SUPREME COURT OF QUEENSLAND

CITATION:	*Ban v The Public Trustee of Queensland* [2015] QCA 18
PARTIES:	**In Appeal No 4528 of 2014** **HAJNAL DALIA BAN** (appellant) **v** **THE PUBLIC TRUSTEE OF QUEENSLAND** (respondent) **In Appeal No 105 of 2012** **HAJNAL DALIA BAN** (applicant) **v** **THE PUBLIC TRUSTEE OF QUEENSLAND (as litigation guardian for RUSSELL GEOFFREY TACON)** (respondent) **In Appeal No 2154 of 2012** **HAJNAL DALIA BAN** (applicant) **v** **THE PUBLIC TRUSTEE OF QUEENSLAND (as Litigation Guardian for RUSSELL GEOFFREY TACON)** (respondent)
FILE NO/S:	Appeal No 4528 of 2014 Appeal No 105 of 2012 Appeal No 2154 of 2012 SC No 3401 of 2014 SC No 158 of 2011 SC No 13246 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Miscellaneous Applications – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2014
JUDGES:	Holmes, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **In Appeal No 4528 of 2014:**

1. **The appeal is dismissed.**

2. **The Public Trustee file and serve any submissions it seeks to make on the question of costs, within seven days of today; and that the appellant file and serve any submissions she seeks to make on the question of costs, within 14 days of today.**

In Appeal No 105 of 2012 and Appeal No 2154 of 2014:

1. **The applications are refused.**

2. **The applicant pay the Public Trustee's costs of and incidental to the applications to be assessed on the indemnity basis.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – JURISDICTION AND DISCRETION OF COURT – QUEENSLAND – where between April 2009 and April 2010 the appellant held an enduring power of attorney in respect of the deceased – where prior to his death the deceased entered into a contract for the sale of real property which was dealt with in his Will – where the Public Trustee contended that the appellant assisted the deceased to execute the contract at a time when he was admitted to hospital in a confused and disoriented state – where the Public Trustee of Queensland challenged the deceased's capacity to enter into the transaction, and the appellant's knowledge of the incapacity – where the fact that the deceased had sold the property prior to his death raised, at least in the eyes of the Public Trustee, the question of whether the specific legacy or devise in the Will had been adeemed – where the Public Trustee of Queensland filed an originating application under s 134 of the *Public Trustee Act* 1978 (Qld) seeking relief in relation to a number of specific questions – where the then Chief Justice found that upon the sale of the property the specific bequest was adeemed – where the appellant submitted that s 134 of the *Public Trustee Act* was unconstitutional as being beyond the power of the state legislature – where this point was not taken below – where the contentions agitated before the Chief Justice were not hypothetical, fictitious or abstract – whether the *Public Trustee Act* is invalid

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – EFFECT OF ENTERING OR RECORDING JUDGMENT OR ORDER – where the applicant sought orders setting aside decisions of the Supreme Court in 2012 – where the orders of this Court are perfected orders of the Court – where the applicant was unable to identify any basis upon which this Court has power to set aside these orders – where no

adequate explanation was given for the delay in bringing this application in August 2014 for orders made in 2012 – whether the orders of the Court should be set aside

Law of Property and Trustees Relief Amendment Act 1859 (Eng)
Public Trust Office Amendment Act 1913 (NZ), s 24
Public Trustee Act 1978 (Qld), s 134
Trusts Act 1973 (Qld), s 96, s 97

Coore v Coore [2013] QSC 196, cited
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; (2008) HCA 42, followed
Marley v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All ER 198; [1990] UKPC 44, cited
Public Trustee (Qld) v Macpherson [2011] QSC 169, cited

COUNSEL: The appellant/applicant appeared on her own behalf
Mr A P Collins for the respondent

SOLICITORS: The appellant/applicant appeared on her own behalf
Official Solicitor to the Public Trustee of Queensland for the respondent

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the orders he proposes.

[2] **GOTTERSON JA**: I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA**: The appellant appeals from the orders made by de Jersey CJ on 17 April 2014. Those orders were made on an originating application filed on 8 April 2014 by the Public Trustee of Queensland, in respect of various matters arising under the Will of Russell Geoffrey Tacon, deceased, dated 5 January 2009.

Background to the appeal

[4] The respondent to the appeal (**the Public Trustee**) is in the course of administering the estate of Russell Geoffrey Tacon (**the deceased**). The administration has been controversial, at least between the appellant and the Public Trustee. A summary of that controversy is set out below.

[5] For a period between 28 April 2009 and 30 April 2010 the appellant held an enduring power of attorney in respect of the personal and financial matters of the deceased. Prior to his death the deceased entered into a contract for the sale of real property which was dealt with in his Will. The Public Trustee's contention[1] was that the appellant assisted the deceased to execute the contract at a time when he was admitted to hospital, and in a confused and disoriented state.[2] The

[1] As appears from the pleadings in proceedings instituted by the Public Trustee, SC No 13246 of 2010.
[2] Statement of Claim, paragraphs 6 and 7.

Public Trustee challenged the deceased's capacity to enter into the transaction, and the appellant's knowledge of that incapacity.[3]

[6] Subsequently, on 28 October 2009, and at a time when the deceased's capacity was under greater question due to the onset of dementia, the appellant executed the transfer of the property. The Public Trustee contended, and the appellant admitted, that she did so because of her belief that the deceased lacked the capacity to execute the transfer.[4] The balance of the proceeds of sale went into a joint bank account in the names of the deceased and the appellant. The Public Trustee's contention was that the appellant obtained the balance of the proceeds of the sale of the land and misappropriated them.[5] The contentions were put on the basis that undue influence was used in relation to the deceased's execution of the contract and the provision of the balance of the proceeds, and unconscientious or unconscionable conduct was involved on the part of the appellant in taking the proceeds and disposing of them. Those matters were challenged by the appellant in her defence and counterclaim.

