JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)
CITATION	**:**	GB [2020] WASAT 61 (S)
MEMBER	**:**	MS F CHILD, MEMBER
HEARD	**:**	8 JUNE 2020
DELIVERED	**:**	20 JANUARY 2021
FILE NO/S	**:**	GAA 4053 of 2019 GAA 4624 of 2019
MATTER		GB Represented Person

Catchwords:

Guardianship and administration - Application for costs following applications for appointment of administrator and review of guardianship order made under *Guardianship and Administration Act 1990* (WA) - Applications by guardian and by applicant for review for costs pursuant to s 87 of *State Administrative Tribunal Act 2004* (WA) - Whether reason to depart from starting position in s 87 of *State Administrative Tribunal Act 2004* (WA) that parties bear their own costs - Conduct of the proceedings by applicant unreasonable in the circumstances - Costs order made

Legislation:

Guardianship Administration Act 1990 (WA), s 16, s 16(4), s 16(5), s 17A, s 17(A)(2), s 86
State Administrative Tribunal Act 2004 (WA), s 87, s 87(1), s 87(2), s 9
State Administration Tribunal Rules 2004 (WA), r 42A, r 46

Result:

Costs order made
Application for costs of responding to costs application dismissed

Category: B

Representation:

Counsel:

Represented Person	:	N/A
Applicant	:	Mr G Cridland
Respondent	:	Mr R Graham

Solicitors:

Represented Person	:	N/A
Applicant	:	GG Legal
Respondent	:	Vogt Graham

Case(s) referred to in decision(s):

BFO & ORS and KPW [2014] WASAT 68
GA and EA and GS [2013] WASAT 175
GB [2020] WASAT 61
J & P Metals Pty Ltd and Shire of Dardanup [2006] WASAT 282 (S); (2006) 45 SR (WA) 242
JB and KH [2014] WASAT 152
Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd [2010] WASAT 125 (S)
MB and MM [2017] WASAT 51
Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [2008] WASAT 302
PHQ and LPQ [2015] WASAT 5
PJB v Melbourne Health [2011] VSC 327
RK [2020] WASAT 53(S)
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32
Winterbourn and Western Australian Planning Commission [2013] WASAT 72

REASONS FOR DECISION OF THE TRIBUNAL:

Background

1 These are the reasons for the decisions of the Tribunal on applications by CG and GB for costs orders pursuant to s 87 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). CG seeks her legal costs of the proceeding before the Tribunal, and CB seeks his legal costs to respond to CG's application for her legal costs.

2 The applications for costs arise from proceedings in the Tribunal brought under the *Guardianship and Administration Act 1990* (GA Act) by CB (a son of the represented person and the applicant for the purposes of these reasons) seeking his appointment as the administrator of the represented person's estate and a review of guardianship orders previously made for the represented person.

3 The guardianship orders appoint CG (a daughter of the represented person and the respondent for the purposes of these reasons) as limited guardian to make treatment and services decisions for the represented person and the Public Advocate as guardian to determine where and with whom the represented person should live and to determine the contact she should have with others.

4 The guardianship orders under review were made on 9 April 2019 (the original proceeding) at which time an application for the appointment of an administrator of the represented person's estate was dismissed as it was determined there was no need for the appointment of an administrator as there was an enduring power of attorney (EPA) made by the represented person by which she had appointed CG as her attorney.

5 The reasons for the decisions on the applications for review and the appointment of an administrator were published as ***GB*** [2020] WASAT 61 (***GB***). This decision should be read together those reasons.

The proceeding before the Tribunal

6 The history of the proceeding is set out in ***GB*** at [14]-[17] and at [24]•[27].

7 As noted in ***GB*** at [14] the original application filed by the applicant was incompetent and the application was amended following

a directions hearing in which the case management member set out the various provisions relevant to the matter.

8 The case management member raised the issue of whether the application was intended as an application pursuant to s 17A or s 86 of the GA Act and noting that for the purposes of s 17A(2) the applicant was out of time. The application was treated as an application for leave to bring an application for review of the guardianship orders and an application for the appointment of an administrator of the represented person's estate. Leave was granted to bring the application for review.

9 Directions made at the conclusion of the hearing included directions for the filing of financial information by the attorney, submissions by the parties and a report from the Public Advocate. As noted in submissions for the respondent, the applicant did not meet the time line for filing his submissions and an extensive document with attachments was filed on his behalf on the day prior to the hearing.

