SUPREME COURT OF QUEENSLAND

CITATION:	*Watson & Anor v Ward* [2013] QCA 393
PARTIES:	**ROBERT JAMES WATSON** (first appellant) **HCOA OPERATIONS (AUSTRALIA) PTY LTD** ABN 85 083 035 661 (second appellant) **v** **ZAC WARD by his litigation guardian SIMONE WARD** (respondent) **SIMONE WARD** (not a party to the appeal) **STEVEN WARD** (not a party to the appeal)
FILE NO/S:	Appeal No 3694 of 2013 SC No 4772 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2013
JUDGES:	Fraser, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	INTEREST – RECOVERABILITY OF INTEREST – IN GENERAL – where the parties settled a claim for damages subject to the sanction of a court pursuant to s 59(1) of the *Public Trustee Act* 1978 (Qld) – where the sanction order provided for the payment of a compromise sum to a person other than the Public Trustee – where the monies were not paid immediately but were paid within the time prescribed by the order – where the respondent sought interest from the date of the sanction order until the date payment was made – where the primary judge dismissed the appellants' applications for declarations that no interest was payable to the respondent – where the appellants argued that the sanction order was not an order for the payment of money within the meaning of either s 48 of the *Supreme Court Act*

1995 (Qld) or s 59 of the *Civil Proceedings Act* 2011 (Qld) – where the parties did not expressly exclude the possibility that interest would be payable – whether s 48 of the *Supreme Court Act* 1995 (Qld) or s 59 of the *Civil Proceedings Act* 2011 (Qld) is applicable to the claim for interest – whether the sanction order is an order for the payment of money =

Acts Interpretation Act 1954 (Qld), s 4, s 20
Civil Proceedings Act 2011 (Qld), s 59, s 108, s 211
Public Trustee Act 1978 (Qld), s 59(1)
Supreme Court Act 1995 (Qld), s 48

Fowler v Gray [1982] Qd R 334, considered
Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75, cited
Re Gould [1992] 2 Qd R 377, distinguished
Taylor v Company Solutions (Aust) Pty Ltd [2012] QSC 309, considered
Thomas v Bunn [1991] 1 AC 362, distinguished
Ward & Ors v HCOA Operations (Australia) Pty Ltd & Anor [2013] QSC 92, related

COUNSEL: G W Diehm QC for the appellants
M Grant-Taylor QC, with S Williams, for the respondent

SOLICITORS: K & L Gates for the first appellant
Minter Ellison for the second appellant
Shine Lawyers for the respondent

[1] **FRASER JA:** The respondent claimed damages against the appellants for negligence in the management of the respondent's mother's labour which resulted in him sustaining cerebral palsy. The parties settled that claim subject to the sanction of the court pursuant to s 59 of the *Public Trustee Act* 1978.

[2] Section 59(1) of the *Public Trustee Act* 1978 (Qld) provides that:

> "(1) In any cause or matter in any court in which money or damages is or are claimed by or on behalf of a person under a legal disability suing either alone or in conjunction with other parties, no settlement or compromise or acceptance of money paid into court, whether before, at or after the trial, shall, as regards the claim of such person under a legal disability, be valid without the sanction of a court or the public trustee, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such person under a legal disability, whether by verdict, settlement, compromise, payment into court or otherwise, before or at or after the trial, shall be paid to the next friend of the plaintiff or to the plaintiff's solicitor or to any person other than the public trustee unless the court otherwise directs."

[3] On 8 April 2011 the Chief Justice sanctioned the settlement by an order which included the following terms:

"1. The compromise of this proceeding on the following terms be sanctioned pursuant to section 59(1) of the *Public Trustee Act* 1978:-

a. That the defendants pay the third plaintiff damages in the sum of $6,440,000.00 inclusive of management fees ("the compromise sum");

b. That the defendants pay the third plaintiff his costs of and incidental to this proceeding, including the costs of this application, to be agreed or failing agreement to be assessed on the standard basis ("the standard costs").

…

6. Within twenty-one (21) days of this Order or of the defendant's receipt of the last of any statutory clearances or charges in relation to the compromise sum (whichever is the later to occur) the defendants pay the compromise sum as follows:-

a. To any statutory body having a charge over the compromise sum, the amount necessary to satisfy the charge;

b. To the first plaintiff, a sum of $245,000.00 for out of pocket expenses incurred on behalf of the third plaintiff and for past personal care and assistance given to the third plaintiff;

c. To the trustee, the balance;

whose receipt shall in each case be a sufficient discharge for the defendants."