[7] In the course of the proceedings orders were made for an account to be taken, as a consequence of which it was declared that $849,732.14 had been withdrawn or caused to be withdrawn from the joint account by the appellant in circumstances where that sum was not used for the benefit or advancement of the deceased.[6]

[8] The property which was sold under the circumstances referred to above was the subject of specific provision in the deceased's Will:

> "I give and bequeath the proceeds of sale of my property situated at 541 Chambers Flat Road, Park Ridge, in the State of Queensland and described as Lot 12 on RP 82892 County of Stanley Parish of Mackenzie to be divided into twenty-two equal parts. The Executor shall have regard that these bequeath [sic] amounts shall be held as joint tenants until dispersed."[7]

[9] The Will then went on to allocate who was to receive how many parts of the 22 parts in total. The appellant was to receive eight parts. The relevant part of the Will then concluded with this provision:

> "Provided however, and conditional upon that this property described as Lot 12 on RP 82892 County of Stanley Parish of Mackenzie shall not be sold until after the fifth anniversary of my death."[8]

[10] The fact that the deceased had sold the property prior to his death raised, at least in the eyes of the Public Trustee, the question of whether the specific legacy or devise in the Will had been adeemed, that is to say, taken out of the Will. On 23 December 2013 the Public Trustee wrote to all of the beneficiaries mentioned in the relevant clause of the Will, raising the question of whether the specific legacy had been adeemed and stating:

---

3 Statement of Claim, paragraph 19.
4 Statement of Claim, paragraph 14; Defence and Counter Claim, paragraph 8.
5 Statement of Claim, paragraphs 17, 18, 21 and 24-37.
6 Order dated 20 November 2012, AB 60.
7 AB 7.
8 AB 8.

> "It is important that the Public Trustee administer the estate according to law on all the relevant facts. Where there is uncertainty as to the correct legal position, it is proper that the Public Trustee refer the matter for determination by the Supreme Court.
>
> To determine the issue relating to whether the bequest of the proceeds of the Park Ridge Property has been adeemed, the Public Trustee proposes to apply to the Supreme Court of Queensland. When the Supreme Court has made a determination on the ademption issue the Public Trustee will administer the estate in accordance with the determination by the Court. The timing of the administration is likely to be affected by other legal issues independent to the ademption question."[9]

[11] Each of the beneficiaries was told that they had "an interest in the outcome of the determination of the issue referred to above by the Supreme Court", and that they had the right to appear and be heard on that application.[10]

[12] Most of the beneficiaries announced that they would abide the outcome of the application and did not wish to appear, or failed to respond. The appellant provided an affidavit in response to the Public Trustee's letter.[11] That affidavit made a number of points including the following:

(a) that the deceased had always made provision for the appellant and her family in the various Wills which he executed;

(b) his assurance of provision for the appellant was to occur upon the sale of the Park Ridge property;

(c) believing that, the appellant took out a high interest loan on her own property, but her ability to deal with that property or refinance it had been hampered by a caveat lodged by the Public Trustee;

(d) in order to cover her outgoings the appellant borrowed from a bank, and assistance had been provided by her mother and brother;

(e) the explanation for her delay in filing various appeals was explained by her financial situation and the bank's threat to foreclose on her own property;

(f) she challenged the fact that $849,732.14 had been appropriated; and

(g) she urged that the Public Trustee to "uphold the wishes of the Testator" and "uphold the Testator's express wishes in administering His Estate".

[13] The affidavit did not contain any objection to the Supreme Court hearing the application foreshadowed by the Public Trustee.

[14] On 24 March 2014, after some further correspondence between the appellant and the Public Trustee, the Public Trustee's solicitors advised that the application in respect of the ademption question was being finalised and would be filed later that week.[12]

---

9 AB 96.
10 AB 97.
11 AB 174.
12 AB 261.

[15] The originating application was filed on 8 April 2014, and heard by de Jersey CJ on 17 April 2014. The application sought relief in respect of a series of questions identified as follows:

[16] Whether the disposition in the Will, of the proceeds of sale of the real property, was a specific gift?[13]

[17] If the disposition was a specific gift, whether that gift had been adeemed by reason of the sale of the property prior to the death of the deceased?[14]

[18] Further, if there had been an ademption, whether the balance of the proceeds of sale of the property formed part of the residuary of the estate?[15]

[19] In the event that the funds did form part of the residuary of the estate, whether the three named sons of the deceased were entitled to take the residuary?[16]

[20] Relief on each question was sought on two alternative bases. The first sought an "opinion or direction pursuant to section 134 *Public Trustee Act* 1978 (Qld)". The alternative basis of relief sought a declaration as to the same questions.

Proceedings before the Chief Justice

[21] The material relied upon by the Public Trustee on the hearing before the Chief Justice included affidavits exhibiting the correspondence with the beneficiaries, as well as the pleadings outlining the points of contention between the Public Trustee and the appellant. The transcript of the proceedings before the Chief Justice reveals that there were appearances on behalf of a number of parties or interested persons. The Public Trustee was represented by counsel, as were the three sons of the deceased. A schedule which became exhibit 1 was tendered, outlining the positions of the beneficiaries. The appellant appeared for herself as well as the interest of "some of the beneficiaries".[17] The Chief Justice made enquiry of the appellant as to whether there was any material she wished to put before the court, and the response was, "No, your Honour".[18] However, the Chief Justice recognised that the appellant was a possible contradictor to the contentions of the Public Trustee.[19]

[22] Following submissions from the Public Trustee, counsel for the deceased's sons was offered a chance to be heard. Apart from supporting the Public Trustee's submissions they had nothing to say. Then the appellant was offered her chance to be heard. The appellant raised a number of points concerning the factual circumstances surrounding the signing of the Will and the Power of Attorney, as well as the Contract for Sale. She also raised a contention that events subsequent to the execution of the Will should be taken into account in some unspecified way, as impacting upon the question of the construction of the Will.[20] The appellant contended that the deceased's intentions were to be interpreted from the Will, saying:

---

13 Paragraph 1 of the originating application; AB 301.
14 Paragraph 2 of the originating application.
15 Paragraph 3 of the originating application.
16 Paragraph 4 of the originating application.
17 Transcript, 17 April 2014, p 1-3.
18 Transcript, p 1-4.
19 Transcript, p 1-5.
20 Transcript, p 1-7.

