

SUPREME COURT OF QUEENSLAND

CITATION: *McChesney v Singh & Ors* [2003] QSC 083

PARTIES: **TONI ANNE MCCHESENEY (BY HER LITIGATION
GUARDIAN JANICE ANNE MCCHESENEY)**
(plaintiff)
v
MUKHTIAR SINGH
(first defendant)
and
PETER AARON HOPKINS
(second defendant)
and
SUNCORP INSURANCE AND FINANCE
(third defendant)
and
**SUNCORP GENERAL INSURANCE LIMITED (ACN
075 695 966)**
(fourth defendant)
and
**FAI GENERAL INSURANCE COMPANY LIMITED
(ACN 000 327 855)**
(fifth defendant)

FILE NO/S: SC No 8851 of 1998

DIVISION: Trial Division

PROCEEDING: Civil Trial- Further orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 4 April 2003

DELIVERED AT: Brisbane

HEARING DATE: 18 March 2003

JUDGE: Mackenzie J

ORDER:

1. Pursuant to s 59(1) of the *Public Trustee Act 1978 (Qld)*, terms of settlement of this proceeding agreed between the parties, in so far as the same relate to the amount of \$119,830.00 to be recovered by the plaintiff by way of administration and management fees, be approved and sanctioned.
2. The order of 7 October 2002 be varied by, in paragraph 1 thereof, deleting the expression "1,885,276" and inserting in lieu thereof the expression \$1,918,215.75".
3. National Australia Trustees Limited ("the Administrator") be appointed Financial

Administrator to administer the moneys to be paid to it on behalf of the plaintiff after payment of the sums referred to in paragraphs 10(a) and 10(b) hereof.

4. The Administrator take possession of and control and manage the trust fund to be constituted by the balance of the moneys referred to in paragraph 10 hereof in such manner as the Administrator thinks fit for the benefit of the plaintiff generally with the powers and duties defined and conferred by the *Trusts Act 1973*.
5. The Administrator have power to invest for and on behalf of the plaintiff pursuant to s 51 of the *Guardianship and Administration Act 2000 (Qld)*.
6. A copy of this order be delivered forthwith to the Administrator by the plaintiff's solicitors.
7. The Registrar forthwith give a copy of this order to the Guardianship and Administration Tribunal.
8. In addition to the revised judgment sum of \$1,918,215.75 referred to in paragraph 2 hereof, the fourth defendant pay the plaintiff the sum of \$119,830.00, being the amount agreed by way of administration and management fees as provided for in paragraph 1 hereof.
9. In addition to the revised judgment sum of \$1,918,215.75 referred to in paragraph 2 hereof, the fourth defendant pay the plaintiff interest at the rate of 7% on the sum of \$1,885,276 for a period (unless the parties agree otherwise) from 7 October 2002 until 21 days after the date of this order, or, if payment of the sums referred to in paragraph 10(c) hereof is made on an earlier date, for the period until that date.
10. The judgment sum of \$1,918,215.75, together with the amounts of \$119,830.00 and interest referred to in paragraph 9 hereof respectively, be paid by the fourth defendant as follows:
 - (a) To the Health Insurance Commission, such sum as is necessary to satisfy the statutory charge maintained by that entity, the receipt of the Health Insurance Commission therefor to be a sufficient discharge to the fourth defendant.
 - (b) To Centrelink, such sum as is the subject of a formal recovery notice, the receipt of Centrelink therefore to be a sufficient discharge to the fourth defendant.
 - (c) To the plaintiff's administrator appointed under paragraph 3 hereof, the balance of the judgment sum of \$1,918,215.75 and the amounts of \$119,830.00 and interest referred

to in paragraph 9 hereof respectively, whose receipt therefor shall be a sufficient discharge to the fourth defendant.

11. Subject to paragraph 12, the fourth defendant pay the applicant's costs of and incidental to the application to be agreed, or if not agreed, to be assessed.
12. Insofar as the application relates to costs of and incidental to the proceedings, the application be adjourned to a date to be fixed, with costs reserved.
13. The time for making submissions as to costs of and incidental to the proceedings be extended for a period of 14 days after determination by the Court of Appeal of the appeal now pending therein or other determination of the appeal.
14. The parties and the Administrator be at liberty to apply for further directions as to the disbursement of the moneys to be held in trust as aforesaid.

