IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 91
EMPC 249/2024

IN THE MATTER OF	proceedings removed from the Employment Relations Authority by the Employment Court
AND IN THE MATTER OF	an application for the appointment of a litigation guardian
BETWEEN	LDJ Plaintiff
AND	EZC Defendant

Hearing:	3 March 2025 (Heard at Auckland)
Appearances:	JO Whyte, counsel for plaintiff J Plunket, counsel for defendant
Judgment:	9 May 2025

INTERLOCUTORY JUDGMENT (NO 2) OF KATHRYN BECK
(Application for the appointment of a litigation guardian)

Introduction

[1] This judgment resolves the issue of whether a litigation guardian should be appointed to conduct proceedings on behalf of LDJ.

[2] In October 2024, counsel for LDJ indicated in a memorandum to the Court that LDJ was likely an incapacitated person for the purposes of instructing counsel. As a result of that memorandum, I paused the substantive proceedings and related

interlocutory matters pending the resolution of the issue of whether to appoint a litigation guardian for LDJ.

Background

[3] In these proceedings LDJ claims that while employed by the defendant over a fourteen-and-a-half-month period, they suffered from extreme stress and burnout which has resulted in adverse and ongoing physical and psychological problems. They have since been diagnosed with post-traumatic stress disorder (PTSD) attributable to occupational stress, and they also suffer from severe depression and anxiety.[1]

[4] After their employment ended, they raised a personal grievance. After negotiation, they were offered and accepted a sum in settlement of their claims. A settlement agreement was signed by both parties but not certified by a mediator employed by the Ministry of Business, Innovation and Employment under s 149 of the Employment Relations Act 2000 (the Act).[2]

[5] LDJ claims that when they signed the settlement agreement, they did not have the requisite mental capacity to do so. They say that the settlement agreement needed to comply with s 108B of the Protection of Personal and Property Rights Act 1988 (the PPPR Act) and that, in light of their incapacity, it needed to be approved by a court for it to be valid. As the agreement was not so approved, they say it should be set aside. The defendant's position is that LDJ did not lack mental capacity, that the settlement agreement did not need to comply with the PPPR Act, and that it is in full and final settlement of all matters between them.[3]

[6] This proceeding was removed from the Authority to the Court by way of a judgment issued on 19 June 2024 on the basis that important questions of law were likely to arise other than incidentally.[4]

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1 *LDJ v EZC* [2024] NZEmpC 109, [2024] ERNZ 446 at [2].
2 At [3].
3 At [4].
4 At [60]–[61].

[7] After the proceedings were removed, LDJ had a change of counsel. In a memorandum filed on 5 August 2024, their new counsel advised the Court that they considered it necessary for LDJ to undergo special assessment as to their ongoing capacity to instruct counsel before the matter proceeded any further towards trial. Counsel noted that they were especially concerned about the risk that the progression of this matter to trial may cause LDJ's condition to deteriorate, causing them to lose capacity.

[8] In a minute dated 6 August 2024, I adjourned the hearing at the time to enable, amongst other things, counsel to take the steps needed to assess whether the appointment of a litigation guardian was necessary.

[9] On 23 September 2024, the defendant filed and served a notice requiring disclosure. This was objected to by LDJ on 30 September 2024.

[10] On 11 October 2024, counsel for LDJ filed a memorandum in the Court regarding LDJ's capacity to instruct counsel. That memorandum attached an email to counsel from Dr Ian Goodwin, a forensic psychiatrist, stating that he had assessed LDJ for one-and-a-half hours. His provisional opinion was that they were most likely an incapacitated person within the meaning of r 4.29(b) of the High Court Rules 2016 and that they required a litigation guardian in order for them to conduct their Employment Court proceedings.

[11] Dr Goodwin went on to note that he needed to review further materials and would furnish a report. He recommended that any further steps in the proceedings that required LDJ's instructions to counsel be halted to safeguard their welfare until capacity issues were resolved.

[12] Given that the Court was then on notice of LDJ's likely incapacity and that a report was to be available, I found that it was not appropriate to take any further steps in the proceeding pending receipt of the report and therefore paused the timetable. This included pausing any steps in relation to disclosure.

[13] On 22 November 2024, LDJ provided a copy of Dr Goodwin's report dated 18 November 2024 to the Court. In that report (to which I will refer in more detail later), Dr Goodwin gave his opinion that LDJ is an incapacitated person as they would be unable to give sufficient instructions in these proceedings.