> "Your Honour, the [indistinct] made his intentions very clear and, looking at the case law which supports the notion that the intentions, you know, must be or should be upheld of the testator and, your Honour, I'll leave my submissions at that."[21]

[23] None of the appellant's submissions to the Chief Justice included the point which, as will appear, is at the heart of her appeal, namely that s 134 of the *Public Trustee* Act 1978 (Qld) (***PTA* 1978 (Qld)**) is invalid as being beyond the power of the State legislature.

Decision of the Chief Justice

[24] The Chief Justice delivered reasons on the afternoon of 17 April 2014. He found that upon the sale of the property the specific bequest was adeemed, meaning that the proceeds of sale were no longer subject to the specific bequest but fell into residue.[22] The Chief Justice recorded the appellant's contentions in the following passage:

> "[The appellant] asked me to focus on Mr Tacon's testamentary intention. His comprehensive will shows very clearly that he intended his three sons should not share in the estate, but Mr Tacon made no provision in his will in relation to residue. That means there is a partial intestacy.
>
> As his only surviving issue, his three sons must therefore take that benefit. [The appellant] also asked me to review the situation in the context of earlier wills. There is, however, no ambiguity or uncertainty about the relevant provisions of the last will. In any case, it would not be permissible to construe that will by reference to a revoked earlier will. Finally, [the appellant] appeared to submit that the money in the joint account was quarantined from the power of attorney. It is true that the account was in her name and in the name of the deceased in their own right, but the estate's entitlement to those monies has been separately determined and the present issue is their disposition as estate assets. That is my determination of the matter. Do you have a draft order?"[23]

[25] Following the passage cited above a debate ensued between counsel for the Public Trustee and the Chief Justice, as to whether there was a necessity to say more than had already been said. By reference to the originating application, the Chief Justice was of the view that he had "said all those things".[24] After some further debate the Chief Justice decided to go further and make declarations in respect of the questions raised in the originating application.[25]

[26] As a consequence the order of the court, as taken out, did not express an opinion or direction within the terms of s 134(1) of the *PTA* 1978 (Qld), but rather reflected the declarations made by the Chief Justice on 17 April 2014.[26]

---

21 Transcript, p 1-8.
22 AB 332.
23 AB 332.
24 AB 333.
25 AB 333.
26 AB 330.

Basis of the appeal

[27] The order sought on the appeal is expressed in these terms:

> "Order that Section 134 of the *Public Trustee Act 1978* be read down/struck down as being unconstitutional as it exceeds the law in allowing the Court to make a declaration on hypotheticals and *ex-parte*."[27]

[28] The grounds of appeal articulated in the notice of appeal were confined to advancing the proposition that s 134 of the *Public Trustee Act* was unconstitutional as being beyond the power of the State legislature. This was expressed in several ways including[28]:

(a) because it "allows The Public Trustee to seek legal advice from the Judiciary, without notification to interested/affected parties and does not require other parties to be served with material and/or to attend the hearing";

(b) it allows the court to "Rule/give opinions on hypotheticals and fictitious or academic questions";

(c) the section should be read down on the basis that the court "cannot give opinion to only one party as this shows Open Bias, particularly in the light of the fact that these applications can be heard ex parte …";

(d) the section "entertains one party's speculative opinions including hypotheticals", and courts will not entertain hypothetical, theoretical or abstract questions; and

(e) therefore the section should be "read down and declared *ultra vires* or outside the law".

[29] Ground 2 of the appeal was concerned with service on the appellant of affidavits prior to the hearing before the Chief Justice. The contention was that r 28 of the *Uniform Civil Procedure Rules* 1999 (***UCPR***) required service at least three clear business days before a hearing, and at least one affidavit was only received on the evening before the hearing.

[30] Ground 3 concerned the question of costs. This seemed to be a pre-emptive contention, as there was no costs order made on 17 April 2014 against the appellant. As best one can understand the ground, it was a contention that each party should bear their own costs of the appeal.[29]

[31] The appellant also filed an affidavit, said to be in support of the notice of appeal. That affidavit made it clear that the central ground of the notice of appeal was that:

> "[Section] 134 must be read down as it allows one party to take advice/opinion of the Judiciary without notification to any particular parsons [sic] or parties that have an interest in the matter or stand to be affected. Further, … section 134, allows for hypotheticals and hypothetical cases to be entertained by the Court."[30]

---

27 AB 335.
28 AB 337-340.
29 AB 341.
30 AB 344.

Discussion – Ground 1

[32] There are a number of difficulties which confront the appellant's contentions that s 134 is invalid.

[33] The first is that no such point was taken before the Chief Justice. The appellant appeared that day on her own behalf and on behalf of some other beneficiaries. She participated in advancing contentions, including as to the manner in which the Will should be construed, and as to whether there was an ademption. At no point was there any suggestion that the court could not or should not utilise the power granted by s 134 of the *PTA* 1978 (Qld).

[34] Secondly, one of the central aspects of the appellant's contentions is that s 134 is invalid because it permits the court to entertain hypothetical, fictitious or abstract questions. However, the appellant's own material accepts that the matter before the Chief Justice was one "where the Court is being asked to rule on a matter that affects the rights of parties and one where the matter is not theoretical but where there is in [sic] contention".[31]

[35] Thirdly, the power ultimately exercised by the Chief Justice was not that under s 134 of the *PTA* 1978 (Qld). As appears from the passages in the transcript referred to above, the Chief Justice was persuaded to make declarations, and the orders taken out reflect those declarations. If one accepts that there was a real controversy between the Public Trustee on the one hand, and the appellant on the other, it was appropriate to give declaratory relief. The contrary was not contended, either before the Chief Justice or before this Court.

[36] Fourthly, the material before the Chief Justice demonstrated that advance notice was given to the beneficiaries of the particular issue, namely whether the sale of the real estate had given rise to an ademption of the specific bequest. There can be no doubt that there was a live issue as to this question, because the consequence of an ademption was that the deceased's three sons would take the residue, when the deceased had expressly excluded them from the provisions of his Will. That was a point the appellant made in her contentions to the Chief Justice. Further, the transcript of the hearing before the Chief Justice reveals that various parties were represented and heard on the application. Apart from the Public Trustee, they included the deceased's three sons, the appellant and those beneficiaries represented by the appellant. Other beneficiaries had signified their position, summarised in exhibit 1. Whatever else might be said about the proceedings before the Chief Justice, they involved a real controversy upon which parties were given advance notice and one where those parties appeared and advanced their various contentions. None of that involves the vices identified by the appellant in her contentions before this Court.

