

SUPREME COURT OF QUEENSLAND

CITATION: *Public Trustee of Queensland v Sabdia & ors* [2012] QSC 358

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND (as financial administrator for CARL ROSS TAYLOR) (applicant)**
v
SULIMAN SABDIA (first respondent)
HASSEN SABDIA (second respondent)
RAFIK SABDIA (third respondent)
SHIRAZ SABDIA (fourth respondent)

FILE NO/S: BS 8130 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 September 2012

JUDGE: Martin J

ORDER: **As made on 12 September 2012.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – PUBLIC TRUSTEES AND TRUSTEE COMPANIES – PUBLIC TRUSTEES – QUEENSLAND – where Public Trustee appointed financial administrator for adult – where Public Trustee seeks advice on continuing investigation and pursuing litigation against certain parties – whether the Public Trustee should expend its funds on further investigation and litigation

Guardianship and Administration Act 2000 (Qld), s 12, s 33, Schedule 2
Public Trustee Act 1978 (Qld), s 134
Glasscock v The Trust Company (Australia) Pty Ltd [2012] QSC 15, considered
Macedonian Orthodox Community Church St Petka Inc v Petar & anor (2008) 237 CLR 66, considered

Public Trustee (as Executor of the Will of Carew-Reid (Deceased)) v Carew Reid [1993] WASC 1483 (13 August 1993), considered

COUNSEL: D B Fraser QC for the applicant
B Walker (solicitor) for the respondents

SOLICITORS: Official Solicitor to the Public Trustee of Queensland for the applicant
Bartley Cohen for the respondents

[1] The applicant Public Trustee was appointed financial administrator for Carl Ross Taylor (“Mr Taylor”) by order of the Guardianship and Administration Tribunal on 12 October 2009.

[2] The applicant sought and obtained orders in the following terms on 12 September 2012, relevantly:

“1. Upon the personal undertakings given to the Court by each of the Respondents in the terms set out in Annexure 1 hereto, and pursuant to s.59 of the *Public Trustee Act* 1978, the Court sanctions the proposed compromise of these proceedings effected by a Deed of Agreement between the Public Trustee as financial administrator for Carl Ross Taylor with the Respondents dated 31 August 2012, being Exhibit to the affidavit of Ian McGregor Campbell filed by leave.

...

5. Pursuant to s.134 Public Trustee Act 1978 the Court advises and directs the Public Trustee that:
(a) it should not institute proceedings against Brian Laver, Will Marcus, Argo Navis Pty Ltd, Geoff Rigby or Challenger Bank in relation to their dealings with Carl Ross Taylor;
(b) the Public Trustee is not required to expend any further of his own corporate funds in carrying out any further investigations as the financial administrator for Carl Ross Taylor into causes of action as against Brian Laver, Will Marcus, Argo Navis Pty Ltd, Geoff Rigby or Challenger Bank.

...”

[3] These reasons relate to the advice given in part 5 of the Order.

Background

[4] Mr Taylor was born on 21 January 1933 and is now 79 years old. He was widowed in 2003 and has no children. Mr Taylor is a pensioner, is insolvent and has no assets. He is a judgment debtor under a judgment obtained by Challenger Commercial Lending Limited (“Challenger”) and the estimated shortfall is in the order of \$1 million.

- [5] Since his wife's death in 2003, Mr Taylor has entered into various financial transactions that have left him in a parlous financial situation. I do not propose to set these out in full, but it is necessary to examine them briefly for the purposes of these reasons.
- [6] In 2003, Mr Taylor entered into a deed of gift with the respondents to this matter ("the Sabdias"), transferring his matrimonial home at 433 Mains Road, Sunnybank, to them. Mr Taylor continued to live in the house after the transfer and is presently living there. Order 1 above relates to the deed of agreement between the Public Trustee and the Sabdias, and I need not consider it further.
- [7] The recitation of events set out below comes from the material read before me. They do not constitute findings of fact.

