SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustees Qld Ltd v Thompson* [2011] QSC 48
PARTIES:	**PERPETUAL TRUSTEES QUEENSLAND LTD** (applicant) **v** **LISE THOMPSON** (respondent)
FILE NO/S:	BS11655/10
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	25 March 2011
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	16 November 2010
JUDGE:	Martin J
ORDER:	**I WILL HEAR THE PARTIES ON THE APPROPRIATE FORM OF ORDER AND COSTS**
CATCHWORDS:	MENTAL HEALTH- MANAGEMENT AND ADMINISTRATION OF PROPERTY- REMUNERATION OF ADMINISTRATOR-GENERAL MATTERS- jurisdiction of the Supreme Court- where compromise between the parties sanctioned pursuant to *Public Trustee Act* 1978, s59- where trustee company appointed administrator under *Guardianship and Administration Act* 2000- where question of remuneration not raised when original orders were made- where applicant does not rely upon the court's *parens patriae* jurisdiction- where trustee company has been previously held not to be a trustee of the fund in question- where *Trusts Act* 1973 does not apply- where original orders granted trustee company liberty to apply- where order for remuneration sought does not vary the original order- whether Supreme has jurisdiction to order that applicant is entitled to remuneration in respect of its functions as administrator of fund to which office it was appointed pursuant to order of the Supreme Court MENTAL HEALTH- MANAGEMENT AND ADMINISTRATION OF PROPERTY- REMUNERATION OF ADMINISTRATOR - GENERAL MATTERS- jurisdiction of the Queensland Civil and Administrative Tribunal - where applicant and respondent submit that the Queensland Civil and Administrative Tribunal has power to

make order for remuneration and fix remuneration of administrator pursuant to *Guardianship and Administration Act* 2000, s48 - Where it has been held that an administrator appointed under the *GAA* is entitled to remuneration only if an order is made - where it has been held that s48 of *Guardianship and Administration Act* 2000 does not apply to the remuneration of the Public Trustee or a trustee company where acting as administrator of an adult under the Act- where *Guardianship and Administration Act* 2000 subsequently amended and *Trustee Companies Act* 1968 repealed - whether Queensland Civil and Administrative Tribunal has jurisdiction to order that applicant is entitled to remuneration in respect of its function as administrator of fund to which office it was appointed pursuant to an order of the Supreme Court

Corporations Act 2001
Fair Work (Commonwealth Powers) and Other Provisions Act 2009
Guardianship and Administration Act 2000, ss12, 14, 48, 245
Public Trustee Act 1978, s59
Trusts Act 1973, s101
Trustee Companies Act 1968, s41
Uniform Civil Procedure Rules 1999, rr 5, 95, 659, 667

13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq) (1999) 30 ACSR 377
Australian Hardboards Ltd v Hudson Investment Group Ltd (2007) 70 NSWLR 201
Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256
Boyd v Halstead; Ex parte Halstead [1985] 2 Qd R 249
Callaghan and Anor v Zevering and Ors [2010] QSC 323
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593
Guardianship and Administration Tribunal v Perpetual Trustees Qld Ltd [2008] 2 Qd R 323
Nissen v Grunden (1912) 14 CLR 297
R v Forbes; Ex parte Bevan (1972) 127 CLR 1
Re Berkeley Applegate Ltd [1989] 1 Ch 32
Re Eastern Capital Futures Ltd (in liq) (1989) 5 BCLC 223
Re G B Nathan & Co Pty Ltd (in liq) (1991) 24 NSWLR 674; 5 ACSR 673
Re Sutherland (2004) 50 ACSR 297
Willett v Futcher (2005) 221 CLR 627

COUNSEL: W Sofronoff QC SG and M Liddy for the applicant

MP Amerena and K Williams for the respondent

SOLICITORS: McInnes Wilson for the applicants

Hall Payne Solicitors for the respondent

[1] **Martin J:** In August 1999 the respondent was severely injured when struck by a motor vehicle. A personal injuries action was commenced on her behalf by her brother as her litigation guardian.

[2] In late 2001 her action was settled subject to being sanctioned under s 59 of the *Public Trustee Act* 1978 ("*PTA*"). The settlement was sanctioned by Byrne SJA on 5 December 2001. Among the orders made that day were the following:

> "2. There be sanctioned, pursuant to the section 59 of the *Public Trustee Act* 1978 ("the Act"), a compromise of the Plaintiff's claim against the Defendants upon terms that the Defendants pay to the Plaintiff:-
> …
> (b) Administration fees in the sum of $91,050.48;
> …
> 3. Perpetual Trustees Queensland Ltd (ACN 000 431 827) ("PTQ") and Michael McDonald be appointed joint administrators pursuant to section 14(1)(c) of the *Guardianship and Administration Act* 2000 in relation to all financial matters relating to the trustee sum only ("the Administrators").
> …
> 6. The Administrators be appointed managers to take possession of and control and manage all financial matters of the Plaintiff relating to the trust sum only and hold the same in trust for the Plaintiff absolutely and apply such funds and the income thereof in the manner as the Administrators think fit for the maintenance and benefit of the Plaintiff.
> 7. The Administrators have the power to invest for and on behalf of the Plaintiff, pursuant to s 51 of the *Guardianship and Administration Act* 2000.
> …
> 10. Liberty be granted to the parties and Administrators to apply."

