SUPREME COURT OF QUEENSLAND

CITATION:	*Nicotra v State of Queensland* [2017] QSC 303
PARTIES:	**PAIGE MARIE NICOTRA (BY HER LITIGATION GUARDIAN LINDA HARTMAN)** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	SC No 3791 of 2017
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
ORDERS:	21 July 2017 and 5 December 2017
DELIVERED ON:	12 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2017, 21 July 2017, 5 December 2017 Supplementary submissions of the applicant received on 19 May 2017; supplementary submissions of the respondent received on 23 May 2017; joint submissions on final order received on 27 July 2017
JUDGE:	Burns J
ORDER:	**THE ORDERS OF THE COURT ARE THAT:**

1. Leave is granted to the applicant to rely on the affidavits of Margaret Cecilia Brain and Vicki Debra Mounts filed on 19 May 2017;

2. The interim orders made on 21 July 2017 are:

(a) varied by deleting "s 59(1)" where it appears in paragraph 1 of those orders and inserting in lieu thereof "s 59(2)";

(b) otherwise, pronounced as final orders.

3. Within sixty (60) days of the making of this order, the administrator shall give to the Queensland Civil and Administrative Tribunal a financial management plan within the meaning of s 20 of the *Guardianship and Administration Act* 2000 (Qld) for approval.

4. Within fourteen (14) days of the making of this order, the administrator shall pay to Linda Hartman (from the moneys received pursuant to paragraph 6(b) of the orders made on 21 July 2017):

(a) $80,000 for out of pocket expenses incurred on behalf of the applicant; and

(b) $220,000 for past care and assistance provided to the applicant.

5. The respondent shall pay to the administrator the standard costs referred to in paragraph 1(b) of the orders made on 21 July 2017 within twenty-eight (28) days of their assessment or prior agreement between the respondent and the administrator as to their amount.

6. The applicant's solicitors shall cause the costs of and incidental to the applicant's claim, including the costs of and incidental to this application, to be assessed on the indemnity basis by a costs assessor, being a person appointed as such pursuant to r 743L of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") with such assessment to be undertaken in accordance with the requirements of paragraph 7 ("the indemnity costs");

7. When assessing the indemnity costs, the cost assessor may only allow costs that have been reasonably incurred and are of a reasonable amount, having regard to:

(a) the scale of fees prescribed in Schedule 1 of the UCPR;

(b) the costs agreement entered into between the litigation guardian for the applicant and the applicant's solicitors in February 2014;

(c) the charges ordinarily payable by a client to a solicitor for the work;

(d) the complexity or otherwise of the claim;

(e) whether or not it was reasonable to carry out the work to which the costs relate;

(f) whether or not the work to which the costs relate was carried out in a reasonable way; and

(g) any other matter the costs assessor considers relevant.

8. When the indemnity costs have been assessed by the costs assessor, the applicant's solicitors shall serve a

copy of the assessment on the administrator.

9. Following receipt of the assessment of the indemnity costs, the administrator shall give due consideration to it and, within twenty-one (21) days of its receipt, decide whether to:

(a) pay the indemnity costs to the applicant's solicitors from the moneys received pursuant to paragraph 6(b) of the orders made on 21 July 2017; or

(b) pay such lesser sum as it may agree with the applicant's solicitors; or

(c) apply to the court for further directions on the giving of five (5) days' notice to the applicant's solicitors.

10. When giving due consideration to the assessment in accordance with paragraph 9, the administrator shall have regard to:

(a) whether the indemnity costs have been reasonably incurred and are of a reasonable amount having regard to the matters specified in paragraph 7;

(b) whether a different costs assessor should be commissioned to review the indemnity costs so as to determine whether they have been reasonably incurred and are of a reasonable amount;

(c) whether a proceeding should be commenced to dispute the whole or any part of the indemnity costs pursuant to Part 3.4 of the *Legal Profession Act* 2007(Qld).

11. Prior to any payment being made under paragraphs 9(a) or 9(b), the administrator shall file an affidavit by its proper officer:

(a) exhibiting a copy of the assessment of the indemnity costs undertaken in accordance with the requirements of paragraphs 6 and 7;

(b) exhibiting a copy of any review assessment commissioned by the administrator;

(c) deposing to the steps taken to give due consideration to the assessment of the indemnity costs in accordance with paragraphs 9 and 10, including (if applicable) the commissioning of a review assessment by

another assessor; and

(d) deposing that the indemnity costs, or the lesser amount the administrator proposes to pay to the applicant's solicitors, have, in the opinion of the deponent, been reasonably incurred and are of a reasonable amount having regard to the matters specified in paragraph 7.

12. When an affidavit is filed on behalf of the administrator pursuant to paragraph 11, the Registrar of the court (or other officer of the court whose duties include the assessment of costs) shall, within fourteen (14) days of the date of filing, consider whether:

(a) the administrator has given due consideration to the assessment of the indemnity costs in accordance with paragraphs 9 and 10; and

(b) the indemnity costs, or the lesser amount the administrator proposes to pay to the applicant's solicitors, have been reasonably incurred and are of a reasonable amount having regard to the matters specified in paragraph 7.

13. If satisfied about both of the matters for consideration specified in paragraph 12, the Registrar of the court (or other officer of the court whose duties include the assessment of costs) shall notify the administrator in writing, in which event, the indemnity costs, or the lesser amount the administrator proposes to pay to the applicant's solicitors, shall forthwith be paid to the applicant's solicitors.

14. If not satisfied about one or both of the matters for consideration specified in paragraph 12, the Registrar of the court (or other officer of the court whose duties include the assessment of costs) shall refer the matter to the court for further directions on the giving of five (5) days' notice in writing to the parties, the administrator and the applicant's solicitors, in which event, no part of the indemnity costs, or the lesser amount the administrator proposes to pay to the applicant's solicitors, may be paid to the applicant's solicitors until further order.

15. The Registrar of the court (or other officer of the court whose duties include the assessment of costs) shall:

(a) provide a copy of this order to the Principal

Registrar of the Queensland Civil and Administrative Tribunal forthwith; and

(b) place the opinion of counsel and the affidavits read on the application in a sealed envelope marked "Not to be opened without an order of the court".

16. The sealed envelope described in paragraph 15(b) must not be opened without an order of the court.

17. Each of the parties, the administrator and the applicant's solicitors have liberty to apply in respect of these orders on the giving of five (5) days' notice to the others.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JUDGMENT AND ORDERS – ORDER SANCTIONING COMPROMISE – where the applicant was a person under a legal disability in consequence of severe brain damage allegedly caused by deficiencies in treatment provided to her during the course of two hospital admissions – where the applicant's mother retained solicitors to investigate the treatment provided to the applicant when in hospital – where the applicant's mother, as litigation guardian for the applicant, subsequently entered into a costs agreement with the applicant's solicitors – where the applicant's claim for damages for personal injuries against the respondent was settled, subject to sanction, at a compulsory conference held pursuant to s 36 of the *Personal Injuries Proceedings Act* 2002 (Qld) – where the compromise was reached before any proceeding was commenced in the court to prosecute the applicant's claim – where the applicant filed an originating application for sanction of the compromise pursuant to s 59 of the *Public Trustee Act* 1978 (Qld) – where the compromise provided for the payment by the respondent of the applicant's standard costs to be assessed or agreed – where it was proposed that the difference between the standard costs paid by the respondent and the indemnity costs incurred on behalf of the applicant be paid from the compromise sum – where the difference between the standard costs and the indemnity costs was estimated to be $254,090.84 – whether it is beyond the purview of the court on the hearing of a sanction application to inquire into the reasonableness of the costs and outlays – whether it is necessary for the court to supervise the final assessment of the indemnity costs – whether the compromise of the applicant's claim is reasonable and for the benefit of the applicant

Guardianship and Administration Act 2000 (Qld), s 10, s 12, s 20, s 33(2), s 34, s 35, s 37, s 49, s 239, s 240, s 245, s

245(2), s 245(3)
Justice and Other Legislation Amendment Act 2008 (Qld), s 118
Legal Profession Act 2007 (Qld), S 341(1), s 420(1)(b)
Personal Injuries Proceedings Act 2002 (Qld), s 36, s 37, s 37(1), s 37(2)(e), s 37(4)
Public Trustee Act 1978 (Qld), s 59, s 59(1), s 59(1A), s 59(2), s 65(1), s 67
Uniform Civil Procedure Rules 1999 (Qld), r 93(1), r 93(3), r 95, r 98, r 98(2), r 667, r 703, r 703(3), r 704

Amos v Monsour Legal Costs Pty Ltd [2008] 1 Qd R 304; [2007] QCA 235, cited
Australian Securities and Investments Commission v Richards [2013] FCAFC 89, cited
Benfield v Australian Railways Commission (1992) 8 WAR 285, cited
Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398; [1995] HCA 9, cited
Chan v Falls Creek Alpine Resort Management Board [2014] VSC 314, cited
Council of Queensland Law Society v Roche [2004] 2 Qd R 574; [2003] QCA 469, cited
Dickson v Australian Associated Motor Insurers Limited [2011] 1 Qd R 214; [2010] QSC 69, followed
Downie v Spiral Foods Pty Ltd & Ors [2015] VSC 190, cited
Foran v Jalbao Pty Ltd [2001] QSC 42, cited
Fowler v Gray [1982] Qd R 334, followed
Gregory v Nominal Defendant & Anor [2006] 1 Qd R 509; [2005] QSC 308, cited
Grevett v McIntyre [2002] QSC 106, cited
Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited [2008] 2 Qd R 323; [2008] QSC 49, discussed
Huet v Irvine [2003] QSC 387, cited
Kelly v Willmott Forests Ltd (in liquidation) (No 4) (2016) 335 ALR 439; [2016] FCA 323, cited
Keryn Mayer as litigation guardian for Ben David McKinlay v Mahoney & Anor [2011] QSC 279, cited
Law Society of New South Wales v Foreman (1994) 34 NSWLR 408, cited
Matthews v AusNet Electricity Services Pty Ltd & Ors [2014] VSC 663, cited
Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited [2017] FCAFC 98, cited
Modtech Engineering Pty Ltd v GPT Management Holdings Ltd [2013] FCA 626, cited
Morris v Clair [2004] QSC 127, cited
Murray v Kirkpatrick (1940) 57 WN (NSW) 162, cited
Oasis Fund Management Limited and Royal Bank of Scotland NV & Ors [2012] NSWSC 532, cited