[37] On that basis it cannot be said that the contentions agitated before the Chief Justice were hypothetical, fictitious or abstract. The property at the centre of the bequest in the Will had been sold well prior to the date specified in the Will, and before the testator's death. In those circumstances the question of whether the gift had been adeemed was one fairly raised by the Public Trustee. The outcome, if that question was answered in the affirmative, was one which the appellant contested. It meant

---

[31] Paragraph 2 of the expanded grounds of appeal, AB 352; paragraph 1.2 of the appellant's outline of arguments in respect of the notice of appeal; AB 358.

that the residuary estate would pass to the deceased's three sons, when he had gone to some pains in the Will to explain why they were not to benefit. The appellant advanced contentions that the deceased's wishes should be respected, namely that the residuary estate should not go to the deceased's sons. Another matter agitated was the impact of the fact that the deceased and the appellant held a joint bank account into which the proceeds had been paid. That was a question in which the Public Trustee was interested, as were other beneficiaries.

[38] However, leaving aside those difficulties, the appellant's main challenge proceeds on a misapprehension as to the nature and operation of s 134 of the *PTA* 1978 (Qld) and the jurisdiction it confers. These matters are properly understood in the historical context in which s 134 came to be enacted, to which I now turn.

Historical context

[39] In 1857 in England Lord St Leonards first propounded a statute under which a trustee could approach the court for assistance in the administration of a trust estate, including deceased estates. It was enacted on 13 August 1859, and entitled the *Law of Property and Trustees Relief Amendment Act* 1859 (Eng).[32] It was also known as *Lord St Leonards' Act*. Section 30 provided:

> "Any Trustee, Executor, or Administrator shall be at liberty, without the Institution of a Suit, to apply by Petition to any Judge of the High Court of Chancery, or by Summons upon a written Statement to any Judge at Chambers, for the Opinion, Advice, or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the Assets of any Testator or Intestate, such Application to be served upon or the Hearing thereof to be attended by all Persons interested in such Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor, or Administrator acting upon the Opinion, Advice, or Direction given by the said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the Subject Matter of the said Application; provided nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice, or Direction as aforesaid, if such Trustee, Executor, or Administrator shall have been guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice, or Direction; and the Costs of such Application as aforesaid shall be in the Discretion of the Judge to whom the said Application shall be made."

When he introduced the Act into the House of Lords in 1857,[33] Lord St Leonards said that it gave a summary right to trustees which: "would be a great benefit to trustees, and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits."

[40] At the time that Act was first introduced into Parliament Queensland did not exist as a separate state. Until it was separated from New South Wales on 10 December 1859, Queensland remained part of New South Wales. When it was separated

---

32 22 & 23 Victoria, C.35.

33 11 June 1857, p 1557. The Bill was entitled the Trustees Relief Bill.

Queensland retained the legal system of the parent colony, New South Wales. Pursuant to the *Australian Courts Act* 1828 (Vic),[34] the law of England at the time of the passing of that Act (25 July 1828) was to be applied in the Australian colonies "so far as the same can be applied". The consequence was that the law applicable in Queensland consisted of the common law of England, applicable statute law in force in England as at 25 July 1828, overlaid by (inter alia) New South Wales legislation to the date of separation on 10 December 1859.[35]

[41] Therefore *Lord St Leonards' Act* applied in New South Wales, and Queensland when it separated on 10 December 1859.

[42] Notwithstanding the effect of the *Australian Courts Act* 1828, as explained by the New South Wales Court of Appeal in *Beck v Henley*[36], *Lord St Leonards Act* was expressly adopted as part of the law of New South Wales, having been first copied by s 30 of the *Trust Property Act* 1862, and then reproduced in the *Trustee Act* 1898 (NSW).

[43] Once Queensland became a state in its own right, with its own legislature, *Lord St Leonards Act* was reproduced in the *Trustees and Executors Act* 1897 (Qld). Section 45 provided:

> "(1) A trustee, executor or administrator may, without an action, apply upon a written statement of facts to the Court for the opinion, advice, or direction of the Court on any question respecting the management or administration of the trust property, or the assets of the testator or intestate.
>
> Notice of such application must be served upon, and the hearing thereof may be attended by, any persons interested in the application, or such of them as the Court may think expedient.
>
> A trustee, executor or administrator, acting upon the opinion, advice, or direction given by the Court, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the application.
>
> (2) This section does not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice, or direction, if he is guilty of fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction.
>
> (3) The costs of the application shall be in the discretion of the Court."

---

34 9 Geo IV c 83.

35 *The Supreme Court of Queensland*, B H McPherson, page 64.

36 *Beck v Henley* [2014] NSWCA 201, at [49] per Leeming JA, Beazley P and Sackville AJA concurring.

[44] From an early time the court held that the process was not applicable where there were disputed questions of fact, nor to advice as to which of two conflicting claims to property is valid.[37] Thus the summary nature of the relief was emphasised.

[45] The precursor to the *Public Trustee Act* was the *Public Curator Act* 1915-1971. Section 79 of that Act enabled the Public Curator to take the opinion of the court on any question arising in the course of his duties. It provided:

> "(1) The public curator may, without judicial proceedings, take the opinion or obtain the direction of the court upon any question, whether of law or of fact, arising under this Act or in the course of his duties.
>
> Any such questions shall be submitted to a judge in such manner and at such time as he may direct, and shall be accompanied by such statement of facts, documents, and other information as he may require; and the public curator or anyone authorised by him shall, if the judge so desires, attend upon him at such time and place as the judge may appoint.
>
> The judge may, before giving his opinion or direction, require the attendance of, or communication with, any person interested in the estate as trustee or beneficiary, but no such person shall have a right to be heard unless the judge otherwise directs.
>
> The judge shall give his opinion or direction to the public curator, and the public curator shall act in accordance with such opinion or direction, and shall, upon the request in writing of any such interested person, communicate to him the effect of such opinion or direction.
>
> The duty of advising and directing upon any such questions shall be assigned by the Chief Justice to a particular judge of the court:
>
> Provided that in the absence or upon the request of such judge any other judge may act for such judge for the purposes of this subsection.
>
> (2) The public curator may by special case submit for the decision of the Full Court any question arising under this Act which appears to him to require such decision, and that court shall give its judgment thereon as if such question had been raised in due form.
>
> (3) The public curator in acting on such opinion, direction, or judgment shall be fully indemnified."