[4] The monies were not paid immediately but they were paid within the time prescribed by the order.

[5] Section 48 of the *Supreme Court Act* 1995, which was repealed by the *Civil Proceedings Act* 2011, provided:

"(1) Where judgment is given or an order is made by a court of record for the payment of money in a cause of action that arose after the commencement of the *Common Law Practice Act Amendment Act 1972*, interest shall, unless the court otherwise orders, be payable at the rate prescribed under a regulation from the date of the judgment or order on so much of the money as is from time to time unpaid

(2) Notwithstanding anything contained in subsection (1)—

(a) where the court directs the entry of judgment for damages and the damages are paid within 21 days after the date of the direction—interest on the damages shall not be payable unless the court otherwise orders;

(b) where the court makes an order for the payment of costs and the costs are paid within 21 days after the ascertainment thereof by taxation or otherwise—interest on the costs shall not be payable unless the court otherwise orders."

[6] After the sanction order was made, Douglas J held in *Taylor v Company Solutions (Aust) Pty Ltd*[1] that, under an order which was in a similar form to the sanction order in this case, s 48 mandated the payment of interest on so much of the money as was from time to time unpaid, unless the court otherwise ordered; the fact that the compromise did not make the settlement sum payable until 21 days after the defendants' receipt of the last of any statutory clearances or charges in relation to the damages did not change the sanction order's character as being one for the payment of money which was unpaid.

[7] The respondent thereafter sought payment of interest for the period between the sanction order and the date of payment to the respondent under paragraph 6(c) of that order. The amount of the interest was subsequently agreed to be $167,452.18. The appellants considered that they were not obliged to pay interest. They brought applications for declarations that no interest was payable by them to the respondent pursuant to s 48 of the *Supreme Court Act* 1995 (repealed) or, alternatively, s 59 of the *Civil Proceedings Act* 2011, in respect of the order of the Chief Justice. The applications were dismissed by the Chief Justice.[2]

[8] On 1 September 2012, s 48 of the *Supreme Court Act* 1995 was repealed by s 211 of the *Civil Proceedings Act* 2011 and replaced by s 59 of the latter Act. Section 59 provides:

> "(1) This section does not apply in relation to a proceeding for a cause of action arising before 21 December 1972.
> (2) Interest is payable from the date of a money order on the money order debt unless the court otherwise orders.
> (3) The interest is payable at the rate prescribed under a practice direction made under the *Supreme Court of Queensland Act 1991* unless the court otherwise orders.
> (4) However—
> (a) if the money order includes an amount for damages and the damages are paid within 21 days of the date of the order, interest on the damages is not payable unless the court otherwise orders; and
> (b) if the money order includes an amount for costs and the costs are paid within 21 days after assessment, interest on the costs is not payable unless the court otherwise orders."

[9] The expression "money order" is defined to mean "an order of the court, or part of an order of the court, for the payment of money, including an amount for damages, whether or not the amount is or includes an amount for interest or costs". The expression "money order debt" is defined to mean "the amount of money payable under a money order".

[10] The Chief Justice considered that the effect of s 108 of the *Civil Proceedings Act* 2011 was that s 59 rather than s 48 applied. Section 108 provides that "[a] reference in any Act or document to section 48 of the *Supreme Court Act 1995* is, if the context permits, taken to be a reference to section 59 of this Act." The appellants challenged that conclusion. They pointed out that s 48 of the *Supreme Court Act*

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1 [2012] QSC 309.
2 *Ward & Ors v HCOA Operations (Australia) Pty Ltd & Anor* [2013] QSC 92.

1995 was in force when the sanction order was made and when the interest subsequently claimed by the respondent against the appellants accrued in full. The appellants argued that s 48 remained the applicable provision. They referred to s 20 of the *Acts Interpretation Act* 1954. It provides, in s 20(2) that the repeal or amendment of an Act does not "(b) affect the previous operation of the Act …" or "(c) affect a right, privilege or liability acquired, accrued or incurred under the Act …". Section 20(3) provides that "… the right, privilege or liability may be enforced … as if the repeal or amendment had not happened." The application of that provision is subject to any contrary intention appearing in any Act: *Acts Interpretation Act* 1954, s 4. The respondent argued that the Chief Justice was correct in holding that s 108 of the *Civil Proceedings Act* 2011 required that reference now to be made to s 59 of that Act rather than to s 48 of the repealed Act.

