HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

BELINDA ANN WILLETT (BY HER LITIGATION GUARDIANS DEBORAH ANN WILLETT AND PATRICK WILLETT) APPELLANT

AND

DUDLEY D FUTCHER RESPONDENT

Willett v Futcher
[2005] HCA 47
7 September 2005
B78/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside order of the Court of Appeal of the Supreme Court of Queensland made on 20 February 2004 and in its place order that the appeal to that Court is allowed with costs.*

3. *Remit matter to the Court of Appeal of the Supreme Court of Queensland for the assessment of the damages to be allowed.*

4. *Amend title to the proceeding in this Court by deleting the words "an infant".*

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with T Matthews for the appellant (instructed by Quinlan Miller & Treston)

D B Fraser QC with M P Kent for the respondent (instructed by McInnes Wilson)

CATCHWORDS

Willett v Futcher

Damages – Measure of damages in actions for tort – Appellant suffered brain damage as a result of respondent's negligence – Application for approval of terms of compromise – Appellant unable to manage financial affairs – Administrator appointed to manage appellant's financial affairs – Where determination necessary to calculate "sum by way of damages in respect of reasonable management fees of the administrator" – Where requirement for management of funds arose as a direct result of respondent's negligence – Whether only certain kinds of costs of managing funds should be allowed in assessing damages – Whether damages to be assessed according to the position of an appellant not awarded a lump sum of damages, or according to the position of an appellant with a lump sum to invest but no disabling injury.

Words and phrases – "damages", "compromise order", "reasonable management fees", "trustee".

Trustee Companies Act 1968 (Q), ss 41, 45.
Trusts Act 1973 (Q), ss 21, 24.
Public Trustee Act 1978 (Q), s 59(1).
Guardianship and Administration Act 2000 (Q), ss 47, 48(1), (2), 245, Sch 4.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. In July 1979, when she was about nine weeks old, the appellant, Belinda Ann Willett, suffered severe brain and other physical injuries as a result of a motor vehicle collision. In 1980 an action was commenced in the Supreme Court of Queensland on Ms Willett's behalf claiming damages from the present respondent. Many years later, when Ms Willett was aged 23, that action went to mediation. Liability was admitted. The solicitor for Ms Willett was later to swear that at that mediation "the matter resolved on the basis that the [respondent] pay to [Ms Willett] the sum of $3,850,000.00 (inclusive of statutory refunds) plus costs plus trustee Administration and Management Charges". On the day the mediation ended, counsel for the parties executed Terms of Settlement to record the settlement agreement.

2 Although Ms Willett was then an adult, she was unable to manage her own affairs. She was unable to make a binding agreement to settle her litigation. Application was therefore made to a single judge of the Supreme Court of Queensland for approval of the arrangement that had been struck at the mediation. On 24 December 2002, Byrne J made orders approving the compromise of Ms Willett's claim and ordered that some amounts, claimed as costs and other outgoings, be paid or satisfied out of the sum to be paid by the respondent. By the same order, Byrne J appointed Perpetual Trustees Queensland Limited ("Perpetual") as administrator in relation to all financial matters relating to the balance of the sum to be paid in settlement of the litigation after satisfaction of the sums which his Honour directed be paid. By the same order his Honour gave directions for the subsequent determination of what was described as "the sum by way of damages in respect of reasonable management fees of the administrator". It will be necessary to return to consider the terms of this order ("the compromise order") in greater detail.

3 The determination of "the sum by way of damages in respect of reasonable management fees of the administrator" subsequently came on for hearing before White J[1]. In the compromise order, Byrne J had ordered that the Public Trustee of Queensland ("the Public Trustee") be a party to that determination and that the Public Advocate have leave to intervene in that determination if so advised. Both the Public Trustee and the Public Advocate appeared by counsel at the hearing before White J ("the determination hearing"). Perpetual was not a party, and was not represented at the determination hearing.

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1 *Willett v Futcher* [2003] Aust Torts Rep ¶81-691.

4 At the determination hearing, evidence was tendered to establish what fees Perpetual would charge for managing the investment of the balance of the sum to be paid for the benefit of Ms Willett in compromise of her claim that would remain after satisfaction of the amounts Byrne J had ordered, in the compromise order, to be paid or allowed out of the sum paid by the respondent under the settlement agreement. Evidence was also tendered of the amounts that the Public Trustee would be entitled to charge for management of that fund if it, rather than Perpetual, had been appointed administrator.

