SUPREME COURT OF QUEENSLAND

CITATION:	*JDM v Hodges & Anor* [2019] QSC 65
PARTIES:	**JDM** (Applicant) **v** **GEMMA ANNE HODGES** (First Respondent) and **AAI LIMITED (ABN 48005297807)** (Second Respondent)
FILE NO/S:	No 576 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	19 March 2019
DELIVERED AT:	Cairns
HEARING DATE:	1 March 2019, further submissions in writing received 13 March 2019
JUDGE:	Henry J
ORDER:	**1. I will hear the parties at 9.15am 22 March 2019 as to orders in light of my conclusion the court has no jurisdiction to determine the application.**
CATCHWORDS:	HEALTH LAW – GUARDIANSHIP, MANAGEMENT AND ADMINISTRATION OF PROPERTY OF PERSONS WITH IMPAIRED CAPACITY – ADMINISTRATION AND FINANCIAL MANAGEMENT – JURISDICTION, PROCEDURE AND EVIDENCE – where the applicant is the beneficiary of settlement monies arising from a personal injuries claim, but has an impaired capacity to manage its administration – where the applicant seeks orders for and in connection with the appointment of an administrator – whether the Court has jurisdiction to make the orders sought, either under sections 12 and 245 of the *Guardianship and Administration Act 2000* or in the exercise of its parens patriae jurisdiction *Guardianship and Administration Act 2000* (Qld) ss 12, 245

Re W (A Minor) (Medical Treatment) [1992] 4 All ER 627

Secretary, Department of Health and Community Services v JWB & SMB (Marion's Case) (1992) 175 CLR 218

Wellesley v Wellesley (1828) 4 ER 1078

Adams v AAI (Unreported, Supreme Court of Queensland, McMurdo J, 16 June 2014)

COUNSEL: M D Glen for the applicant
M Grant-Taylor QC for the second respondent

SOLICITORS: Murray Lyons Solicitors for the applicant
Bray Lawyers for the second respondent

[1] The applicant seeks orders for and in connection with the appointment of an administrator under the *Guardianship and Administration Act 2000* (Qld) ("the Act"). The appointment is sought because the applicant, who is under an impaired capacity for a financial matter under the Act, is the beneficiary of settlement monies said to be payable under the settlement of a personal injuries claim.

[2] The second respondent queries whether this Court has jurisdiction to appoint an administrator. It also asserts the Court should not itself assess the administration and management fees to be paid to the administrator because there has been an agreement between the parties that the relevant amount is $319,970.77. The applicant denies there has been any such agreement and seeks an assessment in the amount $418,000.

Background

[3] The applicant, JDM,[1] is now 23. She was 12 years old when among a group of suburban pedestrians by a negligently driven vehicle. The accident caused the death of her grandmother, physical injury to her mother and chronic post-traumatic stress disorder to JDM.

[4] JDM's disorder persists, despite her having received considerable treatment for her psychiatric symptomatology. She has poor capacity for learning and memory and is said to have a borderline to dull normal range of intelligence quotient of 68. She has struggled to hold down employment for more than a few days or a week. She lives at home with her parents, although she is engaged to a young man with whom she plans to live and have children. She can drive but prefers to have a support person travel with her, such as her mother or partner, if travelling any distance. Her judgment on everyday matters is superficial and significantly uninformed, with limited ability to pursue appropriate resources to help in decision making. She has little or no social or recreational interests and little capacity to function outside the home, the latter being associated with panic disorder with agoraphobia developed in the context of her post-traumatic stress disorder anxiety.

---

[1] Identity anonymised for the purposes of these public reasons.

[5] While she is considered able to manage and budget small sums of money such as her fortnightly Centrelink payment, she is not considered capable of managing large sums of money appropriately because of poor judgment, possible impulsive decision making and vulnerability to manipulation by others. The consensus of psychiatric opinion is that she would not be "capable of managing her own affairs in terms of outlays of large sums of money" and "some regulated financial oversight for approval for spending of large sums of money should be made for her protection".[2] That opinion supports the conclusion that JDM has an impaired capacity to manage the administration of her settlement monies. That was evidently also the view of the parties, in light of the terms of settlement.

[6] On the other hand, JDM was not considered to be under an impaired capacity for the purposes of her giving instructions and making decisions regarding the conduct of the litigation or its settlement.

