SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Yeo* [2010] QCA 69
PARTIES:	**RAYMOND YEO** (respondent/appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent)
FILE NOS:	Appeal No 10092 of 2009 SC No 9323 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2010
JUDGES:	McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – STRONG REASONS FOR INTERFERENCE – GENERALLY – where appellant ordered to be detained in custody for an indefinite term pursuant to s 13(5)(a) *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – where primary judge found appellant had breached his Supervision Order by attending a community support meeting at a McDonald's restaurant – where appellant argued primary judge did not have sufficient regard to the oral evidence of two psychiatrists – where appellant argued primary judge failed to take into account appellant's positive response to psychiatric treatment – where appellant's breach of his Supervision Order did not involve any re-offending – whether to interfere with discretion of primary judge – whether appellant should be released from custody on a supervision order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13(5)(a), s 43(1)

Attorney-General (Qld) v Yeo [2007] QSC 274, cited
Attorney-General for the State of Queensland v Yeo [2006] QSC 63, cited
Attorney-General for the State of Queensland v Yeo [2009] QSC 214, cited
Attorney-General v Francis [2007] 1 Qd R 396; [2006] QCA 324, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited

COUNSEL: P E Smith for the appellant
J M Horton for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Crown Law for the respondent

[1] **McMURDO P:** The appeal should be dismissed for the reasons given by Muir JA.

[2] **MUIR JA: Introduction**
The appellant was ordered on 3 April 2006, pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act"), to be detained in custody for an indefinite term.

[3] On 2 October 2007, on a review of the Order, pursuant to Part 3 of the Act, Mullins J was satisfied that the appellant was a serious danger to the community in the absence of an order pursuant to Division 3 of the Act. She rescinded the Continuing Detention Order and replaced it with a supervision order. The respondent, by application dated 17 March 2009, applied for rescission of the Supervision Order and for a continuing detention order to be made in its place. The application succeeded. On 4 August 2009, the primary judge rescinded the Supervision Order and made an indefinite detention order ("the Order"). The appellant appeals against the Order.

Grounds of Appeal

[4] The grounds of appeal are:

(a) That the learned trial judge erred in failing to have sufficient regard to the oral evidence given by Dr Moyle and Dr Beech in reaching her decision;

(b) That the learned trial judge erred in failing to sufficiently take into account that the treatment provided by Dr Whittingham (the appellant's treating psychiatrist) was the treatment to which the appellant had positively responded; and

(c) As the appeal is by way of rehearing, and as the appellant's breach of the Supervision Order did not involve any re-offending, the Court should order that the appellant be released on a supervision order.

The circumstances which gave rise to the application before the primary judge

[5] Ms Bird, a probation and parole officer with Queensland Corrective Services, gave evidence to the following effect. In the course of her duties as a probation and parole officer, she was involved in the supervision of the appellant. On 9 February

2009, the appellant, who had provided her with a list of his planned weekly activities for the period 9 February 2009 to 15 February 2009 inclusive, requested permission to attend a meeting of Bad Boyz at a McDonald's restaurant in Caboolture on 15 February 2009. Ms Bird, after consulting with a superior officer, orally advised the appellant on 13 February 2009 that he was not permitted to attend McDonald's "due to play equipment being at the same venue … [and because it was] a place where children may congregate". "Bad Boyz" is a community support group for male offenders who have been released from jail.

[6] On 16 February 2009, Ms Bird approved attendance by the appellant at a Bad Boyz meeting to be held in Fortitude Valley.

[7] Ms Bird told the respondent "that, given it is a condition of his Supervision Order not to attend public parks, it would seem appropriate and in accordance with the conditions of his Supervision Order he not attend McDonald's as there is a playground within the establishment". She also told him that "he would need to discuss the matter further with his supervising officer at the next appointment".

[8] The respondent did not mention to Ms Bird on 26 February 2009 at his weekly case management meeting that he intended to attend the Bad Boyz meeting at McDonald's on 28 February 2009.

[9] In the course of a home visit at the appellant's residence on 3 March 2009, the appellant told Ms Bird that he had attended a Bad Boyz meeting at a McDonald's restaurant in Ipswich on the morning of 28 February 2009. He said initially that he did not enter the premises. However, after being told by Ms Bird that there were cameras in the store and that he may wish to rethink what he had said, the appellant told her that he did enter the store with a Mr Vaughan and another person and had met with a third person but had left after 15 minutes as the meeting was cancelled.