[3] No order was sought authorising that the applicant be remunerated for acting as administrator of the proceeds of the settlement.

[4] By an originating application the applicant now seeks such an order. An order setting the rate at which any such remuneration should be paid was not pursued on this application.

Factual background

[5] When this matter came before Byrne SJA on an application to sanction the settlement, there was affidavit evidence with respect to the fees which the applicant intended to charge if the settlement was sanctioned and if the applicant was appointed to be the trustee of the settlement sum. The proposal for the fees to be charged were set out in an affidavit and, after appointment, the applicant charged the respondent in accordance with that proposal. There was no dispute that there had been an agreement between the respondent's litigation guardian and the

applicant that the applicant be appointed upon terms which included that it be paid remuneration in accordance with the schedules set out in the affidavits read on the applicant to sanction the settlement. This agreement is not relied upon as an instrument which binds either the litigation guardian or the respondent. Rather, it is used to support the argument advanced under the "liberty to apply" ground which I deal with later.

[6] In 2004 Mr McDonald sought to withdraw as a trustee. As a consequence, the applicant made an application to the Guardianship and Administration Tribunal (GAAT) in which it sought a review of its and Mr McDonald's appointment as trustees. The Tribunal referred certain questions of law to the Supreme Court and in March 2008 Mullins J answered those questions.

[7] So far as it is relevant, her Honour's answers were:

(a) The fund held by the applicant pursuant to the order of the Supreme Court of 5 December 2001 was held by it as an administrator and not as a trustee.

(b) The remuneration of the applicant as an administrator for an adult under the *Guardianship and Administration Act* 2000 is not regulated by s 48 of that Act.

(c) A litigation guardian appointed for an incapacitated adult pursuant to r 95 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*") cannot enter into a binding agreement under s 41(7)(b) of the *Trustee Companies Act* 1968 on behalf of an incapacitated adult with a trustee company about the amount of remuneration payable to that trustee company in its role as administrator for the adult.[1]

[8] There was unchallenged evidence that the applicant had charged remuneration in accordance with its usual rates on the basis that it was entitled to do so given that the respondent's litigation guardian had consented to the applicants' appointment on the terms that were disclosed to Byrne SJA. The applicant said that that was the basis upon which it consented to be appointed administrator of the fund.

Questions to be answered

[9] At the hearing of the application, the parties agreed that the following questions arose out of the arguments and material:

(a) Does the Supreme Court have jurisdiction to make an order that the applicant is entitled to remuneration in respect of its functions as administrator of the fund of the Respondent to which office it was appointed pursuant to the order of the Honourable Justice Byrne on 5 December 2001?

(b) Does the Queensland Civil and Administrative Tribunal have jurisdiction to make an order that the applicant is entitled to remuneration in respect of its functions as administrator of the fund of the Respondent to which office it

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1 *Guardianship and Administration Tribunal v Perpetual Trustees Qld Ltd* [2008] 2 Qd R 323

was appointed pursuant to the order of the Honourable Justice Byrne on 5 December 2001?

(c) If the Supreme Court and the Queensland Civil and Administrative Tribunal each have jurisdiction to make such an order, should the Court exercise its jurisdiction in the circumstances of this case?

[10] I will deal with the submissions made by the parties when answering those questions.

Does the Supreme Court have jurisdiction to make an order that the applicant is entitled to remuneration in respect of its functions as administrator of the fund of the Respondent to which office it was appointed pursuant to the order of the Honourable Justice Byrne on 5 December 2001?

[11] The applicant relied upon three bases for its submission that this Court had the necessary jurisdiction:

(a) The Court's inherent jurisdiction,

(b) Section 101 of the *Trusts Act* 1973, or

(c) The order made giving liberty to apply.

The Court's inherent jurisdiction

[12] The applicant submitted that the Supreme Court has the inherent jurisdiction to allow trustees' remuneration both prospectively and retrospectively. So much seems able to be drawn from *Nissen v Grunden* [2]. That, the applicant said was sufficient, in light of the circumstances in which the applicant came to be appointed, for the Court to exercise its jurisdiction favourably for the applicant.

[13] The respondent's submissions did not deal with *Nissen v Grunden.* Rather, they identified two possible sources of the court's inherent jurisdiction which might be thought to support the application:

(a) the *parens patriae* jurisdiction; and
(b) the equitable jurisdiction identified in *Re Berkeley Applegate Ltd*[3] ("*Berkeley Applegate*").

[14] Neither of these possible sources, argued the respondent, is available to the applicant.

