; *In Re Silva* [1929] 2 Ch 198 at 205 per Romer J; *In Re Palmer* [1945] 1 Ch 8 at 12 Lord Greene MR . *In Ex parte Haycock* Lord Lyndhurst LC refused to order the sale of certain furniture that a lunatic had made the subject of a specific bequest, on the ground that “he would not defeat the intention that the lunatic had manifested, when sane”. Sir Edward Sugden, when holding office as Lord High Chancellor of Ireland, explained in *Lord Leitrim v Enery* at 363 one reason why the court alters rights concerning the estate of lunatic as little as possible:  
The person entrusted by the Crown with the custody of the persons and properties of lunatics, ought not wantonly change the nature of the property; for if the lunatic recovers, he may reasonably expect to find his property in the same state as when he became of unsound mind: and although the persons who at his death would be his heir and next of kin have no interest in the property, yet the Holder of the Great Seal, representing the Crown in this respect, should not without cause do any act which would have the effect of altering their respective rights. (my emphasis)

At [85] his Honour quoted Lord Macnaghten in *Ailesbury* at 688:

The principles on which the Court acts in dealing with the property of lunatics under its care are not open to question. *The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate, the Court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the Court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession.* (my emphasis)

Campbell JA observed that when dealing with an incapable person there were two relevant principles: not altering the character of the incapable person's property and not interfering with any rights of succession (but that the overriding principle that adequate provision is to be made for the incapable person).

Campbell JA concluded that, notwithstanding the line of first instance cases stemming from *Re Viertel*, when the financial manager sold the garage with proper legal authority from the NSW Trustee to do so that sale would have effected an ademption of the bequest were it not for the existence of a statutory provision such as s 83 of the 2009 Act .

- *Validity of directions*

The second practical aspect of the decision related to the validity of the directions that had been made in relation to the disposal of the property of the incapable person. The Protective Commissioner had directed in 2006 that approval was required for any dealing with an asset of the estate, except for the making of authorised types of expenditure. That direction had the effect of requiring the approval of the NSW Trustee both to the sale of the real estate, and to the investment of the proceeds (including whether the proceeds should be invested as a single lump sum or as segregated sums).

Campbell JA noted at [93] that s 64 of the 2009 Act conferred on the NSW Trustee power to make such orders as it thinks fit in relation to the

administration and management of the estates of managed persons, and such orders as it thinks fit in connection with directing the exercise of the functions of managers and that, as the direction to set aside the \$75,000 related to the management of the estate and was a direction of the exercise of the functions as manager, it was within the literal words of s 64. His Honour considered that the preferable construction of s 65(1) of the 2009 Act was that one of the powers conferred on the NSW Trustee is to make such orders as it thinks necessary or desirable for the care and management of the estate of the protected person. The order to segregate the \$75,000 therefore fell within s 65(1)(c). (It also fell within the words of s 65(3)(c), as a direction for the investment of money not required for the other identified purposes in a manner that the NSW Trustee thinks fit.)

At [94] Campbell JA noted that a statutory power that is in terms confined only by being “in relation to” or “in connection with” some particular topic will be construed as being required to be exercised consistently with the purposes of the legislation that confers the power and considered that a direction to segregate the net proceeds of sale of the garage could not be said to be inconsistent with the purposes of the legislation (even though until the person’s death it would not be known whether there was a “surplus” that would pass under the specific devise as operated upon by s 83, or the quantum of any such “surplus” and even though the specific legatee would have no legal right to any asset until the death and it is known whether the will that is now thought to be likely to be her last one is indeed her last one). His Honour said:

The segregation is justified because s 83 can operate concerning the proceeds of sale of specifically devised property only if one is in a position to identify any “surplus” and its quantum when PBL has died and the time for distribution of her estate arrives. In my view, s 83 by implication gives rise to an obligation on RL and the NSW Trustee to take steps to administer the estate in such a way that, on PBL’s death, it will be possible to identify what is the “surplus”, if any, that s 83 then operates upon. That in itself would require them to identify whether any payment of expenses that was made from the estate was being paid, in whole or part (and if so, what part), from the \$75,000. A convenient way of achieving

that objective is to keep the net proceeds in a separate fund. Putting them into a different fund does not mean that the legal rights that relate to them are any different to those relating to any other part of the assets of PBL's estate. It is purely a convenient accounting device for keeping track of whether or not any part of the net proceeds of sale of the garage are being spent. It was within the discretion of the NSW Trustee to require that the net proceeds be kept in a separate fund.

However, as to the separate question whether s 83 dictated that the separate fund representing the proceeds of sale attributable to the garage should be resorted to last for the payment of the incapable person's expenses, his Honour was of the view that s 83 imposed no such requirement:

Even the "surplus money" that arises from the sale of a specifically devised asset is available for payment of proper expenses of the incapable person. If the fund arising from the "surplus money" were to be used to pay such expenses it would be whatever remained in the fund after payment of those expenses that would become the "surplus money" to which the specific devisee became entitled pursuant to s 83 at the death of PBL. However, neither is s 83 inconsistent with the separate fund being resorted to last for payment of expenses. The order in which assets of PBL are resorted to for payment of her expenses depends on other considerations.

His Honour nevertheless considered at [96] that a legitimate consideration for the NSW Trustee in making decisions relating to administration of the estate of an incapable person, was the longstanding practice of the courts concerning the way in which they administer the estates of incapable persons:

The first consideration in deciding which of several available assets is to be resorted to for payment of expenses is always the welfare of the incapable person. If there was an expense to be met and the only readily saleable asset from which it could be met was the subject of a specific gift in what was likely to be the last will of an incapable person, the court would not hesitate to authorise the sale of that asset. However, no such consideration arises in the present case, where all the available assets (apart from the accommodation bond) are now in the form of cash. Where there is a choice about which of the assets of an incapable person should be used for payment of expenses, the practice of the court has been to use assets that are not the subject of a specific legacy or devise before assets that are the subject of a specific legacy or devise. It was within the scope of the NSW Trustee's power to



issue directions that require that practice to be followed concerning PBL's estate.

