

SUPREME COURT OF QUEENSLAND

CITATION: *TJ v The Public Trustee of Queensland & Anor* [2023] QCA 158

PARTIES: **TJ**
(applicant)
v
THE PUBLIC TRUSTEE OF QUEENSLAND
(first respondent)
CRG
(second respondent)

FILE NO/S: Appeal No 16286 of 2022
QCATA No 149 of 2020

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Queensland Civil and Administrative Tribunal Act*

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane – [2022] QCATA 189 (Senior Member Guthrie)

DELIVERED ON: 4 August 2023

DELIVERED AT: Brisbane

HEARING DATE: 6 June 2023

JUDGES: Bond and Boddice JJA and Callaghan J

ORDERS:

- 1. Leave to appeal be granted.**
- 2. Leave to adduce further evidence be refused.**
- 3. Order 3 of QCATA’s decision of 28 November 2022 be set aside, and in its place it is ordered the appeal to QCATA be allowed.**
- 4. The applicant’s application for compensation in GAA611-16 be remitted to QCAT for rehearing.**

CATCHWORDS: HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – ADMINISTRATION AND FINANCIAL MANAGEMENT – REVIEW, REVOCATION, ETC – where the applicant was appointed as administrator for the second respondent – where the applicant replaced the Public Trustee of Queensland (**the Public Trustee**) as administrator – where the applicant sought an order for compensation to be paid to the second respondent by the Public Trustee for loss said to have been occasioned by its decision as administrator in respect of real properties owned by the second respondent – where those relevant

decisions involved the tenancy of the second respondent's unit, the sale of vacant land purchased to provide cultural and other benefits to the second respondent, and the sale of the unit – where the applicant contends those decisions were not made in accordance with the *Guardianship and Administration and Administration Act 2000* (Qld) and the General Principles articulated by that Act – where QCAT and QCATA dismissed the applicant's application for compensation – where the Public Trustee did not lead any direct evidence before QCAT or QCATA of its decision-making with respect to the relevant decisions – where there was also no evidence, before either Tribunal, that the Public Trustee had sought the second respondent's views, or even attempted to do so, prior to the making of the decisions – where limited enquiries were made with the second respondent's support network with respect to the tenancy arrangement and no enquiries with respect to the sale of the real properties – where the Public Trustee had an obligation to analyse and assess the courses of action which may be reasonably taken and to assess the financial consequences of those actions when making the relevant decisions – whether there was an evidential basis upon which QCATA could conclude the Public Trustee had complied with its obligations in exercising its power as administrator – whether QCATA's decision was affected by error of law

HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – ADMINISTRATION AND FINANCIAL MANAGEMENT – JURISDICTION, PROCEDURE AND EVIDENCE – where QCATA found no evidence had been placed before QCAT suggesting the second respondent's views and wishes were different from those communicated to the Public Trustee by CRG's father and step-mother – where QCATA's decision was made in the context of a direction from QCAT that directions for further submissions will be made if the Tribunal decides a compensation order should be made but considers there is insufficient material to quantify the compensation – where the applicant, a self-represented litigant, failed to lead evidence of alternative courses of action or of loss occasioned by the Public Trustee's failure to comply with the Act – whether a reliance on an absence of evidence in the circumstances deprived the applicant of a fair hearing – whether the applicant was denied procedural fairness

Guardianship and Administration Act 2000 (Qld), s 33, s 34, s 35, s 51, s 59

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 29

Trusts Act 1973 (Qld), s 22, s 24(1)

COUNSEL: The applicant appeared on his own behalf
R T Whiteford and K J Kluss for the first respondent
M O Jones and J T Sargent for the second respondent,
appearing as *amicus curiae*

SOLICITORS: The applicant appeared on his own behalf
Official Solicitor to the Public Trustee of Queensland for the
first respondent
No appearance for the second respondent