[15] The respondent's argument commences with the valuable reminder in *Batistatos v Roads and Traffic Authority of New South Wales*[4] that the phrase "inherent jurisdiction" is a slippery one. It was described by Menzies J in *R v Forbes; Ex parte Bevan*[5] in the following way:

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2 (1912) 14 CLR 297 at 304-308
3 [1989] 1 Ch 32
4 (2006) 226 CLR 256 at [5]
5 (1972) 127 CLR 1 at 7

> "'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have 'inherent jurisdiction'".

[16] The Supreme Court is a court of unlimited jurisdiction in the sense discussed by McPherson J in *Boyd v Halstead; Ex parte Halstead*[6]:

> "The Supreme Court as heir to the jurisdiction of the common law courts at Westminster has in its favour the presumption that nothing is outside its jurisdiction unless expressed to be so intended." (citation omitted)

[17] The respondent argues that the court's *parens patriae* jurisdiction is not available to assist the applicant. While it might make for an interesting examination of the history of an ancient jurisdiction which was once a prerogative exercised by the Crown, I am able to resist the temptation in the absence of any contention by the applicant that it now relies on the capacity of the Court to exercise that jurisdiction in an appropriate case. For reasons I give later concerning the decision of Mullins J in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited*[7] I do not need to consider this issue any further.

[18] I return to the broad grounds relied upon by the applicant. The principles in *Nissen v Grunden* were recently relied upon in an examination of a broadly similar issue in *Callaghan and Anor v Zevering and Ors*[8]where Daubney J held that the court has power to fix trustee's remuneration either under s 101 of the *Trusts Act* 1973 (Qld) or its inherent jurisdiction.

[19] It is also clear that the court has the inherent jurisdiction with respect to trusts as a source of a power to sanction resort to trust property by way of remunerating not only a trustee as such but also a liquidator of a corporate trustee. This is the inherent jurisdiction identified in *Berkeley Applegate a*nd other cases. In *Berkeley Applegate* the court allowed remuneration under its inherent jurisdiction to a liquidator of a trustee company, the "free assets" of the company having been exhausted. That decision was followed in *Re Sutherland* [9] where Campbell J (as his Honour then was) referred to *Berkeley Applegate*; *Re Eastern Capital Futures Ltd (in liq)*[10]; *Re G B Nathan & Co Pty Ltd (in liq)*[11] and *13 Coromandel Place Pty Ltd v CL*

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6 [1985] 2 Qd R 249 at 255
7 [2008] 2 Qd R 323
8 [2010] QSC 323 at [40]
9 (2004) 50 ACSR 297
10 (1989) 5 BCLC 223
11 (1991) 24 NSWLR 674 ; 5 ACSR 673

Custodians Pty Ltd (in liq)[12] as cases which "clearly accepted that the jurisdiction of the court to make an allowance to the person in fact administering a trust fund permitted a payment to be made to a liquidator". His Honour then said:

> "Those cases implicitly accept that the inherent jurisdiction of the court to allow remuneration in connection with the administration of a trust fund is one which can apply so as to allow remuneration not only to a trustee, but also to someone who is for practical purposes controlling a trustee."[13]

[20] The respondent does not seek to gainsay any of those principles; rather, it is argued that they do not apply because there is no trust and the applicant is not a trustee. Reliance is placed on the decision of Mullins J in earlier proceedings involving these parties and this particular fund: *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited.*

[21] In that case, the Guardianship and Administration Tribunal (GAAT) had referred a number of questions of law to the Supreme Court pursuant to the *Guardianship and Administration Act* 2000 ("*GAA"*). One of those questions was: "Whether the fund held by Perpetual Trustees Queensland Limited (Perpetual) pursuant to the order of the Supreme Court of 5 December 2001 is held by Perpetual as an administrator and not as a trustee?" Her Honour ruled that Perpetual held the fund as an administrator and not as a trustee. That decision was not challenged.

[22] The argument by Perpetual before me was that, although the finding that Perpetual is an administrator invokes the provisions of the *GAA* it doesn't destroy its status as a trustee. This was argued before, and rejected by, Mullins J. I respectfully adopt her Honour's analysis which appears at [38] to [49][14] of her Honour's reasons.

[23] As I have noted above, that decision was not appealed. In the absence of any argument that the reasoning was flawed, and because I respectfully accept the correctness of that part of the decision, I will follow her Honour's ruling that Perpetual is not a trustee for the fund in question.

[24] There is another, more powerful, reason for not acceding to the applicant's arguments relying upon the inherent jurisdiction of the Court. There is no longer an issue before the Court upon which an order may be made. Final relief in the sense in which that term is used in r 659 of the *UCPR* has been given. In other words, there is no jurisdiction to be exercised. (There is the capacity in r 667 to vary an order but none of the grounds which would support any variation were advanced.)