One justification for this practice is that it is consistent with the order of application of assets in a deceased estate. If an expense had been incurred for the maintenance of an incapable person but that expense had not been paid at the time of his or her death, the order of application of assets under s 46C and the Third Schedule of the Probate and Administration Act 1898 would require the expense to be paid out of the residuary estate before it was paid from any asset that was the subject of a specific gift. It is consistent that the burden should fall in the same way if the expense is paid during the lifetime of the incapable person. Indeed, it would be anomalous if where the burden of an expense fell depended on the chance of whether the manager of the incapable person's estate was fast or slow in paying bills for expenses.

His Honour noted what had been said by Hodgson J (as his Honour was then) in *Christensen v McKnight* concerning the manner in which s 48 of *Protected Estates Act* would affect the sale proceeds of a property the subject of a specific devise under the relevant will, said at 10–11:

In my view, s 48(5) does not introduce a general discretion into the operation of s 48(1), but only gives some flexibility to the means of putting it into effect. I accept that s 48(1) only operates so long as "surplus money" arising from a sale to which it applies is identifiable as such. In my view, the word "surplus" indicates that the section only applies to the net proceeds of any such sale, and only to so much of these as remain identifiable at the date of death. Here, so much of the deposit as was used prior to the death of the deceased to pay debts would not be affected by s 48, nor would any other part of the deposit which was applied so as to lose its character as proceeds of sale. However, the balance of the purchase money received after the death of the deceased could not be considered as other than money arising from the sale, and in my view, could not be affected by the management plan devised before the deceased's death.

In my view, therefore, at least the balance of the purchase money, less any expenses of the sale which were deducted from it and less any debts which were secured on the property, would be surplus proceeds of sale within s 48(1); and in my view, that section would be effective to produce the result that that money be treated as representing 114 Rosedale Road for the purposes of giving effect to the will.

At [104] his Honour said that:

Insofar as the direction of the NSW Trustee that was substituted by the internal review presupposed that s 83 imposed a legal obligation not to resort to the net proceeds of sale until other assets were exhausted, its basis was mistaken. That does not mean that the substance of the direction was beyond power or (apart from relating to the full \$75,000) in some other way erroneous. In accordance with usual and proper administration, an expense would properly be paid from the net proceeds only if, for some reason evident when the expense fell due for payment, it was not practicable for the expense to be paid from the assets that were likely to fall on PBL's death into residue of her estate. When PBL's assets are nearly all cash and she is quite old, I cannot at present see how that situation will arise. In that situation it was, in my view, open to the NSW Trustee to direct that the net proceeds should be resorted to last (or, perhaps, last but *pari passu* with the net proceeds, if any, of the shares in Ansell Ltd). Any such direction is inherently revocable, and if circumstances not presently foreseeable meant that there was a reason to change it, it would have been open to RL to seek to have the direction altered, or for the NSW Trustee to alter or vary it on its own initiative.

(His Honour considered that the second of the questions on which the court's advice was sought had misstated the direction or requirement of the NSW Trustee by stating it to be more definitive than it was, considering that "word of caution" at the end of the internal review inaccurately characterised the \$75,000 as being "impacted upon" by s 83; whereas the relevant impact was that s 83 justified that fund being separately invested.)

(Young JA, also concurring in the result, noted at [194] that care must be taken in the future as to how the money set aside is to be treated. It is clear that resort may be had to it to maintain the protected person. Management consideration needs to be given as to whether any part of the interest on the money set apart should augment the fund in recognition that, had the realty not been sold, it would have most likely appreciated in value.)

#### *Lessons to be drawn from Re RL*

In summary, therefore, apart from the confirmation by the Court of Appeal as to the operation of the principles of ademption (and that the reasoning in *Re Viertel* is incorrect), the case is an important reminder as to the

scope of applications for judicial advice (such applications not being appropriate where substantive issues affecting parties' entitlements are to be determined) and as to the principles to be taken into account when dealing with the estate of an incapable person.

### ***Capacity***

The second area to which I turn relates to the question of capacity.

The test for capacity is "issue specific" (*Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 and *Dalle-Molle (by his next friend Public Trustee) v Manos* (2004) 88 SASR 193; (2004) 233 LSJS 276; [2004] SASC 102; and more recently *Guthrie v Spencer* [2009] NSWCA 369 at [174] per Campbell JA). In any particular case, capacity is to be tested by reference to the particular transaction or conduct in which the person proposes to engage (or has engaged).

In *Gibbons v Wright* (1954) 91 CLR 423; [1954] ALR 383, the principle was expressed as follows:

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. ... any test of the requisite capacity ... *whether the person concerned is capable of understanding what he did by executing the deed when its general purport was explained to him.*

The principle ... appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as *the capacity to understand the nature of that transaction when it is explained.* (my emphasis)

Hence, the test for testamentary capacity differs from that as to capacity to enter into a particular transaction or (as DeBelle J, in *Dalle-Molle*, noted) whether a person has the capacity to give sufficient instructions in a litigious matter.

### *Capacity to conduct litigation*

As to capacity to conduct litigation, the relevant test outlined in *Dalle-Molle* is whether the party is able to give sufficient instructions to take, defend or compromise legal proceedings. As to what was meant by the qualification “sufficient” in that context his Honour considered it meant instructions of a quantity, extent or scope adequate for the purpose or object of those instructions. His Honour said:

When qualifying the noun ‘instructions’ it is signifying that a person is able, *once an appropriate explanation has been given*, to understand the essential elements of the action and is able then to decide whether to proceed with the litigation or, if it is a question to agreeing to a compromise of the proceedings, to decide whether or not to compromise. (my emphasis)

His Honour did not agree in absolute terms with the comments of Chadwick LJ in *Masterman-Lister* to the effect that:

... a person should not be held unable to understand the information relevant to a decision if he can understand the explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decisions which he does, in fact, make is a decision which would not be made by a person of ordinary prudence.

