CALCULATION of FUND MANAGEMENT

By Dr Andrew Morrison SC

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There have been competing single judge decisions on the methodology to be employed when calculating fund management. In a careful decision in *Gray v Richards*,[1] McCallum J reviewed the authorities and handed down two interesting determinations, which may be of assistance to those engaged in employing actuaries to calculate the cost of fund management.

In *Gray v Richards*, the issues of fund management on fund management, and fund management on income into the fund, were determined. McCallum J held that if they were not included, then there would necessarily be a shortfall, which would have to be met out of the judgment sum. She referred to competing authority in single judge decisions in NSW and Queensland, as well as *dicta* by Meagher JA in *Rosniak v GIO*.[2] Her Honour preferred the approach of Hunter J in *Bacha v Pettersen*,[3] and rejected the views of Burchett AJ in *Buckman v M and K Napier Constructions Pty Ltd*,[4] and Hidden J in *Haywood v Collaroy Services Beach Club Ltd*.[5] She also rejected the approach of Martin J in Queensland in *Lewis v Bundrock*.[6] She held that the approach affirmed by the High Court in *Nominal Defendant v Gardikiotis*,[7] and *Willett v Futcher*,[8] made the cost of future fund management a recognised head of future loss and did not think there was any reason[9] for keeping the plaintiff out of the award necessary to meet an identifiable future cost.

She took a similar view on the issue of fund management on fund income based on the principle of *restitutio in integrum*, *Todorovic v Waller*.[10] The 5 per cent discount rate should be treated as the assumed earnings rate consistent with the approach in *Todorovic*.[11] She said that the argument

that there would be a shortfall if no allowance was made for fund management on the income into the fund (as the defendant contended) was 'irresistible'.[12] Authority to the contrary by Hislop J in *Rottenbury by his tutor Wren v Rottenbury*[13] was, in her view, plainly wrong. On analysis,[14] the defendant's submissions in *Rottenbury* identified no good reason why income on the fund should not be taken into account in calculating the future cost of management. It was then logical and consistent to undertake the calculation by reference to the earning rate of 5 per cent that is implicit in the statutory discount rate.[15]

Accordingly, Her Honour held:

'(a) that the plaintiff's claim for the future cost of managing the fund management component of her damages award should be allowed;

(b) that the plaintiff's claim for the future cost of managing the income earned upon the investment of the fund at an assumed rate of 5 per cent be allowed.'[16]

In *Best (by his next friend Jordan) v Greengrass* [2012] WADC 44, Wager DCJ on 29 March 2012 followed *Gray v Richards* and allowed fund management on fund management.

In *Gray v Richards (No. 2)*,[17] the court had to determine whether the costs of a private fund manager or the allegedly cheaper costs of the NSW Trustee and Guardian should be allowed. A private trust company (The Trust Company Limited) had already been appointed to manage the plaintiff's estate by White J in the Supreme Court's Protective Division. The other issue was what deductions (if any) should be made from the fund before calculating the cost of fund management.

The defendant's submission that tax deductibility should be taken into account in respect of assessing the cost of management was held by Her Honour to be clearly contrary to the decision of the High Court in *Todorovic v Waller*,[18] where it was said that the discount rate was intended to include allowance for tax upon income and that no further allowance should be made for these matters.[19]

Her Honour noted that the NSW Trustee is subject to a weaker disclosure regime than private or commercial managers.

Despite the contention of the NSW Public Trustee that no indirect charges should be allowed above its disclosed rates, Her Honour held that bank fees, Austraclear fees and/or transfers to the NSW Trustee's Reserve Fund should be regarded as an indirect cost to clients, increasing the allowance that should be made for fund management over and above that disclosed by the NSW Trustee and Guardian. As far as bank and Astraclear fees are concerned, Her Honour held[20] that the defendant's contention is inconsistent with what was said in the High Court in *Willett v Futcher*,[21] where the suggestion that these expenses would have been incurred by an uninjured person was described as 'irrelevant and inapt'. A person who was uninjured would not have had to >>

manage a large sum of money to meet a 5 per cent discount rate. On the other hand, Her Honour was not satisfied that transfers to the Reserve Fund (even though these amounts were greater than any payments back to the estate) should be characterised as an indirect cost incurred by a client of the fund. Moreover, there were some indirect costs that were not fully explained, and Her Honour noted:

> 'The present difficulty is that, in the absence of enhanced disclosure obligations of the kind that apply to commercial fund management, Mr Plover's (plaintiff's actuary) efforts have been unsuccessful in revealing a figure for indirect costs on which I can confidently rely in respect of the present management of funds by the NSW Trustee.'[22]

Her Honour did not need to go to any attempted quantification, but indicated that had she had to do so, she would not have been satisfied that she could properly award any sum for indirect costs, given the uncertainties and the modest amounts involved in bank charges and Austraclear amounts.

Her Honour was persuaded, however,[23] that there is a small but appreciable risk that the defendant's assumption (that the existing fee structure of the NSW Trustee and Guardian will continue for 67 years) will produce an underestimate as to the true future cost of fund management.