[25] In circumstances where:

(a) the action which led to Perpetual's appointment has been settled;
(b) resort was not had at the time the settlement was sanctioned to the court's inherent jurisdiction;
(c) the appointment was made under the *GAA*; and
(d) Perpetual has been held not to be a trustee

it follows that resort may not now be had to the court's inherent jurisdiction.

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12 (1999) 30 ACSR 377
13 (2004) 50 ACSR 297 at [14]
14 [2008] 2 Qd R 323

Section 101 Trusts Act 1973

[26] Section 101 of the *Trusts Act* 1973 provides:

> "101 Remuneration of trustee
>
> (1) The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person's services as trustee as the court may think fit.
>
> (2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person's firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court may take into account any charges that have been paid out of the trust property under this subsection."

[27] This section does not apply. Perpetual is not a trustee and it does not seek an order for remuneration as such. It seeks an order that it be remunerated as an administrator.

Liberty to apply

[28] Mr Sofronoff QC argued that, given the material before Byrne SJA, had an order been sought authorising remuneration that his Honour would have made such an order. Due to an oversight (at least by the defendant if not both the plaintiff and the defendant) such an order was not sought. He applied under paragraph 10 of the Order which granted Perpetual, as one of the Administrators, liberty to apply.

[29] A detailed analysis of the authorities which have considered the ambit of an order granting liberty to apply was undertaken by Campbell JA in *Australian Hardboards Ltd v Hudson Investment Group Ltd*[15]. The following principles may be drawn from that analysis:

(a) When final relief has been granted in a suit, an order granting liberty to apply enables further orders to be made which are necessary for the purpose of implementing and giving effect to the principal relief already pronounced or, as it is sometimes called, "*working out the order*".

(b) Liberty to apply cannot be used to alter the substance of an order already made.

(c) What can be done under a reservation of liberty to apply depends on what needs to be done, in the particular case, to work out the particular orders that have been made.

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15 (2007) 70 NSWLR 201

(d) If an order is one the working out of which of its nature involves deciding complex questions, or questions that were not specifically raised at the time that the order was made, those questions can be raised and decided in the original suit pursuant to liberty to apply.

[30] What is involved in "working out an order" was considered by McPherson SPJ (as he then was) in *Fylas Pty Ltd v Vynal Pty Ltd*[16]:

> "… a judgment or order that expressly reserves to parties a leave or liberty to apply can be varied on an application pursuant to such leave only so far as may be necessary for the purpose of working out the actual terms of the order so as to make it more efficacious in matters of detail. What is meant in this context by 'working out' the terms of an order is considered in some of the cases on the point. In *Cristel v Cristel* [1951] 2 KB 727, 728, Somervell LJ said it 'involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied'. A simple judgment for a money sum requires no 'working out' in any sense, so that liberty to apply is quite inappropriate in such a case. On the other hand, there are many orders, particularly on the equity side, as to which the process of carrying the primary judgment into effect may require supervision, with the consequence that further or supplementary orders or directions may be needed to enable it to achieve its purpose. An example commonly encountered in practice is specific performance, where, because the consent or approval of some person or instrumentality may be needed to authorise a preliminary step, the judgment sometimes takes the form only of a declaration that the contract be specifically performed, together with subsidiary orders compelling particular acts to be done. See *Egan v Ross* (1928) 29 SR (NSW) 382, 388; *Hasham v Zenab* [1960] AC 316; *Brown v Heffer* (1967) 116 CLR 344, 350. The primary order may then need to be supplemented by further orders from time to time before the stage is reached at which the defendant can finally be ordered to perform specifically what he contracted to do in the way of transfer or payment as the case may be: *Brown v Heffer* (1967) 116 CLR 344, 350.
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> In *Penrice v Williams* (1883) 23 Ch D 353, 356–357, Chitty J spoke of an order that is 'clearly not of a final character, and also when there is necessarily something to be done irrespective of what appears on the face of the order'. His Lordship was there explaining that in some cases an order may by its very nature need to be supplemented to give full effect to it, in which event liberty to apply is implied and need not be expressly reserved. See also *Fritz v Hobson* (1880) 14 Ch D 542, 561; *Cristel v Cristel* [1951] 2 KB 727, 731. A decree of specific performance in the limited form previously described nevertheless is a 'final' order for the purpose

16 [1992] 2 Qd R 593 at 598

> of appeal and otherwise, and so, at least as to issues litigated, cannot be discharged or varied under liberty to apply, notwithstanding that further decisions and orders may yet have to be made in working out its consequences. What cannot be done under the guise of 'working out' an order is to vary it."

[31] Campbell JA also observed[17], correctly in my respectful opinion, that:

> "A reservation of liberty to apply, by a 21st century judge of the New South Wales Supreme Court, needs to be understood in the context of the particular practices and procedures that this Court has now. Section 56 of the *Civil Procedure Act* 2005 must be taken into account."