[10] Ms Bird said to the appellant that he had been told "on several occasions that if the meeting was to be held at McDonalds then he is not permitted to attend". The appellant denied being told by Ms Bird or Ms Sunley, another parole officer, who, in the absence of Ms Bird, saw the appellant on 23 February 2009 for his weekly case conference that he was not permitted to attend "the meeting at McDonalds" and said that "it was on his list of activities submitted at the case management meeting with Ms Sunley on 23 February 2009".

[11] Ms Sunley swore that the appellant provided her with a handwritten list of planned weekly activities. Included in it was an entry, "28/2/09: Either Bad Boy's Ipswich SAT or Beaudsert (sic) Historical Village and Train Museum". Ms Sunley swore that the appellant told her orally "that the next meeting was being held [in] McDonalds in Ipswich" and that he had been "verbally directed by Ms Bird not to attend these meetings due to the location of the meeting being a place where children congregate". The appellant is reported by Ms Sunley as having told her that his solicitor advised him to request "this direction in writing", that is, that he not attend at McDonalds.

[12] Another employee of Queensland Corrective Services, Ms Moy, who supervised the appellant as a case manager, swore that on 12 January 2009, in the course of a case management interview which she had with the appellant, she told him that "he was not permitted to go to McDonalds' venues or such outlets that had playground

facilities [and that] … he would no longer be permitted to attend the Bad Boyz meetings at this venue [Ipswich] if there was a playground at the outlet". She said that she "told the [appellant] that he should notify his Probation and Parole Officer of all venues for the Bad Boyz meetings prior to the meeting so that an environmental scan could be conducted and approval for attendance at that venue could be issued". Ms Moy swore that at another case management interview on 22 January 2009 she reminded the appellant that he was not permitted to attend a Bad Boyz meeting at McDonald's Ipswich. She said that the appellant argued with her about the decision but that she "clearly stated that a decision had been made that he was not permitted to attend this venue".

[13] Ms Cuskelly, a Probation and Parole Officer with Queensland Corrective Services, swore to attending a case management interview with the appellant on 29 January 2009 when he discussed a verbal direction given him by Ms Moy not to attend the Ipswich McDonald's restaurant. The appellant said that it was not in the conditions of his supervision order that he not be in close proximity to play equipment and that Queensland Corrective Services was in breach of the Order by "enforcing this direction".

[14] No witnesses were required for cross-examination.

[15] In an affidavit before the primary judge, the appellant swore to the following effect. On two or three occasions he was refused permission to go to Bad Boyz meetings "because of the fact there was children's play equipment at the location". He said that he did not go to McDonald's on the occasions permission was refused. Referring to the meeting with Ms Sunley, he said that Ms Sunley took no issue with anything contained in his written schedule and that he would not have attended the Bad Boyz meeting at Ipswich if he had been told not to attend.

The contravention of the Supervision Order

[16] The application for rescission of the Supervision Order and the making of a continuing detention order contained no statement, let alone particulars, of the alleged breach or breaches of the Supervision Order.

[17] No formal identification of the alleged breach of the Supervision Order was made in the course of the hearing before the primary judge. Early in the hearing, counsel for the respondent said:

> "Just in terms of supervision for one moment, there's not much in light of the contravention which could be done to the supervision order because my contention is it was a fairly clear breach. He'd been told on several occasions not to go there and he did."

[18] At the hearing the appellant's counsel conceded that the appellant breached the Supervision Order by attending the McDonald's restaurant contrary to an oral direction given to him. He submitted that it was "a very important factor" that there was only one breach.

The appellant's antecedents

[19] The appellant was born on 18 August 1945. He has a diabetic condition, has had heart attacks, and takes medication for hypertension and high cholesterol. He attended school to Year 11 and left home at the age of 14. He worked as a labourer and factory worker and was employed in the Arnott's biscuit factory for 16 years from a time in the late 1970s.