[46] Provisions to the same effect exist in other states of Australia, either under similar statutes or under the court rules, and the jurisdiction is held to be the same.[38]

---

[37] *In re Tooth's Trusts* (1877) 5 QSCR 10; 1 QLR (Pt II), 8; *In re Murray-Prior's Trusts* (1899) 9 QLJ (NC) 121; *In re Petersen* [1920] St R Qd 42.

[47] Provisions to the same effect have existed in New Zealand for a considerable period. In the *Public Trust Office Act* 1908, s 20 made provision for a trustee to approach a court. The *Public Trust Office Amendment Act* 1913, s 24 provided as follows:

> "(1) The Public Trustee may, in a manner hereinafter provided, and without judicial proceedings, take the opinion of the Court upon any question arising in the course of his duties.
>
> (2) Any such question shall be submitted to a Judge in such manner and at such time as he may direct, and shall be accompanied by such statement of facts, documents, and other information as he may require; and the Public Trustee or anyone authorized by him shall, if the Judge so desires, attend upon him at such time and place as the Judge may appoint.
>
> (3) The Judge may, before giving his opinion, require the attendance of, or communication with, any person interested in the estate as trustee or beneficiary, but no such person shall have a right to be heard unless the Judge otherwise directs.
>
> (4) The Judge shall give his opinion to the Public Trustee, and the Public Trustee shall act in accordance with such opinion, and shall, upon the request in writing of any such interested person, communicate to him the effect of such opinion.
>
> (5) The duty of advising upon any such question shall be assigned by the Chief Justice to a particular judge of the Supreme Court:
>
> Provided that in the absence or upon the request of such judge any other judge may act for such judge for the purposes of this section.
>
> (6) The Public Trustee in acting on such opinion shall be fully indemnified."

[48] The same is the case with the USA where various states have long recognised the ability of their courts, acting in their jurisdiction over the administration of trusts, to give instructions to trustees at their request as to their duties and powers. Many of those states have long contained statutory provisions to the same effect.[39] Further, the right to ask a court for instructions was recognised as existing not only in a trustee, but also as a right of the beneficiaries.[40]

[49] It should also be recognized that such statutes are not the only source of power in the court to give directions with respect to questions arising in the administration of trusts or concerning the powers of trustees, and not only at the request of trustees

---

38 *Coore v Coore* [2013] QSC 196, (***Coore***) at [4], referring to the *Trustee Act* 1925 (ACT) s 63; *Trustee Act* 1925 (NSW) s 63; *Trustee Act* 1936 (SA) s 91; and *Trustees Act* 1962 (WA) ss 92, 95. See *Morris v Smoel (as Executors of the Will of Morris, dec'd)* [2013] VSCA 11, at [20]-[24]; *Re Estate of Heyward* [2010] SASC 247, at [17].

39 *Scott on Trusts*, 4th edition, paragraph 259.

40 See *Scott on Trusts*, at paragraph 259, and the cases cited.

but beneficiaries also. It has long been part of the equitable jurisdiction of the court to do so.[41]

[50] Similar provisions exist in the *Trusts Act* 1973 (Qld), where s 96 provides:

> "(1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee."

[51] Section 97 of the *Trusts Act* 1973 then provides an indemnity for a trustee who acts in accordance with the directions of the court.

[52] When the *Public Trustee Act* was enacted in 1978, s 134 replaced s 79 of the *Public Curator Act* (1915-1971), which in turn was expressly based on the New Zealand *Public Trust Office Act* 1908.[42] Those earlier statutes reflected an already established jurisdiction, peculiar to the area of trusts and deceased estates, whereby trustees could approach the court for advice and directions. That jurisdiction was long established, as signified by the fact that *Lord St Leonards' Act* was first propounded in 1857, and enacted in 1859. The introduction of the *PTA* 1978 (Qld)was not to change the law but rather to streamline and simplify procedures, clarify existing provisions, and simplify and update the language of the provisions, for instance by using the name "the Public Trustee" as opposed to "the Public Curator".[43]

[53] The origin of the jurisdiction to grant the sort of relief envisaged by s 96 of the *Trusts Act* was identified by Atkinson J in *Coore*[44] where, having reviewed certain publications of the Queensland Law Reform Commission on the issue[45] this was said:

> "This jurisdiction arose from the enactment in England in 1859 of s 30 of the *Law of Property Amendment Act* (UK) (*Lord St Leonards' Act*) which created a procedure by which a trustee could obtain the opinion, advice or directions of the court in relation to any question concerning the "management or administration" of trust or estate property. In most Australian jurisdictions, there are statutory provisions similar to s 96 of the *Trusts Act* which are modelled on s 30 of *Lord St Leonards' Act*."[46]

Nature of the jurisdiction

[54] The New South Wales equivalents of s 96 and 97 of the Trusts Act were considered by the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of*

---

41 *Tsaknis as Executor and Trustee of the Estate of Geoffrey Douglas Roland Lilburne (Dec) v Lilburne* [2010] WASC 152, at 37]-[38]. (***Tsaknis***)

42 As amended by the *Public Trust Office Act Amendment Act* 1913 (NZ).

43 Hansard, 16 November 1978, Hon W D Lickiss (A-G), pages 2730-2732.

44 *Coore* at [2]-[4].

45 Discussion paper entitled "A Review of the *Trusts Act* 1973 (Qld)", WP No. 70, December 2012; and interim report, WP No. 71.

46 *Coore* at [4]. The Acts referred to are the *Trustee Act* 1925 (ACT) s 63; *Trustee Act* 1925 (NSW) s 63; *Trustee Act* 1936 (SA) s 91; and *Trustees Act* 1962 (WA) ss 92, 95.

