

SUPREME COURT OF QUEENSLAND

CITATION: *Simmons v Arthritis Queensland Ltd* [2023] QSC 251

PARTIES: **WAYNE MURRAY SIMMONS AS TRUSTEE OF THE
JULIE MAAS CHARITABLE TRUST**
(applicant)
v
ARTHRITIS QUEENSLAND LTD & ORS
(respondent)

FILE NO: 9149 of 2023

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 10 November 2023

DELIVERED AT: Brisbane

HEARING DATE: 1 November 2023

JUDGE: Freeburn J

ORDER: **1. The application is dismissed.**
2. I will hear the parties on costs.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – CHARITABLE TRUSTS – POWERS, RIGHTS AND LIABILITIES OF TRUSTEES – REMUNERATION – where the deceased left his residual estate to a charitable trust – where the applicant is an accountant, executor of the deceased’s Will and the sole trustee of the charitable trust – where the applicant seeks an order that his remuneration be a fixed percentage of the value of the trust’s assets at the end of each financial year – where the applicant’s remuneration is already provided for in the trust document – whether the court should authorise a remuneration process that is different to what was contemplated in the trust document

Succession Act 1981
Trusts Act 1973, s 101

Foster v Spencer [1996] 2 All ER 672
KordaMentha Pty Ltd v The Members of the LM Management Performance Fund [2022] QSC 12
Nissen v Grunden (1912) 14 CLR 297
Re Duke of Norfolk’s Settlement Trusts [1982] 1 Ch 61
Robinson v Pett (1734) 3 P Wms 249
Zevering v Callaghan [2011] QCA 180

COUNSEL: Mr R Whiteford for the applicant
 Mr M Liddy for the first four named respondents
 Mr S Richards (Principal Lawyer, Crown Law for the
 Attorney-General)

SOLICITORS: Merthyr Law (applicant)
 Lithic Legal Pty Ltd (first four respondents)
 Crown Law (Attorney-General)

REASONS

- [1] Johannes Maas died on 12 November 2021. He left a very substantial estate. He left specific bequests to family members. The residual estate, about \$6.6m, was left to a charitable trust named after his first wife – the Julie Maas Charitable Trust.
- [2] The deceased appointed his accountant, Mr Simmons, to be one of the executors and trustees of his Will and to be a trustee of the charitable trust. Mr Simmons is now the sole trustee of the charitable trust.
- [3] The charitable trust has the following six primary beneficiaries:
- (a) Arthritis Queensland;
 - (b) Leukaemia Foundation of Queensland;
 - (c) The Salvation Army (Gold Coast);
 - (d) Gold Coast University Hospital;
 - (e) Spina Bifida Hydrocephalus Queensland;
 - (f) The Make a Wish Foundation

The first four of those charities were represented at the application. The fifth named respondent is in liquidation and the sixth named charity did not wish to be heard. The trustee has a discretion to appoint other charities as secondary beneficiaries, but there is no evidence of any other charities having been appointed.

- [4] As trustee, Mr Simmons has invested the vast majority of the \$6.6m in various bluechip shares and managed funds (e.g. BHP Group Limited, Berkshire Hathaway Betashares Australia 200 EFT, CSL Ltd etc).
- [5] Mr Simmons seeks an order from the court fixing his remuneration at 1.25% of the value of the assets as at 30 June every year. Alternatively, Mr Simmons seeks an order entitling him to charge the estate \$500 per hour.
- [6] The Attorney-General, who appeared as the protector of charities, does not object to either proposed mode of remuneration.

[7] Mr Liddy of counsel, who appeared for four of the six named primary beneficiary charities, did not oppose the order but made some submissions that fell into these categories:

- (a) the four charities support Mr Simmons being reasonably paid for his work;
- (b) the court has a wide discretion to make a remuneration order;
- (c) Mr Simmons' application was entirely novel;
- (d) the trust document already provides Mr Simmons with an entitlement to remuneration;
- (e) the process of remuneration is potentially complicated and burdensome as it requires annual valuation of the assets and a review of that valuation by the six charities – who may receive nothing in the relevant year;
- (f) it may be more preferable for there to be an alternative process whereby the work was undertaken by Mr Simmons' firm, including more junior staff, and then Mr Simmons' could apply for approval of his expenditure (through his firm).

[8] Thus, these questions arise:

- (a) what are the legal principles that apply to applications for remuneration by the trustee of a charitable trust?
- (b) does the trust document authorise remuneration and, if so, what type of remuneration?
- (c) what type of remuneration process should the court authorise in this case?

What are the legal principles that apply to applications for remuneration by the trustee of a charitable trust?

