SUPREME COURT OF QUEENSLAND

CITATION:	*Shorten v Bell-Gallie* [2014] QCA 300
PARTIES:	**IAN RODGER WILLIAM SHORTEN** (applicant) **v** **SHIRLEY BELL-GALLIE** (respondent)
FILE NO/S:	Appeal No 11869 of 2013 QCAT Appeal No 1 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	25 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2014
JUDGE:	Fraser JA and North and Flanagan JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application filed 10 December 2013 for leave to appeal be refused.** **2. The application for leave to adduce new evidence filed 8 January 2014 be refused.** **3. No order as to costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant was the fiancée of a permanently disabled woman – where the woman had three members of her family appointed as her administrators pursuant to the *Guardianship and Administration Act* 2000 (Qld) ("**GAA**") – where those three family members were replaced with the Public Trustee of Queensland by the Queensland Civil and Administrative Tribunal ("**QCAT**") – where the Public Trustee was replaced as administrator with the respondent – where the applicant applied for a review of the respondent's appointment as administrator pursuant to s 31 of the GAA prior to the appointment's expiry – where the review application was dismissed without a hearing in accordance with a practice direction – where the applicant appealed the dismissal of the

review application to the Appeal Division of QCAT ("**Appeal Tribunal**") – where the applicant applied to introduce new evidence into the Appeal Tribunal and was unsuccessful – where the applicant's appeal to the Appeal Tribunal was dismissed – where the applicant applies for leave to appeal the Appeal Tribunal's decision to the Court of Appeal – where an appeal to the Court of Appeal can only be on a question of law – where the applicant submits that he was denied natural justice, that there was a failure to take into account relevant considerations, that irrelevant considerations were taken into account and that the Appeal Tribunal misconstrued s 146 of the QCAT Act – whether leave ought to be granted to appeal against the decision of the Appeal Tribunal

APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the applicant was the fiancée of a permanently disabled woman – where the woman had three members of her family appointed as her administrators pursuant to the *Guardianship and Administration Act* 2000 (Qld) ("**GAA**") – where those three family members were replaced with the Public Trustee of Queensland by the Queensland Civil and Administrative Tribunal ("**QCAT**") – where the Public Trustee was replaced as administrator with the respondent – where the applicant applied for a review of the respondent's appointment as administrator pursuant to s 31 of the GAA prior to the appointment's expiry – where the review application was dismissed without a hearing in accordance with a practice direction – where the applicant appealed the dismissal of the review application to the Appeal Division of QCAT ("**Appeal Tribunal**") – where the applicant applied to introduce new evidence into the Appeal Tribunal and was unsuccessful – where the applicant's appeal to the Appeal Tribunal was dismissed – where the applicant applies for leave to appeal the Appeal Tribunal's decision to the Court of Appeal – where the applicant applies for fresh evidence to be admitted into the Court of Appeal – whether leave ought to be granted for fresh evidence to be admitted into the Court of Appeal

Guardianship and Administration Act 2000 (Qld), s 31, s 35
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 28, s 29, s 32, s 142, s 146, s 150, s 151, s 153

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Niall v Mangrove Housing Association Inc [2014] QCA 58, cited
Queensland Building and Construction Commission v Robuild Pty Ltd [2014] QCA 81, cited
Underwood v Queensland Department of Communities (State of Queensland) [2013] 1 Qd R 252; [2012] QCA 158, cited

COUNSEL:	The applicant appeared on his own behalf with T C Reihana assisting No appearance for the respondent
SOLICITORS:	The applicant appeared on his own behalf with T C Reihana assisting No appearance for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Flanagan J and the orders proposed by his Honour.

[2] **NORTH J:** I agree with the reasons for judgment of Flanagan J and the orders proposed by His Honour.

[3] **FLANAGAN J:** By application filed 10 December 2013, the applicant sought three orders:

(a) an extension of time;
(b) leave to appeal; and
(c) leave to adduce "new evidence".