Australia and New Zealand.[47] The plurality in the High Court identified a number of propositions about the New South Wales statute, which are relevant here. There were eight points in total, which Atkinson J summarised in *Coore*, at [10]. Those points relevant to the present discussion are:

(a) it is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words;[48]

(b) there are no express words in the New South Wales equivalent to s 96, and no implications from the express words which are used, that automatically preclude a court from giving judicial advice; further there is nothing which limits the application of the section to "non-adversarial" proceedings, or proceedings other than those in which the trustee is being sued for breach of trust, or proceedings other than those in which one remedy sought is the removal of the trustee from office;[49]

(c) there is only one jurisdictional bar to the relief available under s 96 and its New South Wales equivalent, namely that the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument;[50]

(d) the procedure under that section has a "summary" character designed to assist the court's administration of trusts by orders less extreme than a general administration order; that character had been reflected as early as 1857 when Lord St Leonards delivered his First Reading Speech on the *Trustees Relief Bill*, which then became *Lord St Leonards' Act*, the precursor to the *Trusts Act*, and reflective of the relief available under s 134 of the *PTA* 1978 (Qld);[51]

(e) the section[52] operates as "an exception to the court's ordinary function of deciding disputes between competing litigants", and affords a facility for giving "private advice";[53] and

(f) the context in which *Lord St Leonards' Act* was enacted, and the onerous obligations on trustees, meant that it was understandable that the legislature should enact provisions enabling trustees to take advice before embarking on any course which might carry a risk of incurring costs that might be outside the indemnity which normally applies, namely that trustees are entitled to an indemnity out of trust's assets.

---

47 (2008) HCA 42; (2008) 237 CLR 66. (***Macedonian Church***)

48 *Macedonian Church* at [55], citing *Owners of "Shin Kobe Maru" v Empire Shipping Co In.* (1994) 181 CLR 404 at 421; [1994] HCA 54.

49 *Macedonian Church* at [56].

50 *Macedonian Church* at [58].

51 *Macedonian Church* at [61]-[63].

52 Referring to the New South Wales equivalent of s 96 of the *Trusts Act*.

53 Adopting language from the case at first instance and on appeal, *Application of Macedonian Orthodox Community Church St Petka Inc (No. 2)* (2005) 63 NSWLR 441 at 445, [23] per Palmer J, approved in *Macedonian Orthodox Community Church St Petka Inc v His Eminence KR, The Diocesesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 at 122 [40] per Beazley and Giles JJA. See also *Martin v Hayward* [1908] SALR 187, at 197; *Re Jackson* [1944] SASR 82 at 85.

[55] The High Court described the position in respect of the *Trusts Act* in this way:[54]

> "[71] In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.
>
> [72] It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust."[55]

[56] That point is supported by what was said by the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd*,[56] namely that in a judicial advice application, "the court is essentially engaged solely in determining what ought to be done in the best interest of the trust's state and not in determining the rights of adversarial parties"

[57] The right to approach the court in this way has been held to apply where the trustee is in genuine doubt as to the question to be answered.[57] In my view this follows from the words of the statute themselves, requiring that the court's opinion or advice be in relation to a "question, whether of law or of fact, arising under this Act or in the course of the Public Trustee's duties".

[58] In my view the points made in *Macedonian Church*, and in *Marley*, are apposite to the position of the Public Trustee when it applies to the court under s 134 of the *PTA* 1978 (Qld). The proceedings are essentially the same, and the same object is being served. In this respect I agree with the conclusions reached by McMeekin J in *Public Trustee (Qld) v Macpherson*,[58] where his Honour applied what was said in *Macedonian Church* to the application of s 134 of the *PTA* 1978 (Qld).[59]

[59] Looking at the express words of the section nothing is said as to whether or not the court can entertain hypothetical or theoretical questions in the way which would be a difficulty in normal civil litigation between competing parties. The statute permits

---

54 *Macedonian Church* at [69].

55 *Macedonian Church* at [71]-[72].

56 *Marley v Mutual Security Merchant Bank and Trust Co. Ltd* [1991] 3 All ER 198 at 201. (***Marley***)

57 *Marley* at 201; *Re Australian Pipeline Ltd* [2006] NSWSC 1316, at [17]; *Tsaknis* at 37]-[38]; *Re Application by Marilyn Joy Cottee; Estate of Gwenyth Shirley Smith* [2013] NSWSC 47 at [32]-[35]; *Re Perpetual Investment Management Ltd (as Responsible Entity for 10 Schemes Listed in the Summons)* [2014] NSWSC 784, at [70].

58 [2011] QSC 169 at [19]-[21].

59 Referred to with apparent approval by Daubney J in *The Public Trustee of Queensland as a Corporation Sole* [2012] QSC 178 at [3].

the Public Trustee to approach the Supreme Court in order to "take the opinion or obtain the direction of the court", but subject to the one jurisdictional bar identified in relation to the sections in the *Trusts Act*, by the High Court in *Macedonian Church*. That is, the trustee must point to a "question, whether of law or of fact, arising under this Act or in the course of the Public Trustee's duties".[60]

[60] There is no qualification, implication or limitation arising from the plain words of the section that warrants the gloss which the appellant would place on it, namely that the question cannot be one that is hypothetical or abstract. However, it must be a question "arising under this Act or in the course of the Public Trustee's duties". One can apprehend that such questions might involve contingencies. Many examples can be imagined but one will suffice. The Public Trustee might say: one of two alternative events will happen in the future, and I wish to know the right course to follow depending on what occurs. In normal inter-partes litigation that sort of question would probably be classed as hypothetical, and therefore likely to remain unanswered by the court until the event occurs. However I do not see why that sort of question would be beyond the scope of what the court is entitled to answer under s 134(1). It would be a "question, whether of law or of fact, arising … in the course of the Public Trustee's duties", and that is sufficient for the purposes of s 134(1). To deny the opportunity to have that question answered would run counter to the authorities which show that the right to approach the court applies where the trustee is in genuine doubt as to the question to be answered.[61]