[14] LDJ requested that the Court defer the appointment of a litigation guardian pending the provision of additional treatment so that they could provide the Court with considered views as to such appointment after their mental state had improved.

[15] The defendant provided a memorandum, submitting that the report was insufficient and lacking from a psychological perspective, that the legal test for the appointment of a litigation guardian was not met, and that if a stay was sought, it should be properly applied for.

[16] In a minute dated 11 December 2024, the Court noted the information before it, sought LDJ's personal views in relation to the possible appointment of a litigation guardian, and sought the parties' views on whether the issue could be dealt with on the papers or whether they wished to be heard in person.

[17] On 19 February 2025, LDJ's views as to the potential appointment of a litigation guardian were provided by way of memorandum through counsel. Counsel advised that LDJ thought it essential to their ability to access justice that a litigation guardian be appointed.

[18] An affidavit from LDJ's brother was received on 21 February 2025. Although he was clear that he was writing it in his personal and not his professional capacity, it is relevant that he is a registered medical doctor currently practising as a psychiatry registrar and completing advanced psychiatric training. I will deal with the detail of his evidence later, but it is sufficient to say at this point that he supports the appointment of a litigation guardian.

[19] A hearing of the issues took place on 3 March 2025.

Legal principles

[20] There is no express power under the Act or the Employment Court Regulations 2000 to make an order appointing a litigation guardian. However, it is well established that the Court may appoint a litigation guardian in appropriate circumstances and as the interests of justice require.[5] In such a situation, the Court may apply the relevant procedures set out in the High Court Rules.[6]

[21] Under r 4.30 of the High Court Rules an incapacitated person must have a litigation guardian as his or her representative in any proceeding unless the Court orders otherwise. These terms are defined in r 4.29 in the following ways:

> For the purposes of these rules,—
>
> **incapacitated person** means a person who by reason of physical, intellectual, or mental impairment, whether temporary or permanent, is—
>
> (a) not capable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings; or
>
> (b) unable to give sufficient instructions to issue, defend or compromise proceedings
>
> **litigation guardian**
>
> (a) means—
>
> (i) a person who is authorised by or under an enactment to conduct proceedings in the name of, or on behalf of, an incapacitated person or a minor (but only in a proceeding to which the authority extends); or
>
> (ii) a person who is appointed under rule 4.35 to conduct a proceeding; and
>
> …

[22] Under r 4.35(2) the Court may appoint a person as a litigation guardian if it is satisfied that:

> (a) the person for whom the litigation guardian is to be appointed is an incapacitated person; and
>
> (b) the litigation guardian—
>
> (i) is able fairly and competently to conduct proceedings on behalf of the incapacitated person; and
>
> (ii) does not have interests adverse to those of the incapacitated person; and
>
> (iii) consents to being a litigation guardian.

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5 *Moody v Chamberlain* [2019] NZEmpC 16, [2019] ERNZ 16 at [4]–[5].

6 Employment Court Regulations 2000, reg 6(2)(a)(ii).

[23] The Court may have regard to any other matters it considers appropriate, including the views of the person for whom the litigation guardian is to be appointed.[7]

[24] A robust case is needed to satisfy a court that a person is incapacitated. Affidavits, annexing reports from doctors who are familiar with the person, have been accepted as sufficient evidence.[8]

[25] The principles that should be taken into account in considering whether a person is "incapacitated" were expressed by the Court of Appeal in *Corbett v Patterson* in the following way:[9]

(a) The starting point is a presumption of capacity.

(b) The burden of proof, on the balance of probabilities, is on the party asserting incapacity.

(c) The inquiry should focus on the subject parties' role in the specific litigation at issue, and the complexity of the litigation will be relevant.

(d) The inquiry is not concerned with the sanity of the subject party. Nor is it concerned with the capacity of the subject party to make other legally effective decisions such as the making of a contract or will. The general approach is that capacity is to be judged in relation to the decision or activity in question and not globally. Evidence of the capacity to make decisions which have legal consequences and to conduct ordinary day-to-day affairs will be relevant but must be weighed with other evidence;

(e) Something more is required than mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise the proceedings. The person must be able to understand

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7 High Court Rules 2016, r 4.35(3).
8 *Bethune v Murray* [2023] NZHC 2249 at [20].
9 *Corbett v Patterson* [2014] NZCA 274, [2014] 3 NZLR 318 at [38] and [43].

the nature of the litigation, its purpose, its possible outcomes, and its risks, including the prospect of an adverse costs award.