10 The applications were listed for final hearing on 4 March 2020 (review hearing).

11 At the review hearing an application by counsel for the applicant for an adjournment of the hearing so that the delegated guardian of the Public Advocate could be available to be cross-examined on her report was refused. The submission of counsel that the delegated guardian's report should be disregarded by the Tribunal because of alleged inaccuracies (and the lack of availability of the delegated guardian to be cross•examined on the report) was not accepted for the reasons set out in ***GB*** at [24]-[26].

12 The delegated guardian of the Public Advocate advised the Tribunal of her inability to attend the hearing listed on 4 March 2020 on 30 December 2020, and as acknowledged in ***GB*** at [18] it was a failure of the processes in the Tribunal that the hearing was not re listed. That the non-attendance of the delegated guardian is raised in[1] the submissions filed by counsel for the applicant, on his costs application, and in the manner done so, to by implication, attack the bona fides of the delegated guardian is, in the view of the Tribunal, improper.

13 The Tribunal did not conclude the hearing of the applications at the first hearing and adjourned with an order requiring the filing of

[1] Applicant's submissions para 39.

written submissions (***GB*** at [22]). Those submissions were taken into account in the determination of the applications.

14 The Tribunal dismissed the application for the appointment of an administrator of the estate and amended the guardianship order which appointed the respondent.

15 The Tribunal determined that the application for review of the guardianship orders involved essentially the same case that had been run in the original proceeding, with the only new addition being complaints about the performance of the delegated guardian of the Public Advocate.

16 As previously stated the Public Advocate exercises the functions as limited guardian to determine the accommodation of the represented person and the contact she has with others.

17 The complaints about the Public Advocate's delegated guardian in the performance of these functions were addressed in the directions hearing. It was conceded by counsel for the applicant that the Member in directions had alerted the applicant that it was not the role of the Tribunal to supervise the performance of the Public Advocate.[2]

18 Despite this, this issue continued to be prosecuted in the review hearing and in the submissions filed in support of the argument to replace the Public Advocate as guardian of the represented person with the applicant either solely or jointly with another person. This submission was misconceived. The applicant said that the conflict between the two sides of the family had worsened; it was acknowledged in a written submission of one of the represented person's children that the conflict had spilled out into open conflict in a hospital where the represented person was being treated; and the applicant's concession that the family was divided into two camps and there was no or little effective communication between them.[3] The need for an independent decision•maker to determine contact was, in this context, obvious.

19 In relation to the accommodation function, the position advanced on behalf of the applicant is that the represented person is not receiving the treatment she requires[4] at her current accommodation and there are better bathroom facilities for the represented person at his home rather

[2] ***GB*** at [6].
[3] ***GB*** at [67].
[4] Applicant's submissions at para 98.

than at the home of his sister CG (where the represented person has lived for over 18 years).

20 This was the position put in the original proceeding. Leaving aside the obvious point that it is not the role of the Tribunal to determine where the represented person should live, there was nothing in the professional reports before the Tribunal that supported the applicant's contentions that the care needs of the represented person were not met at the home of the respondent.

21 No contrary independent assessment or other professional advice was submitted to the Tribunal by the applicant.

22 The need to disturb the choice in the long-standing accommodation arrangements of the represented person had clearly not been demonstrated to the independent guardian but the continuing conflict about this issue within the family and the apparent rigidity of the positions on both sides reinforced the ongoing need for the Public Advocate to determine this question.

23 As noted the submissions of the applicant in this regard were essentially the same case as had been advanced in the hearing of the original application.

24 Although leave had been granted to bring the review it could not be said that a change in the circumstances of the represented person had been demonstrated in the material filed by the applicant for the review hearing. Nor was there, in the view of the Tribunal any other good reason for review.

25 Properly advised the applicant's application for review and proposal for the replacement of the Public Advocate with himself must have been seen to be doomed to fail.

26 In respect of the administration application, the applicant submitted there had been a breakdown in trust between him (and his brother J) and CG (who is the attorney appointed under the represented person's EPA). No assertions are made about financial mismanagement by CG (other than a reference to concern of the applicant that services were not consistently provided to the represented person for which there was no supporting evidence provided at the hearing).