5 Because both Perpetual and the Public Trustee would charge fees and incur expenses for so long as the funds remained under management, evidence was led at the determination hearing of the net present value of the expected stream of fees and expenses. The fund was assumed to be reduced to zero at the end of the period of 59 years that was taken to be the life expectancy of Ms Willett. Some aspects of this evidence about valuation were disputed but counsel for Ms Willett identified "the real contest" between her and the present respondent as being "whether all the heads or items of charge identified in the material … are recoverable". Her counsel conceded that the sum to be paid by the respondent by way of damages in respect of reasonable management fees did not have to be fixed "on the basis of the actual charges to be made by Perpetual" but that "some discounting for contingencies and vicissitudes (no more than, say, 10%) should also be applied".

6 Evidence which White J accepted as being reliable showed that the net present value of the fees proposed to be charged by Perpetual and the outgoings it expected to incur was $876,506 and the net present value of the fees which the Public Trustee would charge and expenses it would have incurred, if it had been appointed as administrator, was $969,336. White J concluded, however, that the amount of $180,000 should be allowed as damages for the reasonable management fees of administering and managing the compromise sum to be paid by the respondent to the administrator on Ms Willett's behalf. That sum was fixed to allow for only two categories of charge: categories of charge described as an "establishment fee" and a "discretionary portfolio management fee". Four other categories of charge ("advisory portfolio management fee", "fund manager fee", "initial brokerage fee" and "ongoing brokerage fee") were disallowed. White J held that fees falling within these four categories were not to be allowed as compensation to Ms Willett because "[t]he purpose of investment advice and decision making about investments which concerns the present determination is to maximise the return over and above the amount of compensation awarded which already has an investment strategy inherent in it". The order her Honour

made was that the respondent pay to the administrator of Ms Willett's trust fund "the amount of $180,000 for the reasonable cost of managing the fund" and further ordered that the receipt of the administrator was to be a sufficient discharge for that payment.

7 Being dissatisfied with the order of White J, Ms Willett appealed to the Court of Appeal of Queensland seeking to have the order of White J set aside and in its place an order that the reasonable management fees in respect of the compromise sum paid to the administrator be fixed at $876,506 or such other sum as the Court of Appeal thought fit. The Court of Appeal (Davies JA, Jones and Holmes JJ) dismissed the appeal[2]. By special leave, Ms Willett now appeals to this Court.

The issues

8 The central issue in the appeal is what kinds of costs of managing the damages awarded to a person incapable of managing his or her own affairs, whose incapacity was caused by the defendant's negligence, are to be allowed in assessing the damages to be allowed to that person. But as these reasons will demonstrate, that issue cannot be considered without first paying close attention to a number of statutory provisions: provisions that affect the administration of the affairs of persons unable to manage their own affairs, and provisions that authorise departure from the general rule that trustees are not entitled to remuneration for their labours in the trust[3].

9 In addition, in this particular case, it is necessary to examine some aspects of the course of proceedings in order to deal with some issues presented by that course of proceedings. First, however, it is appropriate to deal with some questions of underlying principle.

General principles

10 The respondent's negligence caused Ms Willett's impaired intellectual capacity. In particular, Ms Willett's need to have others administer her financial affairs was caused by the respondent's negligence. To the extent to which

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2 *Willett v Futcher* [2004] QCA 30.

3 *Robinson v Pett* (1734) 3 P Wms 249 [24 ER 1049].

satisfaction of that need was caused by the respondent's negligence and would reasonably require the expenditure of money, the expense is a loss of which the respondent's negligence was a cause. It was not, and could not be, suggested that damage of this kind is too remote to be recoverable.

11 The present case is markedly different from the circumstances considered by this Court in *Nominal Defendant v Gardikiotis*[4]. In that case the defendant's negligence did not affect the plaintiff's intellectual capacity to decide how her money should be invested or spent. Rather, it affected her physical capacities. In *Gardikiotis* no claim was made that as a result of Ms Gardikiotis' physical disabilities she would incur additional expense in managing her financial affairs[5]. If such a claim had been made, there may have been some question about whether difficulties of that kind were to be regarded as compensated for by the award of general damages[6] or should be an additional item taken into account in assessing those damages[7]. It is not necessary to consider that question in this case.

12 Because Ms Willett does not have capacity to attend to her financial affairs, she sues by her litigation guardians[8]. Not only can she not give instructions for the conduct or compromise of her claim, any sum of damages awarded to her, and any sum accepted in compromise of her claim, must be paid to and held by a trustee on her behalf. In managing and investing that fund the trustee has the obligations that are prescribed by the rules of equity and by statute. Of course many of the relevant provisions regulating the obligations of a person holding a fund on trust for a person of impaired capacity are now to be found in statute.