Debelle J considered evidence of the capacity to make other decisions which have legal consequences and to conduct ordinary day to day affairs would be relevant but must be weighed with other evidence as adduced; and, secondly, that even if the condition suffered by the person was one which rendered him or her vulnerable to exploitation or at risk of making rash or irresponsible decisions, it did not necessarily follow that he or she was unable to give sufficient instructions:

The fact that the person is vulnerable to exploitation or prone to rash or irresponsible decisions may be relevant to a determination of the question whether he is able to give sufficient instructions but it must be considered with other relevant evidence.

His Honour noted that the question whether the person has the capacity to give sufficient instructions must be examined against the facts and subject matter of the particular litigation and the issues involved in that litigation. Accordingly, in a complex matter it may be necessary for careful advice and explanation to be given and for there to be time for consideration by the litigant. His Honour concluded that:

A person will not be under a disability, if after careful advice and explanation and time to consider the advice and explanation, he then gives instructions.

According to his Honour, the level of understanding of legal proceedings involves an ability “to understand the nature of the litigation, its purpose, its possible outcomes, and the risks in costs which is of course but one of the possible outcomes.” (In *Murphy v Doman* [2003] NSWCA 249, Handley JA considered that the test of capacity for a litigant in person would be higher than that for a litigant retaining a solicitor.)

#### *Testamentary capacity*

By contrast, the test for determining testamentary capacity is that set out in *Banks v Goodfellow* (1870) LR QB 549 at 565 by Cockburn CJ (applied recently in *Frizzo & Anor v Frizzo* [2011] QSC 107 at [21]).

Cockburn CJ in *Banks v Goodfellow* (1870) 5 QB 549 at 565:

It is essential to the exercise of such a [testamentary] power that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposes; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made.

In *Bull v Fulton* (1942) 66 CLR 295 at 341-2, Williams J noted that:

A sound and disposing mind is one which is able to reflect upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty and the power of considering the several claims, and of determining in what proportions the property shall be divided between the claimants (*Burdett v. Thompson*). Such a capacity does not exist where the testator is suffering from a disorder of the mind which "shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties" (*Banks v. Goodfellow*). ... It is now recognized that the mere existence of a delusion does not deprive a testatrix of testamentary capacity. (footnotes omitted)

If there is a material delusion which has influenced a testator's testamentary dispositions then the will may be declared invalid as in *Timbury v Coffey* (1941) 66 CLR 277. Where a delusion does not influence testamentary disposition then, absent any other issues affecting its validity, the will would be admitted.

I am indebted to Mr Willmott of Senior Counsel for having referred me to the three "R's" adumbrated by Myers J (writing extra-judicially in the *Australian Bar Gazette* 1967 Vol 2 p 3), those being the need for the testator to have the capacity to remember, to reflect and to reason:

He must be able to remember, so that he can call to mind the property at his disposal and those who may have claims upon him, to reflect so that he can consult within himself on the relative weight of their claims, and to reason so that he can judge, having regard to his assets, how far, if at all, he should give effect to them.

...

It is to be observed that it is not necessary for the testator to do any of those things. All that is required is that he should be able to do them and, if he can, his will will be valid no matter how unreasonable or capricious it may be. Testamentary dispositions are always relevant to the question of testamentary capacity, but I have never known a case in which they have done more than create suspicion on the one hand, or served to confirm capacity on the other.

The relevant principles that a Court must consider, when determining whether a person has testamentary capacity are therefore whether the testator is aware, and appreciates the significance, of the act in the law upon which the testator is about to embark; whether the testator is aware

“at least in general terms” of the nature, extent and value of the estate over which the testator has a disposing power; and whether the testator is aware of those who may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons; and the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.

The caution with which the task of determining testamentary capacity must be approached was noted by Gleeson CJ in *Re Estate of Griffith (dec'd); Easter v Griffith* (1995) 217 ALR 284 at 290, his Honour saying that “[t]he power freely to dispose of one’s assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter”.

Nevertheless, as White J said in *Phillpot v Olney* [2004] NSWSC 592 at [12]:

If the Court is not affirmatively satisfied that [deceased] had such a capacity [testamentary capacity] it is bound to pronounce against the documents.

Similarly, in *Bull v Fulton* (1942) 66 CLR 295 at 343 it was said by Williams J that:

Usually the evidence is such that the question upon whom the onus of proof lies is immaterial, but it is clear to my mind that, although proof that the will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator’s competency, then the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it (Mortimer’s Probate Law and Practice, 2nd ed. (1927), pp. 53-55; *Sutton v. Sadler* ; *Landers v. Landers* , at pp. 235, 236; *Bailey v. Bailey* ; *Timbury v. Coffee* ; *Derrett v. Hall*).

The fact that the deceased committed suicide does not of itself lead inexorably to the conclusion that the deceased lacked testamentary capacity at the time of the execution of either of the instruments although

this is recognised as a factor of significance (*Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 707-708).

In *Worth v Clasohm* (1952) 86 CLR 439 at 453, the effect of doubt as to the question of testamentary capacity was discussed:

A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; *but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.* (my emphasis)

The relevant questions are whether the deceased was able to understand the nature of the act of executing and publishing a will and the effect of the instrument; whether the deceased was able to call to mind the property it was in his power to dispose of in that will; whether the deceased was able to call to mind the persons who may have claims upon his testamentary bounty; whether the deceased able to weigh the relative claims of those persons and whether the deceased's mind was possessed of a delusion that influenced the disposition of his property which, if his mind had been free of that delusion, would not have been made.