P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4) [2010] FCA 1029, cited
Re Barbour's Settlement [1974] 1 WLR 1198, cited
Re Tracey [2017] 2 Qd R 35; [2016] QCA 194, cited
Redfern v Mineral Engineers Pty Ltd [1987] VR 518, cited
Scaffidi v Perpetual Trustees Victoria Ltd (2011) 42 WAR 59; [2011] WASCA 159, cited
Secretary of Department of Health & Community Services (NT) v JWB & SMB (1992) 175 CLR 218; [1992] HCA 15, cited
Stephenson v Geiss [1998] 1 Qd R 542, discussed
Sztockman v Taylor [1979] VR 572, cited
Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd [2002] VSC 457, cited
Welland v Payne [2000] QSC 431, cited
Woolf v Snipe (1933) 48 CLR 677; [1933] HCA 5, cited

COUNSEL: G R Mullins for the applicant
G W Diehm QC for the respondent

SOLICITORS: Maurice Blackburn Lawyers for the applicant
Minter Ellison for the respondent

[1] This application for the sanction of a compromise reached in relation to a claim for damages for personal injuries and consequential loss came on for hearing in the applications jurisdiction on 12 May 2017. It was brought pursuant to s 59 of the *Public Trustee Act* 1978 (Qld).

[2] The compromise was in terms requiring the respondent to pay $6 million to the applicant, being damages of $5.4 million and the balance for management fees. It also provided for the payment of the applicant's standard costs to be assessed or agreed.

[3] Being satisfied that the compromise was reasonable and for the benefit of the applicant, interim orders were made on 21 July 2017 sanctioning the compromise and appointing Perpetual Trustee Company Limited as administrator for the applicant to receive and manage the compromise sum after payment of various statutory charges. That appointment was made pursuant to ss 12 and 245 of the *Guardianship and Administration Act* 2000 (Qld). The effect of the interim orders was to require the compromise sum and the standard costs to be paid by the respondent to the administrator, to authorise the administrator to pay the statutory charges and to invest the balance pending further order.[1]

[4] Among the orders proposed by the applicant's counsel on the hearing of the application on 12 May 2017 were orders requiring the applicant's costs to be assessed on the indemnity basis and then paid by the administrator to the applicant's solicitors from the moneys received from the respondent. Because any differential between the amount assessed for indemnity costs and the amount paid by the respondent for standard costs

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1 The full terms of the interim orders made on 21 July 2017 appear in the Schedule to this judgment.

would have a reducing effect on the net amount available to the applicant, enquiry was made of the applicant's counsel as to the amount likely to be assessed for indemnity costs. When informed that the amount was "about $500,000" and that "the gap is about $200,000",[2] an affidavit deposing to those matters was requested and the application stood down in the list.

[5] The application came back on for hearing later that day after an affidavit was affirmed by Mr Ryan, a costs assessor. Exhibited to that affidavit were costs assessments he prepared and then provided to the applicant's solicitors on 27 March 2017 along with a copy of a costs agreement entered into between the solicitors and the applicant's mother, Linda Hartman, as litigation guardian for the applicant. Indemnity costs were assessed by Mr Ryan in the amount of $546,779.01 and standard costs came to $292,688.17; a difference of $254,090.84. Notwithstanding the provision of Mr Ryan's affidavit, the applicant's counsel then advanced this contention:

> "My primary submission is that the quantification of costs, both standard and indemnity, is not a factor the court need concern itself with beyond ensuring that, in the orders, the ordinary statutory protections are in place to ensure that costs are reasonable."[3]

[6] In the exchange that followed, I expressed the view that the court could hardly decide whether a compromise was reasonable and for the benefit of the applicant unless the extent to which the compromise sum would be reduced (by payment of the difference between indemnity and standard costs) was known, such information being necessary to determine the net sum likely to comprise the fund to be administered for the applicant's benefit. I suggested that, even if the precise figure could not be ascertained by the time of the sanction application, a reliable estimate of the amount of money that will be "left for the plaintiff"[4] should still be placed before the court.

[7] The parties were granted leave to put in supplementary written submissions regarding the contention advanced by the applicant's counsel. They were also asked to address whether it is beyond the purview of the court on the hearing of a sanction application to inquire into the reasonableness of the costs and outlays charged, or proposed to be charged, in the matter and how the interests of the applicant, being a person under a legal incapacity, may be protected against the charging of costs and outlays that are unreasonable or excessive or both.

[8] Aside from the making of final orders sanctioning the compromise and appointing the administrator, these are the issues about which this judgment is principally concerned.

The claim

[9] The applicant, Paige Nicotra, was about 15 months old when she sustained severe brain damage in 1998 which was allegedly caused by deficiencies in the treatment provided to her during the course of two separate hospital admissions in June and July of that year.

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2 Transcript, 1-3.
3 Ibid, 1-5.
4 Ibid, 1-7.

She is now 20 years of age.

[10] In consequence of the damage to her brain, the applicant has been left profoundly disabled. She suffers from a range of physical and cognitive deficits with only a limited capacity to communicate. She is distinctly incapable of managing her own affairs.

[11] In early 2014, Ms Hartman instructed Maurice Blackburn Lawyers to act on behalf of the applicant and, as a component of that retainer, to investigate the treatment provided to her when in hospital. That investigation subsequently occurred and, over time, expert medical evidence was assembled regarding both liability and quantum.

[12] At some point not revealed in the material before the court, the claims procedures under Chapter 2 of the *Personal Injuries Proceedings Act* 2002 (Qld) were invoked, culminating in the holding of a compulsory conference on 12 April 2017 pursuant to s 36 of that Act. The conference took the form of a mediation, with the respondent appearing as the responsible entity in the event that negligence on the part of those who provided treatment to the applicant could be established. The applicant's claim was settled, subject to sanction, on the terms summarised above (at [2]). This compromise was reached before any proceeding was commenced in the court to prosecute the applicant's claim.

A person under a legal disability

[13] Given the devastating effects of the damage to her brain, there was never any question that the applicant is a "person under a legal disability" as that expression is defined in s 59(1A) of the *Public Trustee Act*;[5] although now an adult, she has "impaired capacity for a matter" within the meaning of the *Guardianship and Administration Act*.[6] However, it should not be thought an impaired capacity for any "matter" under that Act will necessarily mean that someone is a "person under a legal disability" within the meaning of s 59(1A). Rather, the sanction of the court (or the public trustee) of a compromise will be required under s 59 only where the person has impaired capacity for a particular type of "legal matter" under the Act.

[14] To explain, there are four categories of "matters" under the *Guardianship and Administration Act*: a "personal matter"; a "special personal matter"; a "special health matter"; and a "financial matter".[7] Each is defined in Schedule 2 of the Act. A "financial matter"[8] includes a "legal matter relating to the [person's] financial or

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5 Section 59(1A) provides that "person under a legal disability means (a) a child or (b) a person with impaired capacity for a matter within the meaning of the *Guardianship and Administration Act*". The full text of s 59 is set out below at [18].

6 The regime under the *Guardian and Administration Act* and the interplay between that Act, the *Public Trustee Act* and the *parens patriae* jurisdiction of this court were considered by Mullins J in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] 2 Qd R 323, [21]-[49], [60]-[65]. And see *Gregory v Nominal Defendant & Anor* [2006] 1 Qd R 509, [9]-[11] per Wilson J; *Hewitt v Bayntun & Allianz Australia Insurance Ltd* [2015] QSC 250, [14]-[18] per McMeekin J; *Re Tracey* [2017] 2 Qd R 35, [19]-[27], [45], [53], [54] (per Fraser JA with whom Holmes CJ agreed).

7 *Guardianship and Administration Act*, s 10.

8 Schedule 2, s 1.

property matters".[9] The expression, "legal matter", includes "a matter relating to … bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding".[10] It is the applicant's impaired capacity for that particular type of legal matter which engages s 59(1A).[11]

[15] So far as a person's capacity is concerned, "capacity, for a person for a matter" means "the person is capable of: (a) understanding the nature and effect of decisions about the matter; and (b) freely and voluntarily making decisions about the matter; and (c) communicating the decisions in some way".[12] Thus, where the person is incapable of understanding the nature and effect of decisions about "bringing or defending a proceeding, including settling a claim" or freely and voluntarily making, or communicating in some way, those decisions, the applicant will be a "person under a legal disability" within the meaning of s 59(1A) of the *Public Trustee Act*. That is the case with the applicant here; on the material before the court, she is incapable of doing any of those things.

[16] That the applicant is a person under a legal disability in the sense just discussed has a number of implications.[13] First, such a person may start or defend a proceeding only by the person's litigation guardian: r 93(1) of the *Uniform Civil Procedure Rules* 1999 (Qld).[14] Second, by r 98 UCPR, the compromise of a proceeding to which such a person

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9 Schedule 2, s 1(o).