[11] Section 108 of the *Civil Proceedings Act* 2011 could only have the effect attributed to it by the respondent if the expression "reference in any Act … to s 48 of the *Supreme Court Act 1995* …" applied on the footing that s 48 referred to itself. It does not do so and the language of s 108 seems quite inapt to achieve a retrospective replacement of s 48 by s 59 of the *Civil Proceedings Act* 2011 for all cases arising after the commencement of the *Common Law Practice Amendment Act* 1972. Section 48 remains applicable to claims for interest under it in cases, such as this one, where that provision was in force when the relevant order was made. In such cases, rights to and liabilities for interest made payable by that provision are preserved by s 20 of the *Acts Interpretation Act* 1954. In this case, the result would appear to be the same whichever provision applied, but in my respectful opinion s 48 is the applicable provision.

[12] Before the Chief Justice it was submitted for the appellants that the sanction order was not an order for the payment of money. They submitted with reference to the analysis in *Fowler v Gray*[3] and the terms of s 59(1) of the *Public Trustee Act* that the latter provision was concerned only with the destination of the sums to be paid. The Chief Justice acknowledged that a sanction order might be confined to the sanction itself, with the parties being left to implement the compromise, but observed that the usual order went beyond that and that paragraph 6 of the order obliged the second defendant to make the specified payments. The Chief Justice accordingly characterised the sanction order as a "money order" for the purposes of s 59 of the *Civil Proceedings Act* 2011. The same reasoning would compel the conclusion that the sanction order is an order "for the payment of money" within the meaning of s 48 of the *Supreme Court Act* 1995.

[13] The appellants advanced the following arguments in support of their contention that the Chief Justice erred in holding that paragraph 6 was an order for the payment of money within the meaning of either provision. Section 59(1) of the *Public Trustee Act* 1978 imposes a prohibition on the payment of money to anyone other than the Public Trustee unless the court directs otherwise. In *Fowler v Gray*[4] Master Lee QC held that in exercising this jurisdiction the Court acts as "a *persona designata*, vested with responsibility of protecting the interests of the person under a legal disability" and does not determine any issue between the parties to the compromise. The effect of paragraph 1 of the order was merely to approve the parties' compromise. The exercise of the Court's *parens patriae* jurisdiction under s 59(1)

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3 [1982] Qd R 334.

4 [1982] Qd R 334 at 349.

of the *Public Trustee Act* 1978 to sanction a compromise was not an order but merely a direction. It did not involve any determination of the rights of either party and it was not enforceable by execution. For an award of interest to be made, paragraph 6 of the order would need to be a source of the obligation to pay the money. According to the appellants' construction, the obligation to pay the compromise sum arose instead from the contract of compromise as modified by s 59(1).

[14] The appellants contrasted this situation with a case in which there was a "verdict" under s 59(1) of the *Public Trustee Act* 1978. In the latter case, all orders would remain the same other than paragraph 1, which would instead give judgment for the sum assessed; in such a case the source of the obligation to pay the monies would arise from paragraph 1, being the order giving judgment (a "money order"). In both cases, paragraph 6 would operate in the same way as an exercise of power under s 59(1) of the *Public Trustee Act* 1978. The appellants referred to *Thomas v Bunn*,[5] in which an interlocutory judgment was held not to be a "judgment debt" for the purposes of the analogous provisions in ss 17 and 18 of the *Judgments Act* 1838 (UK). The House of Lords found that those sections contemplated a final judgment in which the judgment quantifies the sum owed by a judgment debtor to a judgment creditor.