- [1] **BOND JA:** I agree with the reasons for judgment of Boddice JA and with the orders proposed by his Honour.
- [2] **BODDICE JA:** On 26 April 2017, the applicant was appointed by the Queensland Civil and Administrative Tribunal (**QCAT**) as an administrator for CRG, the applicant's step-son. He replaced the Public Trustee of Queensland as administrator.
- [3] Subsequent to that appointment, the applicant sought an order, pursuant to s 59 of the *Guardianship and Administration Act 2000* (Qld) (**the Act**), for compensation to be paid to CRG by the Public Trustee for loss said to have been occasioned by its decisions as administrator in respect of real properties owned by CRG.
- [4] On 12 May 2020, QCAT dismissed the application for compensation.
- [5] The applicant sought leave to appeal that decision, to the Queensland Civil and Administrative Tribunal (Appeals) (**QCATA**), and made an application for leave to rely on fresh evidence.
- [6] On 28 November 2022, QCATA granted the applicant leave to appeal, refused leave to rely upon fresh evidence, and dismissed the appeal.
- [7] The applicant seeks leave to appeal QCATA's decision. The applicant contends leave should be granted as a significant injustice has occurred and matters of law arise regarding the application of the Act's General Principles, which are of general importance.

Background

- [8] In December 2000, CRG was awarded \$500,000 for damages for personal injuries suffered in a motor vehicle accident. At the time of receipt of this sum, CRG was aged 18 years, living in a hostel, and lacked capacity to manage his own financial affairs.
- [9] As a consequence of his lack of capacity, the Public Trustee was appointed administrator of CRG's award.
- [10] Subsequent to that appointment, CRG lived in various places. Sometimes, he lived with his mother and her partner, the applicant. At other times, he lived with an uncle and aunt or in a unit at West End or in hostels in Brisbane.
- [11] On 23 August 2002, CRG's mother and his aunt successfully applied to be appointed as joint administrators for CRG, in place of the Public Trustee. That

order was made following conflict between CRG's mother and the Public Trustee and an acceptance that CRG was very dependent on his mother who had advocated on his behalf over an extended period of time.

- [12] On 22 July 2003, the joint administrators used part of CRG's funds to purchase a unit in his name on the Sunshine Coast. Further, on 5 September 2003, the joint administrators used part of CRG's funds to purchase vacant land in his name, which was described as a "bush retreat". It was intended to provide CRG, who is Indigenous, with "cultural, lifestyle and healing opportunities, as well as a financial growth asset".¹
- [13] The unit on the Sunshine Coast was large enough for CRG to live there with his carers. CRG's mother and the applicant subsequently moved into that unit. However, CRG insisted on remaining in Brisbane.
- [14] For a short period, CRG was in jail. Subsequent to his release from jail, in December 2003, CRG lived with his father and step-mother in their rented home.
- [15] On 12 December 2003, QCAT reappointed the Public Trustee, on an emergency interim basis, as CRG's administrator. The appointment of CRG's mother and his aunt as joint administrators was suspended for such period. That appointment, in favour of the Public Trustee, was confirmed by an order made on 8 April 2004.
- [16] The appointment of the Public Trustee as administrator for CRG was made on the basis that CRG's mother and the applicant had failed to pay rent on the unit; had purchased a number of items using CRG's money which were not for CRG's benefit; had not pursued a Centrelink pension for CRG; had not sought Tribunal approval for the purchase of either the unit or the bush retreat (which was necessary as CRG was not living at either property); had failed to provide an updated management plan within three months of the purchase of those properties; and had not complied with the Tribunal's directions to account for financial transactions. There was also a complete breakdown in the relationship between CRG's mother and his aunt, as joint administrators.
- [17] At the time of the Public Trustee's reappointment as administrator, all of the funds that had been transferred to and managed by the joint administrators had been used up. CRG's remaining assets were the unit, in which his mother and the applicant were living without paying rent, and the bush retreat.
- [18] Upon resuming the position of administrator, the Public Trustee took steps to evict CRG's mother and the applicant from the unit. Once that had occurred, the unit was tenanted, commencing from June 2004.
- [19] On 14 January 2005, the Public Trustee sold the bush retreat, at a significant profit on its purchase price. Those funds were invested by the Public Trustee.
- [20] During this period, CRG lived with his father. The Public Trustee commenced paying a fortnightly sum to CRG's father for CRG's board and lodging. That arrangement continued, although from time to time CRG lived on the streets.

¹ AB30 at [12].

