

HONG KONG / JUDGMENT

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COURT

Court of First Instance

DECIDED

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HCMP 1327/2007

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 1327 OF 2007

IN THE MATTER of Section 59W of the Mental Health Ordinance, Cap

136

and

IN THE MATTER of an Appeal against the decision in the Order for Renewal and Variation of
Guardianship Order under Sections 59K and 59U of the Mental Health Ordinance, Cap 136 given
on 12

June

2007

Before: Hon A Cheung J in Chambers (Not open to the public)

Date of Hearing: 7 September 2007

Date of Judgment: 20 September 2007

J U D G M E N T

Introduction

The Guardianship Board performs a vital function in the care and supervision of mentally incapacitated persons. It makes guardianship orders in respect of those persons, after taking into account their individual needs. These orders include those made in an emergency where the mentally incapacitated person is in danger or is being, or likely to be, maltreated or exploited. It also reviews guardianship orders on a periodical basis. See the Mental Health Ordinance (Cap 136), section 59K(1).

The Board comprises a Chairperson with legal experience and not less than nine other members from three different categories of people, namely lawyers, medical practitioners or social workers

, and those who have had personal experience with mentally incapacitated persons. The quorum of the Board is not less than three, comprising either the Chairperson or a lawyer member, together with one member from the medical practitioner/social worker category and another member from the category of persons having had personal experience with mentally incapacitated persons. The Board is presided by either the Chairperson or the lawyer member. See section 59J(2) & (3) of the Ordinance and paragraphs 4 and 5 in the Schedule to the Ordinance.

All members of the Board, with the exception of the Chairperson, serve on a voluntary basis. The workload of the Board is heavy and the responsibility serious. It is an acknowledged fact that the Board has been performing its unenviable task extremely conscientiously and efficiently.

This appeal, which concerns a decision of the Board to replace an individual guardian with the Director of Social Welfare as the new guardian of a mentally incapacitated person after a review of the original guardianship order, raises a matter of general practice of the Board.

Facts

The background to the appeal can be quickly summarised. The mentally incapacitated person, Madam C, is 96 years old. She has been residing at a nursing home since October 2001. The appellant is her niece. Madam C has been suffering from senile dementia. The appellant was appointed her sole guardian by the Board in 2004 for a period of six months under the original guardianship order, which was subsequently renewed for a period of three years. It is fair to say that the appellant has taken her responsibility as guardian very seriously and has spent much time and efforts in looking after Madam C and in supervising the caring of Madam

s daily living in the nursing home. Unfortunately, in the process, tensions have arisen between the appellant and the nursing home, including the resident doctor there, resulting from differences in opinion regarding how Madam C should be taken care of in terms of her daily living and when she was not well.

After a review hearing before the Board on 12 June 2007, the Board decided to extend the guardianship order for another year but it also decided to replace the appellant with the Director of Social Welfare as the guardian of Madam C. From that latter decision, Madam L appeals to this Court pursuant to section 59W of the Mental Health Ordinance. Lam J, who heard the application for leave to appeal, only granted leave to appeal on one ground, namely that the Board failed to give any reasons for its decision to replace the appellant with the Director of Social Welfare as the guardian of Madam C.

Relevant provisions

This raises a general question concerning the practice of the Board. The relevant provisions regarding the making of decisions by the Board and the supply of reasons for the decisions so made can be found in rules 26 and 27 of the Mental Health Guardianship Board Rules (Cap 136E), which read:

26. Decisions

The decision by which the Board determines an application, or concludes a review of a guardianship order where there is no application, shall be recorded in writing and the record thereof shall be signed by the Chairperson and state the reasons for the decision.

Communication of decisions

The decision by which the Board determines an application, or concludes a review of a guardianship order where there is no application, may, at the discretion of the Board, be announced by the Chairperson immediately after the hearing of the case and, subject to subsection (2), the written decision of the Board, including the reasons, shall be communicated in writing within 7 days of the hearing to all the parties.

Where the Board considers that the full disclosure of the recorded reasons for its decision to the mentally incapacitated person in accordance with subsection (1) would adversely affect the health or welfare of the mentally incapacitated person or others, the Board may instead communicate its decision to him in such manner as it thinks appropriate and may communicate its decision to the other parties subject to any conditions it may think appropriate as to the disclosure thereof the mentally incapacitated person.

Where the applicant, if any, or the mentally incapacitated person was represented at the hearing by a legal representative, the Board shall disclose the full recorded grounds of its decision to the representative, subject to any conditions it may think appropriate as to the disclosure thereof to the mentally incapacitated person.

