

Assessing damages for costs of fund management by a trustee

Willett v Futcher [2004] QCA 30

In *Nominal Defendant v Gardikiotis*,¹ the High Court confirmed that fund management service fees are properly recoverable by a plaintiff with causally related mental incapacity. However, the court did not define the scope of the services that should be taken into account when assessing those damages. In *Willett v Futcher*,² the Queensland Court of Appeal considered this issue.

THE FACTS

The appellant (plaintiff) suffered severe brain damage and other injuries in a motor vehicle accident when she was nine weeks old. When she was 23 years old, the court sanctioned a compromise of her damages claim in the sum of \$3,850,000, together with a sum by way of damages in respect of reasonable management fees payable to an administrator pursuant to an administration order made by the court.

The parties could not agree on the quantum of the 'reasonable management fees' and the issue was referred to the court for determination.

THE DECISION OF THE PRIMARY JUDGE

The appellant claimed \$713,052 in damages for fund management. The

trial judge allowed \$180,000. The type of fees claimed and whether they were allowed or disallowed are as follows:

Allowed

- Establishment fee
- Discretionary portfolio management fee. For 'decision-making and fiduciary obligations' under the statute and 'the elevated duty of care of a professional trustee including the implementation of all ongoing strategic and investment advice and day-to-day investment decisions...'³

Disallowed

- Advisory portfolio management fee. Includes 'six-monthly investment reviews of asset allocation and all portfolio investments, annual review of strategic and investment advice...initial and ongoing independent company and fund manager research...'⁴ This advice would be provided by in-house specialists including senior financial consultants, investment consultants, accountant and a trusts and estates solicitor.

- Underlying investment manager fees. These were for services to be provided by outside experts with whom the fund manager would consult for expert investment advice and included the outside fund manager's fees and the initial and ongoing brokerage fees.

Her Honour disallowed amounts that reflected 'that "extra" investment assistance and cost' on the basis that they 'ought not to be part of the compensation which a defendant must make to an injured plaintiff even if the injury gives rise to the need for assistance in the management of the fund'.⁵

THE APPEAL

The plaintiff's appeal was unanimously dismissed.⁶

The first ground of appeal related to the primary judge's refusal to follow *Wills v Bell*,⁷ which the appellant contended was binding on the court. The court considered that as the relevant principles were not discussed in that case, it was unnecessary to reconsider it.⁸

Tina Cockburn is a Lecturer in the Faculty of Law at the Queensland University of Technology in Brisbane.

PHONE (07) 3864 2707

EMAIL t.cockburn@qut.edu.au

The second ground of appeal was that the primary judge erred in principle in distinguishing between the categories of services and fees, and allowing damages based on only two of those categories.⁹

The court held that management fees are recoverable where they are 'a need which has been created as a direct consequence of the defendant's wrong' or 'the necessary product of the defendant's negligence', notwithstanding that they may also be 'a means of maximising the compromise sum'.¹⁰ Therefore damages are recoverable in respect of reasonable management fees where, as a result of the defendant's negligence, the plaintiff is not capable of managing their own affairs.

Where a trustee with obligations under the *Trusts Act 1973* (Qld), and the general law, is appointed to manage the plaintiff's affairs, this 'will need to be borne in mind in considering what are reasonable management fees'.¹¹

Thus the court considered that it was necessary to distinguish between services 'necessary to enable Perpetual to perform its obligations under the trust of which it was appointed trustee having regard, amongst other things, to the purpose of the trust, the needs of Belinda and the intended duration of the trust, namely 59 years' and 'services to be performed in the exercise of Perpetual's discretion as trustee but not necessary to discharge those obligations'.¹² The court said:¹³

'The question is therefore whether any of the fees... were for the performance of services which Perpetual was obliged to perform or pay for in order to discharge its obligations as a trustee.'

After noting that answering the question was difficult as 'none of the evidence adduced was directed towards it',¹⁴

the court held that as the discretionary portfolio management fee appeared to cover the services necessary for the fund manager to perform its obligations as trustee, then the advisory portfolio management fee was not recoverable, as those services appeared to indicate, although with greater specificity, things which a professional trustee would be required to do to perform its fiduciary obligations. The underlying investment manager fees - fund manager fees - were not recoverable, as they added nothing to the services covered by the discretionary portfolio management fee.

The brokerage fees were regarded as potentially allowable as necessary to perform the trustee's obligations¹⁵ and the estimates were not excessive. However, given that 'the estimate of a total present value for a reasonable management fee in respect of the compromise sum is not a mathematical exercise',¹⁶ the primary judge's estimate was held to be unappealable.

COMMENT

Reasonable management fees are clearly recoverable where, as a result of causally related incapacity, it is necessary to appoint a trustee to administer the damages award. In *Willett v Futcher*, the relevant principle was stated as follows:¹⁷

"Damages in the nature of such fees are awarded in order to place the plaintiff in the position in which she would have been, as far as money can do it, had she not been deprived, by the defendant's negligence, of her capacity to manage her own affairs. So what is awarded by way of damages in respect of management fees is such sum as is necessary to manage the fund which the plaintiff would have managed had she not been so deprived."

The office of trustee carries with it statutory and general law obligations. Even though a consequence of those obligations may be that the standard of services provided is higher than the unassisted decision-making of an adult with no particular skill, training or interest, costs are recoverable at the higher standard. This is because the plaintiff has no choice but to accept such services. However, in *Willett v Futcher* the Queensland Court of Appeal held that it is necessary to distinguish between those services which are necessary to perform the obligations under the trust (which are recoverable) from those services performed in the exercise of discretions but which are not necessary to discharge the obligations of trustee (which are not recoverable).

To ensure that a catastrophically injured plaintiff is fully compensated for the costs of fund management arising due to the defendant's negligence, it will be necessary to ensure that evidence of fees of professional trustees distinguish between trustees' duties and powers, rather than merely stated in general terms. This of course will require careful analysis of trustee legislation and general trust law, particularly the obligations imposed by sections 22, 23 and 24 of the *Trusts Act 1973* (Qld), or equivalent legislation in other jurisdictions.¹⁸ ■

Endnotes: 1 (1996) 186 CLR 49. 2 [2004] QCA 30, Davies, Jones and Holmes JJ; paragraph references are to this decision unless otherwise noted. 3 *Ibid*, p383. 4 Record, Vol. 2, p383. 5 Record, Vol. 2, p378, para [26]. 6 [33]. 7 [2002] QCA 419. An application for special leave was refused with costs: *Wills v Bell & Ors* [2003] HCATrans 479. Hayne J considered that the relevant principles as to allowing investment management fees as a head of damages, are found in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49. 8 [20] and [25]. 9 The error was said to occur in [26] of Her Honour's decision, which is set out at [21] of *Willett v Futcher*. 10 At [15]-[16]. 11 [19] and see [23]-[25]. 12 [26]. 13 [27]. 14 [26]. 15 [31]. 16 [32]. 17 [16]. 18 Some of these obligations are set out at [19]. For an overview of the Queensland legislation, see: T Cockburn, 'Trustee Investment Law Reform - Trusts (Investments) Amendment Act 1999', *Proctor* (2000) 20, p15.