10 Schedule 2, s 18(d).

11 See *Hewitt v Bayntun & Allianz Australia Insurance Ltd* (Supra), [18] per McMeekin J, citing *Welland v Payne* [2000] QSC 431; *Foran v Jalbao Pty Limited* [2001] QSC 42; *Morris v Clair* [2004] QSC 127 and *Gregory v Nominal Defendant* (Supra), 512. In *Gregory*, Wilson J said (at [14]):

> "The definition in s 59(1A) is potentially very broad. It is not expressed in terms of a type or category of matter within the meaning of the *Guardianship and Administration Act*, and so unless read down in some way would include, for example, "special personal matters" such as exercising the right to vote in a Commonwealth, State or local government election and "special health matters" such as participation in special medical research or experimental health care. That cannot have been the intention of the Legislature. In pt 1 of sch. 2 there is a lengthy but non-exhaustive list of financial matters: it includes matters such as carrying on a trade or business and real estate transactions. I do not think it could have been the Legislature's intention that incapacity for any "financial matter" be a sufficient basis for requiring the Court's sanction of a compromise."

12 Schedule 4, Dictionary.

13 The focus here is of course on an adult under a legal disability. Where the claimant is under 18 years of age, the court may make a protection order under s 67 of the *Public Trustee Act* if satisfied that the claimant is: "(a) by reason of age, disease, illness, or physical or mental infirmity or of the person's taking or using in excess alcoholic liquors, or any intoxicating, stimulating, narcotic, sedative or other drug is, either continuously or intermittently (i) unable, wholly or partially, to manage the person's affairs; or (ii) subject to, or liable to be subjected to, undue influence in respect of the person's estate, or any part thereof, or the disposition thereof; or (b) is otherwise in a position which in the opinion of the court renders it necessary in the interest of that person or of those dependent upon the person that the person's property should be protected": s 65(1). See *Welland v Payne* (Supra), [7]; *Re Tracey* (Supra), [21].

14 Unless appointed by the court, a person becomes a litigation guardian of a person under a legal incapacity for the purposes of a proceeding by "filing in the registry the person's written consent to be litigation guardian of the party in the proceeding": r 95 UCPR. A litigation guardian who is not a solicitor may only act by a solicitor: r 93(3) UCPR. Section 239 of the *Guardianship and Administration Act* makes it clear that nothing in that Act affects the rules of court "about a litigation guardian for a person under a legal incapacity".

is a party will be "ineffective unless it is approved by the court or the public trustee acting under" s 59 of the *Public Trustee Act*. The effect of s 59 is that, where there is a proceeding on foot in which damages are claimed on behalf of such a person, no compromise can be valid without the sanction of a court or the public trustee (s 59(1)) and, similarly, a claim for damages on behalf of such a person "out of court [and] before action [is] brought" may only be compromised with the sanction of the court or the public trustee (s 59(2)). Third, if the court sanctions a settlement involving such a person, the court may exercise all of the powers of the tribunal under Chapter 3 of the *Guardianship and Administration Act*, which provisions then apply "to the court in its exercise of these powers as if the court were the tribunal".[15] Such powers include the power to appoint an administrator under that Act[16] and, when that happens, the administrator is vested with the authority to do anything in relation to a financial matter that the person under a disability could have done if the person had capacity.[17] The administrator is also fixed with the responsibility for discharging various obligations including the observance of a number of fundamental human rights in relation to the person under a disability,[18] the provision of a financial management plan to the tribunal,[19] the exercise of powers honestly and with reasonable diligence,[20] the avoidance of conflicts[21] and the keeping of records.[22]

The sanction application

[17] On 13 April 2017, the originating application to sanction the compromise was filed on behalf of Ms Hartman as litigation guardian for the applicant. The particular orders sought were an order sanctioning the compromise pursuant to s 59(1) of the *Public Trustee Act* and "such further consequential or ancillary orders as the court thinks appropriate".

[18] Section 59 is in these terms:

> "**59 Compromise of actions by or on behalf of persons under a legal disability claiming moneys or damages valid only with sanction of court or public trustee**
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> (1A) In this section—
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> **appropriate person**, for a person under a legal disability, means—
>
> (a) an administrator for the person under the *Guardianship and Administration Act* 2000; or

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15 Section 245(2) and (3). As to which, see *Re Tracey* (Supra), [45]. It should also be noted that the *Guardianship and Administration Act* does not affect the court's inherent jurisdiction, including its *parens patriae* jurisdiction: s 240.

16 Section 12.

17 Section 33(2). For this reason, as Mullins J observed in *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* (Supra), where an administrator is appointed, it is, strictly speaking, unnecessary for the court to separately order that the administrator "take possession of and manage all financial matters of [the claimant] relating to the settlement sum": at [48].

18 Section 34 and Schedule 1, Part 1, ss 1-11.

19 Section 20.

20 Section 35.

21 Section 37.

22 Section 49.

(b) if the person does not have an administrator—an attorney for a financial matter for the person under an enduring power of attorney under the *Powers of Attorney Act* 1998; or

(c) if the person does not have an administrator or an attorney mentioned in paragraph (b)—the public trustee.

court means a court within whose jurisdiction an amount or damages are claimed by or for a person under a legal disability suing either alone or with others, and includes a judge or magistrate of the court.

person under a legal disability means—

(a) a child; or

(b) a person with impaired capacity for a matter within the meaning of the *Guardianship and Administration Act* 2000.

taxing officer of a court means an officer of the court whose duties include the taxation or other assessment of costs in the court.

(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.

(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 a court or the public 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.

(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.

(4) All money or damages paid to the public trustee under this section 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.

(4A) However, in addition to the public trustee's other powers as a trustee the public trustee shall have—

(a) power to discharge or reimburse any expenses reasonably incurred by or on behalf of the person under disability; and

(b) where the person under disability is not of full mental capacity—the

> powers that the public trustee would have under part 6 if the moneys or damages were an estate under management and the person under a disability were an incapacitated person.
>
> (5) Nothing in this section shall prejudice the lien of a solicitor for costs.
>
> (6) The costs of the plaintiff or, if more than 1, of all the plaintiffs in any such cause or matter or incident to the claims therein or consequent thereon shall be taxed by the taxing officer on the request, in the form approved by the public trustee, of the public trustee or of the plaintiff or the plaintiff's next friend, on the standard basis and indemnity basis, and no authority other than the provisions of this section shall be necessary to require the taxing officer to carry out such taxation.
>
> (6A) The taxing officer shall certify the respective amounts of the costs calculated on the standard basis and indemnity basis, and the difference (if any) and the proportions of such difference (if any) payable respectively by or out of the moneys of any party who is a person under a legal disability and by any other party to the cause or matter and no costs other than those so certified shall be payable from such moneys.
>
> (6B) However, the public trustee may, without requiring any such taxation, in any case in which the public trustee considers it reasonable to do so, agree to the payment to the solicitor for the plaintiff, or to any person who has incurred costs on behalf of the plaintiff, or to whom costs are payable on the part of the plaintiff of such sum or sums as appears to the public trustee to be reasonable.
>
> (7) The result of any such taxation shall be notified to the public trustee by the taxing officer.
>
> (8) The public trustee in any case in which the public trustee is trustee under this section or any person on behalf of whom the public trustee is holding moneys hereunder may from time to time apply to the court for directions as to the trust or its administration, or to vary directions which have already been given in regard thereto, or to determine any question arising therein, and such directions or determination may be given accordingly."

[19] Although the sanction was sought pursuant to s 59(1) of the *Public Trustee Act*, it has been held that s 59(1) 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".[23] In other words, s 59(1) will only apply where there is a proceeding on foot whereas s 59(2) applies to claims settled out of court before a proceeding is commenced.[24] As such, because the compromise was reached in this case before a proceeding was commenced, the sanction application was in truth one pursuant to s 59(2). For similar reasoning, r 98 UCPR – applying as it does to "a settlement or compromise of a proceeding in which a party is a person under a legal incapacity" – and Practice Direction 9 of 2007 – concerned as it is with "proceedings for damages for personal injuries where the plaintiff is a person under a legal disability"– could not apply to this case.

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23 *Dickson v Australian Associated Motor Insurers Limited* [2011] 1 Qd R 214, [38] per Mullins J.

24 Prior to 25 November 2008, the compromise of claims settled out of court before a proceeding is commenced could only be sanctioned by the public trustee. However, with effect from that date, s 59(2) was amended to insert the words "a court or" after the words "sanction of": *Justice and Other Legislation Amendment Act* 2008 (Qld), s 118.

[20] Rule 98(2) UCPR is facilitative. It requires the litigation guardian to produce to the court an affidavit made by the applicant's solicitor stating why the settlement or compromise is in the applicant's best interests, a statement by the litigation guardian that instructions have been given for the settlement or compromise of the proceeding and any other material the court requires in order to consider whether the settlement or compromise should be approved. Similarly, Practice Direction 9 of 2007 further prescribes what should be provided to the court on an application for a sanction including, ordinarily, an opinion of counsel in relation to the compromise as well as a draft order. Pro forma drafts relating to an adult plaintiff and a child plaintiff are annexed to the Practice Direction.