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4 (1996) 186 CLR 49.

5 (1996) 186 CLR 49 at 52 per Brennan CJ, Dawson, Toohey and Gaudron JJ, 62 per McHugh J, 69 per Gummow J.

6 (1996) 186 CLR 49 at 52 per Brennan CJ, Dawson, Toohey and Gaudron JJ.

7 (1996) 186 CLR 49 at 62 per McHugh J.

8 Uniform Civil Procedure Rules 1999 (Q), r 93.

The relevant statutes

13 In Queensland there are three statutes of most immediate relevance: the *Public Trustee Act* 1978 (Q), the *Guardianship and Administration Act* 2000 (Q) ("the Guardianship Act"), and the *Trustee Companies Act* 1968 (Q)[9]. Close attention must be paid to the relevant provisions of these statutes (or their equivalent in other jurisdictions) by those who propound a compromise of litigation brought on behalf of a person who is not of full capacity, as well as by the court which is asked to approve such a compromise and those who are later to be involved in the administration of any resulting trust fund.

14 First it is necessary to consider the legislation dealing with the compromise of litigation brought on behalf of a person under a legal disability – the *Public Trustee Act*.

Public Trustee Act 1978

15 Section 59(1) of the *Public Trustee Act* provides that the compromise of an action brought on behalf of a person under a legal disability and claiming moneys or damages is not valid without the sanction of either the court within whose jurisdiction the matter lies or the Public Trustee. Section 59(1) further provides that no money or damages recovered or awarded in the matter (whether by verdict, settlement, compromise, payment into court or otherwise) shall be paid to the next friend (now litigation guardian) of the plaintiff, or to the plaintiff's solicitor "or to any person other than the public trustee unless the court otherwise directs".

16 Sums paid to the Public Trustee under s 59 of the *Public Trustee Act* "shall, subject to any general or special direction of a court upon application made in that behalf, be held and applied by the public trustee on trust for the person under a legal disability"[10]. The Public Trustee is then given not only power[11] to discharge or reimburse any expenses reasonably incurred by or on

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9 In each case reference is made to the Act as it stood at the relevant time.

10 s 59(4).

11 s 59(4A)(a).

behalf of the person under disability but also the powers[12] that the Public Trustee would have under Pt 6 of the *Public Trustee Act* to manage the estate of an incapacitated person.

The compromise order

17 The compromise order made by Byrne J was in part an order made under the *Public Trustee Act*. The compromise order provided that the compromise of Ms Willett's claim against the respondent was sanctioned pursuant to s 59 of the *Public Trustee Act*. The terms of the compromise were described in the order as being:

> "(a) The defendant pay to the second plaintiff, as directed by the Court, the sum of $3,850,000.00 … ('the settlement sum'), together with a sum by way of damages in respect of reasonable management fees in respect of so much of the lastmentioned sum as shall be lodged as directed by the court with the Public Trustee of Queensland or a private trustee pursuant to an administration or protection order made by the Court, in a reasonable sum to be agreed, and if not agreed, as determined by the Court);
>
> (b) The defendant pay the second plaintiff's costs of the proceeding, including any reserved costs, and the costs of and incidental to this application and order for sanction, to be assessed on the standard basis".

18 Provision was made in the compromise order for payment by the respondent of some amounts to the Health Insurance Commission, Caboolture Hospital and Centrelink. Provision was also made for payment of $500,000 to Ms Willett's solicitors, to be held for her litigation guardians (her parents) as "partial reimbursement for care and interest thereon and out-of-pocket expenses and interest thereon" that had been provided to or on Ms Willett's behalf to the date of the order. The direction to make these payments was made pursuant to the power given by s 59(1) to direct payment "otherwise" than to the Public Trustee.

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12 s 59(4A)(b).

19 The balance of the settlement sum remaining after these payments was described as "the trust fund" and the respondent was ordered to pay the trust fund to Perpetual as administrator. The direction to pay to someone other than the Public Trustee was again an order of a kind for which s 59(1) provided (by its reference to no payment being made "to any person other than the public trustee unless the court otherwise directs") but the appointment of Perpetual as administrator was made under the Guardianship Act. It is convenient to deal now with that Act.

The Guardianship Act

20 The Guardianship Act provides[13] for the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity. As noted earlier, Ms Willett was of full age when her litigation was compromised. The title to the proceedings should have been, and now should be, amended to reflect that fact.