[4] The applicant also filed an interlocutory application on 8 January 2014 again seeking leave to adduce "new evidence".[1]

[5] The applications, as originally filed, named the "Brisbane QCAT Registry" as the second respondent. On 28 March 2014 Holmes JA, pursuant to rule 69(1)(a) of the *Uniform Civil Procedure Rules* 1999 (Qld), ordered the removal of the second respondent from the application for leave to appeal.[2]

[6] At the hearing of the applications there was no appearance for the respondent. The applicant, Mr Shorten, was self represented. The Court granted leave for a friend of Mr Shorten, Mr Reihana, to make submissions on his behalf.[3]

Extension of time

[7] At the commencement of the hearing the Court granted an extension of time for the making of the application for leave to appeal. The decision from which leave to appeal is sought is the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal ("**QCAT**") delivered 15 October 2013. Section 151(2)(b) of the *Queensland Civil and Administrative Act* 2009 (Qld) ("**QCAT Act**") requires that an application for leave to appeal be made within 28 days after the relevant day unless the Court of Appeal orders otherwise. Section 151(3)(a) provides that "relevant day" means "the day the person is given written reasons for the decision being appealed against". In an affidavit filed by the applicant on 10 December 2013[4] the applicant states that he initially sought to file an application for leave to appeal within time but used the incorrect form. When he attempted to file his application using the correct form the time limit had expired. In those circumstances it was

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1 In each application the reference to "new evidence" is a reference to the same evidence that the applicant submits should have been considered by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal; Transcript of proceedings, 15 August 2014, 1-5, lines 25-27.

2 *Shorten v Bell-Gallie & Anor* [2014] QCA 57.

3 Transcript of proceedings, 15 August 2014, 1-2, lines 27-37.

4 Affidavit of Ian Rodger William Shorten affirmed 6 December 2013, [5]-[6]; Appeal Record Book, 131-132.

appropriate to extend time within which to make an application for leave to appeal pursuant to s 151(2)(b) of the QCAT Act.

Background

[8] Ms JS has a permanent disability arising from a diagnosis of Wernicke's Encephalopathy or Korsakoff's Syndrome.

[9] Prior to 2009, QCAT appointed three members of Ms JS' family as her administrators pursuant to the *Guardianship and Administration Act* 2000 (Qld). In 2009 QCAT ordered the replacement of the three family members with the Public Trustee of Queensland. Subsequently, on 29 July 2010, the Public Trustee was replaced by the respondent. The respondent was appointed Ms JS' administrator for a period of five years.[5] The Tribunal's orders made on 29 July 2010 included the following order:[6]

> "The Tribunal directs Jean Patricia James, Trudy Louise James, and Cindy Patricia Nealson, and The Public Trustee of Queensland (in their respective capacities as former administrators of JS) to provide full details in their possession to Shirley May Bell-Gallie of financial transactions on the Adult's bank accounts for the period from 8 April 2009 until the date of closure of the Adult's ANZ Bank account within thirty (30) days."

[10] The present applicant, Mr Shorten, is the fiancée of Ms JS. On 16 July 2012 he filed with QCAT an application for review of the respondent's administration.[7] The application was brought pursuant to s 31 of the *Guardianship and Administration Act* 2000 (Qld) which provides:

> "**31 Appointment review process**
>
> (1) The tribunal may conduct a review of an appointment of a guardian or administrator (an ***appointee***) for an adult in the way it considers appropriate.
>
> (2) At the end of the review, the tribunal must revoke its order making the appointment unless it is satisfied it would make an appointment if a new application for an appointment were to be made.
>
> (3) If the tribunal is satisfied there are appropriate grounds for an appointment to continue, it may either—
>
> (a) continue its order making the appointment; or
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> (b) change its order making the appointment, including, for example, by—
>
> (i) changing the terms of the appointment; or
>
> (ii) removing an appointee; or
>
> (iii) making a new appointment.
>
> (4) However, the tribunal may make an order removing an appointee only if the tribunal considers—

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5 Order of the Queensland Civil and Administrative Tribunal dated 29 July 2010, [2]; Appeal Record Book, 58.

6 Order of the Queensland Civil and Administrative Tribunal dated 29 July 2010, [5]; Appeal Record Book, 59.

7 Application for administration/guardianship appointment or review dated 12 July 2012; Appeal Record Book, 69-77.

(a) the appointee is no longer competent; or

(b) another person is more appropriate for appointment.