As to the admission to probate of a document not validly executed as a will, in *Public Trustee v Alexander - Estate of Alexander* [2008] NSWSC 1272 at [9], White J said:

To be admitted to probate under s 18A, the document in question must purport to express the testamentary intention of the deceased and the deceased must have intended the document to constitute his will. The document must not only set out what the deceased wished or intended should happen to his property after his death, but he must have intended that the document should



cause that to come about, that is, to operate as a will (*In the Estate of Masters; Hill v Plummer* (1994) 33 NSWLR 446 at 455 per Mahoney JA). As Kirby P said to the same effect in that case (at 452), the deceased must intend the document to govern the disposition of his or her property after death. (See also *Costa v Public Trustee of NSW* [2008] NSWCA 223 per Hodgson JA at [26], and Basten JA at [108] and [110].)

Powell J in *Public Trustee v Commins; Estate of Wray* (NSWSC 19 June 1992 unreported) enumerated the issues which the court is called upon to consider or the purposes of s 18A as:

1. is there a document? 2. does that document purport to record the testamentary intentions of the relevant deceased? 3. is the evidence which has been tendered such as to satisfy the Court that, at the time of the document being brought into existence, or at some later time, the relevant deceased, by some act, or words, evinced her, or his, then intention that the document should, without more, constitute her, or his, will?

#### *Transactional capacity*

Where the question is capacity to enter a transaction in *Szozda v Szozda* [2010] NSWSC 804, Barrett J (as his Honour then was) noted the importance of considering the nature and complexity of the document in question (there, a power of attorney) when assessing the capacity of a party to execute a particular document.

In *Szozda*, his Honour rejected the submission that (by analogy with the approach to onus in a will case), if circumstances were proved which cast doubt on the capacity of the donor (or testator) then it was for the party seeking to uphold the relevant instrument (there, a power of attorney) (or, in the said to be analogous case, the will) to prove that the donor (or testator) possessed the requisite capacity. (That submission was made by reference to *Ghosn v Principle Focus Pty Ltd (No 2)* [2008] VSC 574 at [68].) Instead, Barrett J accepted the submission that there was no room for an analogy drawn from the area of wills and probate and held that it was for the plaintiffs who sought declarations of invalidity in respect of the power of attorney affirmatively to displace the presumption of sanity (his

Honour observing that this was consistent with the observations of Harrison J in *Lake v Crawford* [2010] NSWSC 232 at [13]).

At [28] in *Szozda*, his Honour noted that when considering the capacity to grant a power of attorney the inquiry must therefore be directed towards “the ability to understand the creation of a general and enduring power of attorney, that is, an instrument empowering the attorney or attorneys to do for the donor anything and everything that the donor may lawfully do and creating an authority that continues even if the donor comes to lack capacity”. His Honour noted that there were suggestions in the submissions that the degree of understanding required would vary with the extent and complexity of the person’s affairs. His Honour also noted that, in the context of a power of attorney given specifically to facilitate a particular transaction (as opposed to a general power of attorney as was in issue in that case), this would involve a decision as to the wisdom of the transaction from the point of view of the donor’s interests and hence an understanding of the transaction to be facilitated would be indispensable to an understanding of the power of attorney in such a case (citing *Crago v McIntyre* [1976] 1 NSWLR 729 at 749-750).

It is instructive to note that in *Szozda*, his Honour noted that while the solicitors had explained in broad terms the general nature of the general and enduring power of attorney (that it would authorise the attorney to do anything and everything that the donor herself could do), neither had referred to any particular things that the attorney could do or to particular aspects of the family companies or family trusts in relation to which the attorney could act “nor did either probe [the donor] by, for example, asking her to repeat what had been said to her or putting questions about aspects of her property and affairs answers to which might have formed a basis for specific questions or comments designed to ensure that an informed understanding had been received and was held” (at [119]). His Honour referred to the medical evidence and concluded that it firmly supported the proposition that as at the date of the power of attorney the donor “did not have the mental capacity to understand the nature, implications and far-

reaching ramifications of a general and enduring power of attorney and the various things it allowed an attorney to do and would not have understood them even if they had been spelled out to her by her solicitors in the most comprehensive and punctilious way". (my emphasis)

From the above, it can be gleaned the kind of explanation that a solicitor would need to give (and the kind of questions the solicitor would need to put) in order to be able to form a view as to the ability of a client to understand the nature and effect of a transaction into which that client was entering.

There is a distinction between a plea of incapacity to enter into a transaction and a plea, say, of *non est factum*. (There is also a distinction between such a plea and a plea of undue influence or unconscionability.)

A plea of *non est factum*, if successfully made out, results in the relevant instrument being held as void *ab initio* (*Petelin v Cullen* (1975) 132 CLR 355; 6 ALR 129; *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643), rather than merely voidable (and there is no right vested in the pleader to elect to rescind or affirm the bargain) (Nor in such a case is the 'minimum equity necessary' approach, as expressed in *Bridgewater v Leahy*, applicable.) A challenge to capacity that does not go so far as to amount to a plea of *non est factum* renders the instrument in question voidable.

The plea *non est factum* ('it is not my deed') is a defence by which a person seeks to disown a deed or other document which it is alleged he or she sealed or signed. The classic statement of the plea, as it applies to documents that the pleader has actually signed, is given in *Petelin v Cullen* at 133:

The principle which underlies the extension of the plea to cases in which a defendant has actually signed the instrument on which he is sued has not proved easy of precise formulation. The problem is that the principle must accommodate two policy considerations which pull in opposite directions: first, the injustice of holding a person to a bargain to which he has not brought a consenting mind;

and, secondly, the necessity of holding a person who signs a document to that document, more particularly so as to protect innocent persons who rely on that signature when there is no reason to doubt its validity. The importance which the law assigns to the act of signing and to the protection of innocent persons who rely upon a signature is readily discerned in the statement that the plea is one "which must necessarily be kept within narrow limits" (*Mushkam Finance Ltd v Howard* [1963] 1 QB 904 at 912; [1963] 1 ALL ER 81 at 83) and in the qualifications attaching to the defence which are designed to achieve this objective.