[7] That settlement occurred against a background where a claim and statement of claim were filed on 14 May 2015 in the District Court at Cairns and a conference was convened in October 2016 apparently pursuant to r 553 *Uniform Civil Procedure Rules* ("UCPR"). The terms of settlement were recited in a poorly drafted release document executed on 17 November 2016. The release recorded, inter alia:

> "**IN CONSIDERATION** of Suncorp Insurance paying to the person described in the Schedule as "the Releasor" the sum of money referred to in the Schedule as "The Settlement Monies" in full and final satisfaction and discharge of all claims whatsoever which the Releasor, or any person on behalf of the Releasor, may have arising as a result of, or in any way connected with the matter described in the Schedule as "The Incident"
>
> **TERMS OF RELEASE**
>
> The releasor: …"[3]

[8] The ensuing terms of release included release and discharge provisions, an agreement to file a notice of discontinuance in "the Present Proceedings", and a number of authorisations and acknowledgments. The acknowledgment as to the composition of the settlement monies was not exhaustive and merely recorded that they included amounts for past economic loss and future economic loss, but not an apportionment for contributory negligence. According to the release (term 1) the meaning of "the Present Proceedings" was supposed to be described in the schedule but no such description appears. This was not the only drafting error.

[9] Surprisingly, the release did not record any agreement for the payment of administration and management fees separately to the agreement to pay settlement monies, yet the definition of settlement monies in the schedule to the release excluded administration and management fees. The definition was as follows:

> "**The Settlement Monies: $600,000**

---

2 Affidavit of Jamie McAlister court doc 2 JGM3 report of Dr Joan Lawrence [20.9]; Ex JGM2 report of Dr Michael Likely [11].

3 Affidavit of Jamie McAlister court doc 2 Ex JGM1.

- Inclusive of all heads of damage and statutory refunds;
- Inclusive of amounts paid by or on behalf of AAI Limited …
- Exclusive of standard costs and outlays to be agreed or assessed pursuant to the *Uniform Civil Procedure Rules*;
- Exclusive of reasonable costs associated with the sanction to be agreed or assessed;
- Exclusive of reasonable administration and management fees to be agreed or assessed …"[4]

The document did not identify who was supposed to assess the administration and management fees if they were not agreed. The above quoted words "the sanction" were not explained elsewhere in the document either.

[10] Despite the literal terms of the release and schedule excluding the requirement to pay administration and management fees, the second respondent concedes it was implicit in those terms that, in addition to paying the $600,000 settlement amount as primary damages, the second respondent agreed to pay "reasonable administration and management fees to be agreed or assessed". That is a fair concession. If administration and management fees were not intended to be agreed to be paid there would have been no need to include the words "to be agreed or assessed". The inclusion of such words makes it obvious there was a mutual error in drafting and the second respondent must have agreed an amount so defined would be paid in addition to the settlement monies.

[11] Subsequent to the settlement a dispute developed as to whether agreement had been reached on the quantum of "reasonable administration and management fees". The evidence regarding that dispute was principally contained in a chain of correspondence exhibited before me, supplemented by some short cross-examination of a deponent clarifying some matters of fact. The present application was filed after almost two years had drifted by since the release was executed.

The issues

[12] The determinative issues for consideration are:

(a) whether the court has the jurisdiction to make the orders sought ("the jurisdictional issue") and, if so,

(b) whether the parties have agreed on, or it remains for the court to assess, the amount to be ordered to be paid as administration and management fees ("the agreement or assessment of fees issue").

[13] Despite the attention given in argument and additional written submissions to the agreement or assessment of fees issue it transpires the jurisdictional issue presents an insurmountable obstacle to the present application.

---

[4] Affidavit of Jamie McAlister court doc 2 Ex JGM1.

