SUPREME COURT OF QUEENSLAND

CITATION:	*Dickson v Australian Associated Motor Insurers Limited* [2010] QSC 69
PARTIES:	**DEBORAH LOUISE DICKSON** **(applicant)** **v** **AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMTIED** **(respondent)**
FILE NO:	BS1527 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2009
JUDGE:	Mullins J
ORDER:	**The application made pursuant to the liberty to apply in the order made on 20 February 2001 is adjourned to a date to be fixed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENT AND ORDERS – ORDER SANCTIONING COMPROMISE – where applicant was a person under a legal disability as a result of a severe head injury sustained in a motor vehicle accident – where applicant's claim for damages for personal injuries against the respondent was settled at mediation before a proceeding was commenced in the court to prosecute the claim – where applicant filed an originating application for sanction of the compromise – where compromise between the applicant and respondent was sanctioned by order of the court that stated it was made pursuant to s 59 *Public Trustee Act* 1978 (Qld) – where compromise and associated orders carried into full effect – where applicant subsequently claimed that the court had no jurisdiction to sanction the compromise and the compromise was voidable at the applicant's election – where respondent sought confirmation from the court that the order was within the jurisdiction conferred by s 59 *Public Trustee Act* 1978 or within the *parens patriae* jurisdiction of the court – whether the court had jurisdiction to sanction the compromise where the applicant had not commenced a proceeding to prosecute the claim for damages

Guardianship and Administration Act 2000, s 240
Public Trustee Act 1978, s 59
Supreme Court Act 1995, 253

Australian Hardboards Ltd v Hudson Investment Group Ltd (2007) 70 NSWLR 201, considered
Fowler v Gray [1982] Qd R 334, considered
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, considered
Johnson v Director-General of Social Welfare (Vict) (1976) 135 CLR 92, considered
Katundi v Hay [1940] St R Qd 39, considered
Phillips v Munro [1957] St R Qd 427, considered
Re Public Trustee of Queensland [2000] 1 Qd R 409, considered
Scholes v Douglas [1911] St R Qd 183, considered
Scutt v Bailey (No 1) [1964] WAR 74, distinguished
Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218, considered
Smith v Reynolds [1989] VR 309, followed
Wood v The Public Trustee of Western Australia (1995) 16 WAR 58, followed

COUNSEL: M Grant-Taylor SC and C Heyworth-Smith for the applicant
SC Williams QC for the respondent
RT Whiteford for the Public Trustee of Queensland

SOLICITORS: MurphySchmidt for the applicant
Jensen McConaghy for the respondent
Official Solicitor to the Public Trustee of Queensland

[1] By order made on 20 February 2001 (the order), a judge of this court sanctioned the applicant's compromise of her personal injuries claim arising out of a motor vehicle accident in which she was injured on 21 December 1998. The compromise sum was $1.9m plus administration and management fees plus standard costs. The respondent was the compulsory third party insurer of the relevant motor vehicle. The applicant was 28 years old when she sustained severe injuries in the accident, including a severe closed head injury and an associated left hemiplegia. Her application for a sanction of the compromise of her claim was brought by her litigation guardian Mr James who was then her partner and is now her husband.

[2] The order was sealed by the court. The compromise and associated orders were carried into full effect in accordance with the order.

[3] On 3 August 2009 the applicant's current solicitors wrote to the solicitors for the respondent contending that the Supreme Court had no jurisdiction, either statutory or inherent, to sanction the compromise in the proceeding commenced by the originating application or make the order. The applicant's solicitors asserted that the purported compromise was not binding and was voidable by the applicant and that the applicant intended to proceed with the original claim and avoid the terms of settlement.

[4] The respondent's response was to invoke the liberty to apply that was given in the order and to bring the matter back before the court to seek confirmation that the order was within the jurisdiction conferred on the court by s 59 of the *Public Trustee Act* 1978 (the Act) or within the inherent jurisdiction of the court. On 7 September 2009 the court gave leave for the Public Trustee to be heard on the application and for the parties and the Public Trustee to provide submissions to each other in advance of the hearing of the application.

[5] The Public Trustee appeared by Mr Whiteford of counsel to make submissions to assist the court on the issue of whether the court had jurisdiction to make the order.