[9] For a long time it has been an established principle that a trustee shall have no allowance for the trustee's 'care and trouble'.¹ The rationale was that the trust estate might be loaded with the remuneration obligation and rendered of little value.² The common law requirement for the trustee to act gratuitously applied no matter how much time and trouble the trustee was put to, and even if the trustee's efforts greatly profited the estate.

[10] Of course, a trustee is always entitled to reimburse expenses from the estate. Permitting the trustee to recover out-of-pocket expenses enables the trustee to 'break even' and there is no question of profiting from the trust.³

¹ Picarda traces the principle back to *Robinson v Pett* (1734) 3 P Wms 249 at 251: Picarda, *The Law and Practice Relating to Charities* (4th ed) at 633.

² Ibid.

³ Picarda at 634.

- [11] In modern times, however, it is recognised that the obligation of trustees to act gratuitously may deprive the trust of trustees whose experience and skill would benefit the trust.⁴ For that reason the trust instrument often expressly allows for the trustee to be remunerated, and s 101 of the *Trusts Act 1973* gives the court power to authorise the trustee to be remunerated.⁵

“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.
- (3) For the purpose of this section –
trustee includes a custodian trustee.”

- [12] As Peter Lyons J explained in *Zevering v Callaghan*:

“On its face, s 101(1) confers on the Court a discretion to authorise remuneration for a trustee in very broad terms. The breadth of those terms is apparent from the only stated qualification, namely, that the circumstances appear to the Court to justify the payment remuneration to a trustee.”⁶

- [13] That broad discretion includes a power to allow remuneration by way of payment for work done and services performed, or by way of a percentage commission.⁷ The court may authorise the payment of remuneration for past and future services as trustee.⁸

⁴ See *Re Duke of Norfolk’s Settlement Trusts* [1982] 1 Ch 61.

⁵ Even without s 101, the court has inherent jurisdiction to authorise (or increase or vary) remuneration: See for example, *Nissen v Grunden* (1912) 14 CLR 297 at 304-307.

⁶ [2011] QCA 180 at [46] (Peter Lyons J, with whom Fraser JA and White JA agreed).

⁷ The legislation in Victoria and Western Australia expressly permits a reasonable commission or percentage, not exceeding 5%: s 77 of the *Trusts Act 1958* (Vic) and s 98 of the *Trusts Act 1962* (WA). In *Foster v Spencer* [1996] 2 All ER 672 the court decided that an hourly rate for the services of the trustees was not appropriate but a 5% commission of the proceeds of the sale of the land was appropriate.

⁸ See *Re Duke of Norfolk’s Settlement* [1982] Ch 61 (*supra*) at 72, 80.

- [14] If the trust instrument expressly provides for the payment of remuneration, then:
- (a) the court will construe the remuneration clause strictly;
 - (b) but, if the trustee is a professional person, the interpretation of the remuneration clause will be informed by the commercial context;
 - (c) the remuneration clause does not operate to oust the court's jurisdiction to award remuneration;
 - (d) however, the intention of the trust instrument is a relevant factor.⁹
- [15] One issue is whether the principles are any different for charitable trusts. Dal Pont argues this:

*“While there is nothing to preclude a trustee being paid for services rendered other than in trustee capacity – that is over and above normal trustee duties – it is appropriate that this course be confined to instances where it is demonstrably in the interests of the charity.”*¹⁰

- [16] I am not sure whether the argument here relates to the level of the remuneration, or to the types of services performed by the trustee, or both. In any event, it is doubtful that the broad discretion is more confined in the case of charity trustees. As Dal Pont points out, the law expects of charity trustees the same duty of care and the same core fiduciary duties as other trustees.¹¹ Trustees of charities are not bound to more jealously guard the interests of their beneficiaries than other trustees. And, the argument seems to rely on the views of the Charity Commission for England and Wales, which oversees and regulates charities in England and Wales.¹² The context in Australia is different. In any event, the broad discretion to allow remuneration to trustees is flexible enough to enable a court to take into account the nature of the trust, as well as the size and complexity of the estate, the nature of the trustee's activities, the skill and ability involved, the amount of time spent, the cost of engaging professional help and the success or otherwise of the trust administration.¹³

Does the trust instrument authorise remuneration and, if so, what type of remuneration?

- [17] Clause 14.1 of the Will is in these terms:

“In addition to or in expansion of any powers available to my Trustee at law (specifically under the *Trusts Act 1973* and the *Succession Act 1981*) or in equity, I declare my Trustee and the trustees of any trust established pursuant to this Will (in particular the Testamentary

⁹ The first three of these principles are neatly described by Dal Pont, the author of *Halsbury's Laws of Australia* at [430-3960]. The fourth principle has been added because, as Dal Pont (supra) points out, remuneration is not a contractual right; it derives from the settlor's power to direct how the trust property should be dealt with.

