

SUPREME COURT OF QUEENSLAND

CITATION: *Bergmann v DAW* [2010] QCA 143

PARTIES: **REGINE BERGMANN**
(plaintiff/appellant)
v
DAW
(defendant/respondent)

FILE NO/S: Appeal No 1841 of 2010
DC No 196 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 11 June 2010

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2010

JUDGES: McMurdo P, Holmes and Muir JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The appeal be dismissed with costs**

CATCHWORDS: MENTAL HEALTH – GUARDIANS, COMMITTEES, ADMINISTRATORS, MANAGERS AND RECEIVERS – OTHER MATTERS – Guardian and Administration Tribunal made an interim order under s 12 *Guardianship and Administration Act* 2000 (Qld) appointing an administrator in respect of respondent’s financial matters – respondent entered contract for sale of land while interim order in place – whether appointment of administrator deprived respondent of power to do acts within the ambit of administrator’s power – whether contract void

Guardianship and Administration Act 2000 (Qld), s 5, s 6, s 12, s 33, s 34, s 147, Sch 1

Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15, cited

David by Her Tutor the Protective Commissioner v David (1993) 30 NSWLR 417, cited

Devenish v Jewel Food Stores Pty Ltd (1991) 172 CLR 32; [1991] HCA 7, cited

Gibbons v Wright (1954) 91 CLR 423; [1954] HCA 17, approved

R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603; [2009] HCA 12, cited

Re JNRD and the Protected Estates Act (1992) 28 NSWLR 728, cited
Re Marshall [1920] 1 Ch 284, approved
Re Walker [1905] 1 Ch 160, cited
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177; [1969] HCA 28, cited

COUNSEL: M A Jonsson for the appellant
A W Collins for the respondent

SOLICITORS: Miller Harris Lawyers for the appellant
Mellick Smith & Associates for the respondent

- [1] **McMURDO P:** This appeal concerns the construction of the *Guardianship and Administration Act* 2000 (Qld) (the Act). The question is whether the appointment of an administrator under s 12 of the Act for an adult who in fact retains capacity, deprives the adult of power to do acts within the administrator's power during the period of the appointment. The appellant contends it does not; the respondent contends it does. Muir JA has set out relevant facts, issues and legislation. I will not repeat or add to these unnecessarily. I agree with Muir JA's reasons for dismissing the appeal, but wish to add some further observations.
- [2] The facts of this case were unusual. It was conceded at first instance that, although subject to a s 12 order, the respondent in fact did have capacity to enter into the contract of sale of his property at Palm Cove, near Cairns, which is at the heart of this dispute. It was also conceded that, but for the s 12 order, the respondent would have no defence to the appellant's claim against him for commission. The appellant gave evidence that she knew the respondent was subject to a s 12 order when he signed the contract of sale. The purchaser was also aware of this as the contract of sale was conditional on the respondent removing the notation on the title referring to the administrator.
- [3] There are aspects of the Act which provide some support for the appellant's contentions. The long title of the Act includes a statement that it is to "consolidate, amend and reform the law relating to the appointment of ... administrators to manage the ... financial affairs of adults with impaired capacity". The Act acknowledges in s 5:
- "(a) An adult's right to make decisions is fundamental to the adult's inherent dignity;
 - ...
 - (c) The capacity of an adult with impaired capacity to make decisions may differ according to –
 - (i) the nature and extent of the impairment; and
 - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - (iii) the support available for members of the adult's existing support network;
 - (d) The right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
 - ..."

- [4] The expressed purpose of the Act also lends some support to the appellant's contention. It is to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy and decision-making on the one hand, and the adult's right to adequate and appropriate support for decision-making on the other.¹ An adult is presumed to have capacity.²
- [5] An administrator, in exercising power under the Act, must apply the general principles stated in Sch 1 of the Act.³ These also provide some support for the appellant's contentions and relevantly include:

"1 Presumption of capacity

An adult is presumed to have capacity for a matter.

2 Same human rights

- (1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- (2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

3 Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

4 Valued role as member of society

- (1) An adult's right to be a valued member of society must be recognised and taken into account.
- (2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

5 Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

6 Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

7 Maximum participation, minimal limitations and substituted judgment

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life,

¹ The Act, s 6.