[6] A number of affidavits were filed on behalf of the applicant for the hearing on the re-listing of the application which dealt with matters relevant to the assessment of the cost of future care for the applicant and loss of earning capacity. No submissions were directed at the assessment of damages, as such, but the hearing of the application proceeded on the basis that the reason the applicant wished to avoid the compromise that was the subject of the order was that she now asserts that the compromise was for an insufficient sum.

The sanction

[7] The respondent admitted liability for the injuries suffered by the applicant. Her claim proceeded to mediation. At the conclusion of the mediation the respondent made the offer to settle the applicant's claim for the compromise sum and that offer was accepted. The terms of settlement made the settlement subject to and conditional upon the sanction by the Supreme Court.

[8] By originating application filed on 15 February 2001 the applicant sought an order that settlement of her claim be sanctioned. The application did not expressly specify the jurisdiction on which the application relied. That was the only proceeding brought in the court by the applicant relating to her claim.

[9] When the order was made, ss 59(1), (2) and (3) of the Act (reprint 2E) provided:

> "**(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.
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> **(2)** Any claim for money or damages by or on behalf of a person under a legal disability claiming either alone or in conjunction with other parties may be settled or compromised out of court before action brought, with the sanction of the pubic trustee, but no money or damages agreed to be paid in respect of the claim of any such

> person, whether by settlement or compromise, shall be paid to any person other than the appropriate person for the person under a legal disability unless by direction of a court upon application made in that behalf.
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> **(3)** Every settlement, compromise, or acceptance of money paid into court when sanctioned by a court or the public trustee under this section shall be binding upon the person under a legal disability by or on whose behalf the claim was made."

[10] There is no issue that at the time the order was made the applicant was a person under a legal disability as defined in s 59(1A) of the Act.

[11] Although there was no current action before the court, paragraph 1 of the order stated:

> "The compromise of this action in the sum of ONE MILLION NINE HUNDRED THOUSAND DOLLARS ($1,900,000.00) exclusive of administration costs and the Applicant's standard costs of the action plus the fees and charges (if any) of the Public Trustee be sanctioned pursuant to section 59 of the Public Trustee Act 1978."

[12] The order provided for amounts to be paid from the settlement sum on account of past care and statutory refunds and charges and for the balance to be held in the applicant's solicitors' trust account pending the determination of the Guardianship and Administration Tribunal (the Tribunal) as to the disposition of that balance pursuant to the *Guardianship and Administration Act* 2000 (*GAA*). Paragraph 6 of the order ordered the transfer of the application to the registry of the Tribunal pursuant to s 241 of the *GAA*. The Tribunal appointed the Public Trustee as administrator of the settlement fund. By subsequent order of the Tribunal, the Public Trustee was replaced as administrator by Perpetual Trustees Queensland Ltd and Mr James.

History of s 59 of the Act

[13] Provisions such as s 59 of the Act must be considered against the background of the court's *parens patriae* jurisdiction. That jurisdiction is part of the court's inherent jurisdiction and has evolved from the direct responsibility of the Crown for those who cannot look after themselves: *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 258-259, 279-280. That protective jurisdiction of the Crown which was delegated in England to the Court of Chancery was therefore included in the equitable jurisdiction of this court. See s 22 *Supreme Court Act* 1867 that was re-enacted in s 201 *Supreme Court Act* 1995 and replaced by s 58 *Constitution of Queensland* 2001. In Queensland, some aspects of the court's protective jurisdiction were covered by the *GAA*, but the Legislature expressly specified in s 240 of the *GAA* that the *GAA* does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction: this was referred to in *Willett v Futcher* (2005) 221 CLR 627 at [28]. It was under the *parens patriae* jurisdiction of the court that the practice developed of the requirement of court approval to give validity to an agreement that had been negotiated on behalf of a person under a disability.

[14] The earliest statutory provision in Queensland that was in sufficiently wide terms to cover approval by the court of the compromise of an action for the benefit of a person under a disability was s 53 of the *Trustees and Incapacitated Persons Act* 1867:

> "The guardian of any infant with the approbation of the Supreme Court in equity to be signified by an order to be made on the petition of such guardian in a summary way may enter into any agreement for or on behalf of such infant and the committee of the estate of any lunatic with the approbation of the Supreme Court as aforesaid to be signified by an order to be made in the petition of such committee in a summary way may enter into any agreement for or on the behalf of such lunatic which the guardian of an infant may enter into for or on the behalf of an infant by virtue of this Act."