¹⁰ Ibid.

¹¹ Dal Pont, *Law of Charity*, 3rd edition at [17.25].

¹² The England and Wales context is discussed in Cairns, *Charities: Law and Practice*, 3rd ed.

¹³ This list is adapted from Dal Pont's summary at *Halsbury's Laws of Australia* at [430-3995].

Discretionary Trust established in clause 12) have the following power:

14.1.1 ...

14.1.13 **Charging clause – professional trustee –**

Any trustee of this will who may be engaged in a professional practice or business may be so employed in relation to my estate and shall be entitled to make and receive payment for all usual professional charges for work done by the trustee or any of the trustee's partners or employees in relation to my estate (including work done by an executor or trustee) in the same manner in all respects as if he or she were not a trustee hereof and for the purpose of my Will such professional charges shall constitute administration expenses.

14.1.14 ...”

[18] And so, a trustee who is engaged in a professional practice may:

- (a) be employed professionally in relation to the trust estate;
- (b) receive payment for that professional's usual charges for work done by the trustee or any of the trustee's partners or employees;
- (c) receive payment for the trustee's own work.

[19] Mr Whiteford, Mr Simmons' counsel, made this submission about clause 14.1.13:

“This overcomes the rule against self-dealing. It allows the trustee to retain himself or his firm to undertake work in relation to the administration of the trust and to pay himself or his firm from trust assets for such work. It does not authorise remuneration for services as trustee.”

[20] The last sentence is the problem. The remuneration of the trustee *is* authorised by the trust instrument. The trust instrument expressly authorises “*payment for all usual professional charges for work done **by the trustee** or any of the trustee's partners or employees in relation to my estate.*”

[21] And so, it is difficult to accept the submission that the trust instrument does not authorise remuneration for services as trustee. The trust instrument expressly authorises payment to the trustee for the trustee's work.

[22] Possibly the point being made is that the trustee is not able to charge the estate for beyond his usual professional fee. If that is the contention it is hard to see why the trustee ought to be remunerated above and beyond his usual professional fees. There is no evidence that his usual professional fees are inadequate.¹⁴

¹⁴ See later discussion of the level of fees.

- [23] Possibly also, the submission is made on the basis that Mr Simmons' capacity to charge the trust estate is restricted to charging professional fees through his firm. Mr Simmons expresses the wish to administer the trust himself. He does not wish to employ his firm. However, just how it would work for Mr Simmons to carry on this work as a 'private job' outside his professional practice as an account is not explained. For example, Mr Simmons does not explain:
- (a) how this trusteeship, estimated to occupy 280-306 hours per annum fits with his other, presumably fulltime, work commitments;
 - (b) how he would resource the trusteeship (i.e. through the partnership or privately);
 - (c) whether this private work would be comprehended by the partnership's professional indemnity policy or by some other policy;
 - (d) whether administering the trust estate as a private job would be an advantage or a disadvantage for the trust estate and its beneficiaries.
- [24] In any event, to return to the issue, the trust instrument does expressly authorise remuneration of the trustee, and it contemplates that the trustee would charge the usual professional fees for himself and for the other partners and employees of his accountancy practice.¹⁵

What type of remuneration process should the court authorise in this case?

- [25] The trust instrument contemplates that Mr Simmons would act as trustee through his firm and that the firm would charge its usual professional fees for that work. Certainly, both s 101(1) of the *Trusts Act 1973* and the court's inherent jurisdiction, empowers the court to make another remuneration arrangement. The court may increase the remuneration beyond that specified in the trust instrument.¹⁶
- [26] However, the wishes of the deceased are a factor to be considered. This is a charitable trust set up by the deceased for the benefit of the six specific charities and possibly others. His views concerning how the trust property should be dealt with are deserving of respect.
- [27] It is necessary to deal with some of the arguments and issues.
- [28] *First*, an affidavit by Mr Simmons filed by leave explains that, during the administration of the deceased's estate,¹⁷ he kept a record of the time spent in administering the estate and he described each of those items of work. He complains that: "*Recording all time spent and a description of the items was an administrative burden, tedious and unduly time consuming.*" That tedium, and the

¹⁵ Note that, at clause 2.1 of the will/trust instrument the deceased expressly refers to Mr Simmons as "*my Accountant*". And clause 15.1 of the will expresses the wish that Mr Simmons, of Simmons Partnership Chartered Accountants, be the accountants for the estate and the trustee of the trust.