[20] It is convenient to extract the appellant's criminal history from the reasons of Philippides J in *Attorney-General for the State of Queensland v Yeo*:[1]

> "The respondent's criminal history dates to 1958, when he was aged 13. Between 1958 and 1971 he was convicted of numerous property offences and driving offences, including one offence of dangerous driving causing death. From 1971 to 1989, no offences were committed by the respondent. In 1989, 2 minor stealing offences were committed.
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> There was then no further offending until December 1993 when the respondent committed the first of the sexual offences of which he was convicted. That offence was carnal knowledge by anal intercourse of a person not an adult. The offence was committed on a 16 year old boy with intellectual disabilities, whom the respondent had requested assist him clean up a rural property. The boy had gone to sleep on the respondent's bed when the offence occurred. The respondent was convicted of that offence on 8 November 1995, on a retrial following a successful appeal against conviction. He was sentenced on 17 November 1995 to 3 years' imprisonment.
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> Between 19 June and 3 October 1999, the respondent committed 13 sexual offences, in respect of which he was convicted by a jury on 5 April 2001. The respondent unsuccessfully appealed against those convictions. The offences concerned 9 counts of indecent dealing (with circumstances of aggravation), 2 counts of wilfully and unlawfully exposing a child under 16 to indecent acts (with a circumstance of aggravation) and two counts of unlawfully permitting himself to be indecently dealt with by a child under the age of 16 (with a circumstance of aggravation). The victims were two boys, 9 and 11 years old, both of whom were seriously adversely affected. The offending behaviour occurred over a period of about 4 months. The respondent had been sharing a house with a Mr R. The children also resided at the house. The respondent gave the boys cigarettes and money. The indecent dealing included acts of touching the boys' penis, oral sex, anal digital penetration, requiring each boy on separate occasions to lie naked on the respondent and forcing them to touch the respondent's penis. Concurrent sentences of 3 years' imprisonment were imposed on 5 April 2001. The sentencing judge remarked that the respondent had shown no remorse and that the period of imprisonment served for the 1993 offences seemed 'to have had no deterrent effect' on him.
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> On about 6 May 2000, shortly after he was granted bail for the 1999 offences, the respondent was convicted of two further sexual offences. These offences consisted of two counts of indecent dealing with a child under 12, for which he was sentenced on 18 April 2002 to concurrent terms of 2 years' imprisonment, cumulative on the sentences imposed on 5 April 2001. The respondent unsuccessfully appealed against his conviction. The complainant was a 6 year old boy, whose family the respondent had

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1 [2006] QSC 63 at [12]-[15].

> befriended at a caravan park. The sentencing judge remarked on the 'particularly brazen nature of the offences'. The first offence concerned touching the boy on the genitals. It was committed when the respondent, the child and his mother were fishing on a pontoon. The child was seated beside the respondent with the child' mother being seated about 1 metre away. The second offence was committed when the respondent was a visitor at the boy's home. While the mother was in the kitchen, the respondent went into the boy's bedroom where he was sleeping and touched him on the genitals. The sentencing judge observed of the respondent who gave evidence at trial that he was a 'plausible person and quite astute at telling tall stories'. He recommended a psychiatric assessment with respect to whether the respondent posed a serious threat to young children and made a reporting order applicable upon the respondent's release from prison. The respondent was denied remissions in respect of his current sentence."

Relevant Provisions of the Supervision Order

[21] Provisions of the Supervision Order which are relevant for present purposes are:[2]

> "The Respondent must:
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> (xiii) comply with every reasonable direction of a Corrective Services Officer;
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> (xiv) respond truthfully to enquiries by a Corrective Services Officer about his whereabouts or movements;
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> …
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> (xxi) submit to and discuss with an Authorised Corrective Services Officer a schedule of his planned and proposed activities on a weekly basis or at such other intervals as directed by an Authorised Corrective Services Officer, …
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> …
>
> (xxiii) report to an Authorised Corrective Services Officer on a weekly basis or at such other interval as directed by an Authorised Corrective Services Officer on the trips, visits and other activities that the respondent has undertaken since last reporting to an Authorised Corrective Services Officer …
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> …
>
> (xxvii) not visit a public park without the prior written permission from an Authorised Corrective Services Officer;"

The expert evidence

[22] The primary judge had before her the report of Dr Moyle, psychiatrist, dated 8 April 2009, the report of Dr Beech, psychiatrist, dated 28 June 2009 and the report dated 29 May 2009 of psychologist, Dr Whittingham. The reports of the psychiatrists were prepared under ss 11 and 22(5) of the Act.