- [21] On 8 June 2007, the Public Trustee sold the unit, for a profit on its purchase price. Thereafter, CRG resided in hostels, on the streets, in jail, or at times, with his mother and the applicant.
- [22] In about July 2009, CRG started living on a permanent basis with his mother and the applicant. Thereafter, the Public Trustee made payments from CRG's funds to the applicant.
- [23] On 26 April 2017, QCAT appointed the applicant as administrator for CRG, in place of the Public Trustee. By that time, there had been a significant reduction in CRG's available funds.

QCAT proceeding

- [24] At the hearing before QCAT, the applicant advanced several claims for compensation. The first, made up of vehicle expenses and a sum paid to solicitors on account of legal fees, was dismissed, although aspects were considered in the remaining claims.
- [25] The second and third claims were brought on the basis that, had CRG resided in his own home, that home would have appreciated in value and would have been disregarded, as his main asset, in the assessment of a disability pension. However, by reason of the Public Trustee's decision to rent and then sell the unit and to sell the bush retreat, CRG remained homeless and ineligible for public housing; was without an income; his assets were depleted as a consequence of a perpetual deficit budget; and he lost eligibility for disability support services.
- [26] The applicant contended the Public Trustee's decisions to sell the properties were made in breach of the Act and its General Principles.
- [27] QCAT found there was nothing the Public Trustee did or failed to do which had resulted in CRG not living with his mother at any relevant time and therefore which prevented CRG from living in his own residence when he owned the unit. Further, it was not until about July 2009 that CRG was sufficiently settled to live in his own residence, with care from his family. By that time, his funds had been depleted to such an extent that the plan was no longer practicable. Accordingly, the Public Trustee did not fail to comply with the Act or its General Principles in the exercise of a power.

QCATA decision

- [28] The applicant contended that QCAT did not apply sufficient statutory weight to the Act, its General Principles and the *Trusts Act 1973* (Qld); had disregarded CRG's rights and interests; and had erred by making assumptions that QCAT was not culturally competent to make and that demonstrated racial bias.
- [29] QCATA found no basis for concluding that QCAT erred in the determination of any relevant fact or in applying the relevant law. QCATA found the Public Trustee had not breached the Act or its General Principles in deciding to tenant and subsequently sell the unit. Whilst CRG was not consulted by the Public Trustee, he had the opportunity to attend a family meeting and all of CRG's family members were aware the Public Trustee was appointed to make financial decisions for CRG. Accordingly, the Public Trustee obtained the views of CRG to the extent practicable

at the time. Further, no evidence had been placed before QCAT suggesting that CRG's actual views and wishes were different from those accepted by the Public Trustee based on the Public Trustee's communications with CRG's father and step-mother and CRG's actual living arrangements at the relevant time.

- [30] QCATA also dismissed the applicant's contentions that the member was not culturally competent and had displayed racial bias.

Legislative regime

- [31] Relevantly, s 24(1) of the *Trusts Act* provides that a trustee, when exercising a power of investment must, so far as they are appropriate to the circumstances of the trust, have regard to the following:-

- “(a) the purposes of the trust and the needs and circumstances of the beneficiaries;
- (b) the desirability of diversifying trust investments;
- (c) the nature of and risk associated with existing trust investments and other trust property;
- (d) the need to maintain the real value of the capital or income of the trust;
- (e) the risk of capital or income loss or depreciation;
- (f) the potential for capital appreciation;
- (g) the likely income return and the timing of income return;
- (h) the length of the term of the proposed investment;
- (i) the probable duration of the trust;
- (j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;
- (k) the total value of the trust estate;
- (l) the effect of the proposed investment for the tax liability of the trust;
- (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
- (n) the cost (including commissions, fees, charges and duties payable) of making the proposed investment;
- (o) the results of a review of existing trust investments.”

- [32] Section 33 of the Act provides that an administrator is authorised to do anything in relation to a financial matter that the adult could have done if the adult had capacity when the power was exercised, unless QCAT orders otherwise.

- [33] Relevantly, s 34 of the Act provides that an administrator must apply the General Principles. The General Principles are not fixed rules, but rather considerations

which must genuinely be taken into account to the extent appropriate in the circumstances.

[34] Those General Principles, in force at the time of the relevant decisions by the Public Trustee, were:-

“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, 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.

...

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.”²

- [35] Section 35 of the Act provides that an administrator must exercise the power for an adult “honestly and with reasonable diligence to protect the adult's interests”.
- [36] Correspondingly, s 51 of the Act imports the “prudent person investment rule”. That imports the duties at s 22 of the *Trusts Act* which require the Public Trustee to “...exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons...”.