The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally, it is accepted that there is a heavy onus on a defendant who seeks to establish the defence. All this is made clear by the recent decision of the *House of Lords in Saunders v Anglia Building Society* [1971] AC 1004, especially at 1019; [1970] 3 All ER 961 at 965-6.

The onus is upon the document signer to produce clear and positive evidence that the signer was under a disability and that there was a fundamental or radical difference between the document as it was and what the signer believed it to be (*Saunders v Anglia Building Society* [1971] AC 1004; [1970] 3 All ER 961). Hence, in *Baburin v Baburin* [1990] 2 Qd R 101, a *non est factum* defence was not made out where the trial judge was satisfied that the person signing the document understood the explanation of its effect by an accountant. Where both the actual and supposed documents are legal documents dealing with the same property or rights, it seems unlikely that the difference would be sufficient to sustain the plea of *non est factum*. Thus, in *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242; [1964] 3 All ER 592, a defence of *non est factum* failed where the defendant signed blank hire purchase forms in blank and gave them to her agent, which the agent subsequently used fraudulently to obtain money from a finance company, on the basis that the defendant knew she had signed documents of a similar legal effect. (See also *O'Brien v Australia and New Zealand Bank Ltd* (1971) 5 SASR 347.)

It has been suggested in some cases that the plea *non est factum* is not simply distinct from, but incompatible with, a plea of mental incapacity (for the reason that the former plea denies the signature, while the latter plea admits the signature) (*Crago v McIntyre* [1976] 1 NSWLR 729; *PT v Maradona*). However, this view was rejected by NSW Court of Appeal in *Ford v his Tutor Watkinson v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186 (Allsop P and Young JA, Sackville AJA agreeing). Allsop P and Young JA closely considered the previous cases on *non est factum* and came to the conclusion at [71] that:

The two pleas (*non est factum* and incapacity) must be distinguished, as is clear from *Gibbons v Wright* (at 443). Each may be seen to occupy distinct areas and each is theoretically distinct from the other. But it goes too far, in our respectful view, to say that the two pleas are “incompatible” cf *Crago v McIntyre* [1976] 1 NSWLR 729 at 737. Facts which, if known by the other party, would make the deed voidable may also, if sufficient in themselves, found a conclusion that the document was not signed. The two pleas may be made in the same case (as they were here). Nothing in *Gibbons v Wright* is support for the conclusion that incapacity cannot be a ground for a plea of *non est factum* if the facts as to the incapacity are sufficient to enable a conclusion to be drawn that the document was not signed.

In *Gibbons v Wright*, the High Court said at 443-444:

But if the case made is only a case of incapacity to understand the nature of that to which admittedly the signature was affixed, no analogy exists with cases in which a seeming contract is held to be completely void for want of intention that the signature shall apply to any contract of such a kind. Indeed, after *Molton v Camroux*, whatever doubt may have persisted as to what must be proved in addition to mental incapacity in order to avoid a contract, it was the settled doctrine of English law that the contract of a lunatic was not void but was voidable only.

In relation to conveyances, the Court said at 449 that:

We ought to regard it as settled law that an instrument of conveyance executed by a person incapable of understanding its effect, in the sense of its general purport, is not on that account void, though in the circumstances it may be voidable by the conveyor or his representatives.

Therefore, while the plea of mental incapacity may be based on similar facts as a plea of *non est factum*, the consequences of a successful plea in each case are very different.

### *Costs*

Before turning to the other areas I wish to address, in the context of challenges to capacity in the probate context I note that questions may arise as to who should bear the costs of establishing or challenging testamentary capacity of the deceased.

Powell J in *Shorter v Hodges* (1988) 14 NSWLR 698 noted that the general principle to be applied in adversarial litigation (namely, that costs follow the event on a party/party basis) is subject to two exceptions in the field of probate litigation:

1. where the testator has, or those interested in residue have, been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate;
2. if the circumstances led reasonably to an investigation in regard to the document propounded, the costs may be left to be borne by those who respectively incurred them; see, for example, *Michell and Mitchell v Gard and Kingwell* (1863) 3 Sw & Tr 278; 164 ER 1280; *Orton v Smith* (1873) LR 3 P&D 23; *Wilson v Bassil* [1903] P 239; *Spiers v English* [1907] P 122; *Kenny v Wilson*; *In the Estate of Holtam*; *Gilbert v Rogers* (1913) 108 LT 732.

Even within the two categories of case referred to by Powell J in *Shorter*, there remains a discretion in relation to costs orders. (Further to those exceptions, his Honour pointed out that although a legal personal representative may only be entitled to recover costs from another party to the litigation on a party/party basis, as a fiduciary the legal personal representative retains the right to an indemnity from the estate, and, thus, may have recourse to the estate for any difference between costs on the indemnity basis and the party/party costs recovered from a party.)

As to the first of the costs exceptions referred to above, if the mental frailty and condition of the deceased was such as to cause the litigation (in the sense referred to by Santow J in *Moyle v Moyle*) then an order may be made for the costs of opposing probate to be paid out of the estate. There is also the category of case considered by Campbell J (as his Honour then was) in *Page v Sedawie* [2005] NSWSC 1311 (where there is an overlap between the two exceptions) which would give rise to an exercise of discretion on the part of the trial judge as to which costs order better achieved justice in the circumstance of the particular case.

### ***Notional Estate***

The third topic I raise is that of the issue of notional estate in family provision claims. As the power of the court to designate property as notional estate is dependent on the court first being satisfied that an order for provision ought to be made on the application, the first step, before turning to the question whether any property can or should be designated as notional estate, is therefore to address the adequacy (or otherwise) of the provision made by the deceased for each of the plaintiffs during the deceased's lifetime and out of his estate. The Court is precluded from ordering that costs from the notional estate unless family provision orders are also made in favour of the applicant out of the estate or notional estate of the deceased.