[23] In his report, Dr Moyle gave the opinion that the appellant "remains at high risk of re-offending within the next 10 years". Dr Moyle summarised his conclusions as follows:

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2 *Attorney-General (Qld) v Yeo* [2007] QSC 274.

> "It is my opinion that [the appellant] for the foreseeable future will be at high risk of molesting boys and vulnerable young men if not subject to the DPSOA. I see he has been able, with restrictions imposed by a supervision order enforced, to be detected trying to get around one aspect of the order that prevents his access to children, and returned to custody where he feels punished and sad. His high psychopathy score fits with the rebellion and attempts to subvert the orders intention and make any change anticipated in his behavior unlikely in the short term. This, combined with the paraphilia I think he almost certainly suffers, when combined with a life history saddened by his inability to attract a meaningful loving relationship, yet his ability to enlist support for his perspective inconsistent with the factual evidence at now several trials resulting in convictions, requires at the minimum close supervision of any freedoms he enjoys, as occurred under the restrictions imposed by Justice Mullins. I don't think lower restrictions would protect the community form (sic) the risk he will molest boys and vulnerable young men. The risk is that over the next 10 years he will much more than likely re-offend without restrictions on his freedom, if released form (sic) custody without a supervision order. If detained in custody then he should continue to have intermittent contact with Mr.Whittingham who should advise the QCS staff of interventions they may employ that could assist [the appellant] lower his risk. I doubt anything short of a prolonged therapeutic relationship with a concerned therapist holds any hope of serious personality change if there is any such hope. He has difficulty using a cognitive behavioral approach to his advantage so far."

[24] Asked in evidence-in-chief to "summarise the extent to which if any that contravention [the visit to the McDonald's restaurant] affects a risk [the appellant] poses to the community", Dr Moyle responded:

> "… Well again it's - it reflects an inability to use rational judgment. Not because he has a mental disorder preventing that, but because he may have an urge to do something that strictly speaking he's been warned against by many people acting in his interest in the past from doing, and it simply suggests that [the appellant] in my opinion is more likely to follow his own sense of what he should be doing rather than general principles underlying why he should not be behaving this way, and as such, [the appellant] is more likely than not, most of the time to follow written down orders not to offend. Not so much so that he hasn't breached the conditions, but most of the time, but you can't predict that he will always follow all orders or restrictions."

[25] Asked by counsel for the appellant whether "knowing of this contravention adds anything to the assessment of risk" previously given by Dr Moyle, Dr Moyle said:

> "I don't think it increases the risk. I think he's about the same level of risk as he was in the past. His behaviour. And this way simply reflects the same behaviour he was displaying in the prison prior to his release."

[26] Dr Moyle also said, in evidence-in-chief, that he thought the appellant more likely to follow written instructions than oral directions. Dr Moyle was cross-examined in an attempt to establish that the appellant's professional relationship with Dr Whittingham, a psychologist (who had seen the appellant some 46 times) afforded a prospect of reducing the appellant's risk of re-offending. In the course of responding to a question from counsel, Dr Moyle said:

> "Therefore, my belief is that there is a start of a relationship there. One has to be aware that you're treating people with very serious personality dysfunction all their lives, especially when they're now in their sixties, that's well-entrenched and one isn't - if you're aiming to try and I guess approach the issue of seeing if there can be any long-term change you're not going to expect such long-term change to occur. So if you can form a relationship with somebody and in the context of having his freedom severely restricted so the only avenue he has to express himself is not behaviourally like he tends to do but verbally with Dr Wittingham over a long period of time there is hope that there may be some change, but one cannot say there is good evidence from the literature saying such change is highly likely to occur."

[27] He responded to the suggestion that the appellant's attendance at sessions with Dr Whittingham was "a positive note". Dr Moyle responded, "I think it shows some early capacity to form a relationship with somebody that is – has some benefit to [the appellant] and that's the start of forming a relationship. It's only the start, but it's a start".