[15] The respondent argued that s 59(1) of the *Public Trustee Act* 1978 confers a power to order the payment of a compromise sum to a person other than the Public Trustee. The respondent accepted that the jurisdiction exercised by the court in sanctioning a compromise does not require an adjudication of the plaintiff's right to damages and that paragraph 1 of the order does not adjudge the appellants' liability or order the appellants to pay money. He argued that although s 59(1) of the *Public Trustee Act* 1978 provides for the Court to "direct" rather than "order" that payments be made, the terms of Practice Direction 9 of 2007 contemplate that payments be ordered as they were in this case. The respondent contended that s 48 of the *Supreme Court Act* 1995 and s 59 of the *Civil Proceedings Act* 2011 did not apply only to situations in which there had been a judgment. An award of interest could have been made where the monies were to be paid to the Public Trustee. If the appellants had wished to exclude the possibility that interest would be payable on the compromise sum, they should have included an express provision to that effect in the order.

[16] I would affirm the decision made by the Chief Justice. The appellants' arguments do not surmount the obstacle that paragraph 6 of the sanction order is quite unambiguous in ordering them to pay the compromise sum in the way specified in subparagraphs (a), (b) and (c) of that paragraph. The effect of the appellants' argument is that s 59(1) of the *Public Trustee Act* 1978 relevantly authorises only a direction that the prohibition in s 59(1) upon payment to anyone other than the Public Trustee does not apply to a payment pursuant to a sanctioned compromise, but paragraph 6 of the sanction order made by the Chief Justice plainly goes beyond such a direction. That paragraph is incapable of being read down to accord with the appellants' narrower construction of the section. As an order of a superior court which has not been set aside on appeal or otherwise, paragraph 6 of the sanction order must be given effect according to its terms for the purposes of s 48 of the *Supreme Court Act* 1995: see *Re Gould*.[6]

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5 [1991] 1 AC 362.

6 [1992] 2 Qd R 377 at 381.

[17] The "balance" payable under paragraph 6(c) of the sanction order was ascertainable when the sanction order was made because it depended only upon the quantification of the statutory charges mentioned in paragraph 6(a). The natural meaning of s 48 comprehends a case where the amount of money ordered to be paid is ascertainable even if the amount is not quantified by the order itself. *Thomas v Bunn* is not applicable because it turned upon the very different terms of ss 17 and 18 of the *Judgment Acts* 1838 (UK): see McPherson ACJ's analysis in *Re Gould*.[7] *Re Gould* was a decision upon s 73 of the *Common Law Practice Act* 1867 as amended by the *Common Law Practice Amendment Act* 1972, the provision which subsequently became s 48 of the *Supreme Court Act* 1995. Mr and Mrs Gould sought an order that their former solicitors pay interest on overpayments of professional costs Mr and Mrs Gould had paid to them in connection with long running litigation. Following a dispute, an order had been made that the solicitors refund any overpayment which became apparent once the costs had been taxed. Although the order did not fix the costs and it was impossible to execute upon the order before the costs were taxed, McPherson ACJ held that the order was itself "an order for the payment of money" within the meaning of s 73 of the *Common Law Practice Act* 1867. Interest was awarded from the date of the allocatur which certified the result of the taxation until the date upon which the solicitors repaid the overpayment of their professional costs. (In this appeal there was no contention about the date from which interest should run if interest was payable at all.)

[18] Perhaps *Re Gould* may be distinguished on the ground that the amount ordered to be paid was quantified by the subsequent act of the court itself upon the date from which interest was held to run, but the decision nonetheless demonstrates that an order may fall within the terms of s 48 even though the order does not itself quantify the amount to be paid and may not be enforced by execution before the amount is quantified. It may be said in this case, as McPherson ACJ said in *Re Gould*, that once the amount of the required payment was ascertained "the order … took effect as an order … for payment of the balance so ascertained."[8] Furthermore, the application of s 48 in this case is consistent with its underlying rationale that interest on the amount payable pursuant to a judgment may be necessary to preserve to the beneficiaries of the judgment "the full benefit of their judgment".[9]

[19] The grounds of the appeal and the appellants' arguments were confined to questions about the proper construction of the relevant statutory provisions. It was not contended, and nor could it have been established, that there was any error justifying appellate correction of the discretionary decision not to make any order under s 48 which precluded the obligation to pay interest in accordance with that section.

Proposed order

[20] I would dismiss the appeal with costs.

[21] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.

[22] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Fraser JA. I agree with those reasons and the order proposed by his Honour.

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7 [1992] 2 Qd R 377 at 381-382.

8 [1992] 2 Qd R 377 at 382.

9 *Gould v Vaggelas* (1985) 157 CLR 215 at 275.