NOTE: PURSUANT TO S 80 OF THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT HASTINGS

FAM-2015-020-000274
[2016] NZFC 2235

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	MW Applicant
AND	GC BC First Respondents
AND	ES Second Respondent
AND	WC Subject Person

Hearing:	15 March 2016
Appearances:	G Mason for the Applicant M McKechnie for the First Respondents Second Respondent appears in Person J Harding for the Subject Person
Judgment:	15 March 2016

ORAL JUDGMENT OF JUDGE A B LENDRUM

---

[1] This judgment is the outcome of applications made by MW in respect of her father, WC, a subject person, pursuant to the Protection of Personal Property Rights Act 1988.

[2] This is a family matter. The parties outside of these immediate proceedings by the applicant are her brothers BC and GC, and her sister, ES. Mr Mason acts for Mrs W, Mr Harding is counsel for the subject person, Mr McKechnie acts for BC and GC (although GC has taken few, if any, steps beyond to support his brother) and ES is unrepresented.

[3] The applications before the Court originated in August or September 2015 with the applicant seeking:

(a) The appointment of a manager pursuant to s 31 of the Act; and

(b) The revocation of an enduring power of attorney in relation to property held by BC and GC, and made pursuant to s 105 of the Act.

[4] The effect of her application would be, if successful, the removal of her brother, BC and, as I read it at this time, possibly GC from managing the property affairs of their father, Mr WC; now aged 92.

[5] Mr WC suffers from Alzheimer's disease. The duration of his disease and, more importantly, when that disease affected his ability to properly manage his affairs (or if it did at all) is at the centre of what has become a very bitter family dispute.

[6] In itself, as I understand the matter at this time, the dispute arises from a transaction in September 2014 in which Mr Warwick Coleman sold a farm to his son, Mr BC. It may be that the farm was sold to Mr BC and Mr GC, but I am uncertain of that at this point. Certainly, Mr GC has nothing to do with the farm which Mr BC operates.

[7] It is stated by all three other children, including Mr GC, that the farm had been divided into four blocks in 2005 by Mr WC on the basis that each of the four children would receive one block. Those views were supported by another family member and an independent professional surveyor. Mr BC denies that there was to be any such division.

[8] The applicant Mrs W claims that the sale was effected on terms which very significantly advantaged, and continue to increasingly advantage, BC and, correspondingly, disadvantage his siblings. The applicant claims further that the defendant knew, at the time of the transaction, that his father may well have lacked mental capacity to properly conduct or instruct his advisors with respect to the sale.

[9] An affidavit from an independent psychiatrist indicates that in his professional opinion, albeit ex post facto, Mr WC was unlikely to have had the appropriate mental capacity at the time of the transaction at the centre of the dispute.

[10] Mr WC's general practitioner, Dr Doig, who attended on him at the request of Mr BCapparently to clarify whether he had capacity to discuss what became the transaction in issue, states in an affidavit that:

(a) He was not provided with the hospital discharge summary of 19 August 2013 which listed a diagnosis of cognitive decline in Mr WC; and

(b) Had he seen the document at the time of his meeting with Mr WC on 2 September 2014, he would have recommended a review of Mr WC by a psychogeriatrician.

[11] Importantly, he also added that Mr BC had expressly told him that no member of the family had any concerns over Mr WC's cognitive state. This claim by Mr WC is resisted strongly by both the applicant, and also importantly her sister, ES, who while not formally being a party, has deposed in a manner that very clearly challenges Mr BC's message given to Dr Doig, as deposed by Dr Doig.

[12] The applicant takes that matter further. She contends that, in fact, Mr BC acted dishonestly. She states in her first affidavit that Mr BC was present at a meeting in August 2013 where Dr John Gommans told the family that Mr WC was suffering from Alzheimer's disease.

[13] Needless to say Mrs MW's applications have been strongly resisted by the defendant; a process that was, in itself, foreshadowed by an independent deponent, Mr B. He has, in support of his defence, two deponents; being his father's solicitor, Mr Dent, and his chartered accountant, Mr Rosenberg. He is also supported, at least in part, by his co–attorney and brother, GC, who seeks to remain an attorney for his father.