² The Act, s 7(a).

³ The Act, s 11.

including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.

- (2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
- (3) So, for example—
 - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
 - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
 - (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.
- (4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.
- (5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
- (6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

8 Maintenance of existing supportive relationships

The importance of maintaining an adult's existing supportive relationships must be taken into account.

9 Maintenance of environment and values

- (1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.
- (2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.

Editor's notes—

¹ **Aboriginal tradition** means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a

particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.

- 2 **Island custom**, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships—see the *Acts Interpretation Act 1954*, section 36.

10 Appropriate to circumstances

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

11 Confidentiality

An adult's right to confidentiality of information about the adult must be recognised and taken into account."

- [6] Chapter 11 of the Act "Miscellaneous Provisions" includes s 240 which provides that the Act "does not affect the court's inherent jurisdiction".
- [7] As the appellant's counsel points out, all these matters in combination tend to support his construction of the Act: that if an adult subject to a s 12 order in fact has capacity when entering into a contract in the adult's name, the adult should be bound by the contract.
- [8] Further, the Act, which was passed into law in 2000, did not contain any specific provision setting out the restriction on powers of an adult subject to an administration order under s 12⁴ when such provisions then existed in Guardianship and Administration Acts in other jurisdictions: see s 21(2A) *Guardianship Act 1987* (NSW); s 52 *Guardianship and Administration Act 1986* (Vic); s 77(1) *Guardianship and Administration Act 1990* (WA); and s 42 *Guardianship and Administration Act 1993* (SA). This omission from the Act also tends to support the appellant's contention.
- [9] The Act is silent as to whether an administration order under s 12 deprives an adult, subject to that order but in fact with capacity, from the ability to deal with the adult's financial matters during the period of the order. It is therefore appropriate in determining the legislative intention⁵ to refer to specified types of material extrinsic to the Act which may provide guidance, in this case the second reading speech, relevant explanatory notes and the Queensland Law Reform Commission Report (QLRC Report No 49, June 1996) on which the Act was based.⁶
- [10] In the second reading speech, the Hon M J Foley, Attorney-General and Minister for Justice and Minister for the Arts, stated:

"People with disabilities share the same basic human rights common to us all. For too long, the legal system has failed to give effective

⁴ See Ch 4 of the Act, which deals with functions and powers of guardians and administrators and contains no such provision.

⁵ *Acts Interpretation Act 1954* (Qld), s 14A.

⁶ Above, s 14B.

recognition to those rights. This Bill establishes a tribunal and a Public Advocate to affirm the human rights of people with a decision-making disability and to empower such persons in the exercise of their rights. ...

For the first time in this State, Queensland will have a legislative system by which the most vulnerable members of our society will be able to be supported in achieving autonomy in their decision making and in their lives in general. ...

This Bill completes the process of implementation of the ground breaking recommendations of [the QLRC Report No 49]

... The previous Government failed to create a Guardianship and Administration Tribunal.

This tribunal will have the power to appoint guardians and administrators and review such appointments regularly.

... administrators will have power for financial matters.

This will mean, for example, that the family of a person with impaired capacity can look after the personal and financial affairs of that person without always having to depend on statutory bodies such as the public trustee.

Guardians and administrators will be bound by the principles underpinning the Bill in exercising powers for persons with impaired capacity and by specific responsibilities under the Bill to ensure that their powers are not abused. ...

Committees of the person or estate appointed by the Supreme Court under section 201 of the Supreme Court Act 1995 will continue for twelve months allowing the appointed committee to apply to the tribunal for a guardianship or administration order.

... This scheme brings Queensland into line with the other States and Territories of Australia and introduces a more modern and comprehensive scheme of substituted decision-making. ..." (my emphasis).

- [11] The explanatory notes included the following relevant statements:

"The objective of the Bill is to establish a *comprehensive regime for the appointment of guardians and administrators* to manage the personal and financial affairs of adults with impaired capacity in Queensland. ...

The Bill will implement those aspects of ... (QLRC Report 49) that were not implemented in the *Powers of Attorney Act 1998*"

- [12] QLRC Report No 49 on which the Act was based is of limited assistance in revealing the legislative intent central to this case, but it included the following relevant statement:

"Certain powers will be withdrawn from the person and granted to the decision-maker. This constitutes a serious intrusion into the person's right to individual autonomy.