(5) An appointee is no longer competent if, for example—

(a) a relevant interest of the adult has not been, or is not being, adequately protected; or

(b) the appointee has neglected the appointee's duties or abused the appointee's powers, whether generally or in relation to a specific power; or

(c) the appointee is an administrator appointed for a matter involving an interest in land and the appointee fails to advise the registrar of titles of the appointment as required under section 21(1); or

(d) the appointee has otherwise contravened this Act.

(6) The tribunal may include in its order changing or revoking the appointment of an administrator a provision as to who must pay the fee payable to the registrar of titles for advice of the change or revocation."

[11] By the application for review filed 16 July 2012, Mr Shorten sought to have the respondent removed as administrator and replaced by Shona May Reihana. The removal of the respondent was sought on a number of grounds including:[8]

"(1) No financial update, balance sheet, coming from Administrator over last 2 years

(2) Refusal to act in terms of s.35, to take previous administrators to task/accountability for 'missing' money

(3) Paying people to have basic bookwork done when the basis of current administrators tenure was 'no charge'."

[12] On 23 August 2012 Senior Member Endicott made certain directions in respect of the hearing of the application for review. Those directions required Mr Shorten to file and serve any further information on which he intended to rely in support of "a request to review the appointment of the administrator for JS together with submissions as to why the review application should continue to a hearing and not be dismissed without hearing in accordance with Practice Direction 8 of 2010". It was further directed that a Member of the Tribunal would make a determination whether to schedule a hearing of the review application or dismiss the application on the basis of the filed submissions without an oral hearing.[9]

[13] Mr Shorten required an extension of time in order to file his further information and submissions. This was granted by Acting Senior Member Hanly on 14 September 2012. Direction 3 made on 14 September 2012 restated that a member of the Tribunal would make a determination on the basis of the filed submissions, and without an oral hearing, as to whether to schedule the review application for hearing or whether to dismiss the review application.[10]

[14] In support of the application for review, Mr Shorten filed a six page submission together with an affidavit of Ms JS, Ms Bell-Gallie and various correspondence

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8 Application for administration/guardianship appointment or review dated 12 July 2012; Appeal Record Book, 67.

9 Directions of Senior Member Endicott dated 23 August 2012; Appeal Record Book, 78.

10 Directions of Acting Senior Member Hanly dated 14 September 2012; Appeal Record Book, 79.

between members of Ms JS' family and the respondent.[11] Mr Shorten's submissions sought the replacement of the respondent as administrator with Ms Reihana. In his submissions Mr Shorten identified his primary contention as follows:[12]

> "… the central pillar of contention now is simply that Shirley [the respondent], as did the previous Administrator Public Trustee, failed at all to investigate and take to task the originating administrators the JS family womenfolk for their glaringly obvious discrepancies and withdrawals from the Adult, my fiancee's bank accounts."

[15] This failure on the part of the respondent to call the previous administrators to account was submitted by Mr Shorten to constitute a breach of s 35 of the *Guardianship and Administration Act* 2000 (Qld) which provides:

> "**35 Act honestly and with reasonable diligence**
>
> A guardian or administrator who may exercise power for an adult must exercise the power honestly and with reasonable diligence to protect the adult's interests.
>
> Maximum penalty – 200 penalty units."

[16] By decision delivered 23 October 2012 Member Joachim dismissed the application to review the appointment of the respondent as Ms JS' administrator.[13]

[17] Member Joachim heard and determined the application to review on the papers pursuant to s 32 of the QCAT Act and by reference to Practice Direction 8 of 2010. This Practice Direction in effect provides that a review of an appointment of an administrator by the Tribunal will be conducted at the end of the appointment except in cases where new or relevant information has become available since the hearing, or a relevant change in circumstances has occurred since the hearing, or relevant information that was not presented to the Tribunal at the hearing has become available.

[18] Member Joachim dismissed the application for review on the basis that none of the criteria outlined in Practice Direction 8 of 2010 had been met.[14] In dismissing the application for review Member Joachim observed as follows:[15]

> "[11] Much of the information in Mr Shorten's submissions refer to the actions of Cindy Nealson, a former administrator.
>
> [12] There is nothing in the material which indicates that the administrator has not been doing a satisfactory job. There is nothing in the material which demonstrates that any of the criteria referred to in practice direction 8 of 2010 are met for the purposes of conducting an early review of the appointment.
>
> [13] There is no evidence that the attorney has not acted honestly and with reasonable diligence. Mr Shorten criticizes the administrator for not updating JS' will. The fact is she has no power to update her will. There is nothing whatsoever in JS' affidavit which refers to the actions of the administrator."