To put the rules in their proper context, regard must be had to the sort of decisions that the Guardianship Board is required to make under the Ordinance, the guiding principles for making such decisions and what responsibility a guardian is usually given under a guardianship order. In this regard, it is instructive to look at section 59K(2) for the guiding principles, section 59O on the making of guardianship orders, section 59P on the reports of the Director of Social Welfare and the role he plays in the decision making process, section 59U on the Board

s review of guardianship orders and section 59R(3) on the functions and powers of guardians.

Section 59K(2) reads:

The matters or principles that the Board shall observe and apply in the performance of its functions or the exercise of its powers are as follows, namely

that the interests of the mentally incapacitated person the subject of the proceedings are promoted, including overriding the views and wishes of that person where the Board considers such action is in the interests of that person;

despite paragraph (a), that the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained, respected.

Section 59O deals with the making of guardianship orders:

59O. Board may make guardianship orders

- (1) Subject to subsection (3), if, after conducting a hearing into any guardianship application made under section 59M(1) for the purpose of determining whether or not a mentally incapacitated person who has attained the age of 18 years should be received into guardianship and having regard to the representations (if any) of any person present at the hearing to whom a copy of the guardianship application has been sent under section 59N(3) and considering the social enquiry report referred to in section 59P(1) the Guardianship Board is satisfied that the mentally incapacitated person is a person in need of a guardian, it may make an order appointing a guardian in respect of that person.
- (2) Any guardianship order made under subsection (1) shall be subject to such terms and conditions as the Guardianship Board thinks fit, including terms and conditions (if any) as to the exercise, extent and duration of any particular powers and duties of the guardian.
- (3) In considering the merits of a guardianship application to determine whether or not to make a guardianship order under subsection (1) in respect of a mentally incapacitated person, the Guardianship Board shall observe and apply the matters or principles referred to in section 59K(2) and, in addition, shall apply the following criteria, namely that it is satisfied
 - (a) (i) that a mentally incapacitated person who is mentally disordered, is suffering from mental disorder of a nature or degree which warrants his reception into guardianship; or

- (ii) that a mentally incapacitated person who is mentally handicapped, has a mental handicap of a nature or degree which warrants his reception into guardianship;
- (b) that the mental disorder or mental handicap, as the case may be, limits the mentally incapacitated person in making reasonable decisions in respect of all or a substantial proportion of the matters which relate to his personal circumstances;
- (c) that the particular needs of the mentally incapacitated person may only be met or attended to by his being received into guardianship under this Part and that no other less restrictive or intrusive means are available in the circumstances; and
- (d) that in the interests of the welfare of the mentally incapacitated person or for the protection of other persons that the mentally incapacitated person should be received into guardianship under this Part.

Section 59P makes provisions on the reports of the Director of Social Welfare:

59P. Report of Director of Social Welfare

- (1) For the purpose of section 59O, a report (
social enquiry report
) signed by or on behalf of the Director of Social Welfare and prepared by a public officer in the Social Welfare Department shall, subject to subsection (2), be received in evidence for consideration by the Guardianship Board.
- (2) A copy of the social enquiry report (or the substance of the report) referred to in subsection (1) shall be given or disclosed to
 - (a) an applicant making a guardianship application under this Part;
 - (b) the mentally incapacitated person the subject of the application; and
 - (c) the counsel or solicitor representing any person referred to in paragraph (a) or (b).
- (3) The social enquiry report shall contain the views and wishes of the mentally incapacitated person, in so far as they may be ascertained and include an assessment of the family background, and social and financial situation, of that person.

Section 59U concerns the Board

s review of guardianship orders:

59U. Review of guardianship orders

- (1) The Guardianship Board may, of its own initiative and in accordance with such procedure as it thinks fit, review any guardianship order made under section 59O at any time prior to the expiry of the period for which the guardianship order has effect under section 59R(1).
- (2) The Guardianship Board shall review any guardianship order made under section 59O