[15] Section 53 of the *Trustees and Incapacitated Persons Act* 1867 was relied on by the court in *Scholes v Douglas* [1911] St R Qd 183, 187, as the source of power to sanction a compromise of an administration action in which infants had an interest in the estate, after judgment had been pronounced. Section 51(1) of the *Public Curator Act* 1915 was a specific statutory provision directed at approval by the Public Curator of the compromise of an action claiming money or damages by an infant or person of unsound mind which also dealt with the court's power to direct the payment of the damages or other award to the next friend or solicitor of the person under the legal disability and provided:

> "In any cause or matter in the court in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind not so found by inquisition suing either alone or in conjunction with other parties, no settlement or compromise or acceptance of money paid into court, whether before or at or after the trial, shall as regards the claims of any such infant or person of unsound mind be valid without the sanction of the public curator, and no money or damages recovered or awarded in any such cause or matter in respect of the claims of any such infant or person of unsound mind, whether by verdict or 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 unless the court so directs."

[16] In *Katundi v Hay* [1940] St R Qd 39 (*Katundi*), Philp J considered the application of s 51 of the *Public Curator Act* 1915 to the proposed sanction of the settlement of a dependency claim by the deceased's children. The deceased was an Albanian national who died in a motor vehicle accident in Brisbane. His three children aged between 10 and 15 years lived with their mother in Albania. An attorney in Brisbane, on behalf of the widow and the three children, issued a writ against the driver of the motor vehicle that struck the deceased. A settlement was negotiated with the defendant's insurer that was expressed to be subject to the sanction of the Public Curator under s 51 of the *Public Curator Act* 1915 and to the sanction of a judge of the Supreme Court.

[17] The matter came before the court on a summons in the action to sanction the terms of settlement that had been sanctioned by the Public Curator. Philp J considered (at 44) that, after action was brought on behalf of an infant, the sanction of the Public Curator without judgment or other act of the court when the action was for money or damages is "a doubtful discharge to the defendant." Philp J refused to sanction

the settlement in the way the application had come before the court, explaining at 45:

> "I think I have no jurisdiction to sanction such terms of settlement except by embodying them in a judgment in the action, or making some order which is tantamount thereto. There is no application before me under s. 53 of the *Trustees and Incapacitated Persons Act of* 1867 nor could there be, since the infants' guardian is not a party to the compromise. I do not know who is the infants' guardian under Albanian law. Mr. Matthews suggests that I have jurisdiction to consent, in exercise of the delegated prerogative. The King is *parens patrice et paterfamilias totius regni*, but he is not *paterfamilias totius mundi*. I do not think that non-resident alien infants are under the King's care. However, the alien infants are properly parties to the action and I can give a judgment which binds them, and I see no reason why I should not express my assent, as the compromise seems a proper one. If so desired, a consent judgment embodying the terms of settlement could be moved for, but I think the insurer should be added as a party. I would certainly make that a condition of giving a judgment if the infants were British subjects.
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> Apart from the peculiar position of these infants, it seems to me that in Queensland a Judge has no power other than under s. 53 of the *Trustees and Incapacitated Persons Act of* 1867 to make an order on summons merely sanctioning the compromise. In England there is power because of O. XXII, r. 14, and O. LIII., r. 3. However, the same result is arrived at by giving judgment by consent; for an example of such a judgment see *Lippiat v. Holley* ([1839] 1 Beav. 423; 48 Eng. R. 1004), which is to much the same effect as the form in Edwards, *op. cit.*, p. 256."