21 The Guardianship Act distinguishes[14] between personal matters, special personal matters, special health matters and financial matters. In this case, attention must be directed to the last of these classes of matter. A financial matter is defined[15], for an adult, as "a matter relating to the adult's financial or property matters" and the definition gives 16 examples of such matters. The Act establishes[16] a Guardianship and Administration Tribunal and gives that body power[17] to appoint a guardian for a personal matter or an administrator for a financial matter if:

(a) the adult has impaired capacity for the matter;

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13 Ch 3, Pt 1, ss 12-21.

14 s 10, Sched 2.

15 Sched 2, Pt 1, item 1.

16 s 81.

17 s 12(1).

(b) there is a need for a decision in relation to the matter (or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property); and

(c) without an appointment the adult's needs will not be adequately met or the adult's interests will not be adequately protected.

22 Unless the Tribunal orders otherwise, an administrator is authorised to do, in accordance with the terms of the administrator's appointment, "anything in relation to a financial matter that the adult could have done if the adult had capacity for the matter when the power is exercised"[18]. The Guardianship Act prescribes[19] some "general principles" which guardians and administrators must apply[20]. Those principles include such matters as encouraging self-reliance by the person for whom the guardian or administrator acts[21], taking into account the importance of maintaining that person's "existing supportive relationships"[22] and exercising powers "in a way that is appropriate to the adult's characteristics and needs"[23]. Nothing turns immediately on the application of these general principles.

23 The Guardianship Act provides[24] that a guardian or administrator must exercise powers "honestly and with reasonable diligence to protect the adult's interests". It further provides[25] that an administrator may enter into what it

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18 s 33(2).

19 s 11, Sched 1.

20 s 34(1).

21 Sched 1, item 6.

22 Sched 1, item 8.

23 Sched 1, item 10.

24 s 35.

25 s 37(1).

defines[26] as a "conflict transaction" only if the Tribunal authorises "the transaction, conflict transactions of that type or conflict transactions generally".

24 For present purposes, it is necessary to pay particular attention to ss 47 and 48 of the Guardianship Act. Section 47 entitles a guardian or administrator "to reimbursement from the adult of the reasonable expenses incurred in acting as guardian or administrator". Section 48 regulates the remuneration of professional administrators. It provides:

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

25 It will be noted that s 48(1) provides that an administrator carrying on a business of or including administrations under the Guardianship Act is entitled to remuneration if the Tribunal so orders. Although s 48(1) is cast in the language of entitlement, two related negative implications must be drawn from the language[27]. First, an administrator appointed under the Guardianship Act is entitled to remuneration *only* if an order is made that authorises the administrator to charge for the services provided. Secondly, the amount of the charges that are levied must be determined in the manner prescribed by the order authorising the administrator to charge for services or by some subsequent order varying that authority. That is, an administrator may make no charge for remuneration (as distinct from a claim for reimbursement of reasonable expenses actually incurred[28]) without an order that authorises both making the charge and its amount. And the Act makes plain, by s 48(2), that the amount of remuneration

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26 s 37(2).

27 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

28 s 47.

that may be allowed is limited to the amount of commission payable to a trustee company under the *Trustee Companies Act*. It will be necessary, therefore, to examine the provisions of the *Trustee Companies Act* that limit the amount of commission that a trustee company may charge. Before doing that, however, it is necessary to deal with two other aspects of the Guardianship Act: some provisions of Pt 2 of Ch 4 which deal with particular functions and powers of administrators, and provisions which deal with what the heading to Pt 2 of Ch 11 calls the "Relationship with Court Jurisdiction".

26 The provisions of Pt 2 of Ch 4 of the Guardianship Act (ss 49-55) oblige an administrator to keep records (s 49) and keep the administrator's property separate from the adult's property (s 50). If an administrator has power to invest, s 51 provides that an administrator may invest only in authorised investments (s 51(2)) but may continue investments which are not authorised if, when the administrator was appointed, the adult had the investment (s 51(3)). What are authorised investments is defined in Sched 4 as:

> "(a) an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under the *Trusts Act 1973*, part 3; or
>
> (b) an investment approved by the tribunal."

Part 3 of the *Trusts Act* 1973 (Q) (s 21) gives a trustee, unless expressly forbidden by the instrument creating the trust, power to:

> "(a) invest trust funds in *any* form of investment; and
>
> (b) at any time, vary an investment or realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment." (emphasis added)

The class of "authorised investments" is, therefore, very broad.