Ahimsa House

- [8] In June 2004, Mr Taylor purchased Ahimsa House at 26 Horan Street, West End, with a \$920,000 loan from the Bank of Queensland. Mr Brian Laver, a person who claims to have known Mr Taylor for over 40 years, has told investigators that Ahimsa House was purchased in order to establish a community centre and/or headquarters for the Libertarian movement.
- [9] On 8 July 2004, Mr Taylor entered into two agreements with Argo Projects Pty Ltd ("Argo Projects"). Argo Projects is a company related to Argo Navis Pty Ltd ("Argo Navis"), which is controlled by an architect Mr Will Marcus.
- [10] The first agreement was for the provision of building management services for Ahimsa House and the second for architectural services relating to the refurbishment of that building. The services were to be provided in exchange for Mr Taylor transferring a 1/6 share of Ahimsa House to Argo Projects. In the event that this transfer did not occur, Argo Project's fees for services would become due and payable. It appears from correspondence that this transfer has not in fact occurred and solicitors for Argo Navis estimate that the fees payable amount to more than \$610,000.
- [11] After the purchase of Ahimsa House, Mr Taylor sold four properties and used the money to either further redevelop or make mortgage repayments in relation to it. Mr Taylor took further loans of \$50,000 from the Bank of Queensland and \$223,192.70 from Macquarie Bank. The latter was secured against one of Mr Taylor's properties.
- [12] In May 2007, Challenger Commercial Lending Limited ("Challenger") extended a \$1.295 million loan to Mr Taylor. Geoff Rigby of Rigby Lawyers acted for Mr Taylor in this transaction. Of the \$1.295 million, \$686,851.85 was used to pay out the existing Bank of Queensland loan; the balance was paid to Mr Taylor's Westpac account.
- [13] Also in May 2007, a cheque was drawn by Mr Taylor in favour of Argo Projects for \$168,032. This represented a 1/6 interest in the \$1.295 million loan, on the basis that Argo Projects had a 1/6 interest in Ahimsa House. Argo was supposed to be responsible for a sixth of the mortgage repayments and outgoings of the building thereafter. Payments by Argo ceased shortly afterwards.

- [14] By January 2009, Mr Taylor was in default of the Challenger loan. Challenger commenced proceedings against Mr Taylor on 19 March 2009.
- [15] On 30 July 2009, the Public Trustee was appointed financial administrator for Mr Taylor for a three month period while he underwent a full capacity assessment.
- [16] On 12 October 2009, the Public Trustee was appointed financial administrator for a period of five years. A trust officer has since been looking after the day to day issues of Mr Taylor's financial affairs.
- [17] On 25 February 2010, Mr Taylor not having filed a Notice of Intention to Defend, Challenger obtained a default judgment against him for \$1,404,487.80. A receiver was appointed on 22 March 2010.
- [18] Ahimsa House was sold in February this year for \$975,000.
- [19] Mr Taylor presently owes approximately \$1 million which he is unable to pay.
- [20] Mr Campbell is the solicitor from the Public Trustee with carriage of this matter. He deposes to the fact that, as at 12 September 2012, the Public Trustee had spent approximately \$136,000 of his own funds in an attempt to advance Mr Taylor's interests.

Ministerial complaint and QCAT application

- [21] The actions of some of Mr Taylor's friends have added a layer of complication to this matter.
- [22] While this application was brought ex parte, Mr Curr was given leave to be heard on the date of this application as a friend of Mr Taylor. He was also, along with Mr Bernard Neville and Mr Samuel William, given access to court documents that would otherwise have been sealed. Mr Curr made oral submissions to the effect of what I outline below.
- [23] On 7 February 2012, Ian Curr submitted a formal complaint to the Queensland Civil and Administrative Tribunal ("QCAT") requesting a review of the Public Trustee's handling of Mr Taylor's financial affairs.
- [24] On 14 February 2012, Mr Curr also sent a submission to the Attorney-General's department seeking that:
- (a) Mr Peter Carne be dismissed from further dealings with the financial affairs of Mr Taylor;
 - (b) Mr Bernie Neville, who purportedly previously held the power of attorney in relation to Mr Taylor, be reinstated to look after Mr Taylor's financial affairs;
 - (c) Mr Neville be provided with 'sufficient professional resources by your department to prosecute the unconscionable behaviour of the bank' in this Court; and
 - (d) Mr Neville be indemnified for the costs of prosecuting the financial interests of Mr Taylor.
- [25] A review of the correspondence between Mr Curr (and other friends of Mr Taylor) and the Official Solicitor to the Public Trustee reveals that Mr Taylor's friends

believe the Public Trustee has not sufficiently pursued those responsible for “unconscionable transactions”.