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11 See generally, Appeal Record Book, 80-100.

12 Submissions for justification for review of appointment by Mr Ian W.R. Shorten (undated), 6; Appeal Record Book, 85.

13 *JMW* [2012] QCAT; Appeal Record Book, 101-103.

14 *JMW* [2012] QCAT, [14]; Appeal Record Book, 103.

15 *JMW* [2012] QCAT, [11]-[13]; Appeal Record Book, 103.

Member Joachim noted that the basis of the respondent's tenure as administrator was that there would be no charge.[16]

[19] On 10 December 2012 Mr Shorten filed an application for appeal or leave to appeal the decision of Member Joachim to the Appeal Tribunal. On 13 June 2013 Senior Member Stilgoe made directions in respect to a foreshadowed application by Mr Shorten for leave to file fresh evidence to rely on in the application for leave to appeal.[17] At a further directions hearing held on 22 August 2013 Senior Member Stilgoe refused Mr Shorten's application to file fresh evidence.[18] Mr Shorten, in an affidavit filed in this Court on 24 February 2014, exhibited the transcript from both these directions hearings.[19] This affidavit was filed by the applicant in support of a proposed appeal in respect of the decision of Senior Member Stilgoe refusing the application to file fresh evidence. The affidavit exhibited a proposed Notice of Appeal. In oral submissions the applicant abandoned any reliance on this affidavit.[20]

[20] Mr Shorten appealed and sought leave to appeal Member Joachim's decision to the Appeal Tribunal of QCAT on the following grounds:[21]

> "1.) Practice Note 8 of 2010 was wrongly implemented or applied to my circumstance.
>
> 2.) Use of s.28 discretion to decide under s.32 to hear application on the papers resulted in a contended breach of s.29 where my 'expressed views and assertions' could not possibly have been fulfilled by no in-person hearing."

[21] The references in the grounds to ss 28, 29 and 32 are to the QCAT Act. Section 28 deals generally with the conduct of proceedings before the Tribunal. Section 29 concerns the Tribunal ensuring that parties have a proper understanding in respect of proceedings. Section 32(2) permits the Tribunal, if appropriate, to conduct all or part of a proceeding entirely on the basis of documents. I return to a consideration of these provisions below.

[22] By this appeal and amended application for leave to appeal, the applicant sought the further relevant orders:[22]

> (a) pursuant to s 146(b) and (d) of the QCAT Act, the Appeal Tribunal "overturn" the decision of Member Joachim made 15 October 2012 and finalise the s 31 *Guardianship and Administration Act* 2000 (Qld) application for review at the appeal hearing; and
>
> (b) a declaration that the respondent breached s 35 of the *Guardianship and Administration Act* 2000 (Qld).

[23] Mr Shorten, pursuant to s 142(1) and s 142(3)(b) of the QCAT Act, required the Appeal Tribunal's leave to appeal on a question of fact, or a question of mixed law and fact. In relation to the first ground, the Appeal Tribunal refused leave to appeal stating:[23]

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16 *JMW* [2012] QCAT, [3]; Appeal Record Book, 102.

17 Directions of Senior Member Stilgoe OAM dated 13 June 2013; Appeal Record Book, 113.

18 Directions of Senior Member Stilgoe OAM dated 22 August 2013, Appeal Record Book, 114.

19 Exhibits "A1" and "B" to the affidavit of Ian William Rodger Shorten sworn 24 February 2014.

20 Transcript of proceedings, 15 August 2014, 1-7, lines 1-5.

21 Amended appeal and application for leave to appeal dated 23 August 2013; Appeal Record Book, 117.

22 Amended appeal and application for leave to appeal dated 23 August 2013; Appeal Record Book, 117.

23 Decision of Senior Member O'Callaghan and Member Bayne dated 15 October 2013, [26]-[27]; Appeal Record Book, 124.

> "[26] Mr Shorten refers to the difficulties he and Mr Reihana have had in obtaining various financial documents and returns. However, the Tribunal has appointed Ms Bell-Gallie as Ms JS' administrator and as such she is accountable to Ms JS, and to the Tribunal. Despite Mr Shorten's opinions to the contrary, the Member found that there was nothing in the material before him to support that Ms Bell-Gallie was not doing a satisfactory job. She had acted appropriately and had provided appropriate financial returns to the Tribunal as directed. We have examined the materials, and agree.
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> [27] The Member was also satisfied on 23 October 2012 that no new or relevant information had become available since the hearing on 29 July 2010. We have perused the documents on file on which the Member based this determination and agree."