- (a) at the request of any person entitled to request under subsection (4) a review of the guardianship order; or
- (b) prior to the expiry of the period for which the guardianship order has effect under section 59R(1).
- (3) The Guardianship Board shall review any guardianship order made under section 59O in the circumstances described in section 59T(1)(a) or (b).
- (4) The following persons are entitled to request the Guardianship Board to review a guardianship order made under section 59O
 - (a) the mentally incapacitated person received into guardianship under this Part and the subject of the guardianship order;
 - (b) the guardian of that person;
 - (c) the Director of Social Welfare;
 - (d) any other person (including a relative of the mentally incapacitated person) who, in the opinion of the Board, has a genuine interest in the welfare of the mentally incapacitated person.
- (5) Despite section 59R(1), a guardianship order that would otherwise cease to have effect under that section before the completion of a review under this section shall continue to have effect until the completion of the review.
- (6) On reviewing a guardianship order in accordance with this section, the Guardianship Board may
 - (a) in the case of a review under subsection (1) or (2)(a)
 - (i) vary the guardianship order and, in the case of a variation which is a transfer, may appoint the Director of Social Welfare or such other person approved by the Guardianship Board for that purpose;
 - (ii) suspend or revoke the guardianship order; or
 - (iii) take no further action in relation to the guardianship order;
 - (b) in the case of a review under subsection (2)(b)
 - (i) renew the guardianship order;
 - (ii) renew and vary the guardianship order and, in the case of a variation which is a transfer, may appoint the Director of Social Welfare or such other person approved by the Guardianship Board for that purpose; or
 - (iii) take no further action in relation to the guardianship order; or
 - (c) in the case of a review under subsection (3)

- (i) revoke the guardianship order; or
 - (ii) renew and vary the guardianship order and, in the case of a variation which is a transfer, may appoint the Director of Social Welfare or such other person approved by the Guardianship Board for that purpose.
- (7) The provisions of this Part apply to the renewal or variation of a guardianship order (including a variation in the duration of that order) in the same way as they apply to the making of such an order under section 59O.

For the purposes of this

f9e)

e or more of the following powers, namely-

the power to require the mentally incapacitated person to reside at such place as may be specified by the guardian;

the power to convey, or to arrange the conveyance of, the mentally incapacitated person to the place so specified by the guardian, and such reasonable force may be used as is necessary for the purpose;

the power to require the mentally incapacitated person to attend at places and times so specified by the guardian for the purpose of treatment or special treatment (within the meaning of section 59ZA) or occupation, education or training;

the power to consent to that treatment (other than special treatment) on behalf of the mentally incapacitated person but only to the extent that the mentally incapacitated person is incapable of understanding the general nature and effect of any such treatment;

the power to require access to the mentally incapacitated person to be given, at any place where the mentally incapacitated person is residing, to any registered medical practitioner, approved social worker, or other person (if any) specified in the order;

the power to hold, receive or pay such monthly sum (within the meaning of section 44B(8)) specified in the order on behalf of the mentally incapacitated person for the maintenance or other benefit of that person as if the guardian were a trustee of that monthly sum.

Standard forms

Over the years, as this Court has been given to understand, the Guardianship Board has developed the practice of using standard forms to set out the decisions made by the Board and the reasons for the decisions. Members are free to adapt the forms to cater for the particular circumstances of each case. Taking the present case as an example, two standard forms have been used. The first form sets out the formal order made by the Board after the review hearing, namely to renew the guardianship order, to replace the guardian and to vary some powers originally given in the first guardianship order. It is dated 12 June 2007. No reasons for the order/

decisions are included. The first form is uncontroversial. But not so with the second form that has been used. It is entitled

Reasons for Renewal and Variation of Guardianship Order on Review

the Reasons

). It is also dated 12 June 2007, although it is not in dispute that a copy of the same was only supplied to the Director of Social Welfare and the appellant on 20 and 21 June 2007 respectively.

Nonetheless, in this second document, which is based on the standard form, the Board gives or purports to give the reasons for its decisions, including the decision to replace the guardian. It begins by listing out the witnesses who have given evidence before the Board at the hearing on 12 June 2007. It then sets out the background to the application and the review, and states that the review has been conducted under section

59U(2)(b). It goes on to enumerate the documentary evidence that the Board has received and considered. Paragraphs 9 to 15 then summarise the evidence given by the respective persons who have attended the hearing. It is fair to say that the tensions and differences in opinion between the appellant and others who have also been involved in taking care of Madam

C are quite apparent from the documentary evidence referred to in the Reasons as well as the summary of oral evidence set out there. Then in a section under the caption

Decision

, the Board sets out its decisions. Paragraphs 16 and 17 deal with directions and renewal of the guardianship order. Paragraphs 18 and 19, which are the last two substantive paragraphs in the Reasons, concern the replacement of guardian. They read:

18. The Guardianship Board was satisfied that the Director of Social Welfare is the most appropriate person to be appointed the new guardian of the subject.

The Guardianship Board took the view that it would be appropriate to renew the Guardianship Order for only one year so as to enable an early review to consider whether [the appellant] should be re-appointed as the guardian.

No or no other reasons are given for the Board

s decision. Paragraphs 18 and 19 are followed by the names of the members comprising the particular Board. The document is signed by the presiding member (a

lawyer) of the Board.