[18] Philp J therefore recognised that the court could exercise its *parens patriae* jurisdiction (which is delegated prerogative from the Crown) to approve the compromise of an action for the benefit of children in appropriate circumstances, but that did not apply where the children were not residents or citizens of Australia, as such children were not under the jurisdiction of the Crown, although the fact that the infants were parties to the action meant that he could give a judgment in the action which would bind them. The observation of Philp J at 45 that a judge had no power other than under s 53 of the *Trustees and Incapacitated Persons Act* 1867 to make an order on summons sanctioning the compromise may be a reference to the limitation imposed by s 51(1) that, after a proceeding had been commenced on behalf of a person under a legal disability, no settlement or compromise was valid without the sanction of the Public Curator. Philp J had also observed (at 43) that s 51 invalidated an unsanctioned compromise, but did not provide that the Public Curator's sanction validated a compromise in the sense of making it unassailable by the infant, if it were not for the infant's benefit. Philp J concluded his reasons (at 46) with a suggestion that the Legislature should review the whole question of compromise with infants in all courts. The insurer in *Katundi* subsequently joined the action as a defendant and counsel for the plaintiffs moved for judgment in terms of the compromise, with the consent of the defendant, and Philp J (at 46) sanctioned the agreement contained in the terms of settlement on the basis that he was of the

opinion that the settlement was for the benefit of the infant plaintiffs and ordered that judgment be entered in accordance with the agreement.

[19] The Legislature did review the question of the compromise of claims by persons under a disability: *Re Public Trustee of Queensland* [2000] 1 Qd R 409, 419. Section 51 of the *Public Curator Act* 1915 was amended extensively by the *Public Curator Acts Amendment Act* 1942. The amendments included the insertion in s 51(1) of the words "a judge of the Supreme Court or of" after the words "without the sanction of", so that the sanction under s 51(1) could then be given by either the court or the Public Curator. (That gave the court in Queensland the power that the English courts had under OXXII r 14 that had been referred to by Philp J in *Katundi* at 45.) The amendments also included a new ss (3) which was in the same terms as s 59(2) of the Act, as it was originally enacted.

[20] In *Phillips v Munro* [1957] St R Qd 427, 430, Philp J adverted to the exercise of the *parens patriae* jurisdiction of the court under s 51(2) of the *Public Curator Act* 1915 in exercising the power referred to in that provision to direct payment of damages awarded for the benefit of an infant in a personal injuries action to a person other than the Public Curator.

[21] Section 53 of the *Trustees and Incapacitated Persons Act* 1867 was repealed by the *Trusts Act* 1973. The *Public Curator Act* 1915 was repealed by the Act.

[22] The practice of the court in relation to the sanction of a compromise of an action for damages for personal injuries suffered by a person who was under a legal disability was considered in *Fowler v Gray* [1982] Qd R 334 (*Fowler*) where the role of the court on such an application was described at 349:

> "However the application is made, the Court has a special responsibility for the welfare of persons under a legal disability. They lack full legal capacity, they are incapable of waiving their rights, and they cannot give a discharge to the defendant under the 'agreement' unless it is sanctioned by the Court. This is the defendant's primary concern: s. 59(1), (3). In *Day v. Victorian Railway Commissioners* (1948-1949) 78 C.L.R. 62 at p. 85, Rich J. said:
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> > 'It is the interposition of the court, charged with the duty to watch over the infant's interests, that lends sanctity to a judgment for or against an infant and binds him: *Arabian v. Tufnall and Taylor Ltd.*[1944] 1 K.B. 685 at p. 688.'
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> The Court is, in reality, a *persona designata*, vested with responsibility of protecting the interests of the person under a legal disability. If the compromise is sanctioned, agreement entered into between the parties has legal effect insofar as that person is concerned, and binds him. The Court is not determining a *lis inter partes*. It does not try issues in dispute nor does it arrive at a decision as at a trial. It is only concerned whether, in all of the circumstances of a particular case as presented, the settlement is reasonable and for the benefit of the person under the disability. If that opinion is

> formed the compromise takes effect as in any other case between persons of full legal capacity."

[23] The relationship between the *parens patriae* jurisdiction of the court and statutory provisions dealing with the court's jurisdiction to make orders in relation to the disposition of money ordered to be paid in civil proceedings to a person with a disability was considered in *Smith v Reynolds* [1989] VR 309 (*Smith*). Prior to the enactment of s 79B of the *Supreme Court Act* 1958 (Vic), the practice of the Supreme Court of Victoria upon approving a compromise of a claim on behalf of a plaintiff of unsound mind was to award a payment of the agreed damages to trustees appointed by the court for administration by them under the terms of a declaration or of a deed of trust approved by the court for the benefit of the plaintiff. Kaye J noted (at 311) that the provisions of s 79B were "essentially procedural" and reduced into statutory form the procedure formerly followed by the court. Section 79B was subsequently repealed and another regime set up under s 66 of the *Guardianship and Administration Board Act* 1986 (Vic). Kaye J analysed the content of s 66 and concluded (at 313) that the provisions of s 66, like the former s 79B of the *Supreme Court Act* 1958, were procedural and stated at 313:

> "The court retains its inherent jurisdiction to determine the disposition and application of moneys paid into court for the benefit of a mentally infirmed person who is incapable of managing his or her own affairs."