The application for directions

- [26] The two questions raised by the Public Trustee in this matter are:
- (a) whether it is required to expend further amounts from its own corporate funds to institute further proceedings (if any) against Brian Laver, Will Marcus or Challenger Bank; and
 - (b) whether it is required to expend further amounts from its own funds to carry out further investigations into causes of action against the above parties.
- [27] Mr Fraser QC has provided a meticulously careful and sage memorandum of advice to the Court in which he outlines the salient information regarding each party involved and his opinion as to the steps the Public Trustee should take.

Directions from the Court

- [28] Section 134 of the *Public Trustee Act* 1978 (Qld) (“PT Act”) allows the Public Trustee to “take the opinion or obtain the direction of the court upon any question, whether of law or of fact, arising under this Act or in the course of the public trustee’s duties.”
- [29] As a preliminary point, “the Court will give guidance to the trustee in the exercise of his discretion but ought not give a general direction that will, in effect, absolve the trustee from an exercise of it.”¹ Each particular piece of litigation must be carefully examined to see how the discretion ought properly to be exercised by the trustee in respect of that litigation; for the Public Trustee to take a general decision in respect of all litigation presently on foot or that might arise would not be a proper exercise of discretion.²
- [30] It is important, therefore, to consider the actions taken by the Public Trustee in respect of each named individual or company separately.
- [31] However, an overarching issue that affects any future action in Mr Taylor’s matter is his outstanding debt of about \$1 million. For reasons I will embark upon in more detail, anything that might be recovered in pursuing actions against any of the parties will, in all likelihood, go towards reducing the shortfall. In other words, apart from reducing the debt he owes, success in any litigation would not be of any value to him. This is an important consideration in the ultimate decision as to any future litigation.

Public Trustee as administrator

- [32] The Public Trustee was appointed administrator of Mr Taylor’s financial affairs under s 12 of the *Guardianship and Administration Act* 2000 (Qld) (“GA Act”), which relevantly states:³

¹ *Public Trustee (as Executor of the Will of Carew-Reid (Deceased)) v Carew Reid* [1993] WASC 1483 (13 August 1993); see also *In re Allen-Meyrick’s Will Trusts* (1966) 1 WLR 499.

² *Ibid.*

³ s 1.

- “(1) The tribunal may, by order, appoint... 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] ‘Financial matter’ is defined in schedule 2 of the GA Act. The relevant portions are set out below:

- “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 –
- (a) paying maintenance and accommodation expenses for the adult and the adult’s dependants, including, for example, purchasing an interest in, or making another contribution to, an establishment that will maintain or accommodate the adult or a dependant of the adult;
 - (b) paying the adult’s debts, including any fees and expenses to which an administrator is entitled under a document made by the adult or under a law;
 - (c) receiving and recovering money payable to the adult;
 - ...
 - (p) a legal matter relating to the adult’s financial or property matters;
- ...”

[34] A ‘legal matter’ is defined as follows:⁴

- “A **legal matter**, for an adult, includes a matter relating to –
- (a) use of legal services to obtain information about the adult’s legal rights; and
 - (b) use of legal services to undertake a transaction; and
 - (c) use of legal services to bring or defend a proceeding before a court, tribunal or other entity, including an application under the *Succession Act 1981*, part 4 or an application for compensation arising from a compulsory acquisition; and
 - (d) bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding.”

[35] The Public Trustee therefore has the power to:

- (a) use legal services to obtain information about Mr Taylor’s legal rights; and
- (b) bring or defend proceedings on behalf of Mr Taylor.

⁴ Schedule 2, s 18, GA Act.

- [36] The Public Trustee in his role as administrator is not, strictly speaking, a trustee. The role is, however, analogous to that of a trustee: among other things, there exists a relationship of confidence, an undertaking to perform a task or fulfil a duty in the interests of the adult and a dependency or vulnerability on the part of the adult.⁵
- [37] More specifically, an examination of the GA Act reveals that the administrator may only exercise his power subject to certain duties not dissimilar to that of a trustee's.
- [38] Section 33 of the GA Act authorises an administrator to do "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". In doing so the administrator must, among other things, apply the general principles found in Schedule 1 of the GA Act, act honestly and with reasonable diligence,⁶ avoid conflict transactions,⁷ and keep records.⁸
- [39] These duties are comparable to those of a trustee not to allow a conflict of interest and duty,⁹ not to obtain an unauthorised benefit,¹⁰ and to keep and render accounts.¹¹

Best interests of Mr Taylor

- [40] The purpose of seeking advice from the Court is to determine what should be done in the best interests of Mr Taylor.¹² In considering the best interests of Mr Taylor, several factors have to be considered. They will include:
- (a) Mr Taylor's wishes; and
 - (b) the possible benefits of litigation or further investigation.