[21] The applicant's legal representatives approached the preparation and presentation of their material as though r 98 UCPR and Practice Direction 9 of 2007 applied to this case. However, as Mullins J held in *Dickson v Australian Associated Motor Insurers Limited*,[25] r 98(2) merely sets out "the practice that had developed on an application for a sanction, without the benefit of such a rule".[26] In support of that observation, her Honour cited the summary of that practice contained in the judgment of Master Lee QC in *Fowler v Gray*,[27] part of which was as follows:

> "The next question concerns the material to be produced. The nature of the material to be placed before the Court when a sanction of a compromise of an infant's claim for damages is sought when the action comes before the Court was clearly laid down by W. B. Campbell J. in *Madden v. Hough* [1969] Q.W.N. 7. In my opinion, such considerations are equally applicable to all persons under a legal disability, and in respect of whom a sanction is sought. That term in s. 59 of the Act includes persons not of full age as well as those not of full mental capacity or having the status of an incapacitated person under the Act: *Karvelas v. Chikirou* (1976) 26 F.L.R. 381, at p. 382.
>
> In *Madden v. Hough* (supra) His Honour referred to the "long established practice" which should always be followed. There should be informed assent by the next friend or guardian by affidavit; and affidavit by the solicitor who, after considering all relevant aspects of the case and counsel's advices, is able to state that with respect to liability and quantum he believes the compromise to be beneficial for the person under a disability; counsel's opinion should be to the like effect. Facts and circumstances as to liability, if any, should be clearly stated: *Karvelas v. Chikirou* (supra) at p. 383; there should also be up-to-date medical and other relevant opinions; as to quantum, Cairns, *Australian Civil Procedure* (1981) at p. 389 states:
>
> > "Once the Court is satisfied that questions of liability have been properly disposed of, it turns its attention to quantum. The nature of the injury, and the loss and damage, both present and prospective, must be fully explained. From the information the Court must be able to assess whether the amount offered is adequate for recompense for the alleged loss and damage. Particular attention is given to settlements where there is a discrepancy between what is offered and the loss suffered. There are many perfectly adequate reasons for such a discrepancy. What must be explained to the Court is that reason. In addition, the Court must be able to measure the risk of proceeding against the certainty of accepting settlement. If the risk of proceeding

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25 (Supra).

26 At [41]. The same observation may also be made in relation to the Practice Direction.

27 [1982] Qd R 334, 349-352.

> out-weighs the apparent disadvantage of accepting what appears to be an inadequate offer, then acceptance of a compromise is a preferable course."
>
> It is appropriate for the parties to a compromise to take into account, interest which a Court might award under s. 72 of the *Common Law Practice Act* 1867–1978, if the action was tried and a judgment given. All heads of damages past and future should be properly investigated and considered. This of course includes past economic loss including, if applicable, medical and nursing care and the like, including any sums properly claimable under the principle in *Griffiths v. Kerkemeyer* (1976–7) 139 C.L.R. 161, as well as future economic loss, if any, pain, suffering and loss of amenities, and needs which would not otherwise have existed: *Teubner v. Humble* (1962–1963) 108 C.L.R. 491 at p. 505, which of course includes, if applicable, future nursing care, future hospitalisation and the like, as well as needs for his comfort and his wellbeing. In a particular case, unless it is readily apparent to the Court that proper consideration has been given to all likely heads of damage appropriate to the particular plaintiff, the Court is not in a position to say whether the settlement proposed is reasonable or not in the circumstances."[28]

[22] Master Lee QC went on to consider the manner of presentation of the material to the court and the desirability of placing before the court an opinion from the applicant's counsel, based on full instructions, regarding the compromise. The affidavit material and counsel's opinion should be withheld from the opposing party, along with "any detail of instructions, a disclosure of which to [that party], would in the event of the court not approving the compromise, be an embarrassment to the" applicant. All such material should therefore be placed in a sealed envelope at the conclusion of the hearing with a notation that it not be opened in the absence of an order of the court.[29]

[23] The practice just discussed is of course well-known and, as Master Lee QC held, "equally applicable to all persons under a legal disability"[30] who seek the sanction of the court, either pursuant to s 59 of the *Public Trustee Act* or in the exercise of the court's *parens patriae* jurisdiction. It therefore matters not that the applicant's legal representatives approached the preparation and presentation of the material as though r 98 UCPR and Practice Direction 9 of 2007 applied; the same approach is required in a case such as this where the claim was settled out of court before a proceeding was commenced.

[24] That made clear, it will not surprise that the draft order submitted for the consideration of the court on the hearing of the application was in terms substantially in accordance with the pro forma orders for an adult claimant annexed to Practice Direction 9 of 2007. In addition to orders seeking the approval of the compromise (including the component requiring the respondent to pay the applicant's standard costs), the appointment of the administrator and the payment of the statutory charges, orders were also sought for the payment of $300,000 to Ms Hartman, representing out-of-pocket expenses incurred on behalf of the applicant ($220,000) and past care and assistance ($80,000). There were then these proposed orders:

> "10. The applicant's costs of and incidental to this proceeding, including the costs

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28 *Fowler v Gray* (Supra), 349-350.
29 Ibid, 352.
30 Ibid, 349-350.

> of and incidental to this application, be assessed on the indemnity basis ("the indemnity costs").
>
> 11. The administrator pay the indemnity costs to the applicant's solicitors from the moneys received… within twenty-one (21) days of their assessment or prior agreement between the applicant's solicitors and the administrator as to their amount."

[25] As stated earlier (at [4]-[7]), after enquiry was made of the applicant's counsel as to the amount likely to be assessed for indemnity costs and the application was stood down, an affidavit affirmed by the costs assessor, Mr Ryan, was produced and revealed that he had assessed the applicant's standard and indemnity costs at the request of her solicitors, arriving at totals of $546,779.01 for indemnity costs and $292,688.17 for standard costs. Then, after the parties were granted leave to put in supplementary written submissions regarding the contention advanced by the applicant's counsel and extracted at [5] above, two further affidavits were advanced to the court including one affirmed by the applicant's solicitor, Margaret Brain.

[26] Taken together, the affidavits of Mr Ryan and Ms Brain establish that:

(a) Mr Ryan was requested by the applicant's solicitors to prepare "short form" cost assessments on 16 March 2017 and these were provided on 27 March 2017;

(b) To assess the costs, Mr Ryan was provided with a file consisting of 27 lever arch folders. Of these, five contained correspondence, 14 contained medical records and the balance contained material such as medical reports and research. From his review of the file, Mr Ryan considered this to be a "complex case both medically and legally";

(c) Mr Ryan assessed the "indemnity costs in accordance with the costs agreement" and expressed the opinion that, "taking into account the complexity of the matter and the volume of material, these costs are reasonable";

(d) The standard costs were assessed by Mr Ryan "in accordance with the Supreme Court Scale of Costs";

(e) The difference between the two assessments was, in Mr Ryan's opinion, "directly related to the difference [in] the hourly rate provided in the Supreme Court Scale being $298 per hour for a solicitor and $86.80 for a clerk whereas the costs agreement in this matter provides three hourly rates being $660 (Solicitor), $350 (lawyer/paralegal) and $150 (legal assistant) per hour where there is skill and legal knowledge";

(f) A short form assessment of the applicant's indemnity costs was needed by Ms Brain in order to comply with s 37 of the *Personal Injuries Proceedings Act*. That provision requires certain material to be given to the opposing party at least seven days before the holding of a compulsory conference: s 37(1). This includes a certificate of readiness that must, amongst other things, state in the case of any party who has legal representation that the "practitioner acting for the party has given the party a costs statement" containing details of the party's legal costs up to the completion of the compulsory conference along with an estimate of the party's likely costs if the claim proceeds to trial: ss 37(2)(e) and 37(4);

(g) Ms Brain deposed that a "number of items in the assessment" of indemnity costs

were only estimates and that, following sanction by the court of the settlement, "either an updated assessment is obtained or it is adjusted once final figures are known and a tax invoice is then issued to the administrator". Ms Brain also made the point that, following receipt of the tax invoice, it is open to the administrator to request an itemised bill in accordance with the provisions of the *Legal Profession Act* 2007 (Qld);

(h) The assessment of the applicant's standard costs was requested to allow for the possibility, not realised in this case, that "a figure for standard costs [could] be agreed with the respondent's lawyers at the compulsory conference";

(i) Ms Brain considered it difficult to state precisely how much the applicant will receive "in hand" if the compromise is sanctioned because that will depend on a number of variables including the amount of statutory refunds and the amount recovered from the respondent by way of standard costs.

[27] The costs agreement was executed by Ms Hartman on 17 February 2014 and by Maurice Blackburn the following day. It provides for time-costing in accordance with hourly rates, that is to say, it was agreed that professional fees would be charged "in six minute intervals or part thereof – with six minutes being the minimum interval recorded for professional services". The hourly rates are expressed in a way that is exclusive of GST. When GST is added, the agreed rates were $660 for a solicitor, $385 for a "trainee lawyer/paralegal/clerk" and $330 for a "legal assistant", with provision for those rates to be increased by 5% each year on the anniversary date of the execution of the agreement.