Issues raised

In this appeal, the complaint of the appellant is that the Board has essentially failed to give any reasons for its decision to replace her as guardian. Mr Eric Shum, appearing for the appellant, submits that the Reasons simply set out the evidence received by the Board and the decision made by it. No reasons whatsoever are given.

I am given to understand that the way the Reasons are written is not unique to the present case. It reflects the general practice of the Board.

In other words, this particular Board which has prepared the Reasons has simply followed the general practice of the Board.

This therefore raises three questions. First, whether the Board is under a duty to give reasons. Secondly, if there is such a duty, what are the contents of that duty and thirdly, whether the duty has been discharged on the facts of the present case.

A duty to give reasons

The answer to the first question is straightforward. In my view, it is beyond argument to the contrary that the Board has a duty to give reasons for its decisions. That has been made quite clear by rules 26 and 27 of the Mental Health Guardianship Board Rules already extracted above. Rule 26 provides that the decision of the Board shall be recorded in writing and the record of the decision shall be signed by the Chairperson

and state the reasons for the decision

.

Rule 27 governs the communication of the decision made to the relevant parties. In particular, rule 27(1) requires that

the written decision of the Board, including the reasons, shall be communicated in writing within 7 days of the hearing to all the parties

.

In my view, there can be no doubt that there is a statutory duty to give reasons for the decision by which the Board determines a guardianship application or concludes a review of a guardianship order.

Contents of the duty

The next question is the contents of the duty. In this regard, important guidance has been given by the Court of Final Appeal in a case concerning the duty of the Obscene Articles Tribunal to give reasons. The Tribunal was established under the Obscene and Indecent Articles Ordinance (Cap 390), which on its true construction impliedly requires the Tribunal to give reasons both when making a final classification under section 15 and on a referral under section 29. Oriental

Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority (1997-98) 1 HKCFAR 279.

After pointing out the benefits of a duty to give reasons and exhorting the Tribunal to take a positive attitude towards it (at page 290D to H), the Chief Justice explained (at page 290J to 291A) that:

Where there is a duty to give reasons, it must be discharged by giving adequate reasons. What would amount to adequate reasons for a decision would depend on the context in which the decision maker is operating and the circumstances of the case in question.

The Chief Justice then made four general observations regarding the reasons that should be given by the Tribunal, in the context of its classification work (at page 291C/D to H):

First, the reasons given should show that the tribunal has addressed the substantial issues before it and show why the tribunal has come to its decision. There may not be any need however to address every single issue. But the reasons should show that the issues that arise for serious consideration have been considered.

Secondly when deciding on questions of indecency or obscenity, there may be cases where the contents of the articles in question would virtually speak for themselves. In these instances, the duty to give reasons could be discharged by describing the contents without much more. Apart from cases of this kind, a decision on indecency or obscenity which merely recites the statutory guidelines in s.10 would not normally be adequate. Such statements would in effect assert conclusions and would not reveal why the tribunal has come to such conclusions.

Thirdly, the reasons may not require great elaboration and they may be brief. It is only when they are defective in substance that they should be considered inadequate. Ultimately, what are adequate reasons in the circumstances of a particular case has to be approached sensibly.

Fourthly, where a point of law is raised the point has to be decided by the presiding magistrate and the statute expressly requires reasons to be given in writing. See s.7(3). Reasons for a decision on a point of law should usually set out the findings of fact, the point of law at issue and the process of reasoning leading to the conclusion.

Needless to say, the observations made by the Court of Final Appeal were made in the context of the Obscene Articles Tribunal

s work under the relevant Ordinance. However, subject to common sense adaptation, those observations are equally applicable to the Guardianship Board

s duty to give reasons as required under rules 26 and 27.

Mr Clifford Tavares, Senior Government Counsel appearing for the Director of Social Welfare in this appeal, has done some useful research on authorities in the United Kingdom. I find his assistance very helpful. Here, I should explain that the Director of Social Welfare has in fact supported the continued appointment of the appellant as guardian of Madam C in his social

enquiry report. Put another way, the decision of the Board to appoint the Director in replacement of the appellant as guardian was made contrary to the recommendation made by the Director in the social enquiry report. Quite understandably, therefore, the Director adopts a neutral stance in this appeal. Nonetheless, as described, Mr

Tavares has provided the Court with useful assistance on the general questions under discussion.