[28] Dr Beech was less optimistic of any reduction in the appellant's risk of re-offending resulting from his treatment by Dr Whittingham than was Dr Moyle. He said in his report:

> "In my opinion he has an Anti-social Personality Disorder characterised by childhood onset disruptive behaviour that progressed to juvenile delinquency and later adult criminality. His criminal history is noted for his re-offending and in particular for repeated driving offences, one of which led to a death. He also has a repeat history of sexual reoffending against young males with two offences occurring at two different times while on bail.
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> It is my opinion that he is a Psychopath and a review of reports of Dr Moyle and Dr Lawrence would support this. His personality is notable for a projection of personal responsibility onto others and this has been commented on also by his treating psychologist Dr David Whittingham who is of the opinion that [the appellant] requires external controls and checks. [The appellant] is a shallow glib man able to argue details and legal technicalities but with no sense of remorse, personal reflection, or overview of his circumstances.
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> It is my opinion that he is at high risk of reoffending against young males if released into the community. I believe that he has the sexual deviance, Paedophilia, and he has really taken very few steps to personally address this or his risk of offending. I am sceptical of any

> progress he may have made with Dr Whittingham but I accept it would be a long process of engagement given his resistance to therapy and his denial.
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> *I agree with Dr Whittingham that the recent events suggest that the risk of reoffending even with supervision is increased and I would view it as moderately high.*
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> [The appellant] has shown I believe a general contempt for the law in his most recent driving offences suggest to me a general risk of offending which can be a precursor to sexual offending. His driving offences hearken back to earlier criminality and I believe they suggest that he is maintaining into advancing years a continued anti-social character.
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> I agree with Dr Whittingham that it is difficult to know whether the Bad Boyz contravention reflects simply an anti-social stance towards Corrective Services Officers or to a more specific prelude to sexual re-offending. Neither scenario gives me comfort when I consider [the appellant's] risk.
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> I am uncertain whether he has technically breached his order. In terms of his risk management I do not think it matters really. To use his simile, he is like a child who is continually asking for an ice-cream, despite repeated parental refusals, all the time waiting for the parent to relent or slip up and then use this as an excuse or cover to do what he wants. It displays an abrogation of personal responsibility for his own risk management. This is of particular concern given his impulsive nature and the style of his offences.
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> At present I believe his risk in the community can be managed only to the extent that others are vigilant on his behalf." (emphasis added)

[29] In evidence-in-chief, Dr Beech, in response to a question about the appellant's "need for external controls and checks", explained:

> "And could you explain why?-- I think that by nature [the appellant] has disregarded the rules, a disregard for even the rights of others and - and he is - can be both impulsive and, I believe, calculating in - in the pursuit of his own desires and needs. But he also does respond to, I guess, very strict conditions once they are made very clear to him. *So I think if you put a structure around him and restrictions and are very clear to him what those restrictions are then I believe he will grudgingly accept them. I also believe he will continue to seek loopholes or ways around the restrictions* and he will do that in an astute and glib and I guess plausible manner, as other people have noted. But I think as you become more concrete and black and white and I guess so detailed in restrictions he will comply with them." (emphasis added)

[30] Asked if the breach of the Supervision Order which had been established affected his assessment of the appellant's risk of re-offending, he said, "… yeah, I think the risk of offending without any order, without any supervision, is high. With supervision it's moderately high."

[31] Asked if written changes to the conditions of the appellant's Supervision Order would "be likely to change [the appellant's] response to it?" he said:

> "Yes, I do. I think it will because he argues, … details, he argues what they said, I said, he says, 'They should have told me this. They didn't tell me that. I didn't understand'".

[32] In cross-examination, Dr Beech accepted that his risk of re-offending was "pretty much the same" as when he was released under the Supervision Order, the appellant's counsel also obtained a modest concession from Dr Beech that the fact that Dr Whittingham had noted "some positive progress by [the appellant] with several aspects of his psychological intervention" showed "some glimmer of hope in [the appellant's] case" as compared to how things had been in the past. Dr Beech also accepted that the appellant was "the sort of individual who does respond to very strict conditions".

[33] It was put to Dr Beech that the appellant would comply with strict written directions. He accepted that that was so and observed:

> "The difficulty is trying to think ahead for [the appellant] as to what written directions you need to give him for every aspect. So I think it needs to be that when he does put forward the schedule for each week he has to be very specific about it and people have to go through the schedule and perhaps give him written directions about parts of that schedule … so it's onerous."