[28] As to the costs assessments, the following features should be highlighted:

(a) Although the total of the indemnity costs assessment was $546,779.01, that sum was comprised of professional fees of $450,274.41, $95,937.70 for outlays and $566.90 for sundries;

(b) The standard costs assessment was made up of $198,010.45 in professional fee, $91,969.22 in outlays and $2,708.50 in sundries, for a total of $292,688.17;

(c) Both include outlays that had not been incurred at the date of the assessments – counsel's fees for preparing for, and attending on, the compulsory conference in the estimated sum of $33,000 and the mediator's fee of $4,400, both amounts inclusive of GST;

(d) It was unclear from Mr Ryan's affidavit whether the hourly rates he deposed to taking from the costs agreement – "$660 (Solicitor), $350 (lawyer/paralegal) and $150 (legal assistant)" – were inclusive of GST, but his assessment of indemnity costs as well as the costs agreement make clear that only the first of those rates included GST. It is also apparent that the rate adopted by Mr Ryan for a "legal assistant" is half of the rate provided for under the costs agreement;

(e) Mr Ryan applied the annual increases provided for under the costs agreement to the hourly rates over the period covered by the assessment, that is to say, from 29 January 2014 to 27 March 2017. The increases to the hourly rates (all, inclusive of GST) were:

Year	Solicitor	Trainee Lawyer	Legal Assistant
2014	$660.00	$385.00	$165.00

2015	$693.00	$404.25	$173.25
2016	$727.65	$424.46	$181.91
2017	$764.03	$445.68	$191.01

(f) Mr Ryan's adoption of what he deposed to be the "hourly [rates] provided in the Supreme Court Scale being $298 per hour for a solicitor and $86.80 for a clerk" for the purposes of his standard costs assessment needs some explanation. The Scale of Costs under Schedule 1 UCPR does not provide for hourly rates but makes provision for some items to be charged on a "quarterly-hourly basis" or part thereof and, even then, not all items are allowable under the Scale on that basis. To arrive at a "per hour" rate, Mr Ryan seems to have converted the quarter-hour rate for "other attendances" by "a solicitor, involving skill or knowledge"[31] and an "employee";[32] $74.50 and $21.70 respectively with both amounts inclusive of GST. Otherwise, Mr Ryan appears to have assessed items that cannot be allowed on a time basis by reference to the item charges under the Scale;

(g) The hours in relation to which the professional fees for each assessment were calculated may be summarised as follows:

Year	Solicitor	Trainee Lawyer	Legal Assistant	Total
2014	136.25	32.75	7.80	176.80
2015	93.06	21.00	28.34	142.40
2016	279.39	45.66	60.40	385.45
2017	41.30	0.60	16.10	58.00
	550.00	**100.01**	**112.64**	**762.65**

(h) The professional fees included in the indemnity costs assessment may be broken down as follows:

Year	Solicitor	Trainee Lawyer	Legal Assistant	Total
2014	$89,923.00	$12,608.75	$1,287.00	$103,818.75
2015	$64,490.58	$8,489.31	$4,909.92	$77,889.81
2016	$203,298.56	$19,380.86	$10,987.32	$233,666.74
2017	$31,554.46	$267.41	$3,069.24	$34,897.11
	$389,266.60	**$40,746.33**	**$20,253.48**	**$450,266.41**

[29] As earlier mentioned, on 12 May 2017, the parties were granted leave to put in supplementary submissions, and that subsequently occurred. Then, on 21 July 2017, the application was brought back on at the instance of the parties for the making of interim orders to the effect earlier stated (at [3]). The interim orders were made because, after a review of the material filed in support of the application, it could be determined that the compromise was reasonable and for the benefit of the applicant regardless of whether or not the estimated difference between indemnity costs and standard costs was as high as

31 Item 16(a).
32 Item 16(b).

$254,090.84.

[30] At the hearing on 21 July 2017, counsel for the respective parties were asked to submit a form of order that would, by its terms, not only provide for the making of final orders but also ensure that the court could exercise an appropriate degree of supervision over the assessment of indemnity costs. A suggested form of order was subsequently received along with joint submissions from counsel for the parties.

[31] The suggested order took the form of a variation of the interim orders pursuant to r 667 UCPR together with a mechanism whereby the administrator would be obliged to give "due consideration" to the assessment of the indemnity costs in order to decide whether to pay the amount of those assessed costs, to pay a lesser sum agreed with the applicant's solicitors or to apply to the court for directions. The draft then provided for the filing of an affidavit by the administrator prior to making any payment in which, amongst other things, the steps taken by the administrator to decide whether any proposed payment was "in the interests of the applicant" would be outlined. It also provided for the Registrar to inform my associate of the filing of the affidavit.

[32] In the event, a different mechanism was in my opinion required to supervise the assessment and payment of the indemnity costs. Accordingly, so as to give the parties an opportunity to make submissions about this different form of order, a copy of it was forwarded to them in advance of the handing down of judgment on 5 December 2017. When the matter came on later that day, submissions were made by both parties regarding some of the terms. In the main, those submissions were focused on events that had occurred since the making of interim orders and the need to adapt the proposed orders to take account of those events. That necessitated changes to the orders that had been proposed as well as revision of the reasons to reflect those changes. Nonetheless, once the changes were made, the orders were pronounced and the parties advised that the reasons would be published when revised.

Discussion

[33] Before considering the particular issues that emerged on this application, it is useful to commence with an overview of the principles that guide the exercise of the court's discretion.

Applicable principles

[34] On the hearing of an application for the sanction of a compromise pursuant to s 59 of the *Public Trustee Act*, the central question will always be whether, in all of the circumstances of the case, the compromise is reasonable and for the benefit of the person under the legal disability.[33] But, as Mullins J observed in *Dickson v Australian Associated Motor Insurers Ltd*,[34] provisions such as s 59 fall to be considered against the background of the court's *parens patriae* jurisdiction.[35] That aspect of the inherent

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33 *Fowler v Gray* (Supra), 349; *Stephenson v Geiss* [1998] 1 Qd R 542, 553.

34 (Supra).

35 *Dickson v Australian Associated Motor Insurers Ltd* (Supra), [13]. Her Honour then proceeded to comprehensively recount the history of s 59 and its relationship to the *parens patriae* jurisdiction: [13] –

jurisdiction of the court has as its object the protection of those who cannot look after themselves,[36] and a proper appreciation of that object helps to inform how the discretion conferred on the court by s 59 is to be exercised.

[35] In *Fowler v Gray*,[37] Master Lee QC explained:

> "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 KB 685 at p. 688.'
>
> 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."[38]

[36] As to the circumstances to be considered by the court, some 15 years or so after *Fowler v Gray* was decided, Lee J (as Master Lee QC had by then become) said this in *Stephenson v Geiss*:[39]

> "In considering the matter, I must take into account that if the settlement is not sanctioned and if the matter went to trial, there are normal risks associated with the litigation. I must consider the benefit to the plaintiff of sanctioning the compromise on the one hand as compared to the risk on the other that he might obtain more on a trial. I must also consider the risk that he may not achieve as much as the compromise offered. The relevant test is well known: *Fowler v. Gray*. In the *Supreme Court Practice U.K.* 1985, para. 80/10-11/5 the following appears:
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> > 'In considering whether to approve a settlement, the question before the court is, not what amount of damages should be or would have been awarded to the plaintiff on the trial of the action, but whether the settlement itself is a reasonable one, and is for the benefit of the infant, having regard to all of the circumstances of the case, including the risks of litigation, the desire of the parties to settle, and the disinclination of the plaintiff to go to trial. If Counsel has advised on the reasonableness or otherwise of the settlement, his opinion should

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[28].

36 *Secretary of Department of Health & Community Services (NT) v JWB & SMB* (1992) 175 CLR 218, 258-259.

37 (Supra).

38 *Fowler v Gray* (Supra), 349.

39 (Supra).

> be placed before the Master, who must, however, form his judgment whether to sanction the settlement or not.'"[40]

[37] His Honour went on to emphasise the "high duty" that is "imposed on the profession to give a person under a disability and his next friend advice which is impartial and which must not in any way conflict with any personal interest."[41] In that regard, his Honour set out the following statement by Megarry J in *Re Barbour's Settlement Trust*:[42]

> "Second, there is the important matter of the minors' benefit. When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final form and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."[43]

[38] The considerations to which Lee J referred should not be regarded as exhaustive but, clearly, the prospect that the claimant may do better at trial is to be balanced against the risk that he or she may do worse. As his Honour recognised, in addition to the possible impact of any liability risk, there will be an accompanying risk if the case proceeds to trial that the award of damages may not be as fulsome as the claimant's lawyers hope. In these respects, it is important to remember that the material before the court is untested and, so far as any forecast as to the claimant's prospects of success or the likely quantum of damages are concerned, the views contained in the confidential advice from the claimant's counsel are necessarily *ex parte* expressions of opinion. The undoubted benefit for the claimant in the finality that acceptance of the compromise will bring as opposed to the uncertainty proceeding to trial may entail should also be acknowledged. Not only will the usual risks associated with going off to trial be removed, but so too will the risk that, on any appeal, the result achieved at trial is upset. The sanctioning of the compromise should also result in a significant saving in legal costs and outlays, and that will be especially so if (as here) the compromise is reached before any proceeding is commenced in the court. These are just some of the considerations that might impact, one way or the other, on the court's assessment of the reasonableness of the

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40 *Stephenson v Geiss* (Supra), 553.
41 Ibid, 554.
42 [1974] 1 WLR 1198.
43 Ibid, 1201.

compromise and the extent to which it is of benefit to the claimant.

The relevance of the costs differential

[39] None of the principles just discussed are controversial; they have been applied before in many cases. However, the point of contention in this case is whether the court on the hearing of a sanction application should consider the extent to which the amount available to the applicant will be reduced by payment of the difference between indemnity costs and standard costs and, if so, what can be done to protect the applicant from the charging of excessive costs and outlays.

[40] At stated at the outset (at [5]), the applicant's counsel initially advanced the contention that this was "not a factor the court need concern itself with beyond ensuring that, in the orders, the ordinary statutory protections are in place". However, in supplementary submissions, he conceded that the amount the applicant's estate "will receive under the compromise, net of all costs and outlays, is a factor the court may take into account in determining whether the compromise is in the 'interests' of the person under the disability". As against that, senior counsel for the respondent submitted that this concession should not be accepted because:

> "No authority in support of the submission made [by counsel for the applicant] that the amount net of costs to be received is relevant has been cited. The submission is inconsistent with the principles and the application of them in decided cases cited herein."