(f) The fact that the subject party is vulnerable to exploitation or prone to rash or irresponsible decisions may be relevant but it does not necessarily follow that the party is unable to understand the issues or give sufficient instructions.

(g) When assessing the capacity to give instructions to counsel, the test is whether the subject party is capable of understanding the issues on which his or her consent or decision is likely to be necessary, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require.

[26] Counsel for the defendant emphasised the point set out at [25](g) above from *Corbett.*[10] He submitted that irrespective of which limb of the definition of "incapacitated person" in r 4.29 is applied, it is clear that the relevant inquiry is whether the subject party is capable of understanding the issues on which his or her consent or decision is likely to be necessary. I do not accept that submission.

[27] If applied strictly, the approach taken by the Court of Appeal in *Corbett* would collapse the second limb of the definition of "incapacitated person" in r 4.29 into the first limb of that definition. However, that cannot be correct. They are separate and alternative definitions. The use of "or" between r 4.29(a)(i) and (ii) makes that clear. There is a difference between being able to understand a matter and being able to give instructions. Giving instructions necessarily involves being able to make and communicate decisions about a matter.[11]

[28] In any case, the statements made by the Court of Appeal in *Corbett* about a party's ability to give instructions are obiter because the plaintiff in that case did not understand the issues on which his decision would be required as a litigant.

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10 At [43](f).

11 Although not specifically addressed, that distinction is implicitly acknowledged by the Court of Appeal in *Pool v Summerlee* [2020] NZCA 35 at [16]; and *Harrison v Harrison* [2020] NZCA 189, (2020) 25 PRNZ 189 at [10].

Accordingly, the first limb of the definition in r 4.29 applied, and application of the second limb was unnecessary.[12]

[29] I consider that the correct approach is that set out in a South Australian case, *Dalle-Molle (by his next friend Public Trustee) v Manos*, which was cited with approval by the Court of Appeal in *Corbett.*[13] In *Dalle-Molle* the Court held:[14]

> The second question is what is meant by the expression "sufficient instructions". In ordinary usage "sufficient" means "of a quantity, extent or scope adequate to a certain purpose or object": *Oxford English Dictionary*. When qualifying the noun "instructions", it is signifying that the 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 of agreeing a compromise of the proceedings, to decide whether or not to compromise.

[30] This extract indicates that an ability to understand is not sufficient to meet the second limb of the definition. To be able to give sufficient instructions, the party must also have an ability to decide whether to proceed with or compromise the litigation.

[31] The Court of Appeal in *Corbett* also cited *Masterman-Lister v Brutton & Co* with approval.[15] In that case, the Court of Appeal of England and Wales indicated three features that were necessary for capacity to exist:[16]

> First, the need for the claimant to have "insight and understanding of the fact that she has a problem in respect of which she needs advice". Second, the need to be able to instruct an appropriate adviser "with sufficient clarity to enable him to understand the problem and advise her appropriately". Third, the need "to understand and make decisions based upon, or otherwise give effect to, such advice as she may receive".

[32] The second and third features are relevant to whether a party is able to give "sufficient instructions" for the purposes of r 4.29.

[33] Further, r 13.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 states that:

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12 *Corbett,* above n 11, at [50].
13 *Dalle-Molle (by his next friend Public Trustee) v Manos* [2004] SASC 102, (2004) 88 SASR 193; see also *Erwood v Maxted* [2008] NZCA 139 at [139].
14 *Dalle-Molle,* above n 15, at [22].
15 *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511.
16 At [77].

> … a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

[34] In light of that rule, for a party to have capacity, they need to at least have the ability to provide instructions on "significant decisions". If they cannot do that, their instructions will not be sufficient.

[35] For completeness, when r 4.29 refers to being able to give sufficient instructions to "issue, defend or compromise proceedings", that includes not only the initiation of a proceeding or defence but also the ongoing pursuit of that proceeding or defence.

[36] Once appointed, a litigation guardian may do anything in relation to a proceeding that the incapacitated person could do if he or she were not incapacitated.[17]

Should a litigation guardian be appointed?