Mr Taylor's wishes

- [41] One of Mr Taylor's priorities is to continue to reside in his matrimonial home. This is the home that he transferred to the Sabdias and in which he continues to live.
- [42] There is no further evidence of Mr Taylor's wishes on the material.

Potential proceedings

- [43] It is important to note at the outset that it is not the role of the Court to determine whether any proposed proceedings will or will not be successful.¹³ However, the Court does have a role in determining whether or not the proceedings would be fruitless.¹⁴

⁵ *Breen v Williams* (1996) 186 CLR 71, 107; see also *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165.

⁶ s 35 GA Act.

⁷ s 37 GA Act.

⁸ s 49 GA Act.

⁹ See eg *Chan v Zacharia* (1984) 154 CLR 178.

¹⁰ *Ibid.*

¹¹ See eg *Byrnes v Kendle* (2011) 243 CLR 253.

¹² *Macedonian Orthodox Community Church St Petka Inc v Petar & anor* (2008) 237 CLR 66. While this decision relates to the administration of a trust estate, the general principles are applicable in this case. See also *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, 201.

¹³ *Glasscock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15, [26].

¹⁴ *Ibid.*

- [44] The potential parties in litigation are: Mr Laver, Challenger, Mr Marcus/Argo and Mr Rigby.
- [45] **Mr Laver:** Mr Laver had been acting as attorney for Mr Taylor from December 2004 and claims to have known Mr Taylor and his late wife for over 40 years. In addition to his role in the purchase and ‘refurbishment’ of Ahimsa House, it is said that Mr Laver would attend upon Mr Taylor with blank cheques and Mr Taylor would sign them. In 2009, Mr Taylor expressed his concern to someone at Argo Navis that Mr Laver “had done the wrong thing by him”. Investigations into Mr Laver have revealed that he has no property registered in his name. The Public Trustee has not uncovered any promising avenues of securing repayment of any amounts that Mr Laver may have misappropriated from Mr Taylor if, indeed, any are owed. Mr Laver has not cooperated with investigations by the Public Trustee apart from attending an interview in July 2011.
- [46] **Challenger:** Challenger was the financier responsible for the refinance of Ahimsa House. There is no material which establishes any viable claim against Challenger in the transaction. The Public Trustee was aware of the judgment entered against Mr Taylor and negotiations occurred, but there was no basis to resist those proceedings.
- [47] **Mr Marcus and the Argo entities:** Argo Projects received \$168,032 when Ahimsa House was refinanced on the basis that it owned 1/6 of the property. Argo Projects was to contribute 1/6 of the mortgage repayments but did not do so for long. The Public Trustee has demanded repayment of the \$168,032 to Mr Taylor, but this has not occurred. Neither Mr Marcus nor the Argo entities have made any payment in reduction of the debt to Challenger.
- [48] **Mr Rigby:** Mr Rigby was the solicitor retained for the refinance with Challenger. The file kept by Mr Rigby indicates that Mr Laver was involved in the instruction of Rigby Lawyers. Mr Rigby appears to have followed the usual course that would be expected in acting in relation to the loan and had been provided written assurances by Mr Taylor that he understood the transaction and had sought independent advice.
- [49] I am satisfied on the material before me that proceedings against Challenger and Mr Rigby would be fruitless.
- [50] While pursuing the remaining proceedings may not be futile, I am satisfied that, if any moneys were recovered, it would not benefit Mr Taylor but would merely become available to reduce the debt to Challenger. The material supports a conclusion that anything that might be recovered would be less than the amount owing to Challenger. To pursue these matters would be a burden on a man of impaired capacity such as Mr Taylor. It would expose him to the travails of litigation with no possibility of any actual advantage to him apart from the prospect of a victory which would be Pyrrhic. Such actions would not be in the best interests of Mr Taylor.

Conclusion

- [51] In these circumstances the Public Trustee should not expend any more money or effort.