[61] In *Macedonian Church* the High Court recognised that this sort of jurisdiction is an exception to the court's ordinary function of deciding disputes between competing litigants.[62] Its source lies in the particular jurisdiction of a superior court to assist the administration of trusts and estates, and to give protection to trustees who take on the onerous tasks of administration. Therefore authorities dealing with the proper role of the court, where adversarial parties are involved in normal litigation, are not of assistance.[63]

[62] Section 134 is a provision giving the Supreme Court power to act in its protective jurisdiction in respect of deceased estates. It concerns a particular category of deceased estates, namely those where the Public Trustee is involved. It permits the Public Trustee, and no other party, to apply for the court's assistance "upon any question, whether of law or of fact, arising under this Act or in the course of the Public Trustee's duties". That it is directed to a "questions … arising" points, in my view, to the fact that the section applies to real questions, even if hypothetical in the usual sense in inter-partes litigation. The appellant's contentions focus on what might be objectionable in such litigation, missing the fact that this jurisdiction is an exception to the court's ordinary function of deciding disputes between competing litigants.

[63] It is only a question "arising under this Act or in the course of the Public Trustee's duties" which can be submitted to the court under s 134(3),[64] and only such a question which can be answered by the "court's opinion or direction". Further, s 134(4) provides that the court can require the attendance of, or communication

---

60 *Macedonian Church* at [58].

61 See footnote 57 above.

62 *Macedonian Church* at [64].

63 Most of the authorities referred to by the appellant were in that category, including *Re McBain; Ex Parte Australian Catholic Bishops Conference* [2002] HCA 16; (2009) 209 CLR 372.

64 Which provides "any such question shall be submitted to a judge of the court …".

with, any interested person. Given the protective nature of the jurisdiction in respect of deceased estates, one could be confident that a court entertaining an application under s 134 would be astute to ensure that any interested party was given notice and the opportunity to be heard. None of that involves vices of the sort raised by the appellant, namely that proceedings might be informal and without notification to interested or affected parties.

[64] The historical development, and the nature of, this jurisdiction, both in the equitable jurisdiction of the court and under statutory provisions, suffices to demonstrate the futility in contending that s 134 of the *PTA* 1978 (Qld), when enacted, was not for the peace, order and good government of the State of Queensland.

[65] In my opinion no ground has been demonstrated to support the contention that s 134 of the *PTA* 1978 (Qld) is invalid. In my view this ground of appeal cannot be sustained.

Discussion – Ground 2

[66] This ground concerned the contention that affidavit material was served less than three clear business days before the hearing before the Chief Justice. Even if that be so, I do not consider that the ground has merit. No objection was taken by the appellant before the Chief Justice, as to short service of affidavits. It is true to say that the appellant told the Chief Justice she had only received the Public Trustee's **submissions** "this morning when I was walking into court".[65] However, no adjournment was sought by the appellant. Further, it is unlikely that one would have been granted given that the facts surrounding the critical question of ademption, were uncontroversial. The Will was in evidence, and there was no contest that the relevant property had been sold prior to the death of the deceased, and therefore prior to the time provided in the Will, namely five years after his death. These matters were adverted to in the course of debate between the appellant and the Chief Justice.[66]

[67] This ground of appeal does not succeed.

Discussion – Ground 3

Application to the Court of Appeal by the appellant

[68] In addition to the appeal from the decision of the Chief Justice the appellant sought to have a separate application heard at the same hearing. That application was filed on 28 August 2014. It seeks orders "setting aside whole of the decision of the Court of Appeal dated 13 April 2012, 8 March 2012 and as a result the earlier Supreme Court decision of 7 December 2012". In addition, an injunction is sought preventing the National Australia Bank from selling certain property at 65-71 Tall Timber Road, New Beith, in Queensland.

[69] In support of that application the appellant filed an affidavit, which in turn was answered by material from the Public Trustee. Submissions were also filed in respect of that application.

The relevant orders

---

65 Transcript, p1-6. Emphasis added.

66 Transcript, p1-7.

[70] The order of 8 March 2012 was in Appeal No. 105 of 2012. The order of the court was in these terms:

> "1. If the respondent fails to file and serve an amended notice of appeal and an outline of argument before 4.00 pm on Friday 16/3/12 then the respondent's appeal stands dismissed without further order and it is ordered that the respondent pay the applicant's costs of and incidental to the appeal."

[71] The circumstances leading to that order involved, as its terms suggest, delay on the part of the appellant in prosecuting an appeal. That was an appeal brought from the order made on 7 December 2011 by Boddice J, making declarations as to certain monies in a joint account, and the equitable ownership of property situated at Greenbank. An appeal from that decision was lodged on 4 January 2012. The appellant failed to comply with timings set by the deputy registrar for the conduct of the appeal. As a consequence the matter was listed for mention before Muir JA on 17 February 2012. Orders were then made for the filing of an outline of submissions, and an amended notice of appeal. That was to be done by 27 February 2012.

[72] On 27 February 2012 the appellant advised the Public Trustee that the material would be two days late. On 29 February 2012 the appellant advised that the amended notice of appeal and outline of submissions would be supplied by the end of that week.

[73] Due to the delays and non-compliance with the timetable the Public Trustee brought an application to strike out the appeal. That application came before Muir JA, Chesterman JA and Daubney J on 8 March 2012. It resulted in the order referred to above. The appellant did not comply with that order.

Order dated 13 April 2012

[74] This order was made in respect of Appeal No. 2154 of 2012. That notice of appeal was filed on 7 March 2012, challenging the directions made by Muir JA on 17 February 2012. The appeal was heard by McMurdo P, Mullins J and A Lyons J on 13 April 2012 at which time the following orders were made:

> "1. Appellant's application to have matter heard by five judges denied;
>
> 2. Leave granted to amend notice of appeal in terms of the proposed notice of appeal;
>
> 3. Appeal 2154/12 and the application filed 19 March 2012 are both dismissed, with costs on standard basis."