Because of the potential gravity of the consequences of a decision-making order, it is essential to establish criteria for determining when an order should be made."

- [13] It is clear to me from the italicised passages I have quoted from the second reading speech and explanatory notes, that the legislature intended the Act to replace, after a

transitional period,⁷ the committees of the person or estate, appointed under the *Supreme Court Act* 1995 when adults lacked capacity to manage their financial affairs, with a new and comprehensive scheme broadly consistent with schemes in other states. None of those interstate schemes allowed an adult, who was subject to an administration order like that made under s 12 but who in fact retained capacity, to personally contract in relation to property while subject to the order.

- [14] Prior to the passing of the Act, the settled common law was (although not without controversy⁸) that committees of a person or estate suspended the right of the protected person to deal with property, irrespective of the protected person's capacity: *David by Her Tutor the Protective Commissioner v David*;⁹ *Re Walker*.¹⁰ If the legislature intended the Act to reverse the common law position existing at the time the Act was passed, it is unlikely to have referred to the scheme it enacted as replacing the committees of the person. The Act differs from similar schemes in other states in that it does not expressly restrict the powers of an adult subject to an administration order, but the second reading speech expressed a legislative intent that the Act would bring Queensland into line with other states and territories by introducing a "more modern and *comprehensive* scheme of substituted decision-making" (*my emphasis*). If the legislature intended the Act to amend the common law, in a way which had not been done in other Australian jurisdictions, to allow an adult the subject of an administration order under s 12 to retain the capacity to contract when in fact capable, it can be expected to have stated this in the Act in clear terms. It did not.
- [15] The legislative intent in the Act is certainly to presume an adult has factual and legal capacity and to involve an adult who is subject to an administration order as a valued member of society in the administrator's decision-making on behalf of the adult under s 12. But in my opinion it is not to set up a scheme which would allow both the administrator, and the adult the subject of the s 12 order who has capacity in fact, to simultaneously deal with the adult's financial matters under the Act.
- [16] The better view, in my opinion, is that an order under s 12 suspends the right of the adult subject to the order to deal with financial matters under the Act, even where the adult has capacity in fact, as long as the order is in force. The Act, of course, makes clear provision for changing or remaking an appointment order.¹¹ If I am wrong as to the legislative intent in s 12, the legislature should amend the Act.

⁷ The Act passed in 2000 contained the following provisions:

Part 2 Transitional Provisions for Committee

256 Power to apply to court for compensation for loss of benefit in estate because of committee

(1) If a person's benefit in an adult's estate under the adult's will, on intestacy, or by another disposition taking effect on the adult's death, is lost because of a sale or other dealing with the adult's property by a committee of the adult, section 60 applies as if references in the section to an administrator were references to the committee.

(2) Subsection (1) applies whether the sale or other dealing happens before or after the commencement of this section.

257 Tribunal's power if committee

If a committee for a person continues after the commencement of this section, the tribunal may make an order setting aside the committee and may make any other appropriate order.

⁸ See Kirby P's persuasive dissent in *David by Her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417, 418.

⁹ (1993) 30 NSWLR 417, 438.

¹⁰ [1905] 1 Ch 160, 172.

¹¹ See the Act, Ch 3 Pt 3.

[17] For these reasons, as well as for those given by Muir JA, the appeal must be dismissed with costs.

[18] **HOLMES JA:** I agree, for the reasons given by McMurdo P and Muir JA, that the appeal should be dismissed with costs.

[19] **MUIR JA: The issue raised on the appeal**

The principal question for determination in this appeal is whether the making of an interim order by the Guardianship and Administration Tribunal under s 12 of the *Guardianship and Administration Act 2000* (Qld) appointing an administrator in respect of that person for all financial matters, deprives that person of power to do acts within the ambit of the administrator's power.

The factual background

[20] On 31 October 2007, the respondent signed an Appointment of Real Estate Agent Form, appointing the appellant his agent for the sale of the land at Palm Cove on which he was conducting, or had conducted, a hotel and restaurant business ("the Agency Agreement").