27 It was argued that since the attorney removed her brother's access to the bank account of the represented person there had been a lack of

transparency. This issue was raised in the directions hearing and in the written submissions but in the hearing it was submitted by counsel for the applicant that there was a need for the administration order only if the guardianship orders were changed.[5]

28 The assertions of the applicant regarding the need for an administration order were not persuasive for the reasons given in ***GB*** at [39]•[48]

29 In this proceeding Tribunal adopted the reasoning of the original member that the EPA reflected the wishes of the represented person and was a less restrictive alternative to the appointment of an administrator of her estate in her circumstances.[6] It is not open to appoint an administrator simply to facilitate a guardianship order if the statutory requirements for appointment of an administrator have not been met.[7]

30 The positon of the applicant is that the administration application was in a sense only ancillary to the guardianship review. This submission was misconceived since the Tribunal must be satisfied of the need for the appointment of an administrator of an estate as part of the statutory criteria for the making of such an order.[8]

31 The operation of an EPA which the Tribunal found had met the needs of the represented person was a relevant consideration to the question of need for an administration order.

32 Given the futility of the application for the revocation of the appointment of the Public Advocate as guardian to determine the question of where the represented person should live, the issue of the need for an administrator fell away but nonetheless, the respondent/attorney had to prepare that case.

33 The hearing of the applications was adjourned on 4 March 2020 and later on 5 May 2020 orders were made listing the matter for delivery of oral reasons. That date was vacated and the Tribunal then published a written decision on 9 June 2020.

The applications for costs

34 The respondent's solicitor alerted the Tribunal and the applicant to a costs application on 3 July 2020 and asked that programming orders

[5] ts 14, 4 March 2020.
[6] ***GB*** at [44].
[7] See ***PJB v Melbourne Health*** [2011] VSC 327.
[8] Section 64 1(b) of the GA Act.

be made for the lodgement of submissions by the parties. Counsel for the applicant objected to the application for costs on the basis the application was out of time.

35 Rule 42A of the *State Administrative Tribunal Rules 2004* (WA) (SAT Rules) provides:

> Subject to these rules, an application to the Tribunal for costs under this Division can be made within 21 days of the orders to which the application relates being made by the Tribunal.

36 The Tribunal convened a directions hearing to determine the question of whether time could or should be extended. The respondent's solicitor filed an affidavit and a medical certificate explaining the delay due to illness and personal circumstances of the solicitor which were not the responsibility of his clients.

37 Citing the case of ***RK*** [2020] WASAT 53(S) it is argued for the applicant that there is a live issue of law as to whether the Tribunal has a power to make orders after the orders were made on 9 June 2020. The Tribunal notes that the costs application in this case was not made under s 16(4) of the GA Act.

38 In ***RK***, the Full Tribunal considered a costs application pursuant to s 16(4) of the GA Act filed four days after the determination of a review and order made pursuant to s 17A of the GA Act. In that case although the application for costs was opposed there was no opposition to the consideration of the costs application by the Tribunal and the Full Tribunal determined that a costs order would not be made for other reasons and said that it was unnecessary to express any view on the question whether the Tribunal's power to make further orders (including costs orders) arising from the review application was spent once the orders were made (see ***RK*** at [11]).

39 Although compliance with the SAT Rules is essential to the proper conduct of the Tribunal's work and for certainty for the parties, the Rules allow the Tribunal to dispense with compliance:

> 46. The Tribunal may dispense with compliance with a requirement of a rule, either before or after the time for compliance with the requirement arises.

40 Having regard to the objectives s 9 of the SAT Act and to the particular personal and health circumstances of the solicitor with the conduct of the matter for the respondent and the period of the delay

being three days, the Tribunal determined that the compliance with the requirement to file within 21 days should be dispensed with pursuant to r 46 of the SAT Rules and time was extended for the filing of the costs application and orders were made to that effect.

41 The issue raised by the applicant that a costs application was made only on one matter number is not accepted. Although distinct applications were before the Tribunal, the matters were closely associated as submitted by counsel for the applicant as previously noted. The matters were heard together and determined together and the costs application refers to the proceeding as a whole. Indeed the submissions of the applicant opposing the costs application argue that this was appropriate.[9]

Costs under s 87 of the SAT Act

42 Section 87 of the SAT Act provides:

> (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
>
> (2) Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.
>
> (3) The power of the Tribunal to make an order for the payment by a party of the costs of another party includes the power to make an order for the payment of an amount to compensate the other party for any expenses, loss, inconvenience, or embarrassment resulting from the proceeding or the matter because of which the proceeding was brought[.]