[32] To apply that observation to Queensland requires reference to r 5 of the *UCPR* which provides:

> "Philosophy—overriding obligations of parties and court
> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
> …"

[33] The order sought in this application by Perpetual is that it be remunerated for work done and to be done. To make such an order pursuant to the liberty granted to apply requires that it be demonstrated that it is necessary for the purpose of implementing and giving effect to the principal relief already pronounced. It could not seriously be contended that Perpetual accepted the position of administrator on any basis other than that it would be appropriately remunerated for the work it was to do. It is, in my opinion, an integral part of the appointment of a professional administrator such as Perpetual that it will be paid for the work associated with complying with the order that it "take possession of and control and manage all financial matters of the Plaintiff relating to the trust sum only and hold the same in trust for the Plaintiff absolutely and apply such funds and the income thereof in the manner as the Administrators think fit for the maintenance and benefit of the Plaintiff"[18].

[34] An order that Perpetual be remunerated does not vary the original order in the sense that it does not alter the result of the sanction or deprive the respondent of anything which had not already been the subject of agreement and which underlay the orders sought and made. Such an order falls within the category identified by Campbell JA in *Australian Hardboards Ltd v Hudson Investment Group Ltd* where he said:

> "[56] … **what can be done under a reservation of liberty to apply depends on what needs to be done, in the particular case, to work out the particular orders that have been made**. If an order is one the working out of which of its nature involves deciding complex questions, or **questions that were not**

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17 *Australian Hardboards Ltd v Hudson Investment Group Ltd* (2007) 70 NSWLR 201 at [69]

18 Order of Byrne SJA, 5 December 2001.

> **specifically raised at the time that the order was made, those questions can be raised and decided in the original suit pursuant to liberty to apply**." (emphasis added)

[35] The question of remuneration was not specifically raised at the time the original orders were made. Had it been then it is not contested that such an order would have been made.

[36] In *Willett v Futcher*[19], the High Court considered an order sanctioning a compromise for a person under a disability. The order did not contain orders permitting commission to be charged or fixing the amount of remuneration. The Court recognised the ability to engage the order giving liberty to apply in circumstances such as apply in this case:

> "[30] At the end of the oral argument of the appeal to this Court it was suggested that the compromise order should be amended by consent in the Supreme Court to define ''the settlement sum'' as $3,850,000 plus the damages in respect of reasonable management fees. If that step is taken, the effect of the order will be that the damages in respect of reasonable management fees will augment the sum to be held by Perpetual, as administrator, on trust for Ms Willett. **But there will still be no order permitting Perpetual to charge remuneration and no order fixing the amount of remuneration to be charged. Those are matters that could be taken up pursuant to the liberty to apply in respect of the administration of the trust fund reserved by Byrne J to Ms Willett, her litigation guardians, and Perpetual**." (emphasis added)

[37] The answer, then, to the question set out above does not rely upon the jurisdiction of the Court but upon the power it has under a "liberty to apply" order. For completeness, I note that in *Willett v Futcher* the High Court recognised that the Court could make an order concerning an administrator's remuneration. The court said:

> "[28] … the exercise of power by either the Supreme Court or the District Court to sanction a settlement is expressly regulated by s 245 of the Guardianship Act. In particular, s 245 provides (s 245(2)) that the Supreme Court or the District Court, sanctioning a settlement for, or ordering money to be paid for the benefit of, a person with impaired capacity, ''may exercise all the powers of the tribunal under chapter 3'' of the Act and that (s 245(3)) Ch 3 applies to the court in its exercise of these powers ''as if the court were the tribunal''. **One consequence of these provisions of s 245 is that, when approving a compromise, the Supreme Court or District Court may make an order allowing an administrator whose business is or includes acting as an administrator under the Act to charge remuneration, and make an order fixing the amount that is to be charged**." (emphasis added)

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19 (2005) 221 CLR 627

[38] The liberty to apply which was granted to the administrator is sufficient to allow an order to be made that it be appropriately remunerated because it is:

(a) financially and practically necessary for the working out of the order in this particular case;
(b) an order that would have been made had the issue been raised at the time; and
(c) it is consistent with the principles enunciated in UCPR r 5 that such an order be made in this way.

Does the Queensland Civil and Administrative Tribunal have jurisdiction to make an order that the applicant is entitled to remuneration in respect of its functions as administrator of the fund of the Respondent to which office it was appointed pursuant to the order of the Honourable Justice Byrne on 5 December 2001?

[39] The source of any possible jurisdiction for the Queensland Civil and Administrative Tribunal in this matter is the *GAA*. Whether such a jurisdiction exists was squarely before Mullins J in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited.* Her Honour held:

> "[65] … The proper construction of s 48 of the *GAA* is that it does not apply to the remuneration of the Public Trustee or a trustee company where such an entity is acting as an administrator of an adult under the *GAA*."

[40] Both the applicant and the respondent submit that, on the basis of the current legislation, the Queensland Civil and Administrative Tribunal does have the power to make an order for remuneration and fix the remuneration of an administrator. To understand this submission, especially in the light of the decision of Mullins J, it is necessary to examine the legislative history of the relevant provisions.