Fresh evidence

- [37] The applicant submits that the Public Trustee's decisions to sell the bush retreat and to rent out and subsequently sell the unit did not comply with the Act or its General Principles, and that those decisions had occasioned financial loss to CRG.
- [38] In support of that submission, the applicant seeks leave to adduce fresh evidence, being a report prepared by the Public Advocate in 2021 titled “Preserving the financial futures of vulnerable Queenslanders”, with respect to a review of the Public Trustee's fees, charges and practices.

Consideration

- [39] At the initial hearing before QCAT and at the hearing before QCATA, the Public Trustee did not lead any direct evidence of its decision-making in 2004 to initially tenant the unit; in respect of the decision in 2005 to sell the bush retreat; and in respect of the decision to sell the unit in 2007.
- [40] There was evidence of a submission, made by the Public Trustee in 2011, in which it was recorded that on 5 February 2004 the Public Trustee met with CRG's biological father and his wife; that the biological father had quit his job to look after CRG; that the biological father was requesting money but the Public Trustee had insufficient funds at that time; and that it was agreed with the biological father “that the unit ... should be rented and that the [bush retreat] should be considered for sale”.³ The submission did not record any consideration of alternative options.
- [41] Consistent with its obligations as administrator to act with reasonable diligence to protect CRG's interests under s 35 of the Act, to apply the General Principles, and to exercise the relevant care, diligence and skill a prudent person would exercise in managing the affairs of others under s 22 of the *Trusts Act*, the Public Trustee had an obligation to analyse and assess the courses of action which may be reasonably taken by a prudent person and to assess the financial consequences of those actions,

² At the time of the relevant decisions, the General Principles in force were contained in Schedule 1 of the *Guardianship and Administration Act 2000* (Qld) (**the Act**).

³ Supplementary Record Book vol 1 p 120.

when determining whether to tenant CRG's unit in 2004; to sell the bush retreat in 2005; and to sell the unit in 2007.

- [42] Relevantly, one course of action would include retaining the unit, whilst disposing of the bush retreat, thereby leaving CRG with his own home in the future. Such a course of action would have particular regard to the consequences to CRG in not having available to him his own residence within which to reside, and the financial implications of the investment of the proceeds of those funds on the availability of any government entitlements.
- [43] There was simply no evidence before QCAT or QCATA as to any analysis or assessment of what were reasonable alternative courses of action, or as to their consequences for CRG, in respect of such decisions. Even the 2011 submission failed to outline any consideration of options, such as retaining the unit while selling the bush retreat to realise cash or as to the consequences of such steps to CRG and their financial implications in relation to the receipt of ongoing government benefits.
- [44] Further, in undertaking that analysis and assessment, the General Principles required the Public Trustee to recognise and take into account CRG's right to participate, to the greatest extent practicable, in decisions affecting his life; the importance of preserving, to the greatest extent practicable, his right to make his own decisions; and, in exercising the principle of substituted judgment, to take into account what others considered would be CRG's views and wishes, if it was reasonably practicable to work out CRG's views and wishes from those persons.⁴
- [45] There was no evidence that the Public Trustee sought CRG's views or even attempted to do so, prior to making the decisions to rent to unit, sell the bush retreat and, ultimately, sell the unit.
- [46] Although there was evidence, at first instance and before QCATA, that CRG's living arrangements were transitory at the time of the making of those decisions, nothing in that evidence supported a conclusion that the Public Trustee was unable to take appropriate steps to seek to obtain CRG's views. At that time, CRG was being looked after by his biological father.
- [47] That failure was particularly telling in circumstances where there was evidence that the Public Trustee had, when first considering a request that a house be purchased for CRG in 2002, taken into account CRG's "goals, cultural background, medical and functional status and support networks"; that "[CRG's] involvement in the decision making process was considered a priority"; and the desirability of consultation with an "Aboriginal Welfare Officer ... to liaise with [CRG], his family and the Public Trustee in regard to the issue of [CRG's] accommodation".⁵
- [48] The evidence led in respect of the Public Trustee's decision to tenant the unit, supported a conclusion that only limited enquiries were made in relation to that course of action. Those enquiries involved CRG's biological father and step-mother, notwithstanding that at that time CRG's mother had been residing in the unit, providing a potential support network, and the tenancing of the unit would render it an asset relevant to CRG's governmental entitlements.