The evidence in more detail

[37] As noted above, the Court has been provided with a copy of Dr Goodwin's report. It has been filed as an attachment to his sworn affidavit.

[38] In the report, Dr Goodwin set out his qualifications, which are extensive. He also recorded his knowledge that his report was to be used in court proceedings and confirmed that he had read and agreed to abide by the High Court Rules as they apply to expert witnesses.

[39] In addition to meeting with LDJ for an hour and a half, Dr Goodwin also had access to the following sources of information:

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[17] Rule 4.38; and *S v Attorney-General* [2012] NZHC 661 at [19] and [37].

(a) a letter of instruction dated 8 October 2024;

(b) medical notes of Dr Rob Shieff, consultant psychiatrist, covering the period from January 2018 until July 2024;

(c) emails between counsel and LDJ from 11 October 2024 until 15 October 2024; and

(d) the Court's minute dated 16 October 2024.

[40] The report notes that LDJ has previously been treated by Dr Shieff for depression, anxiety and PTSD. Dr Goodwin noted that their mental health conditions have been worsened by engagement with the case, which has given rise to the question of whether a litigation guardian should be appointed.

[41] Dr Goodwin briefly recorded the prescribing and treatment history for LDJ. He noted that when he examined them in October 2024, they described to him "clear brief episodes of psychosis including auditory, visual and olfactory hallucinations." They also described to him a "generalised paranoia" around their ex-employer and also others who had been associated with their case previously.

[42] Dr Goodwin noted that the High Court Rules define an incapacitated person as a person who, by reason of physical, intellectual or mental impairment, whether temporary or permanent, is not capable of understanding the issue on which their decision would be required as a litigant conducting proceedings or is unable to give sufficient instructions to issue, defend or compromise proceedings.

[43] He assessed LDJ against this criteria and noted that while they had an understanding of the issues on which their decision would be required as a litigant conducting proceedings, they became extremely agitated and anxious when considering these matters. LDJ also described the onset of psychotic symptoms on at least two occasions in direct relation to litigation stressors.

[44] Dr Goodwin stated his opinion that LDJ's background mental state, as well as the added acute stressors of litigation, mean that they would be unable to give

sufficient instruction in these proceedings. He further stated specifically that it is likely LDJ may become so distressed or paranoid that they are unable to engage meaningfully with or provide consistent instruction to counsel. He stated he was therefore of the opinion that a litigation guardian is necessary for LDJ in this case.

[45] He was of the opinion that LDJ's impairment was likely to continue, at least until the conclusion of the preliminary hearing, which was at that point set down for 3–6 March 2025 but has been adjourned pending determination of this issue.

[46] Dr Goodwin stated that he had strongly advised LDJ to seek further psychiatric opinion and care, and he was of the opinion that they would require considerable psychological and pharmacological assistance to take part in the proceedings.

[47] LDJ's brother also provided an affidavit in relation to the appointment of a litigation guardian. As noted above,[18] while he made it clear that he was filing his affidavit strictly in his personal capacity as a close family member of LDJ, and not in his personal capacity as a medical doctor practising in psychiatry, his observations are helpful and insightful. He was also able to provide evidence of LDJ's recent and current diagnosis. LDJ's brother regarded himself as one of the few confidantes that LDJ has. He noted that while they did not see each other in person regularly, as he is based in a different town, they remained in contact, usually talking on the phone.

[48] LDJ's brother's evidence was that in early to mid-2024, he noted that the stress of the litigation was taking a major toll on LDJ; they were contending with major anxiety, depression, stress and fatigue, and although he was concerned about their wellbeing, as the case was clearly exacerbating their suffering, he did not perceive them to be so unwell that they were incapable of dealing with their lawyers.

[49] He says that at that time, LDJ did not seem to be in the grip of psychotic symptoms but seemed fearful of the litigation driving them into a mental health crisis.

[50] In LDJ's brother's observation, LDJ fell into an acute mental health crisis around late September 2024. He stated that from late September and into October

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18 See above at [18].

2024, they began calling him out of the blue, in extreme distress, and increasingly frequently. He noted that they appeared to be hypervigilant and in a very dissociative state. LDJ advised him that the mere sight of an email addressed from their lawyers arriving in their inbox had triggered a panic attack. They shared their experiences with their brother, who indicated that their symptoms struck him as highly probable symptoms of psychosis. LDJ's brother became extremely concerned for their welfare to the extent that every time they spoke, he would require LDJ to commit to calling the mental health crisis team for support immediately after they ended their phone call, as he was deeply concerned for LDJ's safety.