[41] When the orders of Byrne SJA were made and the decision of Mullins J was given s 48 of the *GAA* provided:

> "**48 Remuneration of professional administrators**
>
> (1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.
> (2) The remuneration may not be more than the commission payable to a trustee company under the *Trustee Companies Act 1968* if the trustee company were administrator for the adult.
> (3) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act."

[42] So far as is relevant, the commission able to be charged by an administrator was to be determined in accordance with s 41 of the *Trustee Companies Act* 1968. Section 41 provided:

> "(1) In respect of every estate which is, after the commencement of this Act, committed to the administrator or management of a trustee company

as executor, administrator, trustee, receiver, committee, guardian, liquidator of official liquidator or in any other capacity, the trustee company shall be entitled to receive, in addition to all moneys properly expended by the trustee company and chargeable against the estate, a commission at a rate to be fixed from time to time by the board of directors of the trustee company but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to –

(a) $5 for every $100 of the capital value of the estate; and

(b) $6 for every $100 of the income received by the trustee company on account of the estate."

…

(7) Nothing in this section shall prevent –

(a) the payment of any commission which a testator in his or her will or a settlor has directed to be paid;

(b) the payment of any commission or fee which has been agreed upon between the trustee company and the parties interested therein;

either in addition to or in lieu of the commission provided for by this section."

[43] Section 48 of the *GAA* was considered by the High Court in *Willett v Futcher*. The Court said:

> "[25] It will be noted that s 48(1) provides that an administrator carrying on a business of or including administrations under the Guardianship Act is entitled to remuneration if the Tribunal so orders. Although s 48(1) is cast in the language of entitlement, two related negative implications must be drawn from the language. **First, an administrator appointed under the Guardianship Act is entitled to remuneration *only* if an order is made that authorises the administrator to charge for the services provided**. **Secondly, the amount of the charges that are levied must be determined in the manner prescribed by the order authorising the administrator to charge for services or by some subsequent order varying that authority**. That is, an administrator may make no charge for remuneration (as distinct from a claim for reimbursement of reasonable expenses actually incurred (s 47)) without an order that authorises both making the charge and its amount. **And the Act makes plain, by s 48(2), that the amount of remuneration that may be allowed is limited to the amount of commission payable to a trustee company under the *Trustee Companies Act.*** It will be necessary, therefore, to examine the provisions of the *Trustee Companies Act* that limit the amount of commission that a trustee company may charge. Before doing that, however, it is necessary to deal with two other aspects of the Guardianship Act: some provisions of Pt 2 of Ch 4 which deal with particular functions and powers of administrators, and provisions which deal with what the heading to Pt 2 of Ch 11 calls the "Relationship with Court Jurisdiction". (emphasis added and references omitted)

[44] In *Willett v Futcher* an order had been made appointing the administrator but no order had been made that the administrator could charge for its services. The High Court said:

> "[31] The amount of remuneration to be allowed to Perpetual not having been fixed in the compromise order, the assessment of the damages to be allowed on account of 'reasonable management fees' required consideration of the legislation governing that subject. As noted earlier, s 48(2) of the Guardianship Act directed attention to the amount of commission payable to a trustee company under the *Trustee Companies Act*. As it happens, Perpetual is a company identified as a trustee company in the *Trustee Companies Act* and its power to charge remuneration is therefore regulated by that Act. It should be noted, however, that s 48 of the Guardianship Act applies to any administrator who carries on a business of or including administrations under that Act, not just trustee companies."

[45] In *Guardianship and Administration Tribunal v Perpetual Trustee Limited*, Mullins J took into account what was said in *Willett v Futcher* and arrived at the following conclusion:

> "[65] In taking into account the clear statement made in s 48(3) of the *GAA*, I have concluded that the reservation in s 48(3) excludes the operation of ss 48(1) and (2) of the *GAA*, when a trustee company (or the Public Trustee) has been appointed an administrator under the *GAA*. **The proper construction of s 48 of the *GAA* is that it does not apply to the remuneration of the Public Trustee or a trustee company where such an entity is acting as an administrator of an adult under the *GAA***. The first aspect of question 2 as to whether the Tribunal has power under s 48(1) of the *GAA* to deal with the issue of Perpetual's remuneration as administrator should therefore be answered in the negative. On that basis it is unnecessary to consider the second aspect of the question. It also results in question 2 being answered "The remuneration of Perpetual as an administrator for an adult under the *GAA* is not regulated by s 48 of the *GAA*". (emphasis added)

[46] Both the applicant and the respondent referred me to amendments which have been made to the legislation considered above since the decision in *Guardianship and Administration Tribunal v Perpetual Trustees Qld Ltd*.