[24] As to the second ground, the Appeal Tribunal treated this as an alleged breach of natural justice which was a question of law for which leave to appeal was not required. The Appeal Tribunal, however, dismissed the appeal on the second ground stating:[24]

> "[40] We are satisfied that Mr Shorten was not denied any natural justice and has not been subject of any lack of procedural fairness.
>
> [41] We have also considered whether the Member had properly taken all relevant evidence into account.
>
> [42] The Member is a very experienced Member of the Tribunal who had obviously spent some time studying the documents before him. We do not accept the assertion that the Member did not understand the issues and would have so if Mr Shorten (and/or Mr Reihana) had been available in person to explain them. There is no evidence before us to support that the Member failed to fully consider the views and opinions of Mr Shorten.
>
> [43] The Member's perspective of the matters under contention is endorsed by us. Even with the benefit of the very lengthy and well detailed explanations and elucidations by Mr Reihana, we have reached the same conclusions."

The present application for leave to appeal

[25] Appeals to this Court are dealt with under Chapter 2, Part 8, Division 2 of the QCAT Act. A person may appeal to this Court against a decision of the Appeal Tribunal to refuse an application for leave to appeal (s 150(1)) or a final decision of the Appeal Tribunal (s 150(2)(b)). Leave to appeal is required and the appeal is only on a question of law (s 153). Section 153 deals with the Court's powers in deciding appeals on questions of law only.

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[24] Decision of Senior Member O'Callaghan and Member Bayne dated 15 October 2013, [40]-[43]; Appeal Record Book, 126.

The applicant's submissions

(a) *Natural justice*

[26] The applicant submitted that the Appeal Tribunal had misconstrued his submission in respect of Member Joachim determining the application for review on the papers:[25]

> "Clause [9] & [31] are contended twisted propositions, because it was not a breach of Shorten's natural justice that was appealed against, but a failure by the first instance to ensure, pursuant to **s.29 (1) (b) that 'The tribunal must take all reasonable steps to … understand the … expressed views and assertions of a party to … the proceedings**'.
>
> So, by deciding the initial s.31 Review of Appointment application out the back room on the papers alone, the first instance was never going to 'understand the actions, expressed views and assertions' of the appellant within the submissions and material he had filed for the application - and so adjudicator Mr Joachim didn't / couldn't get to grips with 'the majority of the submissions', wholly due to the discretionary call by the Senior Member Clare Endicott to deal with the s.31 application on the papers. Must means must."

[27] The applicant therefore sought to challenge the direction made by Senior Member Endicott on 23 August 2012 that the application for review be dealt with on the papers. The applicant identified two bases for this challenge; first that the direction breached s 29(1)(b) of the QCAT Act and secondly that because Senior Member Endicott was the Member who made the order on 29 July 2010 appointing the respondent administrator there is "an element of apprehended bias" in Senior Member Endicott making relevant directions on 23 August 2012.[26]

(b) *Failure to take into account relevant considerations*

[28] The applicant further submitted that Member Joachim and the Appeal Tribunal failed to take into account relevant considerations, namely the submissions and material filed by the applicant. In short, the applicant submitted that the material and the submissions made by the applicant before Member Joachim and the Appeal Tribunal inevitably led to only one conclusion, namely that the respondent had breached s 35 of the *Guardianship and Administration Act* 2000 (Qld) and such breach justified not only a review of her appointment but her "inevitable removal from administration". The applicant, relying on *House v The King*,[27] contended that this constituted an error of law rather than an error of fact or a mixture of fact and law.

[29] The applicant also relied on the alleged breaches of s 35 of the *Guardianship and Administration Act* 2000 (Qld) by the respondent after her appointment as leading to the conclusion that Practice Direction 8 of 2010 was misapplied.