[51] LDJ's brother says that LDJ has since been diagnosed with psychosis, which appears to be a major impediment in their daily life, with paranoia creeping in and keeping them on edge constantly. LDJ shared with their brother hallucinations they had had. This was at a time when, due to concerns about the impact of the litigation, they had minimum involvement with the case and their lawyers.

[52] From LDJ's brother's perspective, LDJ is in no state to be directing the litigation. He considers they are in a worse condition now than they were in September 2024 before litigation stress triggered an acute mental health crisis. Prior to that, he says mediation stress triggered a suicide attempt. He is extremely concerned that further exposure to litigation stress without a litigation guardian in place runs the risk of triggering an even more profound mental health crisis.

[53] Counsel for the defendant submitted that LDJ's brother's affidavit was inappropriate because it made professional medical statements rather than merely personal statements. However, I do not accept that criticism. LDJ's brother was careful to describe the symptoms he witnessed and merely noted that they were "highly probable symptoms of psychosis". He is entitled to give such evidence.[19] In any case, his observations are confirmed by the fact that LDJ was diagnosed with psychosis.

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[19] Although the rules of evidence in the Evidence Act 2006 do not strictly apply in the Employment Court, such evidence would be admissible under s 24 of that Act; see *Bracken v R* [2016] NZCA 79 at [54]; and *Nguyen v R* [2022] NZCA 174 at [45].

[54] Counsel for the defendant also submitted that the affidavit contains hearsay statements from LDJ concerning the fact that LDJ was diagnosed with psychosis. However, I consider that such evidence is admissible under s 189 of the Act. I have no reason to believe that his statement concerning LDJ being diagnosed with psychosis is unreliable, particularly given that LDJ's psychosis was also mentioned in the memorandum discussed below. His evidence of LDJ's statements to him provide context for that diagnosis.

[55] A memorandum of counsel dated 19 February 2025 further updated the Court as to the state of LDJ's health. In his memorandum, Mr Whyte, counsel for LDJ, advised the Court that LDJ was transferred from the care of their general practitioner to the care of Community Mental Health Services in December 2024. He stated:

> …
> (d) The plaintiff was transferred from the care of [their] GP to the care of Community Mental Health Services (CMHS) in December 2024:
>
> (i) At their first consultation on 19 January 2025, CMHS prescribed the plaintiff antipsychotic medication.
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> (ii) The plaintiff's condition subsequently deteriorated and on 13 February 2025, CMHS increased [their] antipsychotic dosage and has also increased its monitoring of [their] welfare.
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> (e) The plaintiff continues to report that having direct personal involvement in the conduct of this litigation is acutely distressing for [them] and aggravates [their] conditions, especially [their] psychosis. [They] squarely [attribute] [their] recent deterioration to the approach of the litigation guardian hearing and the imminent need to mentally engage with litigation matters to provide [their] views on the matter to the Court.
> …

[56] The Court had asked counsel to advise LDJ's view on the appointment of a litigation guardian and this was also set out in the memorandum. LDJ concurs with Dr Goodwin's view that if they act as an independent litigant, the litigation stressors will cause them to become so distressed or paranoid that they will be unable to give sufficient instructions in these proceedings. LDJ says this is what happened to them in September/October 2024. They are also concerned that exposure to directly handling the litigation would rapidly trigger a further and more severe mental health crisis.

[57] LDJ advises that they do not have any suitable family members or close friends who could take up an appointment as a litigation guardian and that the appointment of an independent lawyer is the most appropriate course of action. They say that because they are suffering from paranoia and delusions, a lawyer who has experience working with people with trauma and psychiatric disorders, and who also has experience with alternative ways of giving evidence, would be optimal.

[58] The memorandum also set out preferences as to conditions on the appointment of any litigation guardian. I deal with this issue below.

[59] While the defendant has taken issue with the fact that the information contained in the memorandum is not sworn or affirmed evidence, I consider s 189 of the Act enables me to take it into account if it is in the interests of justice to do so. There was no suggestion that it was inaccurate and, given the circumstances of LDJ, I consider that it would not be in the interests of justice for them to be required to prepare an affidavit in this matter.