CATCHWORDS:

PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – CORRECTION UNDER THE SLIP RULE – where damages previously calculated in part – where inadvertent errors being reference to inappropriate discount table in calculating one component of damages and failure to assign amount in calculating damages representing interest for one head of damages – where agreement between parties to variations

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTION FOR TORT – MEASURE OF DAMAGES – IN GENERAL – where question of administration and management fees- where agreement between parties

PROCEDURE – JUDGMENT AND ORDERS- INTEREST ON JUDGMENTS- RATE – where 4th defendant agreed to and has paid costs of care until judgment moneys are paid – where delay in settling management fees issue by plaintiff – whether prescribed rate should be applied in assessing interest on the judgment – whether s 48 *Supreme Court Act* 1995 (Qld) had begun to operate on the judgment given management costs had not been determined

EQUITY- TRUSTS AND TRUSTEES- TRUSTEES- THEIR APPOINTMENT DISMISSAL ESTATE ETC- APPOINTMENT OF NEW TRUSTEES- BY THE COURT- WHO MAY BE APPOINTED – where question of who should be appointed administrator – whether appointment of administrator necessary to protect plaintiff's interests – whether court had power to act as Guardianship and

Administration Tribunal

PROCEDURE – COSTS – PRACTICE MATTERS – TIME TO MAKE ORDER – where issue of costs dependent upon resolution of management fees issue – where appeal pending on quantum of damages – whether time for making submissions as to costs should be extended

Guardianship and Administration Act 2000 (Qld), s12(1), s 14, s 15, s 24

Public Trustee Act 1978 (Qld), s 59

Supreme Court Act 1995 (Qld), s48

UCPR, r 388

Supreme Court Regulations 1998 (Qld), r 4

Nominal Defendant v Gardikiotis (1996) 186 CLR 49, cited

Todorovic v Waller (1981) 150 CLR 402, cited

Willett & Anor v Fitcher [2003] QSC 36, applied

Wills v Bell & Ors [2002] QCA 419, cited

- COUNSEL: M Grant-Taylor SC, with C Heyworth-Smith, for the plaintiff
SC Williams QC, with M Burns, for the fourth defendant
- SOLICITORS: MurphySchmidt Solicitors for the plaintiff
Quinlan Millar & Treston for the fourth defendant

- [2] **MACKENZIE J:** When judgment was given in this matter on 7 October 2002 issues of the appointment of a financial administrator, a sum for management fees and the costs order remained to be determined. It was considered appropriate not to decide them until the parties had had the opportunity to consider the reasons for judgment on the issue of quantum, which would influence the costs order, and to obtain sufficient information to allow a determination of the first two matters to be considered.
- [3] There are two other issues. One is the amendment of the judgment sum to reflect inadvertent errors that may be corrected under *UCPR* 388. These corrections were to be made by consent. The other issue is that of interest on the judgment sum.
- [4] I am satisfied on the evidence at trial in terms of s 12(1) of the *Guardianship and Administration Act 2000* (Qld) that without the appointment of an administrator to administer the moneys awarded in the proceedings the plaintiff's interests will not be adequately protected and consequently her needs not adequately met.
- [5] Section 245 of the *Guardianship and Administration Act* permits the court to exercise the powers of the Guardianship and Administration Tribunal if:
- (a) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and
 - (b) the court considers the adult is a person with impaired capacity for a matter.
- [6] It was accepted that the case fell into the second category in (a) and that it provided authority to exercise the powers of the Tribunal to the court. Chapter 3 which

governs a number of aspects of appointment of administrators applies by virtue of s 245(3). It is necessary to address the appropriateness of considerations in s 15 which incorporates the general principles in Schedule 1 Part 1. Plans for investment of the money were prepared on behalf of National Australia Trustees Limited and the Public Trustee. However the Public Trustee did not appear at the hearing to press a case for appointment. The preference of the plaintiff's mother, the litigation guardian, after taking advice, was that National Australia Trustees Limited be appointed. It is a trustee company under the *Trustee Companies Act* 1968 (Qld) and therefore qualified for appointment pursuant to s 14(1)(b)(ii) of the *Guardianship and Administration Act*. I am satisfied by the affidavit of Mr Steele that the matters in s 15(1) have been adequately addressed and that the proposed administrator is an appropriate appointee. I will therefore make an order that National Australia Trustees Limited be appointed administrator.