[34] The following paragraphs of Dr Whittingham's report are of particular relevance for present purposes:

> "2. In the context of psychological intervention response, progress with self regulating his risk of sexual re-offending;
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> a. On balance [the appellant's] progress with self regulating his risk of sexual re-offending appears mixed, with positive progress from that observed, in custody noting engagement with development of hypothetical risk factors and a risk management plan, however application of these concepts to regulating his behaviour appears limited when considering his decision to attend McDonalds for the Bad Boys meeting. There appears a appears slight worsening of his dynamic risk factors, more specifically his co-operation with supervision in that he appears to have tested the conditions of his order and known risk factors. It is unclear if this testing was a function of sexual self regulation difficulties (i.e. acting on sexual needs), or simply a reflection of his antisocial and entitlement oriented thinking and beliefs.
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> …
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> 5. Changes to [the appellant's] risk of sexual recidivism given his assessed baseline risk, any identified dynamic risks, and acute risks.

> a. I note overall based on available information, on balance and review [the appellant's] results on the STABLE and ACUTE 2007, appears to indicate a slight worsening of a stable dynamic risk factors, and a worsening of an acute dynamic risk factors that relates to co-operation with supervision as outlined."

The appellant's submissions

[35] Counsel for the appellant submitted that the primary judge failed to take into account sufficiently or at all:

(a) the oral evidence regarding the appellant's positive relationship with Dr Whittingham;
(b) the appellant's compliance with other aspects of the Order;
(c) the minor nature of the breach;
(d) the oral testimony regarding the value of written instructions;
(e) the limited potential for rehabilitation of the appellant in custody;
(f) the preference to be given to supervision orders;
(g) the oral evidence regarding whether the risk of re-offending increased or decreased after the breach; and
(h) the appellant's affidavit materials.

[36] The reference to the "affidavit material" was to the evidence of the applicant that: he was able to obtain a driver's licence; was able to get a job and was prepared to continue seeing Dr Whittingham.

[37] Counsel for the respondent emphasised the psychiatric evidence, which was to the effect that the appellant had limited capacity to control his own behaviour in the absence of "external constraints". Reference was made to Dr Beech's evidence that the appellant's attitude to the Supervision Order, as demonstrated by his contravention, was "not a good prognostic factor", and also to Dr Whittingham's evidence. Dr Whittingham considered that "dynamic factors" had worsened slightly by reason of the facts known to him about the contravention. These were matters, it was said, which supported the primary judge's conclusion. Reference was made to the psychiatric evidence that, even with supervision the risk of re-offending remained "moderately high", and to Dr Beech's evidence of the impulsivity of the appellant's nature.

[38] It was submitted that the primary judge's conclusions were well open to her, having regard to: the appellant's "open defiance" of the Supervision Order; the propensity of the appellant to test any restrictions placed on his freedom; his resentment concerning such restrictions and the fact that the restrictions contravened were clear.

The reasons of the primary judge

[39] Towards the end of her reasons, the primary judge set out the following findings which she considered to be of particular relevance:[3]

> "In coming to a determination as to the appropriate order, I consider that the following findings to be particularly relevant;
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> (1) [The appellant] has an anti-social personality disorder and he operates within the range of psychopathy. His sexual offending history is consistent with homosexual paedophilia.

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[3] *Attorney-General for the State of Queensland v Yeo* [2009] QSC 214 at [29].

(2) Dr Whittingham, who has seen [the appellant] on 46 occasions since his release on conditions, considers that [the appellant] is in the high risk category compared to other sex offenders. [The appellant] still consistently denies any past sexual offending and denied any risky thoughts.

(3) Dr Whittingham considered that there was evidence that [the appellant] displayed problems with self regulation, particularly in relation to traffic and driving offences and that he had negative emotionality specific to his views of Queensland Corrective Services, the legal system and his own circumstances.

(4) [The appellant's] impulsivity, disobedience to rules and minimal regard for others are factors relevant to his re-offending.

(5) [The appellant']s defiance is a life long problem.

(6) [The appellant] should not be in any situation where he could be in contact with children under the age of 16 years or disabled persons.

(7) [The appellant] has previously made contact with a parent or the parents of an intended victim so that he was in a situation where he was alone with or physically next to the victim that enabled him to commit the offences. The relationship with the parent facilitated the preparatory contact with the victim that can be described as 'grooming style'.

(8) [The appellant's] refusal to acknowledge his sexual offending precludes intervention strategies based on any recognition by him of the triggers of such offending.

(9) [The appellant] is adept at working around conditions that are placed on him and this requires the external constraints (the requirements of the supervision order) to be clearly and unambiguously articulated.

(10) [The appellant's] failure to show empathy or take responsibility for his actions affects his risk of re-offending.