[47] By the *Fair Work (Commonwealth Powers) and Other Provisions Act* 2009 both the *Trustee Companies Act* 1968 and the *GAA* were amended. So far as is relevant:

(a) Part 4 of the *Trustee Companies Act* 1968 (which contained s 41) was repealed, and

(b) Section 48 of the *GAA* was amended so that it now provides –

Remuneration of professional administrators

(1) If an administrator for an adult carries on a business of or including administrations under this Act, the administrator is entitled to remuneration from the adult if the tribunal so orders.
(2) The remuneration may not be more than the amount the tribunal considers fair and reasonable, having regard to—
(a) the nature and complexity of the service; and
(b) the care, skill and specialised knowledge required to provide the service; and
(c) the responsibility displayed in providing the service; and
(d) the time within which the service was provided; and
(e) the place where, and the circumstances in which, the service was provided.
(3) Nothing in this section affects the right of the public trustee or a trustee company to remuneration or commission under another Act or the Corporations Act.

[48] An "administrator" in s 48 is an administrator appointed under the *GAA*[20]. The appointment of an administrator is made by the tribunal under s 12 or, in the case of the sanction of a settlement of a civil proceeding, by the Court which has all the powers of the tribunal under Chapter 3 of the *GAA*. This is allowed for in s 245 which provides:

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.
(3) Chapter 3 applies to the court in its exercise of these powers as if the court were the tribunal.
(4) As soon as practicable after a court makes an order under this section, the registrar of the court must give a copy of the order to the tribunal.
(5) Also, after the order is made, the registrar must, if requested by the tribunal, give the tribunal a copy of the part of the record of proceedings that is relevant to making the order.
(6) A fee is not payable to the court for a copy of part of the record of proceedings under subsection (5).
(7) In this section—
court means the Supreme Court or the District Court.
settlement includes compromise or acceptance of an amount paid into court.

[49] Chapter 3 of the *GAA* deals with a number of matters including who is appropriate to be an administrator, and the revocation and review of appointments. It does not, though, include s 48 which deals with remuneration. That appears in Chapter 4 of the *GAA*. It is not a power, then, that the court may exercise.

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[20] *GAA*, Schedule 4

[50] The decision by Mullins J holds that the tribunal, likewise, may not exercise the power under s 48 in these circumstances for the following reasons:

> **"**[60] It was contemplated in the QLRC Report 49 that the Public Trustee or a trustee company under the *TCA* would be eligible for appointment as an administrator for a financial matter for an adult with impaired capacity for that matter. There was nothing in the QLRC Report 49, however, about the remuneration of administrators. Section 14 of the *GAA* implemented the recommendation that the Public Trustee or a trustee company be eligible for appointment as an administrator. The *GAA* places both the Public Trustee and a trustee company in a different position from other administrators in that under s. 28 of the Act other administrators are subject to periodic review of appointment. The appointment of any administrator (including the Public Trustee or a trustee company) is reviewable by the Tribunal under s. 29 of the *GAA*, but there is no review by the Tribunal under s. 28 of the *GAA* of the appointment of the Public Trustee or a trustee company. The only other provision of the *GAA* in which a reference is made to a trustee company is s. 48 of the *GAA*.
>
> [61] The charges that could be made by a trustee company were already regulated under pt 4 of the *TCA* at the commencement of the *GAA*. Although s. 48(1) of the *GAA* does not expressly exclude trustee companies (or the Public Trustee for that matter) from its operation, s. 48(2) puts a ceiling on the remuneration that can be approved by the Tribunal for an administrator that carries on a business of or including administrations under the *GAA* (such as a lawyer or an accountant) equivalent to the commission payable to a trustee company under the *TCA*, if the trustee company were administrator for the adult. Section 48(2) of the *GAA* in its terms is not directed at a trustee company that acts as administrator for an adult under the *GAA*. It is the commission payable to a trustee company which is the benchmark for the remuneration of professional administrators under s. 48 of the *GAA*.
>
> [62] The position is then sought to be clarified by the reservation in s. 48(3) that nothing in s. 48 of the *GAA* affects the right of the Public Trustee or a trustee company to remuneration or commission under another Act. **Section 48(3) of the *GAA* expressly recognises that the remuneration of a trustee company that acts as an administrator under the *GAA* is regulated by another Act (which must be taken to be a reference to the *TCA*).** The construction issue relating to s. 48 of the *GAA* that needs resolution is whether the effect of s. 48(3) is to leave the remuneration of a trustee company that is acting as an administrator under the *GAA* to be regulated by the *TCA*, and thereby excludes the operation of ss 48(1) and (2) of the *GAA* when a trustee company is an administrator under the *GAA*.