[21] The respondent suffered brain injuries in a motor vehicle accident. His friend and former physician, Dr Gunes, applied to the Tribunal for an urgent interim order appointing an administrator for the respondent's financial matters on the grounds that the respondent had impaired decision making abilities. In a letter accompanying the application dated 18 July 2008, Dr Gunes advised, inter alia, that the respondent "has tried to sell his property for more than 2 years and is on borrowed time for urgent sale". In its interim order made on 11 August 2008, the Tribunal stated that it was satisfied that urgent action was required. The Order provided, inter alia:¹²

3. That The Public Trustee of Queensland is appointed as administrator for [DAW] for all financial matters.
4. The Tribunal directs the administrator to provide a written account of their actions as administrator to the Tribunal no later than three (3) working days prior to the hearing.
5. This administration appointment remains current for three (3) months or, if the Tribunal makes a further order in this matter, until the date of the further order, whichever is the sooner."

[22] The Order also directed that the administrator identify any interest in real property registered in the respondent's name, and lodge a copy of the Order and a notice notifying the Registrar of Titles of any interest in land held by the respondent which was subject to the Order.

[23] On 29 August 2008, the respondent entered into a contract for the sale of the land for a sale price of \$6,250,000. The Contract provided for a deposit of \$20,000 and a completion date 90 days from the date on which the respondent notified "the purchaser of satisfaction of Special Condition 4 and the removal of the administrator". Special Condition 4(a) made the Contract subject to the respondent "removing the administrator noted on the Title to the property ... by the settlement date". Special Condition 4(b) required the vendor to notify the purchaser in writing

¹² Record, 129.

of the removal of the administrator "whereupon the calculation of the 90 days for the settlement date will commence". Special Condition 5 provided for the release of the deposit to the vendor by the stakeholder upon satisfaction of Special Condition 4(b).

- [24] The applicant applied through his solicitor on 11 September 2008 for removal of the administrator, a declaration that the respondent had capacity to manage "his own financial, legal and personal decisions", and for an order that the Registrar of Titles remove any notice of appointment of the administrator from "any interest in land held by" the respondent.
- [25] On 16 September 2008, the Tribunal ordered that "the appointment of The Public Trustee of Queensland as administrator" be revoked.
- [26] The sale did not proceed for reasons which do not appear clearly from the evidence. Nevertheless, on 11 December 2008, the appellant presented the respondent with an invoice for \$125,000 on account of the commission allegedly payable under the Agency Agreement. The respondent refused to pay and the appellant commenced these proceedings claiming \$125,000 together with interest.
- [27] It was admitted on the pleadings that a deposit of \$20,000 was paid. The respondent's solicitor, who appeared at first instance, conceded, in effect, that if it were not for the appointment of the administrator, the respondent would have had no defence to the appellant's claim.

The decision at first instance

- [28] The primary judge dismissed the claim on the basis that the making of the interim order "took away from the [respondent] his capacity to enter into a contract for the sale of the property for the duration of the order". He decided, by inference, that no right to commission under the Agency Agreement could arise.

Relevant provisions of the Act

- [29] The Act relevantly provides:

"5 Acknowledgements

This Act acknowledges the following—

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
 - (i) the nature and extent of the impairment; and
 - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
 - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;

- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.

6 Purpose to achieve balance

This Act seeks to strike an appropriate balance between—

- (a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making; and
- (b) the adult's right to adequate and appropriate support for decision-making.

...

Part 1 Making an appointment order

12 Appointment

- (1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal is satisfied—
 - (a) the adult has impaired capacity for the matter; and
 - (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
 - (c) without an appointment—
 - (i) the adult's needs will not be adequately met; or
 - (ii) the adult's interests will not be adequately protected.

33 Power of guardian or administrator

...

- (2) Unless the tribunal orders otherwise, an administrator is authorised to do, in accordance with the terms of the administrator's appointment, anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised.

34 Apply principles

- (1) A guardian or administrator must apply the general principles.

...

Schedule 2 Types of matters

Part 1 Financial matter

1 Financial matter

A *financial matter*, for an adult, is a matter relating to the adult's financial or property matters, including, for example, a matter relating to 1 or more of the following—

...