[24] Kaye J also observed (at 312) that repeal of s 79B of the *Supreme Court Act* 1958 did not abolish or reduce the jurisdiction of the court in the exercise of its *parens patriae* powers to make orders for the control and administration of funds in court for the benefit of the person incapable of managing his or her own property. This reasoning was based on the conclusion that s 79B was procedural. Kaye J made the additional observation (at 312) that the court's unlimited jurisdiction could not be lawfully repealed, altered or varied, except in the manner provided by s 18(2)(b) of the *Constitution Act* 1975 (Vic) and that the *Guardianship and Administration Board Act* 1986 was not passed in accordance with the procedures prescribed to effect reduction of the jurisdiction. That observation did not modify the conclusion that had been reached about the procedural nature of s 79B of the *Supreme Court Act* 1958 and the continuance of the *parens patriae* jurisdiction.

[25] The effect of the practice of the Western Australian courts in relation to compromises of actions brought in the name of an incapable person that was formalised in the Rules of the Court was considered by the Full Court in *Wood v The Public Trustee of Western Australia* (1995) 16 WAR 58 (*Wood*). O 70 r 12 of the Rules dealt with the control of money recovered on behalf of a disabled person and required the money to be paid to the Public Trustee for investment on behalf of the person under a disability, unless otherwise ordered by the court. Before the personal injuries action of Mr Wood was compromised and sanctioned, his wife had obtained an order in her favour under s 68 of the *Mental Health Act* 1962 (WA) appointing her the manager of Mr Wood's estate with specific powers including to take possession of the property of the incapable person and demand, receive and recover any compensation or damages for injury to the estate of the incapable person. The District Court judge who approved the compromise of Mr Wood's claim during the course of the trial of his personal injuries action ordered the defendant to pay to Mr Wood a large sum by way of damages and ordered the net amount to be paid to the Public Trustee in reliance on O 70 r 12. When the Public

Trustee refused to pay those moneys to Mr Wood's wife as the manager of his estate, she sought the assistance of the court. The judge at first instance found no conflict between s 68 of the *Mental Health Act* 1962 and O 70 r 12.

[26] On appeal, Pidgeon J (with whom the other members of the court agreed) analysed (at 62-63) the inherent power of a court of equity to grant approval of the agreement of a person under a disability to compromise an action for damages on the basis that the court exercises the jurisdiction, if it is satisfied that it is for the benefit of the person under a disability. Pidgeon J observed (at 62) that the power is inherent and not dependent upon the Rules of the Court and that the rules provide a framework to enable the court to exercise the power that it has. Pidgeon J (at 65) could find no inconsistency between the inherent powers of the court, the Rules of the Court and the provisions of the *Mental Health Act* 1962. An earlier Western Australian single judge decision of *Scutt v Bailey* (No 1) [1964] WAR 74 which found that the court had no inherent jurisdiction to sanction the compromise of a personal injuries action brought on behalf of a person who was under a legal disability was not referred to by Pidgeon J and is inconsistent with the Full Court decision of *Wood*.

[27] The continuing role of the *parens patriae* jurisdiction has also been acknowledged in other Western Australian decisions including by the Full Court in *Morris v Zanti* (1997) 18 WAR 260, 284-286 and by Heenan J in *Cadwallender v The Public Trustee* [2003] WASC 72 at [27]-[31].

[28] There are recent Queensland decisions concerning the compromise of a personal injuries action by an adult with impaired capacity that were not concerned with an analysis of s 59 of the Act, but rather with working out the application of the new regime set up under the *GAA: Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] 2 Qd R 323 at [25].