In *R (Ashworth Hospital Authority) v The Mental Health Review Tribunal for West Midlands & Northwest Region* [2001] EWHC Admin 901, a hospital applied for judicial review of a Mental Health Review Tribunal

s decision to discharge a patient who had been detained in the hospital under section 3 of the Mental Health Act 1983. One of the grounds of application was that the reasons for the tribunal

s decision were wholly inadequate. Under the relevant statutory rules, the Tribunal was required to give written reasons for its decision. Mr Justice Stanley Burnton had this to say in paragraphs 77 and 78 of his judgment on this aspect of the case:

77. In my judgment the following propositions set out the relevant law:

Proper adequate reasons must be given that deal with the substantial points that have been raised: *Re Poyser and Mills*

Arbitration [1964] 2 QB 467, 478, the classic statement of Megaw J, made, it should be noted, in the context of an arbitration award.

Reasons must be sufficient for the parties to know whether the tribunal made any error of law: *Alexander Machinery Ltd v Crabtree* [1974] ICR 120.

Where, as in the case of Mental Health Review Tribunals, Parliament has required that a decision be given with written reasons, those reasons have to be adequate. They may be elucidated by subsequent evidence, but in general, inadequate written reasons cannot be saved by such evidence: *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302.

A Mental Health Review Tribunal

s reasons must deal with the entirety of its decision, and not only its decision on the issues set out in section 72(1)(a) or (b) of the Mental Health Act: *Bone v Mental Health Review Tribunal* [1985] 3 All ER 330.

It is unnecessary for a tribunal to set out the evidence and arguments before it or the facts found by it in detail: *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 983.

It is often difficult to explain why one witness is preferred to another. Generally speaking, a tribunal

s decision will not be inadequately reasoned if it does not give such an explanation.

In assessing the adequacy of reasons, one must bear in mind that the decision will be considered by parties who know what the issues were: *R v Mental Health Review Tribunal ex p Pickering* [1986] 1 All ER 99, 102; *R v Mental Health Review Tribunal ex p Booth* [1997] EWHC Admin 816, per Laws J at paragraph 29.

However, the reasons must sufficiently inform both the patient and the hospital as to the findings of the tribunal: *Pickering* at 104. This consideration has been given added significance by the decision of the Court of Appeal in *Brandenburg*. A tribunal must also bear in mind that its decision may have to be considered by those who were not present at or parties to the hearing, such as Dr Silva and the local health authority in the present case. Furthermore, in my judgment there is no real difference in the requirements of reasons where the decision of the tribunal is to discharge a patient and where its decision is to refuse to do so, at least in a case such as the present, where inappropriate discharge may create risks for third parties, whose own Convention rights under Articles 2 and 5 may be in play.

In considering the adequacy of reasons the Court is entitled to take into account the fact that the tribunal has a legally-qualified chairman, and that in the case of Mental Health Review Tribunals the reasons do not have to be given immediately. Rule 23 does not require its decision or its reasons to be recorded in writing immediately after the hearing, and Rule 24 gives the Tribunal 7 days in which to communicate its written decision and reasons.

78. The judgments to which I was referred include a number of cases in which the tribunal's reasons were brief in the extreme, yet the decisions were upheld. However, the adequacy of reasons must depend on the context, the issues and the evidence ...

The Judge concluded, on the facts of that case, that the Tribunal had not given adequate reasons for its decision, which was therefore unlawful. This part of the Judge

s decision was upheld on appeal: *R(H) v Ashworth Hospital Authority* [2003] 1 WLR 127. Dyson LJ, with whose judgment the other members essentially agreed, rejected an argument that problems of excessive workload and inadequate resources constituted justifications for the Tribunal

s failure to give adequate reasons (paragraph

76). His Lordship then quoted with approval the advice given in a handbook issued to the Tribunal members in September 2000 (paragraph 77):

Tribunals must give detailed reasons, based on the evidence and the logical application of sound judicial principles, for their decisions (this has been given substance by decisions in the High Court). The reasons need not be elaborate but they must deal with the substantive points, which have been raised and must show the parties the basis on which the tribunal has acted. It is not sufficient merely to repeat the statutory grounds. It is not usually necessary to review the evidence at length. It is important to say which evidence has been accepted and often which has been rejected. It is not usually necessary to give lengthy reasons for acceptance or rejection of evidence. The reasons for the decision will be agreed by the tribunal members at the conclusion

of the hearing, put in writing and signed by the president.

His Lordship added that so far as disputed evidence was concerned, reasons had to be given for its acceptance or rejection, although it was not usually necessary for this to be lengthy (paragraph 78).