27 Because the power to invest must be exercised "honestly and with reasonable diligence to protect the adult's interests"[29] it is inevitable that management of a large fund for the benefit of a person incapable of managing their own affairs will require the administrator to consider investing the fund in a

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29 *Guardianship and Administration Act* 2000 (Q), s 35.

diverse range of investments and to review those investments from time to time[30]. Those obligations are made explicit by s 24 of the *Trusts Act* and its requirements that a trustee have regard to a large number of matters, including[31] "the desirability of diversifying trust investments" and[32] "the results of a review of existing trust investments".

28 Section 239 of the Guardianship Act provides that the Act does not affect the rules of court of the Supreme Court, District Court or Magistrates Court about a litigation guardian for a person under a legal incapacity. Section 240 provides that the Act does not affect the Supreme Court's "inherent jurisdiction, including its parens patriae jurisdiction". This provision of s 240 may well suffice to preserve the Supreme Court's powers[33] to sanction the settlement of a proceeding brought in the name of a person under a legal incapacity and to allow remuneration to a trustee[34]. But the exercise of power by either the Supreme Court or the District Court to sanction a settlement is expressly regulated by s 245 of the Guardianship Act. In particular, s 245 provides[35] that the Supreme Court or the District Court, sanctioning a settlement for, or ordering money to be paid for the benefit of, a person with impaired capacity, "may exercise all the powers of the tribunal under chapter 3" of the Act and that[36] Ch 3 applies to the court in its exercise of these powers "as if the court were the tribunal". One consequence of these provisions of s 245 is that, when approving a compromise, the Supreme Court or District Court may make an order allowing an administrator whose business is or includes acting as an administrator under the Act to charge remuneration, and make an order fixing the amount that is to be charged.

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30 cf *Wells v Wells* [1999] 1 AC 345.

31 s 24(1)(b).

32 s 24(1)(o).

33 *Supreme Court of Queensland Act* 1991 (Q), s 9.

34 *In re Freeman's Settlement Trusts* (1887) 37 Ch D 148; *Forster v Ridley* (1864) 4 De G J & S 452 [46 ER 993]; *In re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

35 s 245(2).

36 s 245(3).

29 It is evident, then, that a number of provisions made by the compromise order were made in exercise of powers given by the Guardianship Act. In particular, the appointment of Perpetual as administrator was made pursuant to ss 12 and 245 of that Act. What the compromise order did not do, however, was to provide that Perpetual might charge remuneration for its services as administrator. The directions that were given in the compromise order for determination of the "reasonable management fees" were directions concerning the fixing of an amount to be paid by the respondent as damages. Indeed, the compromise order treated that sum of damages as standing outside the regime prescribed by the order for payment to the administrator and receipt on behalf of Ms Willett. The amount described in the order as "the settlement sum" did not include this sum of damages and the "trust fund" was the balance of "the settlement sum" after payment of the various sums for which the order provided.

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

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

Trustee Companies Act 1968

32 Part 4 of the *Trustee Companies Act* (ss 41-45A) regulates the commission and fees chargeable by a trustee company. Section 41 authorises a trustee company, "in addition to all moneys properly expended by the trustee company and chargeable against the estate" to receive a commission at a rate fixed from time to time by the board of directors of the trustee company "but not in any case exceeding, after discounting for any GST payable on any supply the commission relates to" five per cent of the capital value of the estate and six per cent of the income received by the trustee company on account of the estate. Subject to the Act, the commission is to be accepted in full satisfaction of any claim to remuneration[37] and "no other charges beyond such commission and moneys so expended by the trustee company shall be made or allowed"[38]. Provision is made[39] for the Supreme Court or a Judge, if "of opinion that the rate of commission charged in respect of any estate is excessive", to review "on the application of any person interested in the estate" the rate of commission and "on such review, reduce the rate of commission".

33 Sub-section 7 of s 41 provides that:

> "Nothing in this section shall prevent –
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> (a) the payment of any commission which a testator in his or her will or a settlor has directed to be paid;
>
> (b) the payment of any commission or fee which has been agreed upon between the trustee company and the parties interested therein;
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> either in addition to or in lieu of the commission provided for by this section."

How, if at all, this provision could be engaged in the case of a person incapable of managing his or her own affairs was not explored in argument.

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37 s 41(3)(a).

38 s 41(3)(b).

39 s 41(4).

34 As noted already, a trustee company's entitlement to commission is "in addition to all moneys properly expended by the trustee company and chargeable against the estate". It would not be useful to attempt to give a list of all of the kinds of expenditure that would be chargeable against the estate. But one example of such an expenditure is immediately relevant. Where a trustee company engages a third party to act as stockbroker in connection with a dealing in listed securities forming part of the trust fund under administration, the brokerage chargeable on that transaction would be a sum properly expended and chargeable against the estate under administration.