Recent amendment to s 59 of the Act

[29] Section 59(2) of the Act was amended by the *Justice and Other Legislation Amendment Act* 2008 with effect from 25 November 2008 by inserting the words "a court or" after the words "sanction of." The reason given for that amendment in the Explanatory Notes was "to clarify that the court has jurisdiction to sanction the settlement of a claim by a person under a disability on an originating application."

The applicant's submissions

[30] Mr Grant-Taylor SC who appeared with Ms Heyworth-Smith of counsel for the applicant draws attention to the differences between s 59(1) and s 59(2) of the Act: s 59(1) is framed in the negative in that it provides that no compromise of a claim of a person under a legal disability, where the proceeding has commenced, is valid without the sanction of a court or the Public Trustee, but s 59(2) is framed in the positive in that it provides that a claim of a person under a legal disability may be settled with the sanction of the Public Trustee, before the proceeding is commenced. The applicant therefore contends for the construction of s 59 of the Act (when the order was made) that after the proceeding has been commenced, a settlement is not valid, until it is sanctioned, but that prior to commencement of the proceeding, a settlement of the claim is valid, but is voidable and does not become binding, unless sanctioned by the Public Trustee.

[31] It is therefore argued that the settlement that was reached on the applicant's behalf and was the subject of the order, where no proceeding for damages for personal injuries had been commenced by the applicant, was not void *ab inito*, but was voidable at the election of the applicant, because it had not been sanctioned by the Public Trustee.

[32] The applicant also argues that s 59 of the Act abrogated the *parens patriae* jurisdiction of the court in respect of the sanction of the settlement or compromise of a claim on behalf of a person under a legal disability that is within the terms of s 59 and draws support from the terms of r 98(1) of the *Uniform Civil Procedure Rules* 1999 (*UCPR*). The applicant therefore argues that the purported sanction of the court under the order was of no effect, as there was no sanction by the Public Trustee.

The respondent's submissions

[33] The respondent relies on the fact that the jurisdiction of the court that resulted in the making of the order was invoked consensually by the parties and properly engaged s 59 of the Act, as the subject originating application commenced a proceeding that fell within the description of a cause or matter for the purposes of s 59(1) of the Act.

[34] It is argued, in the alternative, that if it were determined that the proceeding in which the order was made had been incorrectly commenced by originating application, that was an irregularity that could be cured by the making of an order of the court *nunc pro tunc* that the proceeding be treated, as if it had been commenced by claim, in reliance on r 14 of the *UCPR*.

[35] Mr Williams QC for the respondent also argues that, in any case, the court's power to sanction a compromise derives from its inherent jurisdiction and not from s 59 of the Act which merely provides the framework for the exercise of the inherent power and that was the only power that was exercised by the court in making the order, despite the reference in paragraph 1 of the order to s 59 of the Act.

The Public Trustee's submissions

[36] It is submitted that it was open to the court to find that s 59(1) of the Act did not confer jurisdiction to make the order because, by its terms, it is confined to settlements and compromises reached in a "cause or matter … in which money or damages are claimed" and that an application to sanction the settlement, before the personal injuries proceeding had been commenced, did not satisfy the definition.

[37] The Public Trustee submits, in reliance on *Wood*, that s 59 of the Act did not displace the court's inherent jurisdiction in relation to settlement of claims by persons under a legal disability and that the inherent jurisdiction of the court supported the making of the order, even though paragraph 1 of the order incorrectly referred to s 59 of the Act as the source of power for the sanction.

Construction of s 59 of the Act

[38] On the issue of whether s 59(1) of the Act is broad enough in its terms to apply to an originating application for sanction of a settlement reached before a proceeding was commenced in the court on behalf of the person under a legal disability to claim money or damages, an application for a sanction does not itself amount to the

prosecution of the claim for money or damages. According to its clear terms, s 59(1) of the Act is limited in its application to settlements or compromises after a proceeding has commenced in which the person under a legal disability prosecutes a claim for money or damages. The respondent's contention to the contrary must be rejected. As the applicant's originating application was never intended to be a claim for damages for personal injuries, because that claim had been settled, it is not a matter which can be regularised by recourse to r 14 of the *UCPR*. In any case, discretionary considerations due to the lapse of time since the making of the order and the carrying out of the order would make it inappropriate to exercise the power under r 14(2), even if it were available.