> [63] The High Court in *Willett* treated (at 643 [52]) the existence of provisions such as s. 48 of the *GAA* and pt 4 of the *TCA* as relevant to the assessment of damages that was the issue in the appeal:
>
> > "Assessing what remuneration and expenses are properly charged or incurred by an administrator requires consideration of the relevant statutory limitations on those charges. It does not depend only upon identifying whether Perpetual's proposed fees and charges are less than those that the Public Trustee would be entitled to charge. As noted earlier, however, no reference was made to the relevant statutory provisions either at first instance or on appeal to the Court of Appeal and there is no evidence that would reveal how the relevant statutory limitations would apply."
>
> [64] The analysis that the High Court made of s 48 of the *GAA* was not complete without reference to s 48(3) of the *GAA*. The issue that is raised by question 2 in this proceeding was not the focus of the appeal to the High Court in *Willett*. The issues raised by question 2, however, require all subsections of s 48 of the *GAA* to be considered in determining the construction to be given to s. 48 of the *GAA*.
>
> [65] In taking into account the clear statement made in s 48(3) of the *GAA*, I have concluded that the reservation in s 48(3) excludes the operation of ss 48(1) and (2) of the *GAA*, when a trustee company (or the Public Trustee) has been appointed an administrator under the *GAA*. The proper construction of s. 48 of the *GAA* is that it does not apply to the remuneration of the Public Trustee or a trustee company where such an entity is acting as an administrator of an adult under the *GAA*. The first aspect of question 2 as to whether the Tribunal has power under s 48(1) of the *GAA* to deal with the issue of Perpetual's remuneration as administrator should therefore be answered in the negative. On that basis it is unnecessary to consider the second aspect of the question. It also results in question 2 being answered "The remuneration of Perpetual as an administrator for an adult under the *GAA* is not regulated by s. 48 of the *GAA*"." (emphasis added)

[51] The recent amendment to s 48 means, with respect, that that conclusion can no longer stand.

[52] The explanatory note which accompanied the *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009* provided, with respect to this amendment:

> "Clause 102 amends section 48(2) of the Act which applies a provision of the *Trustee Companies Act 1968* (which is to be repealed) to the remuneration of certain administrators. The remuneration will instead be not more than the Guardianship and Administration Tribunal considers fair and reasonable having regard to stated factors."

[53] With the repeal of parts of the *TCA* the provisions of s 48(3) should not now be construed as limiting the power of the tribunal with respect to administrators. Section 48(3) relates to trustee companies and not necessarily to a trustee company acting as an administrator under the *GAA*. The distinction can be drawn between s 48(1) which refers to an administrator (which can include a trustee company acting as such) and s 48(3) which also deals with a trustee company when it is not acting as an administrator. Section 48(3) does not restrict the provisions of s 48. It serves to make plain that a trustee company, when acting in a capacity other than as an administrator, is not restricted by s 48 but can earn commission or remuneration under other statutes. Such activities can include, for example, acting as the executor of a deceased estate or holding scheme property for a managed investment scheme. The latter will now be regulated under the *Corporations Act* 2001 (Cth) following the amendments made by the *Fair Work (Commonwealth Powers) and Other Provisions Act* 2009 which are referred to above. The *TCA* no longer has a part to play in the remuneration of administrators under the *GAA* and the basis for Mullins J's reasoning has been withdrawn by the amendment.

[54] It follows, then, that QCAT does have jurisdiction to make an order that the applicant is entitled to remuneration in respect of its functions as administrator of the fund of the Respondent to which office it was appointed pursuant to the order of the Honourable Justice Byrne on 5 December 2001.

If the Supreme Court and the Queensland Civil and Administrative Tribunal each have jurisdiction to make such an order, should the Court exercise its jurisdiction in the circumstances of this case?

[55] As is noted above, notwithstanding that in the Originating Application the applicant sought orders setting out the remuneration which could be charged by it, in argument the applicant only sought answers to the questions I have identified.

[56] The appointment of an administrator is something within the power of both the Court (s 12, s 14 and s 245 *GAA*) and QCAT (s 12 and s 14 *GAA*). The power of the tribunal to order that there be remuneration and its level is specifically dealt with in s 48 of the *GAA.* It must be taken from *Willett v Futcher* that the court's power to make similar orders arises from the general provision in s 12(2) that the court[21] can appoint an administrator on terms considered appropriate by the court.

[57] The respondent submitted that QCAT is a specialist tribunal entrusted with deciding upon many similar issues and that it has an expertise which means that it has an enhanced capacity to make this type of decision. Of course, the Supreme Court has, for nearly 150 years, been deciding questions of what is reasonable in a given set of circumstances. It is more likely that, if both bodies can deal with the matter, that it would be the body which can hear and determine the relevant issues more expeditiously and at a lower cost. If the tribunal is currently seized of the matter then no reasons have been advanced for it not to continue to hear and determine the issue of appropriate remuneration.

[58] I do not think it proper to say any more than that. Although the parties agreed that this was a question which should be answered it is really seeking an advisory

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[21] Section 12 can be read as applying to the court – see s 245 *GAA*

opinion. The answer would not determine any issue between the parties nor would either party be bound by any answer.

[59] Given that both parties sought answers to the three questions considered above, I will hear the parties on the appropriate form of order and costs.