43 Section 16 of the GA Act deals with costs of proceedings before the Tribunal commenced under the GA Act. Section 16(5) of the GA Act provides that nothing in the GA Act limits any other power of the Tribunal under the SAT Act. This was recently confirmed in ***RK*** at [20]

44 The starting position in respect of legal costs in proceedings before the Tribunal is that parties bear their own costs. There is however a discretion under s 87(2) of the SAT Act to make an order for costs in

[9] Applicant's submissions at para 67.

some circumstances and the applicant for costs bears the onus of persuading the Tribunal to exercise that discretion.[10]

45 The respondent submits that the general principles to be applied by the Tribunal to determine whether costs ought be awarded under s 87(2) of the SAT Act are set out in ***Medical Board of Western Australia and Kyi*** [2009] WASAT 22 at [73]•[74].

> … If a party has conducted itself in such a way as to unnecessarily prolong the hearing, has acted unreasonably or inappropriately in its conduct of the proceedings, has been capricious, or the proceedings in some other way constitute an abuse of process, then this may give rise to an exercise of the discretion to award costs. This encompasses a situation where proceedings should not have been maintained against a party because it is clearly untenable and no reasonable person would have believed they could be successful[.]
>
> Thus the Tribunal's discretion to award costs extends to ordering the payment of costs incurred unnecessarily by a failure of a party to act appropriately in a particular circumstance in the conduct of the proceedings. … it will usually be necessary to show that the conduct of the party was unreasonable and unfairly caused the increased costs.

46 In support of the respondent's application for a costs order it is submitted that the bringing of and the conduct of the applications was unreasonable, in summary :

a) The late filing of a 324 page PDF submission by the applicant late on the day before the hearing was unreasonable conduct where a party is represented.

b) The application itself was misconceived the arguments and evidence of the applicant reinforced the need for an independent guardian.

c) The application for the appointment of an administrator was, from the outset, lacking in merit.

d) The conduct of the hearing and the focus in cross-examination on historical issues which ultimately were not relevant to the present proceeding prolonged the proceeding which meant written submissions were required.

[10] ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32 at [51].

47 The Tribunal accepts that unreasonable conduct of a party in prosecuting proceedings in the Tribunal is a basis on which a costs order may be made, and the principles referred to above are relevant to an application for costs on such grounds.

48 The applicant submits that his costs of the response to the costs application should be paid by the respondent. It is argued there is no convincing reason for the Tribunal to depart from the normal rule that parties bear their own costs.

49 It is argued the conduct of respondent in misunderstanding the nature of GA proceedings and her actions in respect of the management of the contact function by the Public Advocate's delegated guardian rendered the applications necessary. It is asserted that the delegated guardian of the Public Advocate was unwilling to meet with the applicant and the request that the issue be escalated to a more senior officer was refused. It is said that had the Public Advocate been responsive to the applicant's request then Tribunal time and legal costs would have been avoided.[11]

50 As noted the applicant was advised at the directions hearing that the role of the Tribunal did not include monitoring the performance of the Public Advocate.[12]

51 The assertion that the applicant achieved a 'great result'[13] since the Public Advocate has, it is submitted, changed the delegated guardian since the review hearing, it is said in response to the applications before the Tribunal misconstrues the nature of the review of the guardianship order conducted. An application for review brought in an effort to influence the exercise of the discretion of the Public Advocate in the exercise of her functions as an independent statutory officer might be regarded as an improper purpose. In ***GA*** and ***EA*** and ***GS*** [2013] WASAT 175 the Tribunal found that the applications (of an unrelated but analogous type) had been maintained for an ulterior purpose, 'outside the scope' of the provisions of the GA Act.

Was the application commenced or continued unreasonably?

52 The Tribunal has exercised its discretion and costs orders have been made in the past where the applicant has acted unreasonably,

[11] Applicant's submission at para 35.
[12] ts 12-16, 20 December 2019.
[13] Applicant's submissions at para 51.

or where the proceedings were maintained unreasonably and this caused the other party to incur costs unnecessarily.

53 The Tribunal accepts the respondent's submission that the confirmation of the appointment of the Public Advocate was inevitable on the applicant's evidence and the application for review of the guardianship order was misconceived. The ancillary application for the appointment of an administrator was unsustainable.