There has been recognised to be an issue as to whether there is power to designate property as notional estate simply for the purposes of satisfying costs orders. (White J in *Mayfield v Lloyd Williams* [2004] NSWSC 419 was prepared to order that the plaintiff's costs on a party party/basis be paid from the notional estate but the point does not seem to have been argued before his Honour nor was it seen to be an issue in the Court of Appeal where a similar costs order was made.)

Notional estate can also include "distributed estate". The provisions relating to notional estate in the *Family Provision Act* have largely been

repeated in the *Succession Act*, and are well understood. I simply raise the change that has been made in relation to the operation of the principle in *Prince v Argue* [2002] NSWSC 1217 (by reference to ss 81 and 82 of the *Succession Act*).

Under the provisions that were applicable in family provision claims before the *Succession Act*, there was an issue as to whether a designation, as notional estate, of property held by or distributed to someone who had subsequently died was able to be made since there was then no longer a “disponnee” of that property alive for the purposes of ss 23 or 24 of the *Family Provision Act*.

In *Prince v Argue* [2002] NSWSC 1217, Macready AsJ heard proceedings involving claims on the estates of two deceased persons who had been husband and wife. The husband’s interest in a jointly owned property had passed by right of survivorship to the wife and it was claimed that there was a prescribed transaction as a result of the failure of the husband to sever the joint tenancy. The “disponnee” in relation to that transaction was the wife who had died prior to the commencement of the proceedings.

Macready AsJ dismissed the claim, holding that a designating order cannot be made under the Act where the relevant property to be designated as notional estate is no longer held by or on trust by the disponnee, as was there the case where the disponnee had died.

“Disponnee” was defined in s 21 of the Act as including, where property becomes held by a person (whether or not as trustee), that person and, where property becomes held subject to a trust, the object of the trust.

The requirement to be satisfied under s 22(1)(a) of the Act as the first limb of the test for a person to be deemed to enter into a prescribed transaction was that the person “does, directly or indirectly, or omits to do, any act, as a result of which” property becomes held by another person or subject to a trust. (my emphasis). “Property” is defined in very broad terms.



In *Kavalee v Burbidge; Ryland v Burbudge* (1998) 43 NSWLR 422, Mason P (with whom Meagher JA agreed) noted that the legislative scheme underlying the notional estate provisions was beneficial to applicants and restrictive of the property rights of disponees, stating that:

“Prescribed transaction” is defined in s.22. It is obvious that the legislature has cast the net very wide, in pursuit of its goal of providing adequate provision in favour of eligible persons. As beneficial legislation, a liberal approach to construction is called for, notwithstanding the obvious impact of a designating order upon existing property rights’

However, his Honour went on to say that:

... the ability to choose a construction which promotes the purpose of extending the powers of the Court to the full range of benefits and advantages controlled by testators exists only ‘in so far as any question of construction presents a choice’

At 443, his Honour noted that the definition of prescribed transaction used the words “as a result” not “as the result”, thus indicating that the link may be direct or indirect.

The issue that arose in *Prince v Argue* was whether “disponnee” on its proper construction in s 23 is limited to the first recipient of the property in question. Macready AsJ held that, for there to be a designation of property as notional estate for the purposes of s 23 or s 24 of the Act, it was necessary that the property the subject of the prescribed transaction or forming part of the distributed estate, as the case may be, must remain held by or for the benefit of the person *first* receiving the property as a result of the prescribed transaction or distribution in question (at least unless there were successive transactions so closely linked that the subsequent transaction could be said to be a cause of the property so being held for on behalf of that person).

Section 82 of the *Succession Act* is the machinery provision to overcome the problem that arose in *Prince v Argue* and allows for the grant of

administration of the estate of a deceased transferee to be obtained in order to allow for the notional estate designation of property that passed to that deceased transferee under a relevant property transaction. Special circumstances are required to be shown in that regard. Section 81(1) empowers the Court to designate as notional estate property the subject of a subsequent relevant property transaction and is not confined to the first of such transactions.

### ***Standing issues***

#### ***Standing***

Finally, I raise as a matter of interest the need to take care in considering issues of standing where undue influence claims are pressed after the death of the person said to have entered into the relevant transaction or to have made the relevant gift under the operation of that undue influence (whether or not those claims may be coupled with testamentary challenges). Beneficiaries under a will have standing to challenge testamentary capacity in relation to the will; they do not have standing to bring an *inter vivos* undue influence claim (that being a chose in action held by the estate). Proceedings brought by beneficiaries in relation to the latter type of claim have been found to be a nullity (and, in some cases, the invalid constitution of the proceedings is incapable of rectification).

In *Scallan v Scallan* [2001] NSWSC 1129 Windeyer J considered was an application by a beneficiary to set aside certain (*inter vivos*) transactions by the deceased on the grounds of either undue influence or unconscionable conduct, or in the alternative under the *Contracts Review Act 1980*. The proceedings before his Honour had been instituted at a time when there were contested probate proceedings that had not been determined and therefore there had been neither a grant of probate nor a grant of administration (general or limited) in the estate of the deceased. Windeyer J said (at [9]-[12]):

The chose in action being the cause of action for undue influence and setting aside the transactions relevant to the present proceedings was an asset vested in Gail Anne Scallan, now deceased. It would continue after death for the benefit of her estate. At the present time no legal personal representative of her estate has been appointed. The defendant's claim on the notice of motion is that the plaintiff has no standing to bring the action, that it is therefore a nullity and that it should be dismissed.

The argument of the plaintiff is that she is a beneficiary under the 1997 will of which her brother is executor; that clearly enough he would not be willing to bring an action in undue influence against himself, even if that were possible; that therefore the position of the plaintiff is analogous to that of a beneficiary seeking to bring proceedings for enforcement of a right of action vested in a trustee which the trustee refuses to bring. Counsel for the plaintiff relied on a number of cases including *Ramage v Waclaw* (1988) 12 NSWLR 84; *Hilliard v Eiffe* [1874] LR 7 HL 39 and *Hayim v Citibank NA* [1987] AC 730. None of these cases really bear upon the situation. In all of them there was a legal personal representative of the estate or trustee of a trust, who either refused to take action or was unwilling to do so. It is not necessary to write a treatise on this interesting subject. In *Marshall v D G Sundin & Co Limited* (1989) 16 NSWLR 463, it was held that proceedings by a named executor before a grant were a nullity. That decision was followed in *Darrington v Calderbeck [sic] – Caldbeck* (1990) 20 NSWLR 212. The power to appoint a person to represent an estate given by Pt 8 r16 of the Rules cannot assist if the proceedings cannot be instituted without such order. The difficulty can be solved in appropriate cases by obtaining a grant of administration ad litem. ...