35 Apart from expenditures of the kind with which s 41 deals, s 45 of the *Trustee Companies Act* makes provision for a trust company to charge fees for certain work and services. Those charges are "[i]n addition to the commission and the other moneys specified that it is entitled to receive" under s 41 and s 44. (Section 44 provides for the charging of an additional fee to carry on "any business or undertaking which belongs wholly to the estate, or in which the estate has an interest as partner". That section has no application in the present matter.) The fees that may be charged for work and services include such things as arrangement of insurances or preparation of income and land taxation returns.

36 How the provisions of Pt 4 of the *Trustee Companies Act* would apply in the present case was not explored in evidence or argument in the courts below. It was touched on in the course of argument of the appeal to this Court, but only in response to inquiries made by the Court of the parties. And for want of any evidence or consideration of these provisions in the courts below, the submissions directed to these issues during the argument in this Court were necessarily brief. In particular, there could be no comparison made between the charges which Perpetual proposed to make and a commission fixed at five per cent of capital value and six per cent of income received, together with moneys properly expended and any fees chargeable under s 45 of the *Trustee Companies Act*.

37 It is to be recalled, however, that s 59 of the *Public Trustee Act* contemplates that money or damages recovered or awarded in a cause or matter in which money or damages is or are claimed by or on behalf of a person under a legal disability may be paid to and held by the Public Trustee. In that event, the Public Trustee would be authorised by s 27(4) of the *Public Trustee Act* to charge for that administration the fees and charges fixed pursuant to that Act. At the times relevant to the present matter those fees and charges were set out in the Public Trustee (Fees and Charges Notice) (No 2) 2002 given pursuant to s 17 of

the *Public Trustee Act* and published in the *Queensland Government Gazette*[40]. The evidence led at the determination hearing showed that, under that regime of fees and charges, the Public Trustee would have been entitled to charge fees having a net present value of $969,336.

Perpetual's proposed fees and charges

38 For the purposes of the determination hearing, further and better particulars of the management fees which it was claimed should be allowed as damages were filed on behalf of Ms Willett. The calculations made in the particulars assumed, among other things, that Ms Willett had a life expectancy of about 59 years, that where fees "are ongoing through the life of the portfolio" the fund would diminish to zero over Ms Willett's life expectancy, and that a discount rate of five per cent should be used in calculating the net present value of future outlays. The particulars identified Perpetual's fees and "third party expenses" as falling into five categories:

(a) establishment fee;

(b) discretionary portfolio management fee;

(c) advisory portfolio management fee;

(d) underlying investment manager fees – initial brokerage fee (third party); and

(e) underlying investment manager fees – ongoing brokerage fee (third party).

The content of each of those categories was amplified in the particulars and, at the determination hearing, was further identified in evidence given by a Senior Financial Consultant in the Private Clients division of Perpetual's holding company (Mr D R Gallagher).

39 The establishment fee, calculated as a percentage of the initial investment assets to be managed, was described as covering "all costs associated with establishing [Ms Willett's] account". It included preparation of a financial management plan covering such matters as making what were called

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40 *Queensland Government Gazette*, No 52, 8 November 2002.

"[i]nvestment recommendations". To whom such recommendations would be made was not explored.

40 Both the discretionary portfolio management fee and the advisory portfolio management fee were described as ongoing fees calculated as a percentage of the assets under management. The former fee was said to include "[t]he decision making and fiduciary obligations undertaken by Perpetual to act as Administrator" for Ms Willett and "[t]he elevated duty of care of a professional Trustee" but again, precisely what work this encompassed was not revealed by the evidence that was adduced. The advisory portfolio management fee was described as including fees for the provision of strategic and investment advice, provision of professional advice "by in-house specialists" such as investment consultants, accountants and solicitors, administrative and custodial services, preparation of various reports and provision of a "Client Relationship Manager" giving "[a] personal and central point of contact for [Ms Willett], her family and care providers for all portfolio and financial matters".

41 The remaining categories of charge were presented by Mr Gallagher as fees charged by the managers of funds in which investments were made (underlying investment manager fees) and brokerage fees for investments in direct equity investments incurred when an investment was first made (the initial brokerage fees) or later changed (the ongoing brokerage fees). Fees charged by fund managers were said to be charged by fund managers before declaring a return to investors. Direct investment in equities was said to be a service provided to Perpetual's clients "through our broker at 0.385%".