Determination

[14] The orders sought include:

> "1. Pursuant to Sections 12 and 245 of the *Guardianship and Administration Act 2000* Equity Trustees World Services Limited (*"the administrator"*) be appointed administrator for the Applicant to receive and manage:
>
> a. The balance of settlement monies paid to the applicant pursuant to the compromise of District court proceedings… .
>
> b. All assets and all property which has been purchased by the Trustee of the Administration Trust for the Applicant from the proceeds of the settlement monies … .
>
> 2. The administrator be empowered to invest all monies received and held under this Order pursuant to Section 51 of the *Guardianship and Administration Act 2000*. …
>
> 5. Within 21 days of this Order the Second Respondent pay to the administrator administration and management fees:
>
> a. In the sum of $418,000;
> b. Alternatively in such amount assessed by the Court to be reasonable.
>
> 6. Within 21 days of this Order the Applicant's solicitors pay to the administrator the sum of $56,588.14 being all monies held in the trust account of the Applicant's solicitors for and on behalf of the Applicant forming part of the balance of settlement monies received by the Applicant's solicitors.
>
> 7. Within 21 days of this Order [DDM] in her role as trustee of the administration trust for [JDM]:
>
> a. Obtain the return of all monies invested by the Administration Trust … including any profits obtained thereon to date;
>
> b. Pay to the administrator all monies held by the said Administration Trust as trustee for the Applicant … ;
>
> c. Transfer to the administrator all assets held by the said Administration Trust as trustee for the Applicant …"

A series of related logistical and consequential orders are also sought.

[15] The sections of the Act, which the application cites in support of the Court's jurisdictional power to make the orders sought, relevantly provide:

> "**12 Appointment**

(1) The tribunal may, by order, appoint a guardian for a personal matter, or an administrator for a financial matter, for an adult if the tribunal are 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. …

(3) The tribunal may make the order on its own initiative or on the application of the adult, the Public Guardian or an interested person. …

245 Settlements or damages awards

(1) This section applies if, in a civil proceeding –

(a) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and

(b) the court considers the adult is a person with impaired capacity for a matter.

(2) The court may exercise all the powers of the tribunal under chapter 3. …

(7) In this section –
court means the Supreme Court or the District Court.
settlement includes a compromise or acceptance of an amount paid into court."

[16] The "tribunal" referred to above is QCAT.[5]

[17] By reason of s 245 the Supreme or District Court may exercise the tribunal's power to appoint an administrator for a financial matter contained in s 12 of the Act. However, that power only arises out of s 245 if:

- "in a civil proceeding",
- "the Court":
  - "sanctions a settlement", or
  - "orders an amount to be paid by another person to an adult".

[5] Per the Act's schedule 4 definition.

[18] The present proceeding is not part of the originating process of, or an interlocutory application in, the District Court claim that was the subject of the settlement agreement. It is a separate civil proceeding started by application, permissible pursuant to rule 11 UCPR. It is a civil proceeding, but a separate civil proceeding from the District Court claim.

[19] In the present proceeding the Court is not being asked to sanction a settlement. That is doubtless because it has been held in previous decisions of this Court, such as *Gregory v Nominal Defendant & Anor*,[6] that incapacity for a financial matter, the only relevant incapacity here, is not a sufficient basis for requiring a sanction per s 59 *Public Trustee Act 1978* (Qld).

[20] It follows that for s 245 to apply, this application would need to be a civil proceeding in which the Court "orders an amount to be paid by another person to an adult". It is true that some of the orders sought are orders that an amount be paid by another person to an adult – see proposed orders 5, 6 and 7 ("the payment orders"). However, it is circular to reason that the source of the Court's jurisdiction under the Act derives from orders sought on the assumption the Court has jurisdiction to make them under the Act.

[21] Section 245 confers a power arising consequentially upon the exercise of a power to make a payment order. For s 245 to be triggered there would have to exist power, in the Court being asked to exercise the tribunal's powers, to make a payment order in the first place. Section 245 does not confer that power.

[22] In *Adams v AAI*[7] the fact of the seeking of a payment order was thought to activate s 245 but the circularity point was not considered. That is likely because the order to pay in that case was apparently made within the personal injuries action in which the settlement occurred, an obvious jurisdictional distinction from the present case. Had the present application been made in the District Court claim the parties could easily have used the device of joint admissions and or an order per r 483(1) to determine a question separately, to allow the District Court to determine whether administration and management fees had been agreed and, if not, to determine the quantum of reasonable administration and management fees and order their payment. In the event of making such an order the District Court would thus have been empowered by s 245(2) to also make the other orders sought in the present application. This begs the question, regrettably not ventilated in argument, why the present application was not brought in the District Court action. It would be no answer to say there was concern about the District Court's monetary limit because, if that were a problem, the remedy lay in an application to transfer the District Court action to the Supreme Court.[8]

[23] The fact that s 245 does not confer jurisdiction to make the payment orders is a determinative obstacle to the present application in this Court, unless a viable other source of jurisdiction empowers this Court to make the payment orders sought.