¹⁶ See Dal Pont's discussion of this topic, and the cases cited at Halsbury's Laws of Australia [430-4000].

¹⁷ Remuneration of the estate work was recoverable pursuant to s 68 of the *Succession Act 1981*. The administration of the estate is work that is separate from the work as trustee of the charitable trust.

continuous recordkeeping, is a reason for his preference for his remuneration to be fixed at 1.25%.

- [29] It is not clear why the tedium of time recording for the estate work will be replicated in the trusteeship. The work will be different. And the trustee has already engaged Pinnacle Partners to provide investment advice, and Hub24 Invest to manage trades of shares or funds, as well as providing reporting services. Mr Simmons' material shows that Hub24 aims to achieve a substantial reduction in the administrative burden.¹⁸ In any event, having more junior staff attend to more menial tasks is an advantage of the deployment of Mr Simmons' firm. That advantage will be lost if Mr Simmons undertakes the trusteeship as a private job.
- [30] And, of course, the tedium of time recording is endured by many professionals – including lawyers, engineers and accountants.¹⁹ It is not the only method of calculating remuneration for professionals. But it is a method that produces a figure commensurate with the work performed. A fee calculated as a percentage of the trust estate carries with it the risk that the fee may be earned for very little work in a particular year, and the fee earned may be inadequate recompense where a great deal of work is required in a particular year.
- [31] *Second*, Mr Liddy for the four charities, submitted that there was likely to be a significant administrative burden in calculating the value of the trust's assets as at 30 June each year. I am not satisfied that is the case. At present all of the assets of the trust are in cash, shares or managed funds. The Hub24 platform provides up-to-date on-line portfolio valuations. Many other on-line platforms provide that service. And, even if the trust were to purchase a block of units, as Mr Liddy suggests, there is unlikely to be a great burden in valuing that type of asset.
- [32] *Third*, I am not satisfied that it would be a significant burden for the primary beneficiaries to receive annual notices of the remuneration to be charged and the basis for its calculation. It is true that the primary beneficiaries may receive nothing in a particular year. But it is not likely to be particularly onerous for a charity to read such a report and decide whether any action should be taken.
- [33] *Fourth*, Mr Simmons' counsel explained the skills he brought to the role:

“The Applicant has been a chartered accountant since 1991. He is the managing partner of a firm of chartered accountants. He specialises in high net worth clients. He has held several directorships of companies associated with clients with wealth of between \$10 million and \$40 million. He has acted as trustee of high net worth deceased estates over some 20 years. He has the ability to apply a high level of skill in undertaking the tasks required of him as trustee. The Applicant knew the deceased as a client and as a friend for about 25 years prior to the deceased's death. Because of this, it may be inferred that the deceased appointed him as trustee because

¹⁸ See “*Key Benefits of Hub24 Invest*” at page 87 of Mr Simmons' second affidavit. HUB24 is responsible for “*all administrative issues relating to the account (e.g. receipt of dividends, mail, corporate actions) and provides continuous consolidated reporting ... including the keeping of tax records.*”

¹⁹ See *KordaMentha Pty Ltd v The Members of the LM Management Performance Fund* [2022] QSC 12 at [29].

of his qualifications, experience and the trust the deceased reposed in him.”

- [34] All of that may be accepted. However, none of that persuades me that the court should authorise an annual payment to Mr Simmons of 1.25% of the annual value of the trust. Mr Simmons is an accountant. He, and the vast majority of his profession, charges professional fees based on the hourly rates for each of the professionals who do the work. Presumably, that was the basis on which the deceased had retained Mr Simmons and his firm prior to his death. That was the commercial context in which the deceased executed the will appointing Mr Simmons as executor and trustee and including a remuneration clause that contemplated Mr Simmons’ firm charging its usual fees.
- [35] *Fifth*, Mr Simmons argues that a payment to him of 1.25% of the current value of the trust assets (\$6.6m) would result in a payment to him of nearly \$83,000. He argues that compares favourably with the likely charge on an hourly basis (280 to 306 hours x \$500 per hour = \$140,000 to \$153,000).
- [36] The court can accept that some decision-making will be involved, and that the expertise of an experienced accountant will be an asset for the trust. However, the decision-making will be assisted decision-making. Pinnacle Partners have already been engaged and have provided a detailed advice on the investments appropriate for the trust. Investments have been made in accordance with that advice. Similarly, Hub24 Invest has been engaged to provide administrative and reporting services. Mr Simmons proposes to engage lawyers where that is necessary.
- [37] In the circumstances, it is hard to accept Mr Simmons’ estimate of the work he is likely to undertake in administering the trust.²⁰ For example, Mr Simmons estimates that 52 to 78 hours will be involved in maintaining the fund’s investment portfolio in accordance with Pinnacle’s statement of advice, including purchasing and selling shares and other assets. However, any purchases or sales of shares or units in funds will be ‘cost effectively’ managed by Hub24.²¹
- [38] Mr Simmons has not explained the work he has performed since Pinnacle recommended the 24 shares, funds and cash holdings in January 2023 – some 10 month ago. The detail of that work is conspicuous by its absence. If there were details, then it would enable the court to see what work is required of the trustee given that investment advice is given by Pinnacle, and the administration work is carried out by Hub24.
- [39] The services of Pinnacle and Hub24 will come at a cost to the trust estate. Putting aside Pinnacle’s initial advice fee of \$6,600, Pinnacle’s on-going service fee is 1.1% of the capital value. And, of course, some of the managed funds recommended by Pinnacle will include their own management fees which will be passed on via the fund distributions.²² The fees charged by Hub24 comprise a number of different components which is not clear on the material.²³