- (m) undertaking a real estate transaction for the adult;
- ...
- (p) a legal matter relating to the adult's financial or property matters;"

The appellant's contentions

[30] The appellant argues that at the core of the Act "lies Parliament's acknowledgement of the importance to the individual of his or her ability to make decisions, and to have courts recognise and carry those decisions into effect".¹³ Parliament was also astute to stipulate that the rights of an impaired individual to make decisions should be restricted or interfered with to the least extent possible.¹⁴ Consequently, any legislative intention to displace or exclude such fundamental rights would have been manifested with unmistakable clarity. It is further contended that the primary judge's construction of the Act is contrary to the presumption against construing a statute in such a way as to interfere with vested property rights or interests unless an intention to do so is conveyed with irresistible clarity.¹⁵ Counsel for the appellant referred to guardianship legislation in Western Australia, South Australia, Victoria and New South Wales in which the consequences of a protected person's dealing with his or her property while the equivalent of an administration order was in existence were expressly stated. He argued that the fact that it was found necessary to take this course pointed against the implication of such a provision in the Act.

Consideration

[31] Sections 5 and 6 relevantly acknowledge: the right of adults to make their own financial decisions; that capacities to make decisions in respect of "financial matters" differ in nature and degree; the importance of providing appropriate support for decision making to adults with impaired capacity and that the rights of persons with impaired capacities in respect of financial matters should not be interfered with any more than is necessary. Nevertheless, s 5(d) implicitly acknowledges that the right of an adult with impaired capacity to make decisions may be "restricted, and interfered with".

[32] Section 12 enables the Tribunal to appoint an administrator for a "financial matter" if the adult has impaired capacity for the matter and the requirements of s 12(b) and (c) are met.

[33] Consequently, an administrator may be appointed only if:

- (a) The Tribunal is satisfied that the adult has impaired capacity for the matter the subject of the appointment; and
- (b) The appointment is necessary in order to enable a decision to be made in relation to financial matters, or to avoid the likelihood that the adult will do something in relation to financial matters which will involve unreasonable risk to the adult's welfare or property; and
- (c) Absent an appointment, the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

[34] Where an administrator is appointed, unless the Tribunal orders otherwise, the administrator may do "anything in relation to a financial matter that the adult could

¹³ *Guardianship and Administration Act 2000* (Qld), ss 5(a) and 6(a).

¹⁴ *Guardianship and Administration Act 2000* (Qld), s 5(d).

¹⁵ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 618-620.

have done *if the adult had capacity for the matter when the power is exercised*".¹⁶ (emphasis added)

- [35] It is necessarily implicit in ss 12 and 33 that an administrator for all financial matters appointed under s 12 assumes the powers in respect of financial matters of the adult in respect of whom the appointment is made, to the exclusion of the adult, except to the extent that the Tribunal orders otherwise. If the Act did not operate to deprive the adult of the powers assumed by the administrator, the protection that s 12 is plainly intended to provide to a person of impaired capacity would be negated in whole or in part. There would be dual control over the adult's "financial matters": surely a result which the Legislature could not have intended.¹⁷ The financial wellbeing of the impaired adult would be imperilled, for example, by the risk that the administrator and the adult could separately enter into transactions, such as separate contracts for the sale or purchase of the same property to different purchasers or from different vendors, which might expose the impaired adult to liability. Counsel for the appellant, who ably presented the appellant's case, argued that if the appellant's construction was accepted, the incapacitated person's capacity to contract could be resolved in the normal way by application of common law principles. In many circumstances that would mean that litigation would be necessary to obtain legal certainty as to the incapacitated person's capacity to deal with his or her property at the time of the relevant dealing. The administrator could be prevented from dealing with the property until the conclusion of the litigation. Where the incapacitated person's mental capacity was variable it may prove difficult for the administrator and third parties to determine whether the incapacitated person lacked relevant capacity at the critical time. This argument thus has little to recommend it.
- [36] It is implicit in ss 5 and 6 that an adult with impaired capacity may, nevertheless, retain some decision making capability, with or without support for decision making. This does not necessitate a conclusion contrary to the one just expressed. The Act contemplates that orders of the Tribunal will identify the extent of any interference with an impaired adult's decision making capacity and that such orders address, where appropriate, the question of decision making support. The words "that the adult could have done if the adult had capacity for the matter when the power is exercised" in s 33(2) strongly imply that where an administrator is appointed in respect of an adult, the adult lacks capacity and, by inference, the power to make decisions in respect of financial matters.
- [37] "An administrator" is defined in Schedule 4 to the Act as meaning, "an administrator appointed under this Act". In everyday speech, the appointment of an administrator of the property, assets or business of a person or corporation implicitly connotes that the power to undertake the activity the subject of the appointment is vested in the administrator to the exclusion of others.
- [38] Administrators appointed by a court of competent jurisdiction to administer the property of deceased persons¹⁸ and administrators appointed to a company under Division 2 Chapter 5 of the *Corporations Act 2001* (Cth) are examples of administrators who have the sole power to perform or exercise the functions and powers vested in them.