---

6 [2005] QSC 308.
7 Unreported, Supreme Court of Queensland, McMurdo J, 16 June 2014.
8 See Part 4 *Civil Proceedings Act 2011* (Qld).

[24] In anticipation of the above conclusion, counsel for the applicant advanced an alternative line of reasoning, seeking the exercise of the Court's power in its parens patriae jurisdiction. That line of reasoning was, in effect, that the present application can be construed in the alternative as an application in the parens patriae jurisdiction for the Court to make the payment orders, thus giving the application the character of a civil proceeding in which the Court orders an amount to be paid by another person to an adult, thus granting this Court's power, standing in the shoes of the tribunal, to appoint a guardian pursuant to s 12.

[25] Counsel for the second respondent did not take the technical point that this was not a foundation of jurisdiction identified in the originating application and made no particular submissions on the point. That was consistent with its pragmatic position generally of not conceding or resisting the Court's exercise of jurisdiction to determine the present controversy. In the face of such a position it might be thought regrettable that lack of jurisdiction looms as such a barrier to me determining the agreement or assessment of fees issue, particularly in light of the unsatisfactory history of the documenting and implementing of the settlement. However it is elementary that the Court must have jurisdiction to act.

[26] I treat the aforementioned submissions of the applicant's counsel about the exercise of the parens patriae jurisdiction as an oral application to amend the application, so that the orders sought at paras 5, 6 and 7 of the application are sought pursuant to the Court's parens patriae jurisdiction.

[27] The amended application must also fail.

[28] In the parens patriae jurisdiction the Court is empowered to exercise the delegated power of the Crown in discharge of the Crown's direct responsibility to look after those who cannot look after themselves.[9] It is said to be a jurisdiction of theoretically unlimited scope, save as limited by statute,[10] but must be exercised according to the ordinary principles of a judicial enquiry.[11] In the circumstances of the present case, there is no need for the Court to intervene on the premise JDM cannot look after her own interests in the remaining dispute as to agreement on or assessment of administration or management fees.

[29] The dispute as to whether there has been agreement as to payment and the prospective assessment of the quantum of reasonable administration or management fees is simply part of the broader legal dispute in which JDM has instructed lawyers without relevant incapacity. The only evidence of incapacity goes to JDM's capacity to manage the settlement amount, whenever it might finally be available to her benefit. She was not considered to be under an impaired capacity for the purposes of her giving instructions and making decisions regarding the conduct of the litigation or its settlement. There is no evidence of any change in that regard.

---

9 *Secretary, Department of Health and Community Services v JWB & SMB* (Marion's Case) (1992) 175 CLR 218, 259.

10 *Wellesley v Wellesley* (1828) 4 ER 1078, 1085; *Re W (A Minor) (Medical Treatment)* [1992] 4 All ER 627, 637.

11 *Secretary, Department of Health and Community Services v JWB & SMB* (Marion's Case) (1992) 175 CLR 218, 258.

[30] If follows JDM should be regarded as capable of looking after her own interests in resolving the remaining dispute and the dispute is therefore not apt to even potentially attract the Court's parens patriae jurisdiction.

Conclusion

[31] This Court does not have jurisdiction to make the orders sought. That is unfortunate, for if I had the jurisdiction I was sufficiently seized of the evidence and argument to reach a conclusion on the merits regarding the agreement or assessment of fees issue. Given the prospect that task may fall to another Court it as well that I express no view on the merits of that issue.

[32] My conclusion as to the absence of jurisdiction is determinative of my present role. The proper order appears to be to dismiss the application and make a costs order which follows the event. However, I am conscious the parties may wish to consider the admittedly unlikely prospect of any component of the application being susceptible to transfer for determination elsewhere[12] and there may exist some as yet unaired considerations relevant to costs. I should give the parties an opportunity to consider and be heard on those issues.

Orders

[33] My order is:

1. I will hear the parties at 9.15am 22 March 2019 as to orders in light of my conclusion the court has no jurisdiction to determine the application.

[12] Section 241 of the Act allows transfer of a proceeding within the tribunal's jurisdiction to the tribunal but such a transfer would only be warranted in the event of an order for payment. Rule 78 UCPR provides for consolidation of proceedings but its premise appears to be that the proceedings have been properly instituted in the first place, for if not it is difficult to see how the decision in one could affect the other.