Dyson LJ then dealt with the difference between a judgment given in ordinary civil litigation and a decision made by a Mental Health Review Tribunal and emphasised that a decision made by the Tribunal could be read by parties who had not taken part at the hearing and a patient might have difficulties in adequately recollecting the evidence and arguments before the Tribunal when he later considered a decision. His Lordship therefore rejected the

informed audience

argument and said it could not properly be relied on to justify as adequate a standard of reasoning in Tribunals which would not be regarded as adequate in a judgment by a judge. (The informed audience argument was essentially that since the reasons were meant to be read by those who had participated at the hearing, they could be brief as the readers would be assumed to know what the Tribunal was talking about.) But it did not follow, the judge added, that Tribunals were obliged to produce decisions which were as long as judgments by a judge often tended to be. A brief judgment was no less likely to be adequately reasoned than a lengthy one (paragraph 79).

In relation to differences in expert opinion, the Judge stated that it would not be enough for the Tribunal simply to state that it preferred the evidence of one to that of another. It had to give reasons. It had to at least indicate the reasoning process by which it had decided to accept some and reject other evidence, his Lordship explained, quoting what Henry LJ had said in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 382 (paragraph 80). This is what Henry LJ has said in *Flannery* at page 382:

Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.

The principles set out in the decision of the Court of Appeal in *Ashworth* were followed and applied in *R*

(Mersey Care NHS Trust) v Mental Health Review Tribunal [2004] EWHC 1749 (Admin), paragraphs 74 to 77. In that case, Beatson J also pointed out that the mere recitation of evidence or submissions was no substitute for giving reasons, citing L v Devon County Council [2001] EWHC Admin 958 as authority in support of his proposition.

I have no doubt that the general principles discussed above are helpful in understanding the contents of the Guardianship Board

s duty to give adequate reasons. However, it cannot be over emphasised that whether reasons are adequate must be determined by reference to what is demanded by the issues that are pertinent to the decision. Needless to say, for instance, where an application is uncontested and the Board accepts the views of the experts or that expressed in the social enquiry report, all it is expected to say by way of reasons is that it so accepts, and thus adopts, the views of the experts or the Director.

Duty not discharged in present case

Turning to the facts in the present case, which also serves as an illustration of how the general principles are applied in practice, Mr Tavares has very helpfully submitted that the Reasons are inadequate for a number of reasons: The Reasons do not expressly explain why the Board is satisfied that the Director is the most appropriate person to be appointed the new guardian of the Madam C; they do not state expressly why the Board does not accept the Director of Social Welfare

s recommendation that the appellant be appointed as Madam C

s guardian for another three years; they do not state what weight, if any, has been given to any of the many documents listed out in the Reasons and what particular matter or matters in those documents have been relied on. The Reasons summarise the evidence given by the various witnesses before the Board, but do not state expressly whether the Board prefers the evidence of a particular witness to that of the other and if so why. Although apparently credibility of the witnesses is not in issue, the Reasons do not expressly say that this is the case. The Reasons do not say whether the Board prefers the appellant

s views or those working at the nursing home on those issues where they have differed and if so why. In particular, some of the differences involved differences in opinion between the in-house doctor of the nursing home and the independent medical opinion obtained by the appellant. Nor do the Reasons expressly say how the differences in opinion and the tensions arising from the differences have affected or may in future likely affect the interest of Madam C and whether there are ways, short of replacing the appellant as guardian, to remove or lessen the tensions.

I find these to be valid criticisms. They are areas which the Board, depending on the actual reasons that it has in mind, should have covered in the Reasons.

Unfortunately, no such reasons are contained in the Reasons. They simply set out the disputes, cover the evidence and state the conclusions reached. The Board

s reasons are singularly missing.

One is therefore driven to the conclusion that the Guardianship Board has failed to discharge its duty to give reasons in the present case. I am afraid that the current practice (as I understand it) of the Board merely stating its conclusion or decision and not giving substantive reasons for it cannot be supported and should no longer be continued. I wish to emphasise that the law does not require the Board to give lengthy reasons. Succinct reasons which deal with the real issues and the evidence would suffice.

Additional Reasons

I do not for a moment doubt the ability of the Board to give such reasons. I say this, not only having regard to the composition of the Board, but also for a very specific reason: four days before the hearing of this appeal, the Guardianship Board sent to the Court and the parties concerned a

Statement of Reasons for Renewal and Variation of Guardianship Order on Review

dated 31 August 2007 (

the Additional Reasons

), which were signed by the presiding lawyer member of the Board. In the covering letter, the Court was told that upon reading the papers lodged in this appeal, the presiding member of the Board

thought it prudent to assist the Court by specifically preparing an additional Statement of Reasons for Renewal and Variation of Guardianship Order on Review

for placing before the Court at the hearing of the appeal.