As a final fall back the plaintiff relies on s61 of the *Wills Probate and Administration Act 1898*. The plaintiff's solicitor has written to the Public Trustee asking whether he would be prepared to be substituted as plaintiff or joined as co-plaintiff. Not surprisingly the Public Trustee has replied saying that s61 does not give him any active role. The plaintiff says that as the estate of the deceased is deemed to be vested in the Public Trustee and as he is unwilling to take proceedings, then by analogy to the cases where a beneficiary is entitled to bring proceedings on behalf of an estate or on behalf of a trust, if the executor or trustee refuses to do so, then she should be held so entitled in this case.

I do not consider that this argument has substance. Without going into the matter in detail, I consider it is established by ex parte *The Public Trustee re Birch* (1951) 51 SR NSW 345 that the fact the estate of the deceased before grant is deemed to vest in the Public Trustee "in the same manner and to the same extent as aforesaid the personal estate and effects vested in the Ordinary" does not mean that the Public Trustee has power, in respect of the estate of a deceased person before grant of administration, to bring an action to recover property transferred as a result of undue influence or unconscionable conduct. *Andrews v Hogan* (1952) 86 CLR 223, which held that a notice to quit can be served on the

Public Trustee, and perhaps that the Public Trustee has capacity to surrender a lease, does not go so far as to hold that the Public Trustee would be empowered under s61 to commence the action the plaintiff purports to bring as representative of the estate. In *Foy v Public Trustee* (1942) 64 SR (NSW) 209 at 211, Roper J held there was no such power. As power to take possession of assets and to hand them to the administrator for distribution does not extend to power to pursue a chose in action in Court proceedings; refusal to do so cannot be relied upon as a ground to entitle a beneficiary to take proceedings on behalf of the estate. It must be remembered that limited grants for the purpose of bringing actions can be made in appropriate circumstances. Assuming that the chose in action is vested in the Public Trustee (which it is) and the Public Trustee has power to take action to recover it, (which he has not) it would not be appropriate for a beneficiary in the estate to take action on the basis that the Public Trustee refused to do so. The appropriate course would be to apply for a limited grant for appointment of an administrator ad litem who would then pursue the claim.

Apart from the potential for delay (where proceedings are invalidly constituted), it should be borne in mind that there may be personal exposure of the legal representatives for the costs of the proceedings.

In *Scallan*, Windeyer J held that the proceedings were a nullity but went on to say that, had he not come to the conclusion that the proceedings should be dismissed, he would have thought it appropriate that they be stayed pending the determination of the contested probate proceedings in relation to the will of the deceased.

In *Hewitt v Gardner* [2009] NSWSC 705, I had cause to consider that very question of standing in proceedings where there was both a probate claim (albeit somewhat irregularly brought) and an *inter vivos* undue influence claim. The difficulty was that the plaintiffs were beneficiaries (and had brought *Family Provision Act* claims against the estate as well). They had no standing to bring the *inter vivos* undue influence claim. I was invited by Counsel for the defendant to dismiss the proceedings as a nullity (and it was submitted that the proceedings could not be saved by the joinder of a representative for the estate at that point).

I considered in some detail various authorities in relation to defects in the constitution of proceedings (including cases to which Windeyer had referred in *Scallan*), in particular *Watkins v Combes* (1921) 29 CLR 317; *Marshall v DG Sundin & Co Pty Limited* (1989) 16 NSWLR 463; *Bridgewater v Leahy* (QCA, unreported, 14 March 1997); *Ramage v Waclaw* (1988) 12 NSWLR 84; the judgment of the Court of Appeal of England in *Ingall v Moran* [1944] 1 KB 160; and *Minister of State for the Interior v R T Co Pty Limited* (1962) 107 CLR 1).

I do not propose to revisit that analysis in the present paper. Suffice it to note that care needs to be taken in the constitution of proceedings in which *inter vivos* undue influence claims are sought to be brought. If the plaintiff is not the executor/administrator of the deceased, then consideration should be given to the making of an application for appointment as a guardian ad litem to commence the proceedings or for the appointment of a personal representative of the estate under the relevant provisions in the Rules.

There is an issue as to whether a personal representative may be appointed to act as a plaintiff (as opposed to an administrator ad litem). That was considered by Young J (as his Honour then was) in *Re Estate of Harriett Cassel* [2000] NSWSC 294 (and see the decision of Hodgson J (as his Honour then was) in *Leue v Reynolds* (1986) 4 NSWLR 590).

In *Cassel*, Young J said (at [7]-[9]):

The practice of the former Probate Division was to make a grant under s 41A whenever there was evidence that an eligible person requested it. The reason for this is that the Court has taken the view that the purpose of the section is merely to enable Family Provision Act applications to be made within 18 months of the date of death and the section was inserted so that defendants could not frustrate the proceedings by delaying the taking out of a grant. This is reinforced by the Supreme Court Rules. Part 78(26A) provides that an application for a grant will be in Form 105A. This form is drafted on the assumption that the person to get the grant is either the plaintiff being the eligible person, or the plaintiff on behalf of the eligible person, presumably in a situation where the eligible person is under a disability.

The grant under s 41A is not a grant entitling the grantor to administer the estate in any way at all. It is a grant purely to get over the barrier that would otherwise prevent an application being made under the Family Provision Act.