[30] The alleged breaches by the respondent of s 35 identified by the applicant were:

(a) the respondent failing to properly investigate alleged financial improprieties by previous administrators;

(b) the engagement of a bookkeeper by the respondent (at the expense of Ms JS) to assist in the preparation of the administration's financial accounts;

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25 Applicant's outline of argument for appeal, 1.

26 Applicant's outline of argument for appeal, 1.

27 (1936) 55 CLR 499; [1936] HCA 40.

(c) a failure to have a will executed for Ms JS;

(d) the respondent was colluding with former family administrators; and

(e) the respondent was "knee deep in a conflict of interest" situation with former family administrators.

[31] The applicant therefore submitted that the Appeal Tribunal misconstrued s 35 essentially because it failed to find that the respondent had breached the section in the respects identified by the applicant. The fresh evidence sought to be adduced by the applicant was submitted to be relevant to these alleged breaches of s 35. The fresh evidence consists of an affidavit of Ms JS sworn 3 July 2013 and an affidavit of Patricia Cook sworn 9 August 2013. The applicant submitted that the fresh evidence is sought to be adduced:[28]

> "… mainly for the 'even more nails in [the respondent's] coffin' element, of further s.35 breaches by the Administrator to come to fruition, to sit alongside the other 'overlooked' s.35 breaches within the submissions and material before the first instance and appeal tribunal."

(c) *Taking into account irrelevant considerations*

[32] Again relying on *House v The King*, the applicant submitted that the Appeal Tribunal erred in failing to find that Member Joachim, in having regard to management accounts filed by the respondent with the Tribunal, took into account an irrelevant consideration.

(d) *Misconstruing s 146 of the QCAT Act*

[33] Finally, the applicant submitted that the Appeal Tribunal misconstrued s 146 of the QCAT Act in that it should have conducted a review of the respondent's appointment, removed the respondent as administrator and replaced her with Ms Reihana.

Consideration

[34] The applicant may only appeal on a question of law.[29] This Court should therefore refuse leave to appeal if the applicant has not demonstrated a reasonably arguable case that the Appeal Tribunal erred in law. There must be reasonable prospects of success to warrant a grant of leave,[30] and the interests of justice must warrant this Court's intervention.[31]

[35] For the reasons which follow I am of the opinion that the applicant has not established any arguable case of error of law and accordingly leave to appeal should be refused. The applicant's interlocutory application to adduce fresh evidence should also be refused.

(a) *Natural justice*

[36] The applicant's submission that Member Joachim did not comply with s 29(1)(b) of the QCAT Act should be rejected. This subsection falls within Chapter 2, Part 2 of the QCAT Act which deals with practices and procedures. The procedure for

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28 Applicant's outline of argument for appeal, 3.

29 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150(3)(a).

30 *Underwood v Department of Communities* [2013] 1 Qd R 252, 256 [18] (Muir JA), 265 [68] (P Lyons J); *Niall v Mangrove Housing Association Inc* [2014] QCA 58, [7] (Gotterson JA).

31 *Queensland Building and Construction Commission v Robuild Pty Ltd* [2014] QCA 81, [2] (Holmes JA).

a proceeding is at the discretion of the Tribunal, subject to the QCAT Act, an enabling Act and the rules.[32] The Tribunal, in all proceedings, must act fairly and according to the substantial merits of the case.[33] In conducting a proceeding it must observe the rules of natural justice[34] but must act with as little formality and technicality and with as much speed as the requirement of the QCAT Act, an enabling Act or the rules and a proper consideration of the matters before the Tribunal permit.[35]

[37] A further requirement is that pursuant to s 29(1)(b) the Tribunal must take all reasonable steps to understand the actions, expressed views and assertions of a party. It is important to clearly identify what Member Joachim was deciding. Under s 31(1) of the *Guardianship and Administration Act* 2000 (Qld) it is the Tribunal that may conduct a review of an appointment of an administrator. Here the applicant was requesting that the Tribunal conduct a review prior to the expiry of the respondent's five year appointment.