Although for reasons that I will presently turn to, neither Mr

Shum nor Mr Tavares has thought fit to make submission on the contents of the Additional Reasons, it seems to me that at least, on the face of it, the Additional Reasons, comprising six paragraphs in three pages, are the sort of succinct reasons that the Board is expected to give in explaining the decision in question. Having read the Additional Reasons, speaking for my part, I now have a better idea as to why the Board has reached its decision to replace the appellant as the guardian. I say this without having the benefit of submission from either side. And I must immediately add that I am not suggesting or implying that the reasons now given are good or sufficient reasons for the decision made. All I am saying is that at least on the face of it, the Additional Reasons accord with the sort of adequate reasons that are called for in making a decision of the present type. I have therefore said that I do not doubt for a moment the ability of the Board to come up with adequate reasons that it is required by law to give in a succinct

manner.

Having made those preliminary remarks, I now explain why both sides have not thought fit to make submission on the contents of the Additional Reasons. In short, they simply come too late and are therefore irrelevant, the parties contend. As mentioned, rules 26 and 27 require the Board to give written reasons within seven days after the hearing. That the Board has purported to do

it sent to the Director of Social Welfare as well as the appellant the formal order and Reasons on 20

and 21 June 2007. When subsequently the Legal Aid Department wrote to the Board (on June 2007) asking for

detailed reasoning

of the Board in the course of processing the appellant

s application for legal aid, the Board simply referred the Department of Legal Aid to the formal order and Reasons dated 12

June

2007. It is plain that the Board intended the Reasons dated 12 June 2007 to be its reasons for the purposes of rules 26 and 27. On the other hand, the Additional Reasons were only supplied to the Court and the parties four days before the hearing of the appeal. They were only prepared after the presiding member had read the papers lodged in the appeal.

I agree with the parties that the Additional Reasons cannot be regarded as the reasons of the Board. Put another way, the Board has simply become *functus officio*. It is in no position to remedy its failure to give reasons by the belated provision of the so-called Additional Reasons. In this regard, I agree with Stanley Burnton J when he said in paragraph

77(c) of his first instance judgment in *Ashworth* that where, as in the case of Mental Health Review Tribunals, Parliament has required that a decision be given with written reasons, those reasons have to be adequate. Whilst they may be elucidated by subsequent evidence, in general, inadequate written reasons cannot be saved by such evidence.

In my view, this is particularly so, as Mr Shum has forcefully submitted at the hearing, when the so-called Additional Reasons were, at least on the face of the covering letter, only prepared by the presiding member of the Board, rather than by the Board itself (comprising also two other members apart from the presiding member). I do not think the presiding member could speak for the entire Board. And indeed it is inappropriate for him to do so: see the comments of Rogers VP in *A solicitor v The Law Society of Hong Kong* CACV 269/2004 (28 November 2005), paragraph 8, where his Lordship had some strong words to say regarding an affidavit made by a Solicitors

Disciplinary Tribunal chairman who purported to provide additional explanations and reasons to supplement those given in the decision of the Tribunal which formed the subject matter of the appeal.

Having said all that, I wish to stress that I do not doubt for a moment the good intentions of the presiding member in the preparation of the Additional Reasons for the Court

s use, or that they represented, to the best of his own recollection and understanding, the actual reasons of the Board in reaching the decision in question. I would also say that probably if those supplemental reasons had been shown to the other two members (assuming that that has not been done) they would also have agreed or substantially agreed with them.

But all this is quite beside the point. The purported Additional Reasons are simply irrelevant for the purposes of this appeal. As mentioned, it is plain that the Board intended the Reasons dated 12 June 2007 to be its reasons for the purposes of rules 26 and 27. No further reasons were contemplated.

Relief

In the circumstances, I must approach this case on the footing that no reasons have been given. Paragraphs 18 and 19 in the Reasons are only conclusions or decisions, but not reasons. In those circumstances, the decision of the Board to replace the appellant with the Director of Social Welfare as the new guardian of Madam C must be disturbed. Mr Shum, on behalf of the appellant, has submitted that as all the evidence is before the Court, credibility is not in issue and most importantly, her client

s case is

overwhelming

, the Court can and should here and now make a decision in favour of the appellant on the substantive matter. In other words, the Court should, in allowing the appeal, order that the appellant

s appointment as guardian of Madam C be continued under the renewed guardianship order.

No doubt the Court has power to make such an order under Order 55 of the Rules of the High Court (Cap 4).