Accordingly, what usually occurs in this sort of case is that a grant is made to the plaintiff who is about to bring proceedings under the Family Provision Act. The Court, when hearing those proceedings, then needs to appoint a person to represent the estate under Part 8 rule 16 [the precursor to UCPR 7.10], or some other rule under Part 8.

Although the usual practice following a s 41A appointment is for the court, when hearing the proceedings, then to appoint an authorised representative for the estate, this is not always the course which is adopted. In *Vukic v Grbin* [2006] NSWSC 41, Brereton J, dealing with an application which had been brought under the Family Provision Act by a person who had obtained a limited s 41A grant for the purposes of the proceedings, said (at [4]):

Save for the limited s 41A grant to the Plaintiff, there is no formal representative of the estate, which has an interest in the proceedings. However, all the persons interested in the estate are parties and have notice of the proceedings, and in those circumstances I am satisfied that it is appropriate to order, pursuant to UCPR r 7.10(2)(a), that the proceedings continue in the absence of a representative of the estate.

Brereton J there noted that under the *Family Provision Act*, s 15(1)(a)(v), the court could make a vesting order which has the same effect as a vesting order under the *Trustee Act 1925* (NSW), s 78.

As to the appointment of a personal representative under Rule 7.10 of the *Uniform Civil Procedure Rules 2005* (NSW), while the usual circumstance in which a personal representative would be appointed under the rule is where there is no person willing or able to take out a grant of probate or administration and where proceedings cannot be continued or disposed of in the absence of a representative of the estate, the use of the rule is not limited to such circumstances (see *Hele v Lord Bexley* (1852) 15 Beav 340; 51 ER 569) and in a number of cases where such an application has

been made by a party, the court has made the order conditional upon notification of the application being given to persons having an interest in the estate (*Long v Storie* (1853) Kay App 12; 69 ER 317; *Joint Stock Discount Company v Brown* (1869) LR 8 Eq 381; *Davies v Boulcott* (1860) 1 Dr & Sm 23, 62 ER 286; *Tarratt v Lloyd* (1856) 2 Jur NS 371).

As to the distinction between the two roles, *Dean & Chapter of Ely v Gayford* (1853) 51 ER 896; 16 Beav 561 supports the proposition that the person appointed under a rule such as r 7.10 “ought, as nearly as possible, to be the same as would have been appointed administrator ad litem” (at 896-897), but does not in my view support the proposition that an appointee under the rule needs to be (or would normally be) appointed as an administrator ad litem. (See the distinction referred to in *Daniell's Chancery Practice* 4th ed, 1866.) Similarly, in *Aliperti v Official Trustee* [2000] NSWSC 315, Austin J discussed the origin of Pt 8 r 16 of the old Supreme Court Rules:

The English Court of Chancery had jurisdiction to appoint a person as administrator ad litem if the person was willing so to act: *Dean & Chapter of Ely v Gayford* (1853) 16 Beav 561, 51 ER 896. However, it appears that with the adoption of statutory provisions which authorised the Court to appoint a representative in equivalent circumstances (Chancery Procedure Act 1852, s44), the appointment of an administrator ad litem became rare and it became more usual to appoint a representative pursuant to the statutory provisions and rules of Court: see Butterworths Australian Legal Dictionary, entry for 'ad litem'. The English statutory provision became s24 of the Equity Act 1901 (NSW), and a comparable provision is now found in Pt8 R16 of the Supreme Court Rules.

The distinction between the two roles is perhaps most clearly expressed in the following passage of the judgment of *Hutley JA in Government Insurance Office v Johnson* [1981] 2 NSWLR 617 at 625:

In the course of argument in the court, it was suggested that the master's orders were equivalent to appointments of an administrator ad litem. It is not within the powers of a Master in Common Law to make such an order: Supreme Court Act, 1970, s 118. In any event, he did not do so. His Honour had all the powers of the probate judge and could, undoubtedly, have appointed an administrator ad litem, but he did not do it. If he had done it, the

orders of the court would have had to be preceded by a formal grant, an administrator ad litem being, for limited purposes, as much an administrator as any other administrator. The only way in which this Court can know whether a grant has been made is by the formal production to it of that grant, which did not happen. Further, no grant could have been made because, except where specially authorized by statute, a corporation cannot be appointed as an administrator, though it has the power to designate by instrument under its seal one of its officers (a syndic) to take a grant on its behalf: *In the Goods of Darke* (1859) 1 Sw & Tr 516; 164 ER 839; *Mortimer on Probate*, 2nd ed, (1927) 205.

(A grant of administration ad litem should ordinarily be sought through the filing of a summons (see *Bar-Mordecai v Rotman* (Bryson J, 21/7/1998, unreported); paragraph [5245] *Succession Law & Practice NSW*), whereas the appointment of a personal representative under rule 7.10 can properly be sought by the bringing of a motion (see for example *Davies v Boulcott; Chaffers v Headlam* (1852) 9 Hare App 46; 68 ER 782).)

In *GIO v Johnson*, Hutley JA said (at 624) that “[a] wholly uninterested party should never represent an estate against which an adverse claim is being made” citing the concern of Romilly MR in *Gibson v Wills* (1856) 21 Beav 620; (1856) 52 ER 999 that the nominee of the plaintiffs “may make a feeble defence.” However, courts have historically contemplated the appointment of solicitors or the Public Trustee (or its equivalent) under the rule or as administrators ad litem, who could not be said to be personally interested in the proceedings (including some cases in which it was sought to render the estate liable – see for example *Watts v The Official Solicitor* [1936] 1 All ER 249; *Re Simpson’s Estate; Re Gunning’s Estate* (in which case a chartered accountant was appointed as administrator); *Lean v Alston* [1947] 1 KB 467). I read the statements of Hutley JA and Romilly MR as indicating that the Court must be satisfied that the proposed representative will bona fide and competently represent the estate in the proceedings (ie, as matters going to the issue of the fitness of the appointee to act).

Justice Julie Ward  
10 July 2012