42 On their face, then, the fund manager's fees were taken by the managers before payment to the investor of the return on investment in the fund; the brokerage charges appeared to be moneys expended by the administrator and chargeable against the estate. Neither appeared to be a commission allowed to Perpetual. Whether the reference to "our" brokers suggested some question of dealing between related entities that might attract a question about self-dealing was not explored in evidence.

The determination hearing

43 The determination of the sum to be allowed as damages in respect of reasonable management fees was understood by White J as raising an important point of principle. Her Honour described the point as being:

> "whether the cost to [Ms Willett] of obtaining suitable investment advice and other ancillary charges in respect of that part of the trust fund available for investment ought be borne by the [respondent] as an aspect of the damages ordered to be paid 'in respect of reasonable management fees'."

The respondent, and the Public Trustee, contended that "that cost to [Ms Willett] is not compensatory in nature being rather a means of maximising the compromise sum".

44 This submission by the respondent and the Public Trustee highlights an assumption which underpins the form of the compromise struck in this case. The compromise assumed that it was possible to fix the amount of damages to be allowed in respect of reasonable management fees without knowing how the agreed sum of $3,850,000 was calculated. The validity of that assumption could not be, and was not, tested in argument, but its making should be noted. Whether an assumption of that kind would be appropriate when assessing a single lump sum award of damages (rather than agreeing upon two separate amounts to be allowed as damages) is a question that was not agitated in this appeal.

45 Although White J recognised that it may not be easy to distinguish between fees charged for the management of a sum awarded as damages to a person unable to manage his or her own financial affairs and fees charged for "investment advice", her Honour concluded that fees for the latter class of service were not allowable as damages. The determination of $180,000 as the damages to be awarded for management fees represented the sum assessed by White J as being the net present value of the fees that Perpetual would charge *otherwise* than for investment advice. It was a sum that was fixed as representing the establishment fee and the discretionary portfolio management fees that would be charged by Perpetual. No allowance was made for the advisory portfolio management fee, for the underlying investment manager fees or for brokerage (initial or ongoing).

The Court of Appeal

46 The Court of Appeal saw[41] the division made by White J in arriving at the figure of $180,000 as drawing a line "at the point where, in the performance of

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41 [2004] QCA 30 at [22].

[the trustee's obligations under the *Trusts Act* and under general law], the trustee goes beyond the range of unassisted decision-making which an able adult of no particular skill, training or interest in the subject would make". But as the Court of Appeal correctly pointed out[42], a necessary product of the respondent's negligence "was the appointment of a trustee [more accurately an administrator under the Guardianship Act] with statutory and other legal obligations" and the need to perform those obligations being a product of the respondent's negligence, the cost of them was properly recoverable from the respondent. Accordingly, the Court of Appeal, at least inferentially, must be taken to have rejected the distinction which White J drew.

47 Yet the Court of Appeal dismissed the appeal against the orders made by White J. It seems that the Court reached that conclusion on the basis that some of the services that Perpetual would provide were not necessary to discharge Perpetual's obligations under the trust of which it was appointed trustee[43]. But as the Court rightly pointed out[44], none of the evidence adduced in the determination hearing was directed to drawing such a distinction. And neither the content of the distinction nor its application is apparent from the Court's reasons. Rather, the questions posed by the Court[45] ("whether all of the services for which fees are claimed will be necessary to enable Perpetual to perform its obligations under the trust … or whether … some of them are services to be performed in the exercise of Perpetual's discretion as trustee but not necessary to discharge those obligations") were left unanswered, at least directly.

48 It is, therefore, unclear upon what basis the Court of Appeal reached the conclusion, as it did[46], that $180,000 was not shown to be other than a reasonable sum for the fees to be allowed as damages. Indeed, the Court's implicit rejection of the central step in the reasoning of White J is inconsistent with that conclusion. As these reasons will show, however, it is unnecessary to go beyond noticing these aspects of the decisions of the courts below.

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42 [2004] QCA 30 at [23].

43 [2004] QCA 30 at [26].

44 [2004] QCA 30 at [26].

45 [2004] QCA 30 at [26].

46 [2004] QCA 30 at [32].

The appeal to this Court

49 As noted at the start of these reasons, the central issue in the appeal to this Court is what kinds of costs of managing the damages awarded to a person incapable of managing his or her own affairs, whose incapacity was caused by the defendant's negligence, are to be allowed in assessing the damages allowed to that person. The question should be answered: an amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund. No distinction of the kind made at first instance by White J between investment advice and other services should be drawn in assessing that amount. Because the allowance to be made is for remuneration and expenditure *properly* charged or incurred, the distinction drawn by the Court of Appeal between fees for services necessary to enable Perpetual to perform its obligations, and fees for services not necessary to perform those obligations, becomes inapposite. The services properly to be provided by an administrator must first be identified. And the identification of what remuneration and expenditure is properly charged or incurred, as with the identification of the amount of remuneration and expenditure properly allowed, will require close attention to the statutes governing those matters.