[39] On the issue of whether s 59 of the Act was intended to displace the inherent jurisdiction of the court in protecting the interests of persons under a legal disability, it is relevant that there is no reference in s 59 of the Act to the criterion to be applied by the court (or the Public Trustee for that matter) of whether the settlement is beneficial to the person under the legal disability in sanctioning any settlement or compromise of a claim on behalf of a person under a legal disability. This is consistent with s 59 of the Act providing the framework for the court's exercise of the power that it has under its inherent jurisdiction of the delegated Crown prerogative (as was explained in *Smith* and *Wood*) and statutory conferral of equivalent powers on the Public Trustee. Any intention of the Parliament to take away the court's *parens patriae* jurisdiction must be expressed in unambiguous language: *Johnson v Director-General of Social Welfare (Vict)* (1976) 135 CLR 92, 97, 99.

[40] It does not follow from the fact that the Legislature amended s 59(2) of the Act in 2008 to clarify that the court did have jurisdiction to sanction the compromise of a claim before proceedings were commenced that there was no such jurisdiction prior to that amendment. It remains a matter of construction of the relevant statutory provisions, as they existed before that amendment was made.

[41] Rule 98(1) of the *UCPR* merely recites in a summary way the effect of the terms of s 59 of the Act which makes sense of the following r 98(2) which sets out the practice that had developed on an application for a sanction, without the benefit of such a rule: *Fowler* at 349-352. Rule 98 is procedural and does not provide support for the contention of the applicant that s 59 of the Act evinced the Legislature's intention to abrogate the *parens patriae* jurisdiction of the court in respect of the sanctions of settlements or compromises that were covered by the terms of s 59 of the Act.

[42] The terms of ss 59(1) and (2) of the Act, as they stood in 2001, are given effect, because of the content of the court's *parens patriae* jurisdiction. The fact that s 59(1) is framed in the negative provides for the statutory consequence where no sanction is obtained from the court or the Public Trustee in circumstances where s 59(1) is applicable, but remains consistent with the exercise by the court of its *parens patriae* jurisdiction in considering whether it sanctions the settlement. Section 59(2) of the Act conferred statutory jurisdiction on the Public Trustee to sanction the settlement of a personal injuries claim made by a person under a legal disability, before the proceeding to prosecute such a claim had been commenced, but s 59(2) was not framed in terms that prescribed the sanction by the Public Trustee as the means of obtaining the approval of the settlement, in order to validate it, to the exclusion of the exercise of the court's *parens patriae* jurisdiction. The

express provisions of ss 59(1) and (2) of the Act did not preclude the exercise by the court of its inherent jurisdiction to sanction the compromise of the settlement of a claim for damages by a person under a legal disability, before the proceedings began, in circumstances that were not covered expressly by s 59(1) of the Act.

[43] In the circumstances which applied to the applicant at the time the application was made on her behalf for the sanction of the settlement of her personal injuries action, the only basis on which she could apply to the court for the sanction was the *parens patriae* jurisdiction, because she had not commenced her personal injuries action when she settled her claim. That was the only power that the court could exercise when making the order. It is implicit in the terms of paragraph 1 of the order that the court found that the compromise that was sanctioned was for the benefit of the applicant. The fact that technically the circumstances of the application did not fall within the express terms of either ss 59(1) or (2) does not alter the fact that the court was asked to exercise its *parens patriae* jurisdiction and did do so. The incorrect reference in paragraph 1 of the order does not invalidate the exercise by the court of its *parens patriae* jurisdiction.

Should any orders be made in this proceeding?

[44] The submission made on behalf of the applicant that the settlement that had been reached on her behalf that was the subject of the order was voidable at her election assumes the order itself was not an impediment to that election. Even though the making of the order was supported at the time by the respondent, the originating application did not require the court to determine any issue between the applicant and the respondent: *Fowler* at 349. The applicant is now dissatisfied with the amount for which her claim was settled which was sanctioned by the court. The sanction embodied in the order was the determination by the court that the settlement was for the benefit of the applicant. It is difficult to see how the applicant can assert that the settlement is voidable at her election, while the order stands, without taking some action that has the effect of setting aside the order or otherwise countenancing the applicant's implicit assertion that the order is of no effect.