Grounds of the application

[75] The appellant's complaints, as articulated in her supporting affidavit were as follows:

(a) Muir JA should not have sat on the court on 8 March 2012, in Appeal No. 105 of 2012, because he had given directions in that same appeal on 17 February

2012; this was said to offend s 40 of the *Supreme Court of Queensland Act* 1991;

(b) on 8 March 2012 the Court of Appeal were informed by the appellant that she had filed a notice of appeal, challenging the orders made by Muir JA on 17 February 2012;

(c) there were extenuating circumstances surrounding the failure of the appellant to file the material in accordance with the order made on 8 March 2012; this related to another appearance being made by the appellant in another court on another matter on the same day; the appellant suggested that she had sought permission from the other court to leave so she could file material, but that leave was not given; the appellant also alluded to personal matters which affected her personal ability to file the relevant documents;

(d) the appeal against the orders of Muir JA was heard by the court on 13 April 2012; notwithstanding that the court disposed of the arguments advanced by the appellant as to why the orders of Muir JA were challengeable, and dismissed the appellant's appeal on the basis that no error had been disclosed in the reasons of Muir JA, there were other extenuating circumstances affecting the appellant's ability to file material which should now be taken into account by this Court;

(e) the appellant prepared an application for special leave to the High Court in respect of this Court's orders in Appeal Nos. 2154 of 2012 and 105 of 2012, but did not prosecute that application; the appellant attempted to file that application "but kept it in abeyance", reserving to herself the prospect that "it may be filed/amended based on the outcome of this Application";[67]

(f) notwithstanding those matters, this Court has equitable jurisdiction to set aside the orders made on 8 March 2012 and 13 April 2012.

Discussion in respect of the application

[76] There are a number of reasons why the appellant's application cannot succeed.

[77] First, the orders she seeks to challenge are perfected orders of this Court, the first dated 8 March 2012 and the second dated 13 April 2012. That of 8 March 2012 was an order made on an application by the Public Trustee to strike out Appeal No. 105 of 2012, for failure to comply with the court imposed timetable. The order granted a further extension to the appellant, with which she did not comply. The second order was made after a hearing on the merits of the appellant's challenge to the original order of Muir JA on 17 February 2012 and to the termination of her appeal under the order of 8 March 2012. As the reasons of this Court of 13 April 2012[68] demonstrate, the appellant could not establish that there was any error on the part of Muir JA in making the orders on 17 February 2012. The court referred to the fact that the appellant had sent material electronically seeking an extension of time, but did not bring such an application. As a consequence, in accordance with the order of 8 March 2012 the appellant's appeal was dismissed. McMurdo P went on to say:

> "This is most unfortunate. [The appellant's] incompetence has meant her appeal was dismissed without a determination on the

---

67 Affidavit of the appellant, 28 August 2014, paragraph 9.

68 *Ban v The Public Trustee of Queensland as litigation guardian for TAA* [2012] QCA 93.

> merits. Her appeal was not without some prospects. She should seek competent legal advice as to the best method of now proceeding.
>
> But this means that the present appeal (No 2154 of 2012) is from an interlocutory order made at a directions hearing in a proceeding relating to an appeal which has now been dismissed, namely Appeal N. 105 of 2012. There is, therefore, no utility in proceeding to determine her appeal in No 2154 of 2012."

[78] The appellant was unable to identify any basis upon which this Court has power to set aside the perfected orders made on 8 March 2012 and 13 April 2012. The proposition advanced was that there was an inherent jurisdiction in this Court to review any of its own decisions. That proposition runs counter to well-established authority in the High Court.[69] There being no inherent power, no rule was identified which would permit this Court to interfere.

[79] Secondly, the orders challenged by this application were made in March and April 2012. The application was not filed until 28 August 2014. No adequate explanation was given for the delay in bringing this application, even assuming that there was some lawful basis upon which this Court could act to set aside those previous orders.

[80] Thirdly, the lack of an adequate explanation for delay was compounded by the fact that the appellant prepared a special leave application to be made to the High Court, seeking to appeal from the decision made on 13 April 2012 in Appeal No. 2154 of 2012. However, by deliberate choice the appellant did not file the application but "kept it in abeyance", intending to decide whether or not to file it depending upon the outcome of the application. That course of conduct demonstrated two things, namely that the appellant was conscious that her only legitimate avenue to challenge the previous decisions was by special leave to the High Court, and that she made a deliberate decision not to follow that path in a timely way.

[81] Finally, insofar as the application sought an injunction to restrain the National Australia Bank from moving to realise its security over the appellant's property, no basis whatever was identified for interference with that secured creditor's rights. The appellant's contention was that her default under the NAB mortgage was because the Public Trustee put a caveat on her property, and that as the deceased had always promised that he would pay the mortgage out, equity should fulfil the deceased's promise. No basis in law was identified for this contention. The circumstances do not raise themselves anywhere near to the level where the rights of a registered mortgagee could be affected.[70]

Conclusion and disposition

---

69 *Bailey v Marinoff* (1971) 125 CLR 529; *Goodwin v Southern Tablelands Finance Co Pty Ltd* (1968) 42 ALJR 309; and *FAI General Insurance Company Limited v Southern Cross Exploration NL* (1988) 165 CLR 268.

70 See, for example, *Inglis v Commonwealth Trading Bank of Australia* (1971) 126 CLR 161; *Harvey v McWatters* (1948) 49 SR (NSW) 173, at 178; and *Glandore Pty Ltd v Elders Finance and Investment Co Ltd* (1984) 4 FCR 407; cf *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540.

[82] For the reasons given above the appeal does not succeed, and the basis for relief in the application appeal has not been established. I would dismiss the appeal and the application.

[83] On the application, the Public Trustee contended that if the application failed the appellant should pay its costs on an indemnity basis. This was said to be warranted as the application was misconceived, inutile and a waste of the Court's time.[71] Since any costs incurred by the Public Trustee in defending the application would inevitably deplete the funds of the estate, and the application was correctly characterized as hopeless, I consider that the appellant should pay the Public Trustee's costs of and incidental to the application, to be assessed on the indemnity basis.

[84] As to the appeal, neither party addressed the question of the orders which might follow as to costs. I would therefore direct that the Public Trustee file and serve any submissions it seeks to make on the question of costs, within seven days of today; and that the appellant file and serve any submissions she seeks to make on the question of costs, within 14 days of today.

---

[71] Outline paras 6-8.