Submissions

[60] Counsel for LDJ submits that it is clear from the evidence before the Court that LDJ is severely unwell and at acute risk of harm from their involvement in these proceedings, having previously attempted suicide after mediation. Further, because LDJ's conditions, particularly their psychosis, are exacerbated by the stress of personally conducting litigation, they have been rendered incapable of providing sufficient instructions to counsel to progress the substantive proceedings since at least 3 October 2024. Counsel also submits that due to LDJ being highly prone to entering into a state of paranoia and acute distress from litigation stressors if they were to engage, it is more likely than not that they would be unable to make any decisions at all, or that they will make decisions based on delusional beliefs or transient strong emotions.

[61] It is unusual for a defendant to oppose an application such as this. In the majority of cases referred to by counsel, the opposing party to the litigation for the most part abided the decision of the Court. In this case the defendant vigorously opposes the appointment.

[62] Counsel for the defendant submits that LDJ is not an incapacitated person. They rely on Dr Goodwin's report, which acknowledges that LDJ is capable of understanding the issues on which their decision would be required and were critical of the report not expressing a diagnosis or assessment of LDJ.

[63] Further, they submit that LDJ must be presently, rather than prospectively, incapacitated under r 4.29 and that Dr Goodwin's report and LDJ's memorandum only indicate that they will become an incapacitated person. They also note that LDJ is described by their counsel as being able to provide meaningful and considered input into major decisions about the case and submit that they therefore cannot be incapacitated.

[64] The defendant submits that, in reality, while LDJ appears to desire a litigation guardian, given the conditions that were proposed through the memorandum of counsel, they do not want a litigation guardian in substance. Rather, they are proposing a hybrid model. It says that as LDJ is not an incapacitated person, there is no discretion or basis for the Court to appoint a litigation guardian.

[65] The defendant's primary concern is that if a litigation guardian is appointed, r 4.47 of the High Court Rules would provide an immediate roadblock – it provides that the Court must terminate the appointment of a litigation guardian if it is satisfied that a person is no longer an incapacitated person, which the defendant says would be the case at present.

[66] The defendant says that while it has no opposition in principle to a litigation guardian being appointed for LDJ, given that LDJ does not fit the definition of an incapacitated person any such appointment brings with it significant associated risk that the proceedings, or indeed a settlement, would later be undone (or argued to be undone) on the basis that a litigation guardian was erroneously appointed.

Analysis

[67] As noted above, the definition of "incapacitated person" has two alternative limbs.[20] The first limb states that a person is incapacitated if they are not capable of understanding the issues on which their decision would be required as a litigant conducting proceedings. Alternatively, a person is incapacitated if they are unable to give sufficient instructions to issue, defend or compromise proceedings.

[68] LDJ has at least a temporary mental impairment, the features of which reduce their insight and judgement in relation to the litigation at issue. While encountering difficulties in their day-to-day life, they are not incapacitated in a broader sense. In other respects they are able to cope adequately. As noted above, however, capacity for the purposes of rr 4.29 and 4.30 is to be judged in relation to the decision or activity in question and not globally; it is not concerned with the sanity of a person.

[69] There is no suggestion that LDJ is not capable of understanding the issues on which their decision would be required as a litigant conducting proceedings. The concern in this instance is whether they are able to give sufficient instruction to issue, defend or compromise proceedings. It is apparent from the evidence before the Court that they are not able to do so.

[70] The evidence before the Court clearly establishes that LDJ has in fact been unable to give instruction from September/October 2024 until February 2025, and that attempting to do so caused them significant mental harm. Further, in light of the recent diagnosis of psychosis, including delusion and paranoia, it has been noted by both Dr Goodwin and LDJ's brother, as well as counsel, that while LDJ may understand the legal issues, they are unable to properly exercise sound judgement and reasoning in relation to those issues.

[71] The defendant submits that LDJ cannot be incapacitated because the language used by Dr Goodwin in his report indicated that they would be unable to give instructions in the future, rather than that they were unable presently to give instructions. I accept that LDJ must be presently incapacitated for a litigation guardian

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[20] See above at [21] and [27].

to be appointed, but I consider that the interpretation of Dr Goodwin's report proposed by the defendant is unduly pedantic.