54 However, a weak case does not itself give rise to a costs order. ***BFO & ORS and KPW*** [2014] WASAT 68. This is particularly so in the context of s 87(1) of the SAT Act and the protective jurisdiction of the GA Act (see ***MB and MM*** [2017] WASAT 51 at [63]).

55 The Tribunal should not lightly award costs which would be counter to the s 9 of the SAT Act objectives to ensure access to persons bringing matters to the Tribunal. In this case the parties were represented and it can be assumed that the Tribunal's role and the nature of the review proceedings were understood by the parties. In addition, these issues were fully canvassed in the directions hearing and the position made clear to counsel.[14]

56 In respect of the conduct of the proceeding, the lateness of the filing of submissions (requiring an adjournment so that the representative of the Public Advocate could read the material) and the focus by counsel for the applicant in the review hearing on the report of the delegated guardian and her non-attendance both took up allocated hearing time. Time was also given to cross-examination of CG on historical matters which were not relevant and did not assist the Tribunal to determine the review. The attack on the report and delegated guardian did not strengthen a weak case however the time given to this limited the opportunity of the Tribunal to hear from other parties and ultimately necessitated the taking of written submissions.

57 Although the family conflict was significant and the parties were clearly unable to communicate effectively with each other and both were no doubt assisted in formulating their positions, the conflict between them and the matter before the Tribunal was not unique or legally complex. However, I am satisfied that the continuation of the application and the conduct of it at the review hearing did unnecessarily add to the costs of the respondent.

[14] ts 12-16, 20 December 2019.

Quantum of costs

58 The Tribunal confirmed in ***JB and KH*** [2014] WASAT 152 at [91] and ***PHQ and LPQ*** [2015] WASAT 5 that the Tribunal 'approaches the task of fixing costs to be awarded in a broad and relatively robust fashion; ***Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd*** [2008] WASAT 302 at [67] and ***Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd*** [2010] WASAT 125 (S).

59 It has always been the position that an award of costs is not intended to be a full indemnity for the actual expense incurred by a party to a proceeding. Further, the Tribunal must be satisfied that the claim is reasonable having regard to the matter before it.

60 In ***Winterbourn and Western Australian Planning Commission*** [2013] WASAT 72 (***Winterbourn***) at [44], Parry J citing ***J & P Metals Pty Ltd and Shire of Dardanup*** [2006] WASAT 282 (S); (2006) 45 SR (WA) 242 at [38]:

> … Tribunal's obligation to minimise the costs to parties will be reflected in the costs assessed by the Tribunal as recoverable. That approach reflects an expectation that representatives of parties before the Tribunal will approach … proceedings in a way that minimises costs to their clients. If clients choose to approach proceedings before the Tribunal in a way which substantially increases costs for them, it will be a rare case where that increase in costs will be recoverable through a favourable costs order.

61 In ***Winterbourn*** at [45] Parry J further stated:

> In *Medical Board of Australia and Costley* [2013] WASAT 2 the Tribunal said the following at [66] in relation to costs assessments:
>
> > … In our view, in matters of this nature, the preferable approach is not to look at what has actually been charged to the client, but rather what reasonable allowance should be made, taking a robust and broad brush approach, for the work necessarily done to bring the proceedings to a conclusion[.]

62 The quantum of costs claimed both in the costs application $14,245.44 and the applicant's application for his costs of responding to the costs application $6,320.60 are excessive but some provision should be made for the costs incurred by the respondent arising from the continuation of the proceedings after the directions hearing and the preparation of written submissions following the review hearing.

63 The Tribunal does not consider that the arguments advanced for the applicant's costs of responding to the costs application are made out.

64 Having considered the schedule of costs submitted for the respondent and taking the approach described in the cases cited, the Tribunal finds an appropriate amount of legal costs to be paid by the applicant to the respondent is $7,000.

65 This assessment is calculated by allowing for what the Tribunal considers a reasonable fee for the work required in this type of matter.

66 The application of the applicant for his costs of responding to the costs application is dismissed.

Order

It is ordered that in the matters GAA 4053 of 2019 and GAA 4624 of 2019:

1. The applicant pay to the respondent a total of $7,000 as a contribution to her legal costs for both matters within 90 days of the date of this order.

2. The application by the applicant for his costs is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS F CHILD, MEMBER

20 JANUARY 2021