(11) [The appellant's] likelihood of re-offending is enhanced by his plausible manner and glib social interactions.

(12) [The appellant] was under a supervision order which had 31 restrictive conditions, which included the condition that he comply with reasonable directions and that he not undertake any trip, visits, or other activity away from his approved place of residence without the prior written approval of an authorised Corrective Services Officer.

(13) [The appellant] breached a clearly understood direction of the Corrective Service Officers.

(14) [The appellant] resents having to submit written schedules."

[40] The primary judge then posed "the essential question" of whether she was satisfied, on the balance of probabilities, that despite his contravention of the Supervision Order, the adequate protection of the community can be ensured. Her Honour observed that as the appellant lacked "internal restraints and no recognition of risk factors", the adequate protection of the community could result only from the "success of the conditions of the supervision order". Addressing the risk posed, she noted that the Supervision Order had been framed in a detailed way because of the recognition that such detail was a key to its successful operation. Her Honour then said:[4]

> "The only way the supervision order can work is if the external constraints around [the appellant] are sufficient to meet the risk. As Dr Beech explains, the only way the supervision order can really work is 'vigilance' on the part of Corrective Services. A reading of [the appellant's] explanation as to why he breached the conditions exemplifies the difficulties faced by the department. [The appellant] argued details and legal technicalities but with no sense of remorse, personal reflection, or overview of his circumstances. [The appellant] is waiting for the department to slip up or falter and if there is any mistake [the appellant] takes advantage of it. As Dr Beech stated at the hearing 'he will continue to seek loopholes or ways around the restrictions and he will do so in an astute and glib and I guess plausible manner'. He later stated:
>
> > 'So, I think, it just seems to me that he has an entrenched pattern of breaking rules and doing what he wants to do and there's little comfort to be taken from his - his return to old patterns of offending in a general sense. So my concern when I see that is that he will simply be returning to old patterns of offending when it comes to sexual matters.'
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> In my view, [the appellant's] recent behaviour indicates he is not currently suitable for a supervision order given the level vigilance, monitoring and supervision required to ensure he does not find the loopholes or take advantage of a slip up. Essentially [the appellant] is a high or moderately high risk of re-offending and a supervision order cannot currently address that risk because of [the appellant's] attitude to any constraints placed on him. I do not consider that [the appellant] has satisfied me that the adequate protection of the community can be ensured by a supervision order given his attitude to the previous supervision order. I consider that the only way the risk can be adequately managed at this point in time is in detention."

Consideration

[41] Insofar as the appellant's counsel's submissions suggested that because the appeal was by way of rehearing,[5] it was unnecessary for the appellant to demonstrate error on the part of the primary judge before the appeal could succeed, they must be rejected. The proposition misapprehends the nature of a right of appeal by way of

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4 *Attorney-General for the State of Queensland v Yeo* [2009] QSC 214 at [34]-[35].

5 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 43(1).

rehearing. It is abundantly plain that for such an appeal to succeed, error on the part of the Tribunal making the Order appealed against must be established.[6]

[42] As the assessments the primary judge was required to make "call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the Order involves the exercise of a judicial discretion".[7] The circumstances in which an order made in the exercise of a judicial discretion may be interfered with by an Appellate Court are well settled.

[43] In the joint reasons of Mason and Deane JJ in *Norbis v Norbis*,[8] it was said:[9]

> "The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal." (citation omitted)

[44] In *House v The King*,[10] Dixon, Evatt and McTiernan JJ explained the nature of "appellable error" as follows:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court

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6 *Fox v Percy* (2003) 214 CLR 118; *Norbis v Norbis* (1986) 161 CLR 513; and *Attorney-General v Francis* [2007] 1 Qd R 396.

7 *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason and Deane JJ. See also *Attorney-General v Francis* [2007] 1 Qd R 396 at [34].

8 (1986) 161 CLR 513.

9 At 518, 519.

10 (1936) 55 CLR 499 at 504, 505.