[14] As a consequence of the defences raised, the applicant has sought extensive discovery concerning in particular:

(a) Her father's state of health; and

(b) The transaction in which her father sold the farm to her brother.

[15] The discovery application of 22 September 2015 was against the brother's C, but was also expanded on 22 February 2016 to seek discovery against Mr WC's professional advisors, the aforesaid Mr Dent and Mr Rosenberg. Both those applications against the non–parties have been strongly resisted. The strength behind the defences filed can be seen as a reflection of a likely claim following discovery.

[16] As I had intimated to counsel this morning, as I saw the matter the issue of discovery could determine whether equitable actions in the High Court could ensue and being for undue influence and possibly unjust enrichment.

[17] In a very comprehensive memorandum for the Court, Mr Mason for the applicant, has made application that this matter be transferred to the High Court, pursuant to s 14 Family Courts Act 1980. That such an application can be made also under this Act is clear from s 85, which governs appeals to the Court of Appeal from decisions of the High Court. These occur where an application to a Family Court,

for the exercise of the Court's jurisdiction under this Act, has been transferred to the High Court in accordance with s 14 Family Courts Act.

[18] Section 14 Family Courts Act 1980 makes it clear that where proceedings are brought a Family Court may, on the application of any party to the proceedings, or of its own motion, order that the proceedings be transferred to the High Court if it is satisfied that, because of the complexity of the proceedings, or of any question in issue in the proceedings, it is expedient that the proceedings be dealt with by the High Court.

[19] Mr Mason requested transfer on the grounds that there are novel points arising from the claim for confidentiality made in respect of the professional deponents and the claim of public interest confidentiality advanced on behalf of Mr Rosenberg. In his view they were issues of genuine complexity. This conclusion followed his lengthy summary of the defences raised vis a vis the Evidence Act 2006.

[20] Mr Ferguson, for the non–parties, made the point that the matters that the discovery sought by the applicant had no jurisdiction or basis under the Act because the misconduct at the heart of the discovery application was not misconduct in terms of the office held by the defendant.

[21] I accept that is a view which may have some validity. However that submission, when contrasted with Mr Mason's submissions, indicate to my mind a complexity that will be best resolved in a higher Court.

[22] One of the issues I face, as the Family Court Judge in this case, is dealing with family matters as expediently as is possible in all the circumstances. That is a touchstone and foundation of the jurisdictions in this particular Court.

[23] I have reviewed the law in respect of these issues and, in particular, I have noted the case of *Re SDJ* [2000] NZFLR 193 where proceedings were transferred to the High Court because the parties all acknowledged they would appeal the decision of the Family Court. I have not sought from counsel a declaration as to whether they

would appeal any decision had I decided to deal with this matter in this Court. However it is clear from the complex and serious issues raised, and the polarity of the views expressed, that these are matters where a review in the High Court would almost certainly have ensued, whatever decision I determined.

[24] It is clear to me is that any decision I make with respect to discovery for one party or the other will undoubtedly be appealed. It is trite for me to add that any such appeal will inevitably delay the process of resolving this intense family dispute.

[25] Accordingly, I accept Mr Mason's application for transfer of these proceedings to the High Court. I accept that the points he made in the final paragraph of his memorandum, together with the other matters I have raised, mean that that is clearly the appropriate Court to determine these issues.

[26] Finally, I note that Mr Harding, counsel for Mr WC, continues to support the applicant's application for full discovery, including third party discovery.

[27] If, as Mr Ferguson notes, the applicant's claim for discovery is in essence for the purpose of founding an equitable claim for undue influence, then full discovery might effectively resolve that issue by absolving the defendant from such a claim if that information was made available.

[28] Undoubtedly, however, a resolution of this matter is in the best interests of all members of this family. Clearly, that will not occur until this issue of discovery is finally determined. Accordingly, for all the reasons I have given, I determine that this matter should be transferred to the High Court.

A B Lendrum
Family Court Judge