50 These conclusions follow from the general principles identified earlier in these reasons and the operation of the various statutory provisions also identified above. It is as well, however, to say a little more about the distinction drawn by White J at first instance. That distinction sought to identify the amount that would be necessary to place the appellant in the position of a person who is able to make investment decisions about the sum that is to be invested. That is, as the Court of Appeal pointed out[47], it drew the line at the point where the administrator did what would be done by "an able adult of no particular skill, training or interest in the subject" of investment. Performance of those tasks was to be allowed for, but beyond that the cost of administration was to fall on the injured appellant.

51 In a case, like the present, where a plaintiff must have an administrator appointed to manage his or her financial affairs because the plaintiff's incapacity to deal with those matters was caused by the defendant's negligence, the plaintiff is awarded a lump sum of damages which is to compensate the plaintiff for losses

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47 [2004] QCA 30 at [22].

past, present and future. In a case, again like the present, where the plaintiff will never be able to manage his or her affairs and will never be able to work, the damages awarded will often include a significant allowance for future economic loss. The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she would have been in had the tort not been committed. That requires comparison with the position the plaintiff would have been in *without* the award of a lump sum for damages. It does not, as the distinction adopted by White J supposes, require or permit comparison with the position that the plaintiff would have been in had the disabling injuries not been sustained but the plaintiff nonetheless had a lump sum to invest. That comparison is irrelevant and inapt. In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period.

52 Assessing what remuneration and expenses are properly charged or incurred by an administrator requires consideration of the relevant statutory limitations on those charges. It does not depend only upon identifying whether Perpetual's proposed fees and charges are less than those that the Public Trustee would be entitled to charge. As noted earlier, however, no reference was made to the relevant statutory provisions either at first instance or on appeal to the Court of Appeal and there is no evidence that would reveal how the relevant statutory limitations would apply.

53 The order of the Court of Appeal dismissing the appeal to that Court must be set aside. Once that Court recognised, correctly, that the reasoning of White J proceeded from a distinction that should not be drawn, the appeal to the Court of Appeal had to be allowed. But what consequential orders should have been made?

54 Deciding what consequential orders should have been made must take account of the nature of the proceedings from which the appeal was brought. As earlier noticed, the proceedings before White J were, and were treated by the parties as, the determination of an issue about quantification of damages as between Ms Willett and the respondent. The proceedings were not, and were not treated as, an application by Perpetual for an order allowing its remuneration or fixing the amount of that remuneration. If the proceedings had had this latter

character the Court's role would have been to protect the interests of the person whose affairs were to be administered. It may well then have been appropriate to remit the matter to the primary judge to receive further evidence about what remuneration, consistent with the relevant statutory limitations on the remuneration that might be charged, was properly to be allowed. But being a contest between plaintiff and defendant about damages, not a contest about the amount to be charged against the trust fund, the better view is that the parties should be confined to the evidence adduced before White J[48]. It was in the *respondent's* interests to explore these matters, but it did not. It would be inappropriate to give the respondent a further opportunity to do that. It follows that the matter should be remitted to the Court of Appeal to determine, on the evidence adduced in the determination hearing, the amount of damages to be allowed.

55 In this Court it was argued for the appellant that the Court of Appeal's conclusion as to the correctness of the figure of $180,000 rested on the erroneous view that some of her claims involved double counting. In the circumstances it is not necessary to decide whether that argument is correct. However, the appellant is at liberty to contend to the Court of Appeal hearing the matter remitted that there is no double counting, the respondent is at liberty to contend the contrary, and the Court of Appeal is at liberty to reconsider the matter unconstrained by what the Court of Appeal has already said on that subject in support of the orders appealed from[49].

Conclusion and Orders

56 The appeal to this Court should be allowed with costs. The title to the proceeding in this Court should be amended by deleting the words "an infant". The orders of the Court of Appeal of Queensland should be set aside. In their place there should be orders that the appeal to that Court is allowed with costs. The matter should be remitted to the Court of Appeal for the assessment of the damages to be allowed.

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48 *Coulton v Holcombe* (1986) 162 CLR 1.

49 *Willett v Futcher* [2004] QCA 30 at [26]-[32].