¹⁶ *Guardianship and Administration Act 2000* (Qld), s 33(2).

¹⁷ C.f. *Re Walker* [1905] 1 Ch 160 at 172 and *David by Her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 438.

¹⁸ *7 Halsbury's Laws of England*, 4th ed, para 703.

- [39] Counsel for the appellant argued that a legislative intention to displace or exclude the "fundamental rights" affirmed in ss 5 and 6 "would need to be manifested within the statute with unmistakable clarity".
- [40] The following statement of principle is to be found in the reasons of Barwick CJ in *Wade v New South Wales Rutile Mining Co Pty Ltd*:¹⁹
- "... the fundamental principle that if Parliament intends to derogate from the common law right of the citizen it should make its law in that respect plain is pertinent to the question whether any such implication should be sought to be made. The courts are not entitled, and ought not, to eke out a derogation of such private rights by implications not rendered necessary by the words used by Parliament but merely considered to be consistent with the policy which the courts conclude or suppose the Parliament to have intended to implement."
- [41] The above passage is often quoted and its authority is undisputed, but as is apparent from it and other authority, the presumption under consideration may be displaced by implication.²⁰ The implication here is irresistible for the above reasons.
- [42] Also, it would be wrong to view this legislation as detracting from common law rights. Rather, the Act is remedial in nature and protective of the rights and property of incapacitated persons. As such, the legislation should be construed liberally.²¹ The fact that in other States the legislatures have chosen to make express provision for the power a protected person whose property is under the equivalent of administration has to deal with his or her property and for the consequences of an impermissible dealing provides scant support for the appellant's argument. Such provisions may well have been inserted out of an abundance of caution. In some cases they have been inserted so as to provide a more comprehensive and flexible framework for dealing with transactions by protected persons.²² Also, such legislation was enacted long after it had been established that a purported disposition of his or her property by an incapacitated person the control of whose property had passed to the Crown or a receiver appointed under a statute was void. Authorities in this regard are discussed below.
- [43] For the above reasons, it was only the administrator who had power to deal with the land during the term of the interim order. The Contract was not binding on the respondent.
- [44] Under Clause 10.2 of the Agency Agreement, commission was stated to be payable "On settlement". Clause 2.1 of the standard terms and conditions forming part of the Agency Agreement provided:

2. ENTITLEMENT TO COMMISSION

- 2.1 The Client agrees to pay the Agent commission as specified in the Appointment if a Contract of Sale of the Property is entered into with a buyer, whether within the Term or after

¹⁹ (1969) 121 CLR 177 at 181.

²⁰ *Coco v The Queen* (1994) 179 CLR 427 at 437, 438.

²¹ See e.g., *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 43, 44 per Mason CJ.

²² *Guardianship and Administration Act 1993* (SA) and *Guardianship and Administration Act 1990* (WA).

the Term, where the Relevant Person is the effective cause of the sale within the Term, provided that:

- (1) the Contract of Sale of the Property is completed; or
- (2) the Client defaults under the Contract of Sale and that Contract is terminated by reason of or following that default; or
- (3) the Contract of Sale is not completed and the whole or part of the deposit paid is liable to be forfeited; or
- (4) the Contract of Sale is terminated by mutual agreement of the Client and the buyer."