[41] The respondent's argument proceeded on the footing that the "sole enquiry by the court" on a sanction application pursuant to s 59 of the *Public Trustee Act* was whether the settlement was reasonable and for the benefit of the person under the disability. It was submitted that the amount the claimant will receive by way of compromise, net of all costs and outlays, would "not ordinarily be regarded as relevant to that question" and that, if the "claim was resolved by a judgment following a trial, such questions would not be engaged". Then, this submission was made:

> "What sums stand to be deducted from the plaintiff's award, including in particular with respect to legal costs, has no bearing upon the question as to whether or not the proposed settlement itself is in the plaintiff's interest. That question has to be assessed by taking into account the plaintiff's prospects of success on questions of breach of duty, causation and quantification of damages flowing from causative breach. The impost of costs gaps does not bear on the value or merits of the claim and would not be improved by protracting the litigation." [Underlining in original]

[42] Support for these submissions was said to be provided by Practice Direction 9 of 2007 and, in particular, the terms of the accompanying pro forma orders, providing as they do for the costs to be assessed after sanction. The respondent did, however, submit that the court "would, of course, be concerned to take any necessary or appropriate steps to protect the [applicant] if incidentally there emerged some concern that the [applicant] was to be improperly disadvantaged by the costs gap" but, it was contended, that would be something done in the exercise of the court's *parens patriae* jurisdiction rather than pursuant to the discretion conferred by s 59.

[43] The respondent's submissions involve several misconceptions.

[44] *First*, the submissions ignore the supervisory jurisdiction over legal practitioners which the court may exercise in any appropriate case to "regulate the charges made for work done by [practitioners] in that capacity, and to prevent exorbitant demands".[44] Leaving to one side the disciplinary consequences that might very well flow from the charging of "excessive legal costs",[45] the rationale for the jurisdiction was explained by Tadgell J in *Redfern v Mineral Engineers Pty Ltd*:[46]

> "The court's surveillance over costs as between solicitor and client is assumed with a view to preventing any unfair advantage by solicitors in their charges to their clients. It stems, it seems, from the notion that ordinarily a solicitor is presumed to be in a position of dominance in relation to [a] client as a result of [their] presumed knowledge of the law and of what may and may not be properly charged by way of fees. Were a strict view not taken it might be open to a solicitor to overreach his client or otherwise act oppressively towards [the client] on the matter of costs."[47]

[45] *Second,* it is wrong to think that the exercise of the *parens patriae* jurisdiction of the court is in some way divorced from the judicial task under s 59 *Public Trustee Act*. As already discussed (at [34]), s 59 provides the framework within which the court exercises the inherent protective jurisdiction that it has.[48] The overarching concern of the court is to protect the person under a legal disability and that is why it is commonplace for safeguards regarding the assessment of costs to be incorporated in orders approving settlements involving such persons. Indeed, in *Benfield v Australian Railways Commission*,[49] Malcolm CJ (with whom Pidgeon and Rowland JJ agreed) drew on the 1991 edition of the same source consulted by Lee J in *Stephenson v Geiss*,[50] to hold that protection of the claimant against unreasonable costs is one of the purposes behind the requirement to obtain the court's sanction. His Honour said:

> "In the context of an application for leave to compromise under O 70 r 10 the purposes of the requirement of leave are to ensure that the compromise is fair and reasonable; to provide a means by which the defendant can obtain a valid discharge; and to ensure that the solicitors for the person under a disability are paid their proper costs and no more. This last purpose of the procedure is to avoid any overcharging of the plaintiff and to remove any temptation that a solicitor might recommend an unfavourable settlement because of an unduly favourable offer to agree his costs: see J I H Jacob, *The Supreme Court Practice (White Book)* (1991) Vol 1, par 80/10."[51]

[46] Such a purpose is also recognised in other contexts. For example, in representative proceedings, the role of the court has been held to be "akin to that of a guardian, not

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44 *Woolf v Snipe* (1933) 48 CLR 677, 678 per Dixon J.

45 The charging of excessive legal costs in connection with the practice of the law is capable of constituting unsatisfactory professional conduct or professional misconduct: *Legal Profession Act* 2007 (Qld), s 420(1)(b).

46 [1987] VR 518.

47 Ibid, 523. And see *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [26]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, [332].

48 *Dickson v Australian Associated Motor Insurers Ltd* (Supra), [23]-[26], [42].

49 (1992) 8 WAR 285.

50 (Supra), 553.

51 (1992) 8 WAR 285, 292. And see *Scaffidi v Perpetual Trustees Victoria Ltd* (2011) 42 WAR 59, [51].

unlike the role a court assumes when approving infant compromises".[52] In that setting, it has been held in the Full Court of the Federal Court of Australia that, if the "legal fees are excessive or unreasonable, then the court can deal with that in any settlement approval application."[53] Likewise, the Supreme Court of Victoria has observed that the proper discharge of the court's protective role may require scrutiny of legal costs for the reason that where "costs are deducted from the settlement sum, it has the potential to affect the reasonableness of the settlement."[54]

[47] *Third*, the proposition that the court can determine whether a compromise is reasonable and for the benefit of the person under a legal disability without knowing what sum is likely to comprise that person's estate is unsound. True it is that, for the reasons deposed by Ms Brain, identification of the precise amount that will be left for the benefit of the claimant will not in every case be possible, but that does not mean that a reliable estimate of the amount cannot be made and, even more to the point, placed before the court. To proceed otherwise is to engage in an artificial exercise because an important part of the equation will be missing.

[48] *Fourth*, the respondent's submission to the effect that the sums to be deducted from the compromise amount, including legal costs, can have no bearing on the question as to whether or not the settlement is itself in the claimant's interest is one-sided because it focuses on the *merits* of the claim without regard to the *outcome* for the claimant. A claim may have little merit and thereby be deserving of little in the way of damages, but the proportion of that sum likely to be left to the claimant is still something the court must know in order to properly exercise its discretion.

[49] *Fifth*, the feature that the pro forma orders accompanying Practice Direction 9 of 2007 contemplate the assessment of costs after sanction does nothing to take away from the proposition that the court may require an estimate of those costs to be placed before it so as to determine the amount likely to be available to the applicant if the compromise is approved and, in that way, determine whether the compromise is reasonable and for the benefit of the person under the legal disability. To submit that such questions could not arise after a trial is hardly to the point. In that circumstance, the court is not being asked to approve any compromise; it is adjudicating on the claim. The submission also overlooks the point earlier made (at [44]) concerning the court's supervisory jurisdiction because that jurisdiction may be exercised at any stage, regardless of whether there has been a trial. Thus, if for any reason the court is concerned that the costs or outlays charged, or proposed to be charged, in any proceeding before it are excessive, it may act accordingly.

[50] It follows that, in order for the court to determine whether a compromise is reasonable and for the benefit of the person under a legal disability, evidence should be placed before it as to the amount likely to comprise the applicant's estate after the various

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52 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [8]; *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, [4]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029, [23]; *Oasis Fund Management Limited and Royal Bank of Scotland NV & Ors* [2012] NSWSC 532, [37].

53 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, [90].

54 *Downie v Spiral Foods Pty Ltd & Ors* [2015] VSC 190 at [178] per Forrest J; *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663, [348].

external calls on the compromise sum (including statutory charges, management fees, costs and payments out for past expenses and care) have been paid. Although it may be undesirable for costs to be agreed before a compromise is sanctioned because that might give rise to a conflict of interest (between the applicant and his or her solicitors) and would, in any event, be tantamount to placing the court in the position of cost assessor so far as that component of the compromise is concerned,[55] a reliable estimate of the indemnity and standard costs should be advanced. It is only in that way that the estimated differential, being a sum that will go in reduction of the applicant's estate, may be ascertained.

[51] There may well be cases where the likely differential is so significant that the reasonableness of the compromise is affected. As it turns out, for the reasons later discussed (at [69]-[71]), this is not such a case. That, of course, is not to say that the likely differential is insignificant; only that it is not such as to affect the reasonableness of the compromise. However, simply because the compromise is reasonable and for the benefit of the applicant does not mean that the court is free to ignore the possibility that what is left to the applicant may be impermissibly eroded by legal fees that have not been reasonably incurred or which are not of a reasonable amount.

Court supervision

[52] It has already been observed (at [45]) that safeguards regarding the assessment of costs are commonly incorporated in sanction orders. Until the regime under which costs were assessed by the court's taxing officers came to an end in 2007, it was regarded as a satisfactory means of ensuring that the estates of persons under a legal disability were not burdened with excessive legal costs or outlays. So, to illustrate, in *Stephenson v Geiss*[56] it was proposed that a sum of $110,000 be paid to the next friend to be held on trust by him for the payment of legal fees including counsel's fees and outlays and, further, that the sum be held pending the receipt of final accounts from counsel, medical practitioners and the like with a view to refunding any surplus to the public trustee once those accounts had been paid. Lee J declined to make such an order, observing that the "court's primary duty is to ensure that the plaintiff's estate is protected as far as possible and this is normally achieved by the involvement of the public trustee and the taxing officer in the ordinary course".[57]

[53] Since then, the form of protection suggested by the pro forma orders accompanying Practice Direction 9 of 2007 is the assessment of costs by an independent costs assessor and the oversight of the public trustee or, where appointed in lieu of the public trustee, the administrator. In most cases, the interests of the person under a legal disability will be protected by this form or order, but there will be other cases where the court is of the view that more in the way of protection is needed. In those cases, orders may be made to supervise the assessment of indemnity costs.

[54] Whether the assessment of indemnity costs should be supervised is ultimately one of

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55 *Sztockman v Taylor* [1979] VR 572, 574; *Chan v Falls Creek Alpine Resort Management Board* [2014] VSC 314, [16].