The fact that the Trust Company Limited had been appointed in the Protective Division was relevant but not determinative of reasonableness, in Her Honour's opinion. There was unchallenged affidavit evidence from the plaintiff's mother of past difficulties in dealing with the NSW Trustee and Guardian. Her Honour commented that her decision not to use their services was, on that unchallenged evidence, entirely reasonable. Her Honour was satisfied, having regard to the orders made by White J but also on the strength of the evidence before her, that the Tutor's choice of a private manager was entirely reasonable.[24] Despite what has been said by Barwick CJ in *Arthur Robinson (Grafton) v Carter*,[25] to the effect that the plaintiff is entitled not to what is ideal but to what is reasonable to satisfy her requirements, she accepted that the plaintiff had satisfied her that in the particular circumstances of this case, her claim for the cost of fund management by the Trust Company Limited was reasonable and should be allowed.

The final issue for determination was what sum should be regarded as subject to management for the purposes of calculation. The defendant asked for the fund to be reduced by at least $200,000 for solicitor/client costs; at least $200,000 for past gratuitous services damages, which might be paid to the plaintiff's mother; an amount to represent the likely cost of house modification and installation of a swimming pool, being at least $250,000; and that there should be no fund management on fund management (a matter upon which Her Honour had previously ruled adversely to the defendant's argument).

Following the order of White J on 2 September 2011, the whole of the judgment must be paid to the Trust Company Limited as manager of the plaintiff's estate. Relying on what had been said by the Court of Appeal in *GIO v Rosniak*,[26] and *Tran v GIO*,[27] Her Honour said that the plaintiff's submission should be preferred; namely, that it was a matter of pure speculation whether or when any of the payments identified by the defendant would be made.[28] *Rosniak* provided commanding support for the view that the court should be slow to pre-empt the decisions of a trustee charged with the potential management of a large sum required to meet the needs of a severely disabled plaintiff over a lengthy period of time. Even in respect of the solicitor/client component of the plaintiff's costs, which is likely to be paid within the next one to two years, it is not possible to predict with any confidence whether that would carry the expenditure of the fund over the critical $500,000 point assumed in the actuarial calculations as being the drawdown in any event.

In those circumstances, Her Honour was not satisfied[29] that it was appropriate to deduct any sum from the verdict for the purpose of calculating future fund management costs.

These are important decisions for the calculation of fund management. In determining that the cost of fund management on fund management and fund management on income to the fund should be allowed, Her Honour has resolved (for the moment) longstanding issues. She rejected the proposition that a court was bound to award the cheapest alleged rates (those of the NSW Public Trustee) and said that, in the circumstances, the cost of a private trust company was appropriate. Finally, she held that s83 payments and advances aside, there was no basis for deducting any sum from the damages before the calculation of the cost of fund management is made, given the uncertainties as to when and in what circumstances any payments out would be made. The defendant/third party insurer has given notice of an appeal from all aspects of Her Honour's determinations. ■

Notes: **1** *Gray v Richards* [2011] NSWSC 877 (McCallum J). **2** *GIO of NSW v Rosniak* (1992) 27 NSWLR 665 (NSW CA). **3** *Bacha v Pettersen* (unreported NSWSC 20 September 1994). **4** *Buckman v M and K Napier Constructions Pty Ltd* [2005] NSWSC 546. **5** *Haywood v Collaroy Services Beach Club Ltd* [2006] NSWSC 566 at [8]. **6** *Lewis v Bundrock* [2009] 1 Qd R 524 at [16]. **7** *Nominal Defendant v Gardikiotis* [1996] HCA 53; (1996) 186 CLR 49. **8** *Willett v Futcher* [2005] HCA 47; (2005) 221 CLR 627. **9** *Gray v Rchards*, see note 1 above, at [35]. **10** *Todorovic v Waller* (1981) 150 CLR 402 at 412.3. **11** *Ibid*, at [48]. **12** *Ibid*, at [55]. **13** *Rottenbury by his tutor Wren v Rottenbury* [2007] NSWSC 215. **14** *Gray v Richards*, see note 1 above, at [59]. **15** *Ibid*, at [62]. **16** *Ibid*, at [[74]. **17** *Gray v Richards (No. 2)* [2011] NSWSC 1502 (McCallum J). **18** See note 10 above, at p409. **19** *Ibid*, at pp36-8. **20** *Gray v Richards (No. 2)*, see note 17 above, at [52-3]. **21** *Willett v Futcher*, see note 8 above, at [51]. **22** *Gray v* Richards, see note 9 above, at [56]. **23** *Ibid*, at [70]. **24** *Ibid*, at [82]. **25** *Arthur Robinson (Grafton) v Carter* (1968) 122 CLR 649. **26** *GIO v Rosniak*, see note 2 above. **27** *Tran v GIO* (Carruthers J unreported NSWSC 9, August 1994) at pp2-4. **28** *Gray v Richards (No. 2)*, see note 17 above, at [95-7]. **29** *Ibid*, at [98].

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