> at first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[45] There is no substance in the appellant's contention (a). Her Honour had regard to the professional relationship between the appellant and Dr Whittingham, and to the psychiatric evidence in respect of it. The thrust of that evidence was that the prospects of Dr Whittingham's treatment leading to a reduction in the prospects of the appellant's re-offending, at least in the short term, were insignificant, or nearly so. As for (b) and (c), it does not appear to me from the reasons that the primary judge overlooked the fact that the applicant had, with two other exceptions, complied with the Supervision Order. Nor do the reasons reveal any misapprehension on the part of the primary judge as to the quality of the breach. The primary judge's concern was not so much with whether the breach, of itself, was serious in the sense that it constituted criminal conduct, or conduct which could be a precursor to, or indicator of the likelihood of future offending, but with what it demonstrated about the appellant's willingness and capacity to be bound by the terms of the Supervision Order and lawful directions given under it.

[46] There is also no substance in the contention (ground (e)) that there was error in any failure to take into account the limited potential for rehabilitation of the appellant in custody. That matter was not addressed in the evidence.

[47] With reference to grounds (d) and (g), it is right, as counsel for the appellant submitted, that the state of the psychiatric evidence after the conclusion of the oral evidence was to the effect that the appellant's transgression had not altered relevant risk factors. Dr Whittingham, however, was of the opinion that there had been a "slight worsening" of risk factors. Dr Whittingham was not cross-examined.

[48] The primary judge was rightly concerned with the respondent's lack of what was described in the expert evidence as internal constraints. Her Honour concluded, with respect, correctly, that "the only way the supervision order can work is if the external constraints … are sufficient to meet the risk". Her Honour was concerned with the "level [of] vigilance, monitoring and supervision required to ensure [that the appellant] does not find the loopholes or take advantage of a slip up". It appeared, however, from the expert evidence that clear, written instructions and, preferably, clear, detailed terms in an Order were likely to be effective. For example, Dr Beech accepted that the appellant responded to "very strict conditions" and to written conditions. The Supervision Order had been in force for some 22 months and it did not appear that there was any particular difficulty in compliance.

[49] The vigilance, of which the psychiatrists spoke, appeared to be the taking of great care in the giving of directions and in the perusal of the appellant's weekly schedules. Having regard to the nature of supervision orders and their constraints on personal liberty, it would not appear to me that the necessity for such vigilance, care and scrutiny on the part of Corrective Services Officers should be permitted to weigh particularly heavily when balanced against the liberty of the appellant.

[50] As was remarked in the reasons of the Court in *Attorney-General v Francis*:[11]

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11 [2007] 1 Qd R 396 at [39].

> "The Act does not contemplate that arrangements to prevent such a risk must be 'watertight'; otherwise orders under s. 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[51] To my mind, the nature of the breach and the circumstances in which it came about, are also of some significance. The only term of the Supervision Order akin to the contravened direction, was the requirement that the appellant not visit a caravan park or public park without prior permission. The contravened direction significantly expanded the restrictions imposed on the appellant by prohibiting him from attending the McDonald's restaurant for a legitimate purpose. The prospect that the appellant, in the company of other attendees at the Bad Boyz meeting would place minors at risk of sexual interference or place himself at risk of reoffending, were remote. There was no suggestion that the restaurant staff were not present in the normal way and the appellant was accompanied by a chaplain with Community Care Network. The appellant's case managers would not have been aware, when giving the subject directions, of the identity of the persons who would have been present with the appellant in the restaurant. However, they would have been aware that the appellant's prior offending had occurred in circumstances in which the appellant had developed social contact with the victim, or where he had ingratiated himself into the confidence of the victim's family.

[52] In those circumstances, one can see why the appellant may have harboured a sense of grievance and set out to defy or evade the subject directions. That explanation, whilst not justifying the appellant's conduct, does support the submission by the appellant's counsel that the breach was relatively minor.

[53] I accept that the evidence tends to show that the appellant will continue to "seek loopholes or ways around [his] restrictions and [that] he will do so in an astute and glib and … plausible manner".

[54] However, in my respectful opinion, the above discussion shows that there is much to be said for the view that the exercise by the appellant's case managers of careful supervision, allied with the issuing of clear written directions, whenever directions are required, would suffice to ensure the adequate protection of the community.

[55] I am not persuaded, however, that by finding as she did, the primary judge demonstrated an appellable error. No errors of fact or law have been demonstrated and I note that the appellant has a right to periodic review under s 27 of the Act and may apply for a review under s 28.

[56] For the above reasons, I would order that the appeal be dismissed.

[57] **CHESTERMAN JA:** I agree with the reasons given by Muir JA for dismissing the appeal.