56 (Supra).

57 At 560.

impression, but the greater the differential between the estimated indemnity costs and the costs that are estimated to be recoverable from the respondent in the form of standard costs, the greater the need for scrutiny. That will be particularly so where the proportion which the estimated differential bears to the gross sum the respondent agreed to pay is higher than what might be expected for a case of its kind. There may be other reasons, of course, including the hourly rates proposed to be charged and the extent of work claimed in comparison to the work reasonably expected for a case of its kind.

[55] Some other observations may usefully be made.

[56] *First*, when the court orders costs to be assessed on the indemnity basis, r 703(3) UCPR requires the costs assessor to:

> "[Allow] all costs reasonably incurred and of a reasonable amount, having regard to–
>
> (a) the scale of fees prescribed for the court; and
>
> (b) any costs agreement between the party to whom the costs are payable and the party's solicitors; and
>
> (c) charges ordinarily payable by a client to a solicitor for the work."

[57] Whether costs are "reasonably incurred" and "of a reasonable amount" within the meaning of UCPR r 703(3) will involve "a consideration, at the time of the assessment of the costs, of all relevant circumstances pertaining in the particular case".[58] By necessary implication, it will also involve an element of proportionality.[59] But the point of present relevance is that the holding of a view that indemnity costs are marked out by the terms of a costs agreement and nothing else is quite erroneous. The costs agreement governing the relationship between a solicitor and his or her client is only one of the factors to which the costs assessor must have regard when determining whether costs are "reasonably incurred" and "of a reasonable amount", the others being the scale of fees prescribed in Schedule 1 UCPR and the objective standard incorporated in r 703(3) UCPR, that is to say, the "charges ordinarily payable by a client to a solicitor for the work." Furthermore, s 341(1) of the *Legal Profession Act* requires costs assessors when conducting an assessment to consider: (a) whether or not it was reasonable to carry out the work to which the legal costs relate; (b) whether or not the work was carried out in a reasonable way; and (c) the fairness and reasonableness of the amount of legal costs in relation to the work.[60]

[58] It follows that, when assessing whether particular costs should be allowed in the sense that they have been reasonably incurred and are of a reasonable amount, the costs assessor should have regard to at least the following:

(a) the scale of fees prescribed in Schedule 1 of the UCPR;

(b) the terms of any costs agreement;

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58 *Amos v Monsour Legal Costs Pty Ltd* [2008] 1 Qd R 304, [29].

59 Ibid.

60 Subsection 341(2) then sets out a range of factors to which the costs assessor may have regard when "considering what is a fair and reasonable amount of legal costs".

(c) the charges ordinarily payable by a client to a solicitor for the work;

(d) whether or not it was reasonable to carry out the work to which the costs relate;

(e) whether or not the work to which the costs relate was carried out in a reasonable way; and

(f) any other relevant circumstance such as the complexity of the case.

[59] *Second*, it is the litigation guardian, and not the applicant, who incurs a liability to the applicant's solicitors for the payment of costs.[61] In turn, the litigation guardian is entitled to an indemnity from the applicant for those costs provided they were reasonably incurred.[62] It was submitted on behalf of the respondent that, if the "litigation guardian incurs a liability to pay costs which are unreasonable or excessive, then the litigation guardian may not be entitled to an indemnity from the applicant with respect those costs", but it is more accurate to state that there can be no liability on the part of the litigation guardian to pay such costs because costs that are unreasonable or excessive are not recoverable against the litigation guardian either.

[60] *Third*, even if the applicant was bound by the costs agreement, its terms could never authorise the charging of excessive costs. In that respect, all costs assessors should be cognizant of the following views expressed by de Jersey CJ in *Council of Queensland Law Society v Roche*[63] in the context of a disciplinary appeal:

> "1. The circumstance that a solicitor's right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her 'fully informed consent' to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity. It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor's advantage and the client's disadvantage.
>
> It is useful to refer here to some statements made in the New South Wales Court of Appeal in *Foreman*,[64] per Kirby P (p 422):
>
> > 'Litigants look to this Court, ultimately, to protect them from over-charging by legal practitioners where this is so high as to constitute professional wrongdoing. The courts of other Australian jurisdictions have begun to deal determinedly with gross over-charging by legal practitioners where this is proved to amount to professional misconduct … No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety.'
>
> and per Mahoney JA (p 437):
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> > '… if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of

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61 *Murray v Kirkpatrick* (1940) 57 WN (NSW) 162, 163; *Stephenson v Geiss* (Supra), 558.

62 Ibid.

63 [2004] 2 Qd R 574.

64 *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408.

> the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them.'

2. The extent to which a solicitor need explain to his or her client a prima facie unusual basis of charging may depend on the extent to which that basis is unusual. Should it be proposed, for example, as in this case, and one would hope very unusually, that the time of a non-legally qualified paralegal, performing essentially secretarial or administrative tasks, be chargeable at rates approaching those appropriate to an employed solicitor or partner, then one would expect some compelling explanation: has, for example, the charge out rate been set appreciably lower than that which would usually apply to a partner, reflecting appropriately the mix of professional/non- professional work, in the interests of convenience to the client? It would be unprofessional, as happened in this case, to set a high, across-the-board rate, albeit less than a commandable partner rate, which resulted in a windfall because of the high proportion of non-qualified work to be accomplished.

3. A careful explanation should ordinarily be offered for what have, in this case, been termed "blended" rates. A client would usually be astonished to think he or she had to pay for the solicitor's secretary or clerk at the same rate as for the solicitor. Cases like this one should cause careful clients to be circumspect about entering upon blended fee arrangements. A solicitor proposing such an arrangement should offer a most careful justification for what is proposed, to assure the client he or she is not being disadvantaged, and to inform the client appropriately so the client may make the requisite fully informed decision whether or not to agree to the proposal.

   As observed by Gleeson CJ in *New South Wales Crime Commission v Fleming and Heal* (1991) 24 NSWLR 116, 126, "to allow a simple, flat, hourly rate as the basis for charging for anything, of whatever character, done by any solicitor of whatever seniority and experience in relation to the matter, is difficult to justify." I add, even more so, where the rate extends to work done by employees without legal qualification.

4. Major criteria which ultimately inform the professionalism of the law are integrity, and as concomitants, honesty and reasonableness. A degree of recklessness may unfortunately have entered this field in recent times in the case of some practitioners. How, as instances, could it be conceived, as professional, to require recompense from the client, on a timed basis, for unsuccessfully seeking to telephone someone, for time spent unsuccessfully searching a file, and as mentioned above, for steps taken to express thanks for assistance? The legal profession must realize that to maintain its perceived professionalism, its practices must be seen as those appropriate to a profession, and not those of a run-of-the-mill commercial enterprise. There is, in short, a large role for discretion and conservative moderation, characteristics not evident in this unfortunate case."[65]

The sanction

[61] By the interim orders made on 21 July 2017, the compromise was sanctioned, Perpetual

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65 [2004] 2 Qd R 574, [32].

Trustee Company Limited was appointed as the administrator, the respondent was required to pay the compromise sum and the standard costs to the administrator and the administrator was then authorised to pay the statutory charges and invest the balance pending further order. Each of those orders was made final on 5 December 2017 along with orders authorising the payment to the litigation guardian of the sums sought for the provision of past care and reimbursement of expenses paid on behalf of the applicant and a series of orders designed to supervise the assessment of the indemnity costs.

The appointment of the administrator

[62] As earlier discussed (at [13] and [14]), the court has power to appoint an administrator for an adult pursuant to ss 12 and 245 of the *Guardianship and Administration Act* if satisfied that the applicant has "impaired capacity" for "bringing or defending a proceeding, including settling a claim". That will be so unless the applicant is capable of: (a) understanding the nature and effect of decisions about such matters; (b) freely and voluntarily making decisions about them; and (c) communicating the decisions in some way.[66] The medical evidence before the court establishes that the applicant is sadly incapable of doing any of those things.

[63] The public trustee was served with the application and provided with a copy of the proposed orders. In correspondence received by the applicant's solicitors from the official solicitor to the public trustee, no objection was made to the appointment of Perpetual Trustee Company Limited as administrator, and the public trustee did not appear on the hearing of the application.

[64] It was therefore appropriate that Perpetual Trustee Company Limited be appointed as the administrator.

The claim for past expenses and care

[65] Before an order for the payment to the litigation guardian of the sums sought for the provision of past care ($220,000) and reimbursement of expenses paid on behalf of the applicant ($80,000), there must be satisfactory evidence before the court of the details of the actual expenses, the nature and extent of the services provided and the fair value of those services.[67] Also, any risk that the proposed payment might unacceptably diminish the capital sum required to be invested to meet the applicant's future needs should be addressed. When determining whether there should be a payment out, the court will be alert to the feature that there is a "conflict of duty and interest inherent in the litigation guardian's propounding [of] a compromise that would accord him [or her] substantial rewards".[68] In short, the awarding of such a payment is "no mere formality"; it "should be ordered only on proper evidence".[69]

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66 *Guardianship and Administration Act*, Schedule 4 (Dictionary). And see *Hewitt v Bayntun & Allianz Australia Insurance Ltd* (Supra), [19]-[20].

67 *Grevett v McIntyre* [2002] QSC 106, [6]; *Huet v Irvine* [2003] QSC 387, [10]; *Keryn Mayer as litigation guardian for Ben David McKinlay v Mahoney & Anor* [2011] QSC 279, [14].

68 *Grevett v McIntyre* (Supra), [6] per Byrne J.