[72] Dr Goodwin stated that LDJ's mental state meant that they "would be unable to give sufficient instructions in these proceedings" and that "it is likely that [LDJ] may become so distressed or paranoid that [they are] unable to engage meaningfully with counsel, or to provide consistent instruction to counsel." Dr Goodwin is not saying here that LDJ is or will be entirely unable to give instructions, but that is not determinative. The question is whether they will be able to give *sufficient* instructions in these proceedings – Dr Goodwin's evidence clearly indicates that LDJ is not able and will not be able, while their health remains in the same condition, to give sufficient instructions.

[73] The defendant has raised concerns about whether the evidence establishes that LDJ has been diagnosed with psychosis. However, I accept, on the balance of probabilities, based on the evidence and other information before the Court, that they have been diagnosed with that condition. Therefore, if there were any doubts about LDJ being incapacitated arising from Dr Goodwin's report, I consider that the subsequent evidence about their psychosis firmly resolves those doubts.

[74] The defendant also submits that LDJ cannot be incapacitated because they claim to be able to provide meaningful and considered input into major decisions about the case. However, the fact that they can give input into major decisions does not mean that they are able to give sufficient instructions. As noted above, they need to at least have the ability to provide instructions on "significant decisions"; I am not satisfied, on the balance of probabilities, that they would be able to do that at this point in time.

[75] I also do not accept the defendant's submission that r 4.47 is a bar to a litigation guardian being appointed as I consider that LDJ is incapacitated for the purposes of r 4.29.

[76] More generally, the defendant is concerned that if LDJ is not in fact incapacitated, they may seek to set aside any decisions made by their litigation

guardian. However, that concern goes both ways. If a litigation guardian is not appointed and LDJ is in fact incapacitated, the Court has the power to set aside any steps taken while they were incapacitated.[21] In any case, a litigation guardian's appointment does not cease immediately on a person regaining capacity; rather, the Court first needs to be satisfied that they are no longer incapacitated. Therefore, it is not clear that any decisions made by a litigation guardian before their appointment is terminated but after a party regains capacity could be set aside. I consider the defendant's concern is misplaced.

Conclusion

[77] The evidence filed on behalf of LDJ from Dr Goodwin and LDJ's brother, including the recent diagnosis of delusions and psychosis, means that the definition of "incapacitated person" in r 4.29 of the High Court Rules can readily be met. Having found that LDJ is an incapacitated person, I consider that it is in the interests of justice to appoint a litigation guardian.

[78] For completeness, the finding that LDJ is incapacitated for the purposes of r 4.29 does not have any bearing on whether they were incapacitated when they entered into the settlement agreement – those are two separate issues.

Should the appointment be subject to conditions?

[79] The defendant spent considerable time criticising the preferences as to conditions on appointment which were set out in the memorandum of counsel dated 19 February 2025. The memorandum records LDJ's preference for conditions to be applied in relation to the appointment of a litigation guardian. The defendant is correct. Such conditions would be unusual and arguably inconsistent with the appointment of a litigation guardian.[22] That said, some of the conditions sought by LDJ are likely to form best practice on the part of any experienced lawyer acting as a litigation guardian in any case.[23]

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21 High Court Rules, r 4.34.

22 See *A v D* (1994) 7 PRNZ 502 (HC) at 505; and *Moody v Chamberlain*, above n 5, at [16]–[18]. But see *Remnant v Mills* [2020] NZHC 1937 at [10].

23 *S v Attorney-General*, above n 19, at [37]; and *Erwood v Holmes* [2019] NZHC 2049 at [56].

[80] I agree it is not appropriate or necessary to impose conditions. Any concerns from LDJ can be addressed by the litigation guardian being someone who has relevant expertise but who has not been involved in the proceeding previously.

[81] In the circumstances, I consider that a senior independent lawyer will be best placed to provide the necessary support and assistance to LDJ.[24]

[82] The Registrar will make inquiries as to a suitable senior lawyer to undertake the role of litigation guardian. The appointment will be confirmed by minute.

Outcome

[83] I order that a litigation guardian be appointed for LDJ in the conduct of this proceeding.

[84] LDJ was successful on this matter and is entitled to costs. I strongly encourage the parties to agree on costs. If they are unable to do so, LDJ will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with the defendant having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 4 pm on 9 May 2025

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[24] *Moody*, above n 5, at [18].