However, I am not persuaded that I should follow that course. First, the so-called Additional Reasons supplied by the presiding member, although irrelevant to the question of whether the Board has given adequate reasons for its decision, do demonstrate that there is another side to the matter. All I would say is that the reasons given by the presiding member are reasons worthy of consideration. I would not say and should not be taken as saying whether they are sufficient reasons to justify a decision to replace the appellant with the Director of Social Welfare as the new guardian of Madam C. What I am saying is that given the materials before the Court, the appellant

s case may not be as

overwhelming

as Mr

Shum would like this Court conclude.

Secondly and more generally, having considered the relevant provisions in the Mental Health Ordinance, particularly those relating to the composition of the Board and those relating to appeals to the court, I take the view that generally speaking, the court

s appellate role is essentially to deal with questions of law (section 59W(1)(a)) or any other questions that may merit the special attention of the court. In my view, the general intention is that matters like guardianship applications and reviews should primarily remain matters for the Board to decide. It is only where a question of law arises, or where the particular application raises a special matter that merits the court

s attention or possible intervention, that the court should take it upon itself to decide the matter. A fortiori, where there is no first instance reasoned decision by the Board. This makes good sense. The Board comprises three members, ie the Chairperson or a presiding lawyer member, a member belonging to the medical doctor/social worker category, and a third member who has had personal experience with mentally incapacitated persons. That composition is uniquely suited for making decisions on the types of applications that the Board is required to make. The combined professional learning, trainings and experiences are invaluable in ensuring that the best decision is made in the interest of the mentally incapacitated person. Their collective views are entitled to high respect from the court.

In those circumstances, I would say that save in exceptional circumstances, the court should be slow to make, in effect, a first instance decision on an application that should have been dealt with by the Board (where as here, no reasons have been given for the decision below). The present case is a good illustration. The Board, rather than the court, is best suited for deciding the issues in question. Of course, if there should be a question of law or any other special matter arising that requires the attention or possible intervention by the court, the decision can be challenged on appeal to the court. And one can safely assume that after this judgment, such a decision will be accompanied by adequate reasons. However, in the absence of such a reasoned decision, it is quite inappropriate, in my view, for this Court to assume the role of the Board and make a decision on the present matter. If nothing else, the Court sits alone and does not have the assistance of either a medical doctor or social worker who is experienced in assessing or treating mentally incapacitated persons, or a person who has had personal experience with mentally incapacitated persons.

In those circumstances, I am not inclined to accept Mr Shum

s invitation to make a decision on the disputed matter. Remitting the matter to the Board for its reconsideration would seem to me to be a much better option to take.

In so concluding, I have also taken into account the fact that the appellant would, on the evidence, continue to take an active interest in supervising the caring of Madam C

s daily living in the meantime, pending the rehearing of the matter by the Board, even though formally she is no longer the guardian. She may of course continue to make suggestions to the Director, who is for the time being the guardian, on all matters pertaining to the welfare of Madam C. I fully believe that the Director will give due consideration to the appellant

s suggestions according to their merits. Secondly, the inevitable delay accompanying the remitting of the case to the Board for reconsideration will not prejudice the best interest of Madam C because in the meantime the Director will continue to act as her guardian. I have no reason to believe that the Director will not discharge his duty to the best of his ability. As I said, if the appellant has any suggestions to make, she can make them to the Director who will be duty bound to consider those suggestions in the best interest of Madam C.

Having looked at all relevant matters in the round, I have come to the conclusion that by way of relief, I should order that the matter be remitted to a differently constituted Board for rehearing.

Finally as regards the question of costs, fortunately the appellant is legally aided. Neither she nor the Director of Legal Aid is interested in asking for costs against anybody. In practical terms, her costs will be borne by public funds. As regards the Director of Social Welfare, he is a reluctant participant in this appeal. He does not ask for costs. The Board is not a party to this appeal, and there is no suggestion that costs could or should be awarded against the Board.

Outcome

In conclusion, I order that the appeal be allowed and the question of replacing the appellant with the Director of Social Welfare as guardian under the renewed guardianship order be remitted to a differently constituted Board for rehearing. For the avoidance of doubt, I further direct that the decision of the Board at the rehearing must be accompanied by adequate reasons. I make no order as to costs, save that there be legal aid taxation of the appellant

s own costs.

Having consulted the parties, I give permission for the circulation and publication of this judgment.

It only remains for me to thank counsel for their assistance.

(Andrew Cheung)

Judge of the Court of First Instance

High Court

Mr Erik Shum, instructed by Messrs Ho, Tse, Wai & Partners, assigned by the Director of Legal Aid, for the appellant

Mr Clifford Tavares, Senior Government Counsel of the Department of Justice, for the Director of Social Welfare

More precisely, the category comprises

persons who have had experience in assessing or treating mentally incapacitated persons and may include registered me

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