69 *Huet v Irvine* (Supra), [10] per Dutney J.

[66] In *Huet v Irvine*,[70] Dutney J observed:

> "There are many factors which might bear upon whether a payment should be made in this case and the quantum of it. The fact that the claimants are continuing to provide care for an indefinite time into the future, if applicable, is plainly relevant. If future care is to be gratuitously provided it will reduce the demands on the capital of the fund and make it more likely that the plaintiff's needs can be met even if payment is made to the claimants. How the plaintiff's needs will be met in a case where the capital sum is inadequate is of great importance. The period of time before which the plaintiff again becomes eligible for welfare benefits might be a relevant consideration. As well, in this case there would seem to me to be a stronger than usual moral obligation to the former partner if she now has the responsibility of caring for their children without support from the plaintiff. The effect on the plaintiff's parents of caring for the plaintiff might be such that without some benefit such as a holiday which they can only afford with a lump sum payment they will be unable to continue to provide gratuitous care. Such a factor could, in an appropriate case, provide a sufficient benefit to the plaintiff to outweigh the disadvantage of thereby reducing the capital of the fund. These are examples of things which, singly or in combination, might justify the payment of the value of the past care to a claimant even if the fund is prima facie inadequate. They can be relied upon, however, only if they are supported by sworn evidence."[71]

[67] Here, there is satisfactory evidence before the court of the details of the actual expenses paid on behalf of the applicant, the nature and extent of the services provided to her and the value of those services. The amounts sought to be paid out to Ms Hartman represent only a fraction of what could have been claimed in these respects. Also, there is in my view no risk that the payment of these amounts will unacceptably diminish the capital sum necessary to meet the applicant's future needs.

[68] It was accordingly proper that the administrator be authorised to pay Ms Hartman the amounts sought for past expenses and care.

The compromise overall

[69] For the reasons already discussed (at [34]-[50]), in order for the court to determine whether the compromise in this case was reasonable and for the benefit of the applicant, it was necessary to consider what amount was likely to comprise the applicant's estate after payment of the statutory charges and other outgoings, the management fees, the amounts to Ms Hartman for past expenses and care and the difference between the applicant's indemnity costs and standard costs.

[70] In the end, there was evidence before the court concerning each of these amounts and, of course, by the supplementary affidavit material, the costs differential was capable of being estimated – $254,090.84. There was also evidence going to a number of the other considerations including the capital sum required to properly care for the applicant for the remainder of her life.

[71] Despite such a large costs differential, I was satisfied after a consideration of the factors

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70 (Supra).
71 At [13].

I touched on earlier (at [36]-[38]) that the compromise was reasonable and for the benefit of the applicant, and that it should be sanctioned pursuant to s 59 of the *Public Trustee Act*.

Should the assessment of indemnity costs be supervised?

[72] The applicant's counsel submitted that the administrator is responsible for ensuring that the applicant's estate is not burdened by the imposition of costs that have not been reasonably incurred and, further, has the capacity to dispute any costs assessment in accordance with Part 3.4 of the *Legal Profession Act*. Because of those things, it was submitted that the "court need not specifically order any further protection".

[73] Although I accept that the administrator has that responsibility and that capacity, the court also has a responsibility to protect the applicant and, in my opinion, this is one of those (hopefully) rare cases where an additional layer of oversight is in my opinion required.

[74] It is contemplated that a final assessment of the indemnity costs will be obtained, but it is not clear which costs assessor will be commissioned to do that. If it is Mr Ryan, then it has to be said that the assessment he provided on 27 March 2017 was almost wholly based on the hourly rates contained in the costs agreement entered into between Ms Hartman and the applicant's solicitor. If so, Mr Ryan's assessment will not accord with the approach I summarised above (at [58]) because it fails to have regard to the scale of fees prescribed in Schedule 1 of the UCPR, the charges ordinarily payable by a client to a solicitor for the work, whether or not it was reasonable to carry out the work to which the costs relate or whether or not the work to which the costs relate was carried out in a reasonable way. Although Mr Ryan deposed that the case was "medically and legally" complex and that, when that feature was taken into account along with the volume of material, the costs were in his opinion "reasonable", that is not the test. What needs to be ascertained is whether the costs were reasonably incurred *and* that they were in a reasonable amount. Just because a unit of time is recorded by a fee-earner does not, without more, establish that it was reasonable to devote that time to the service of the matter, and nor can the agreement of the litigation guardian to particular hourly rates mean that those rates must be taken as reasonable for all manner of work and (within the separate fee-earner categories) by whomsoever performed.

[75] Otherwise, it will be apparent from what I have already said that my impression of the estimated costs differential is that it is well beyond what might be expected for a case of this kind. There are other features of concern such as the number of hours expended on what was essentially an unlitigated claim and the differences in the hourly rates provided for under the costs agreement and those prescribed under the court scale, the details of which have already been set out (at [26]-[28]). There is also a real risk in my view that the administrator might make the same mistake I suspect others in the case have made of thinking that the assessment of indemnity costs is governed by the terms of the costs agreement and not much else.

[76] None of this is to say that the applicant's solicitors have it in mind to do other than to charge a reasonable fee for the work they have performed on the applicant's behalf.

After all, they called for and were then provided with an assessment by an independent cost assessor and can only act on what they have been provided. However, I think that the features I have briefly mentioned make it necessary to supervise the final assessment of the indemnity cost so as to ensure that the applicant's estate is protected as much as possible from any further misapprehension as to the proper basis for the final assessment of costs.

Orders

[77] The final orders therefore not only provide for the payment to Ms Hartman of the amounts sought for past expenses and care, they include orders:

(a) requiring the costs of and incidental to the applicant's claim, including the costs of and incidental to this application, to be assessed on the indemnity basis by a costs assessor appointed as such pursuant to r 743L UCPR;

(b) specifying that the cost assessor may only allow costs that have been reasonably incurred and are of a reasonable amount having regard to: (a) the scale of fees prescribed in Schedule 1 of the UCPR; (b) the costs agreement entered into between Ms Hartman and the applicant's solicitors in February 2014; (c) the charges ordinarily payable by a client to a solicitor for the work; (d) the complexity or otherwise of the claim; (e) whether or not it was reasonable to carry out the work to which the costs relate; (f) whether or not the work to which the costs relate was carried out in a reasonable way; and (g) any other matter the costs assessor considers relevant;

(c) requiring the applicant's solicitors to serve a copy of the indemnity costs assessment on the administrator;

(d) requiring the administrator to give due consideration to the assessment including considering whether a different costs assessor should be commissioned to review the assessment or a proceeding commenced to dispute any part of the costs pursuant to Part 3.4 of the *Legal Profession Act*;

(e) requiring the administrator, prior to making any payment with respect to the costs, to file an affidavit by its proper officer deposing to the steps it has taken to give due consideration to the assessment;

(f) requiring the Registrar of the court (or other officer of the court whose duties include the assessment of costs), to review what the administrator has done with a view to then either notifying the administrator that the proposed payment costs can be made or referring the matter to the court for further directions.

SCHEDULE

Terms of the interim orders made on 21 July 2017

THE INTERIM ORDER OF THE COURT IS THAT:

1. The compromise of this proceeding on the following terms be sanctioned pursuant to s 59(1) of the *Public Trustee Act* 1978:

   (a) That the respondent pay the applicant the sum of $6,000,000.00 being primary damages in the sum of $5,400,000.00 together with further damages in the sum of $600,000.00 for management fees ("the compromise sum");

   (b) That the respondent pay the applicant her costs of and incidental to the proceeding against the respondent, including the costs of this application, to be assessed or as agreed between the administrator and the respondent, on the standard basis ("the standard costs").

2. Pursuant to Section 12 of the *Guardianship and Administration Act* 2000, Perpetual Trustee Company Limited ("the Administrator") be appointed administrator for the applicant to receive and manage the balance of the compromise sum after deduction of the amounts identified in paragraph 6 of this order.

3. The administrator be empowered to invest all moneys received and held under this order pursuant to Section 51 of the *Guardianship and Administration Act* 2000.

4. Within seven (7) days of this order, the applicant's solicitors serve a copy of it on the administrator appointed by this order.

5. Within sixty (60) days of the date of this order, the administrator give the Queensland Civil and Administrative Tribunal a management plan within the meaning of the *Guardianship and Administration Act* 2000 tor approval.

6. Within twenty-eight (28) days of the respondent's receipt of the last of any statutory clearances or charges in relation to the compromise sum, the respondent pay the compromise sum as follows:

   (a) to any statutory body having a charge over the compromise sum, the amount necessary to satisfy the charge; and

   (b) to the administrator, the balance, who will hold the sum pending further order of this honourable Court,

   whose receipt shall in each case be a sufficient discharge for the respondent.

7. No interest shall be payable in the event the compromise sum is paid within twenty-eight (28) days of the last of the statutory clearances being received by the respondent.

8. In the event that interest becomes payable pursuant to paragraph 7 of this order, such interest will accrue only from the date twenty-eight (28) days from the date of the last of the statutory clearances being received by the respondent, and the rate of interest will be

3.75% per annum.

9. The respondent pay the standard costs to the administrator within twenty-eight (28) days of their assessment or prior agreement between the respondent and the administrator as to their amount.

10. The Registrar of the Court:

    (a) provide a copy of this order to the Principal Registrar of the Queensland Civil and Administrative Tribunal forthwith;

    (b) place the opinion of counsel and the affidavits read on this application in a sealed envelope marked "Not to be opened without an order of the court".

11. The sealed envelope described in paragraph 10(b) not be opened without an order of the court.

12. Each of the parties, the administrator and the applicant's solicitors have liberty to apply in respect of these orders.