[38] The first direction made by Senior Member Endicott on 23 August 2012 was that the applicant had to file and deliver his material on which he intended to rely in support of his request (for the Tribunal) to review the appointment. Member Joachim was therefore dealing with a request by the applicant for a review to be conducted. For the purposes of understanding this request and why the Tribunal may undertake such review, Member Joachim had before him material and extensive written submissions from the applicant.[36] As noted in [13] above, the applicant required, and was granted, an extension of time to file and deliver his material. It cannot be said, from a reading of the Reasons of Member Joachim that, contrary to s 29(1)(b) of the QCAT Act, he did not take "all reasonable steps" to understand the expressed views and assertions of the applicant. This is particularly so in circumstances where previous directions had been made (including an extension of time) for the applicant to file his material.

[39] There is a further difficulty with the applicant's submission in respect of s 29(1)(b). It was not Member Joachim who ordered that the hearing be heard on the papers. These were the previous directions made by Senior Member Endicott and Acting Senior Member Hanly on 23 August 2012 and 14 September 2012 respectively. The applicant did not seek to appeal these directions to the Appeal Tribunal nor did he object to this course at the time the directions were made.[37] He only complained about his application being determined on the papers after Member Joachim's decision was delivered.

[40] Nor did the applicant make any complaint on 23 August 2012 that Senior Member Endicott should not make directions because she had made the original order appointing the respondent as administrator. It is clear, from the applicant's submissions filed in support of his application for review, that he did not oppose the original order of Senior Member Endicott appointing the respondent as administrator.[38]

[41] The applicant has not demonstrated any arguable error of law on the part of the Appeal Tribunal in respect to any alleged breach of s 29(1)(b) QCAT Act.

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32 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(1).

33 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(2).

34 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(3)(a).

35 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(3)(d).

36 See [12] above.

37 This is noted in the decision of the Appeal Tribunal (Senior Member O'Callaghan and Member Bayne) dated 15 October 2013, [37]-[39]; Appeal Record Book, 125.

38 Applicant's submissions for justification for review of appointment (undated), 6; Appeal Record Book, 85.

(b) *Failure to take into account relevant considerations*

[42] It is clear from a consideration of the Reasons of Member Joachim that he took into account the material and submissions filed by the applicant. Member Joachim stated in this respect:[39]

> "[9] The Tribunal has carefully considered the submissions sent by Toni Reihana, the proposed alternative administrator, from Ian Shorten, from JS, the administrator and Trudy James."

[43] The analysis of this material by Member Joachim is noted by the Appeal Tribunal at [23] to [25] of their Reasons:[40]

> "[23] The Member considered that 'the majority of the submissions contained material which was irrelevant to the actions of the administrator'. We agree.
>
> [24] Many pages of the submissions details events and the actions of the family as administrators some years ago, and describe Mr Shorten's negative opinions of the family. Various allegations and assertions are made throughout the materials, many of which are unsubstantiated. The content of several emails basically confirms the ill will between Mr Shorten (and Mr Reihana) and various parties including Ms Bell-Gallie.
>
> [25] The Member also discounted Mr Shorten's concerns about the alleged efforts of Ms Bell-Gallie to remake Ms JS' will and appoint attorneys for her. We agree this is irrelevant in that Ms JS' disability will preclude her, on the grounds of her incapacity, from so doing."

[44] Given that the material and the submissions filed by the applicant were taken into account by Member Joachim the applicant has not demonstrated any error of law on the part of the Appeal Tribunal in this respect. The applicant, in oral submissions, contended that neither the Appeal Tribunal nor Member Joachim gave sufficient weight to the submissions and material filed by the applicant.[41]

[45] It was a matter for the Appeal Tribunal as to how much weight should be given to the submissions and material filed by the applicant. There is no statutory provision in either the QCAT Act or the *Guardianship and Administration Act* 2000 (Qld) which stipulates the weight to be accorded a particular consideration.[42] As noted by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:[43]

> "… in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power."

[46] As to how much weight is given to the applicant's submissions and material is not an error of law.

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39 *JMW* [2012] QCAT, [9]; Appeal Record Book, 102.

40 Decision of the Appeal Tribunal (Senior Member O'Callaghan and Member Bayne) dated 15 October 2013, [23]-[25]; Appeal Record Book, 124.

41 Transcript of proceedings, 15 August 2014, 1-12, lines 10-25.

42 See generally, Mark Aronson and Matthew Groves, *Judicial Review of Administration Action* (Thomson Reuters, 5th ed, 2013) [5.110].

43 (1986) 162 CLR 24, 41.