[45] Although it was suggested in *Fowler* at 354 that an appeal would not lie from a decision to sanction a compromise, that statement was made on the basis that an applicant for a sanction obtains the order that the applicant seeks. The process of the sanction, even though it has an administrative character, still results in the making of an order by the court. As it is neither an order made by the consent of parties nor an order as to costs only, s 253 of the *Supreme Court Act* 1995 would allow such an order to be the subject of an appeal, subject to obtaining any extension of time for filing a notice of appeal (which in the circumstances of this matter may be difficult to obtain). The applicant suggested another means by which the effect of the order could be considered by the court. In the applicant's further submissions, it is suggested that the applicant could file and serve a claim and statement of claim to prosecute her claim for damages for personal injuries and that the effect of the order could be pleaded in the defence which would then require that issue to be determined between the parties.

[46] Mr Williams QC concedes that what the respondent is seeking, in essence, by bringing the proceeding back to court is a declaration that the court did have jurisdiction to make the order. It is understandable that the respondent has taken

pre-emptive action in light of the applicant's assertion that paragraph 1 of the order which has been implemented is now of no effect, because the applicant seeks to avoid the settlement that was the subject of the order.

[47] Apart from any late appeal against the order, the fact that the settlement has been fully carried out and all terms of the order complied with means there is nothing left in this proceeding about which further orders can properly be made.

[48] It was not appropriate to use the liberty to apply provision of the order to seek confirmation that the court did have jurisdiction to make the order: *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593, 598; *Australian Hardboards Ltd v Hudson Investment Group Ltd* (2007) 70 NSWLR 201 at [50]-[71].

[49] There is a real dispute between the applicant and the respondent that was the subject of the hearing before me about whether the court had jurisdiction to make the order, but it may have been better dealt with in a fresh or different proceeding between the parties.

[50] Because of the concerns that I have about the form in which the dispute has come before me, I am cautious about making any orders to reflect the conclusion that I have reached about that dispute, without allowing the parties a further opportunity to consider what is the appropriate course to formalise the outcome of the hearing that is reflected by these reasons, and to make any orders as to the costs of the application. The order that I make in the interim is that the application made pursuant to the liberty to apply in the order made on 20 February 2001 is adjourned to a date to be fixed.

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 1527 of 2001

DEBORAH LOUISE DICKSON	Applicant
and	
AUSTRALIAN ASSOCIATED MOTOR INSURERS LIMITED	Respondent
DARRYN DOUGLAS JAMES	Litigation Guardian

BRISBANE

..DATE 29/03/2010

ORDER

HER HONOUR: The orders that I make in this matter are:

1. The application made by the respondent pursuant to the liberty to apply in the order made on 20 February 2001 is dismissed;
2. The applicant pay the respondent's costs of the application to be assessed.

On 17 March 2010 I delivered my reasons for judgment after a hearing that was listed by the respondent in this proceeding. The matter was relisted pursuant to the liberty to apply that was made in the order sanctioning the settlement of a personal injuries claim. The sanction order was made on 20 February 2001.

The reasons that I published set out what was the substantive dispute between the parties. That dispute was generated as a result of the position adopted by the applicant that the settlement was voidable, despite the order made in this Court sanctioning it, and that the applicant was proposing to pursue her personal injuries claim.

The method by which the respondent sought to have the Court deal with the dispute as to whether the applicant was entitled to take that stand was by relying on the liberty to apply provision in the original order. For the reasons that I set out in my published reasons I did not think that was a proper procedure. The fact remains, however, that there was a dispute that was addressed by my reasons.

When the matter was relisted today I was hopeful that the parties may have reached an agreement on an appropriate way of formalising the determination of the dispute that was reflected by my reasons. They remain at odds over how the matter should be resolved.

The applicant does not concede that there was success by the respondent because there were four points agitated by the parties and the applicant succeeded on three of them. That, however, is an analysis of the matter that does not reflect the real substance of the

dispute and that is whether the applicant was at liberty to continue with her personal injuries claim. That is by far the significant dispute that was between the parties. The other aspects of it were incidental to that. That issue has been resolved in favour of the respondent.

Because of my reservations about making any substantive order under the liberty to apply provision, I am going to dismiss the application. However, I am proposing to reflect the success that the respondent had in the dispute that was argued before me by ordering that the applicant pay the respondent's costs of that application to be assessed.

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