[45] By virtue of Clause 2 of the Agency Agreement, the appellant's entitlement to a commission depended on the entering into of a Contract of Sale. It was assumed, correctly in my view, by the parties that the Contract had to be valid and binding on the respondent and the purchaser under it for an entitlement to commission to arise.

[46] It is the case, as counsel for the appellant contends, that an instrument voidable by reason of the incapacity of a party is valid until avoided by a party or his or her representatives.²³ That principle applies to contracts entered into by persons who are deficient in mental capacity.²⁴ However, the difficulty for the appellant is that the respondent's lack of competence to enter into the Contract arose, not from any want of mental capacity on his part but from the fact that his powers in relation to "financial matters" had passed to his administrator to the exclusion of himself. That rendered the Contract void for the reasons given by the Court in *Gibbons v Wright*.²⁵

"The law relating to persons who are lunatics so found must be put on one side at the outset. Such a person is held incompetent to dispose of his property, not because of any lack of understanding (indeed he remains incompetent even in a lucid interval), but because the control, custody and power of disposition of his property has passed to the Crown to the exclusion of himself. Accordingly his disposition is completely void: *Re Walker*. For a similar reason, the conveyance of a person in respect of whom, though he is not a lunatic so found, a receiver has been appointed under s. 116 (1) (d) of the *Lunacy Act 1890 (Imp.)* (53 and 54 Vict. c. 5), has been held to be void: *Re Marshall*. " (footnotes deleted)

[47] In *Re Marshall*,²⁶ Eve J, in holding that a document executed by the incapacitated person after a receiver had been appointed of his estate under the *Lunacy Act 1890 (U.K.)* was null and void, said:

"A very similar point was considered in the Court of Appeal in *In re Walker*, but there the Court was dealing with a lunatic so found by inquisition. The Court refused to direct an inquiry whether the lunatic had a lucid interval at the time of the execution of the document impeached and decided that it was wholly void. The question is, does the same result follow when the document is executed by a person not certified as a lunatic but respecting whom an order has been made

²³ *Gibbons v Wright* (1954) 91 CLR 423 at 439.

²⁴ *Gibbons v Wright (supra)* at 443, 444.

²⁵ (1954) 91 CLR 423 at 439, 440 and see also *Re JNRD and the Protected Estates Act* (1992) 28 NSWLR 728; and *David by her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417.

²⁶ [1920] 1 Ch 284 at 288, 289.

under s. 116, sub-s 1 (d)? I think it is impossible to read the judgments of the Court of Appeal in *In re Walker*, and particularly those passages where the Lords Justices relied on the provisions of s. 120 of the Lunacy Act, 1890, equally applicable be it observed to lunatics not so found, without coming to the conclusion that their reasoning applies to these persons also. The way it is put is that the right of a person of unsound mind to manage his affairs is suspended by the order and that the sole management thereof in the meantime is committed to the committee or quasi-committee as the person appointed under s. 116, sub-s 1 (d), is called in some of the judgments. If this were not so, this unsatisfactory result would follow, that the affairs of the person of unsound mind, although put under the control of one person, the receiver, would in fact be controlled by two persons – namely, the person of unsound mind and the receiver. That is a state of things which the Court ought not to recognize if it can be avoided and it follows that in my opinion the reasoning of *In re Walker* applies to a case like the present, and the decision ought to be treated as extending to persons in the position of the plaintiff. I think that the concluding words of Cozens-Hardy L.J.'s judgment apply equally to the case of a lunatic so found and a person in respect of whose affairs a receiver has been appointed. He says: 'It cannot be right that the Crown, or the committee who represents the Crown, should have the control and management of the lunatic's estate, and at the same time that she should have power to dispose of her estate as she thinks fit. In my opinion this deed ought to be treated as absolutely null and void.'" (footnotes deleted)

- [48] In my view, the Contract had no legal force or effect. The respondent had no power to enter into it. The Contract was not capable of being affirmed. It is possible that by his conduct the respondent may have become estopped from asserting, as against the purchaser, that the Contract was in existence. Also, it may be that a new contract in terms of the Contract was entered into as a result of the parties' conduct. However, these possibilities were neither pleaded nor argued.
- [49] The primary judge was therefore correct in dismissing the claim and the appeal should be dismissed with costs.