[47] In any event, a proper consideration of the submissions and material filed by the applicant does not demonstrate any basis for the relief sought, both before the Appeal Tribunal and this Court. Part of the relief sought was a declaration that the respondent has contravened s 35 of the *Guardianship and Administration Act* 2000 (Qld). Section 35 creates an offence. Section 35 requires an administrator who may exercise power for an adult, to exercise that power honestly and with reasonable diligence to protect the adult's interests. The material filed falls woefully short of establishing any of the alleged breaches by the respondent of s 35 identified in [30] above. The fact that an administrator of a person with a disability consults with that person's family members or offers payment to a person who assists in the preparation of the administration accounts does not constitute evidence of a breach of s 35. To the contrary, these are steps that one might expect an administrator to take in conformity with their duty under s 35. Nor did the orders made by QCAT referred to in [9] above require the respondent to conduct an inquiry in relation to the actions of previous administrators.

[48] Accordingly, no error has been demonstrated on the part of the Appeal Tribunal in construing s 35. Simply because the applicant does not agree with the result does not mean an error of law has been demonstrated. Nor does it mean that the Tribunal or Appeal Tribunal misconstrued Practice Direction No 8 of 2010.

(c) *Taking into account irrelevant considerations*

[49] The irrelevant consideration is said to be the reference by Member Joachim (agreed to by the Appeal Tribunal) that the respondent (by reference to the accounts filed with the Tribunal) was managing the estate in the adult's best interests and in accordance with the *Guardianship and Administration Act* 2000 (Qld).[44]

[50] The applicant's submissions in this respect are misconceived. There is no statutory criteria either in the QCAT Act or the *Guardianship and Administration Act* 2000 (Qld) which stipulates what matters were relevant or irrelevant to the decision of the Member whether to accede to the applicant's request for the Tribunal to conduct a review. The submission fails at the outset in that the applicant has not established that the reference to the accounts of the administration filed with the Tribunal constitutes an irrelevant consideration. Further, in circumstances where the applicant was requesting a review on the basis that the respondent had breached s 35, the compliance of the respondent in filing proper accounts with the Tribunal was clearly relevant.

[51] It follows that no arguable error of law in this respect has been established.

(d) *Misconstruing s 146 of the QCAT Act*

[52] Both before this Court and before the Appeal Tribunal the applicant submitted that on the strength of the material that has been filed there is only one inevitable conclusion to a review, namely that the respondent be removed as the administrator and Ms Reihana be appointed.

[53] The applicant relies on ss 146 and 153 of the QCAT Act. These sections are in similar terms and permit the Appeal Tribunal and this Court to set aside the decision and substitute its own decision.

[54] The Appeal Tribunal quite correctly refused to accept this submission, stating:[45]

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44 *JMW* [2012] QCAT, [8]; Appeal Record Book, 102.

45 Decision of the Appeal Tribunal (Senior Member O'Callaghan and Member Bayne) dated 15 October 2013, [45]; Appeal Record Book, 126.

> "[45] … The only application before us today is for leave to appeal or to appeal the decision of the Tribunal on 23 October 2012. Even if these were successful, the only decision we could make today would be that the application for a review proceed to a hearing."

[55] This observation does not support the applicant's submission that the Appeal Tribunal misconstrued s 146. The Tribunal had not undertaken a review pursuant to s 31 of the *Guardianship and Administration Act* 2000 (Qld). All that it had done was refuse an application by the applicant that the Tribunal undertake such a review. If the applicant's course was to be adopted it would result in the respondent being denied natural justice because she would be deprived of an opportunity to put her full evidence forward in respect of any review undertaken by the Tribunal.

[56] No arguable error of law in this respect has been demonstrated.

The interlocutory application to adduce fresh evidence

[57] This application should be refused. It constitutes, in effect, an impermissible appeal from the order of Senior Member Stilgoe made 22 August 2013. There has been no appeal from this order to the Appeal Tribunal nor could there be any appeal to this Court from such an order. This is because Senior Member Stilgoe is not a judicial member of the Tribunal.[46]

Conclusion

[58] The application filed 10 December 2013 for leave to appeal should be refused.

[59] The application for leave to adduce new evidence filed 8 January 2014 should be refused.

[60] No order as to costs.

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[46] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 149(2).