²⁰ At paragraph 20 of his first affidavit Mr Simmons sought that, based on his experience he believes that administering the trust will involve work which is listed. The list is, presumably, an estimate.

²¹ Mr Simmons’ second affidavit at page 87.

²² Pinnacle advise of administration and management fees charged by some product providers: see Mr Simmons’s second affidavit at page 64.

- [40] *Sixth*, Mr Simmons compares his proposed fee of 1.25% to the 1.056% standard percentage fee charged by two established trustee companies, Perpetual Private and Equity Trustees.²⁴ However, it is likely²⁵ that is comparing apples with oranges. The services provided by Perpetual Private and Equity Trustees is a service as the trustee of the trust including the management and administration of the trust.²⁶ Equity Trustees, for example, describe their fees as including full custodial services, administration, grant-making and investment services.
- [41] On the other hand, Mr Simmons' proposed private trusteeship will require the estate to pay his fee of 1.25%, plus Pinnacle's on-going service fee of 1.1% for investment advice, and the administration fee payable to Hub24.
- [42] On balance, the circumstances do not appear to me to justify the court exercising its discretion to authorise the payment remuneration method suggested by Mr Simmons. The trust instrument itself contemplates the deployment of Mr Simmons' firm. It contemplates that the firm would charge its usual professional charges for work done by the trustee or any of the trustee's partners or employees. Mr Simmons' alternative fee proposal does not appear to be in the interests of the trust.
- [43] Mr Simmons' alternative proposal was that he be paid \$500 per hour for his services as trustee. That alternative proposal appears to be proposed on the basis that Mr Simmons would act privately, rather than through his firm. Mr Simmons compares his hourly rate to the hourly rate charged by Perpetual Private and Equity Trustees.²⁷ However, it is difficult to know what work would be done and what the charge would be for the trust.
- [44] Again, it is relevant to the discretion to note that the trust instrument contemplates the engagement of Mr Simmons' firm and the burden of that firm's usual professional charges. Such an arrangement would mean that the full resources of the firm,²⁸ including the services of employees, would be available to do the work of the charitable trust. And so, again, the circumstances do not appear to me to call for the exercise of the court's discretion to authorise a different arrangement from that contemplated in the trust instrument.

²³ There appears to be a core administration fee (0.37% on the first \$250,000, 0.25% on the next \$250,000, 0.17% on the next \$500,000 and 0.04% on amounts over \$1m. There may also be an investment management fee of between 0% and 2% if the investment is in a "managed portfolio" and an investment performance fee of between 0% and 22% per annum of the "out performance of the managed portfolio. There is also a cash management fee (up to 1.75% per annum). And an expense recovery fee of 0.35% on the first \$1m.

²⁴ In both cases there are additional fees.

²⁵ The expression 'likely' is used here because the evidence is far from clear. No distinct comparison has been made of the financial consequences for the trust estate of Mr Simmons acting privately (if that is what is intended) as compared with having the trustee services provided by Perpetual Private and Equity Trustees.

²⁶ See Mr Simmons' second affidavit at page 26.

²⁷ The rates for Perpetual are \$660 per hour for partners/directors, \$550 per hour for senior managers/lawyers, \$511.50 for managers/lawyers and \$275 for administrative officers, assistants and paralegals.

²⁸ The resources would include that the likelihood that the firm has access to appropriate professional indemnity insurance.

[45] For those reasons, the application should be dismissed. I will hear the parties on costs.