⁴ General Principle 7.

⁵ AB36 at [48]; AB195.

- [49] There was also no evidence that the Public Trustee had, in deciding to sell the bush retreat, sought the views of CRG's mother or aunt, who had been central in the purchase of that bush retreat, with the intention of providing cultural and other benefits to CRG.
- [50] There was also no evidence that the Public Trustee had, in determining that the unit should be sold in 2007, sought the views of CRG's support network, an Aboriginal support officer, or other members of his family.
- [51] That being so, there was no evidential basis upon which QCATA could conclude that the Public Trustee had, in exercising the power to initially tenant the unit and to subsequently sell the bush retreat and the unit, complied with its obligation as administrator under the Act to apply General Principle 7.
- [52] The Public Trustee submits there was no breach of General Principle 7 as the course of action taken was consistent with CRG's proper care and protection. However, that course of action could not be said to be for CRG's proper care and protection where it was undertaken without having first analysed and assessed other reasonable alternative courses of action, and without seeking CRG's views or those of his mother and other support networks.
- [53] Accordingly, it was an error of law for QCATA to find there was evidence the Public Trustee had applied General Principle 7 in determining to make the relevant decisions. Further, it was an error of law for QCATA to find that the Public Trustee had exercised the power with reasonable diligence to protect CRG's interests, pursuant to s 35 of the Act, when there was no evidence the Public Trustee had applied General Principle 7.
- [54] Once that latter conclusion is reached, an order for compensation may be made, pursuant to s 59 of the Act, for proven loss caused by that failure to comply with the Act, in the exercise of the power to make those decisions.
- [55] Whilst QCATA found there was no evidence the breaches of the Act were causative of loss to CRG, that finding was made in circumstances where QCAT had initially made a direction that "if [the Tribunal] decides that a compensation order should be made but considers that there is insufficient material to quantify the correct level of compensation then it will make directions for further evidence and/or submissions".
- [56] Although there is a difference between evidence of causation of loss and quantification of loss, having regard to that direction, it is unsurprising the applicant, a self-represented litigant, failed to lead evidence of alternative courses of action which may have reasonably been taken by the Public Trustee at the relevant time, or of loss occasioned by reason of the Public Trustee's failure to comply with the Act.
- [57] To rely on an absence of evidence in such circumstances, without first advising the applicant of an intention to do so or without first affording the applicant an opportunity to lead such further evidence, deprived the applicant of a fair hearing.
- [58] It was incumbent on QCAT to take appropriate steps to ensure the applicant did not suffer a disadvantage from relying on the direction. That duty arose as a consequence of the provisions of s 29 of the *Queensland Civil and Administrative*

Tribunal Act 2009 (Qld), which required the Tribunal to take all reasonable steps to ensure a party understood the nature of assertions made and their legal implications.

Conclusions

- [59] The applicant has established that QCATA's decision was affected by error of law.
- [60] The applicant has also demonstrated that he was denied procedural fairness. There is no basis upon which this Court could safely conclude that the denial of that procedural fairness did not deprive the applicant of a fair hearing.
- [61] As a fair hearing may result in a determination that the Public Trustee compensate CRG for loss caused by a failure to comply with the General Principles and s 35 of the Act, in exercising the power to make the respective decisions, a substantial injustice has been established such that a grant of leave is warranted in all the circumstances.
- [62] QCATA's orders, and those of QCAT, ought to be set aside and the applicant's application for compensation remitted to QCAT for rehearing.
- [63] These conclusions render it unnecessary to determine the applicant's application for leave to adduce further evidence. It is a matter for QCAT as to what evidence is admitted at the rehearing.

Orders

- [64] I would order:
 1. Leave to appeal be granted.
 2. Leave to adduce further evidence be refused.
 3. Order 3 of QCATA's decision of 28 November 2022 be set aside, and in its place it is ordered the appeal to QCATA be allowed.
 4. The applicant's application for compensation in GAA611-16 be remitted to QCAT for rehearing.
- [65] **CALLAGHAN J:** I agree with the reasons of Boddice JA and the orders he proposes.