- [7] The two amendments pursuant to *UCPR* 388 were not contentious. One was concerned with an inadvertent reference to an inappropriate discount table in calculating one component of damages and the other related to an inadvertent failure to assign in the calculation of damages an amount representing interest for one head of damages. In both instances working documents in the proceedings indicated that the alterations proposed should be made. The order will, for the sake of completeness, reflect an endorsement made on the file administratively on 17 December 2002, on receipt of agreement of both parties, to the proposed variations.
- [8] The history of the matter needs to be recounted for the purpose of dealing with the other issues. Judgment was delivered on 7 October 2002. The following orders were made:
- “1. That judgment be given for the plaintiff against the fourth defendant in the sum of \$1,885,276 subject to addition of any sum which may be determined to be payable in respect of management costs relating to the moneys payable to the plaintiff.
 2. That the plaintiff and fourth defendant exchange submissions in writing on issues concerning management of damages on or before 4 pm on 15 November 2002, and deliver final submissions to my Associate no later than 4 pm on 20 November 2002.
 3. That, unless submissions to the contrary are exchanged and delivered within the time limits referred to in paragraph 2, the fourth defendant pay the plaintiffs costs, including reserved costs if any, to be assessed.
 4. That leave be given to either party to request that both or either of the issues referred to in paragraphs 2 and 3 be listed for oral hearing if deemed necessary or desirable.”
- [9] On 4 December 2002 it was proposed to both parties that I would be available to hear any further applications in the following week. After my Associate made inquiries, the fourth defendant's solicitors advised that counsel was unavailable that week. My Associate responded, acknowledging that information but advising that I would have preferred to have argument concluded on the issue of administration costs in the following week and advising that the calendar for 2003 did not provide the opportunity to have the matter further considered before the week commencing

17 March 2003. When it became apparent that it would not be possible for the matter to be heard in December, 17 March 2003 was fixed as the commencing date for the further submissions.

- [10] With respect to costs, but for an argument that the provisional determination made as to costs when judgment was delivered had become final in the manner of a guillotine order, it was agreed that determination of the costs application might appropriately await the outcome of an appeal against quantum pending in the Court of Appeal. Leaving aside a separate issue whether indemnity costs should be awarded in respect of some of the costs incurred, the general costs order will be influenced by the level of damages fixed in the appeal.
- [11] The order made with regard to time limits was quite prescriptive but was clearly enough intended to ensure that any disagreement with the provisional order was expressed by the nominated date. A starting point is a letter dated 19 November 2002 delivered to my Associate by the fourth defendant's solicitors, enclosed with which was a submission with respect to management costs and a letter to the plaintiff's solicitors dated 15 November 2002. The operative paragraph of the letter of 15 November 2002 stated that the fourth defendant wished to make submissions as to the ultimate costs order. The letter of 15 November 2002 was uninformative as to what was to be argued. It was not a submission in the ordinary sense of the word. However there is no evidence that the plaintiff's solicitors suggested at that time that the costs question had ceased to be a live issue because of non-compliance with the time limits in the order. The plaintiff made written submissions with regard to costs which did not include any such submission.
- [12] The letter of 19 November 2002 enlarged on the costs issue in the following terms:
"It is our client's intention to advance a further submission in respect of the issue of costs seeking an order that the plaintiff pay the Fourth Defendant's costs from the date on which an offer of settlement was made on behalf of the Fourth Defendant pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules*. However, until the question of management charges has been dealt with, we are not in a position to make any further submission in relation to the question of costs."
- [13] While the solicitors for the plaintiff were apparently not given a copy of that letter, the letter of 15 November 2002 would not have left them with the belief, at the expiry of the period delineated in the order, that the costs order was not being challenged. While there is no evidence that the plaintiffs were made aware of the reason for replying in terms of the letter of 15 November 2002, the reason expressed in the later letter was practical and valid in principle. Further, the management fees issue remained unresolved until a relatively short time after White J's decision in *Willett & Anor v Fitcher* [2003] QSC 36. In that decision she convincingly demonstrated that *Wills v Bell & Ors* [2002] QCA 419 ought not be regarded as consistent with existing expressions of principle in the High Court including those in *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 and *Todorovic v Waller* (1981) 150 CLR 402.
- [14] The proper construction of the costs order provisionally given is that it was intended to ensure that a contention that a different costs order should be made be expressed within the time allowed. Cause has been shown why it was not strictly complied with by providing a full submission. It seems, therefore, appropriate to extend the

time for making further submissions on costs until 14 days after determination by the Court of Appeal or other determination of the appeal. It would seem that if the proceedings are compromised and the appeal becomes unnecessary, sanction would be necessary of the agreement. It would be expected that costs would be resolved as part of that process. The issue of costs should therefore be adjourned for further consideration if it becomes necessary, with the direction as to the time for making further submissions also being made.

- [15] With respect to interest, the argument turns on s 48 of the *Supreme Court Act* 1995 (Qld) which provides that where judgment is given or an order is made for the payment of money in a cause of action, interest shall, unless the court otherwise orders, be payable at a prescribed rate from the date of judgment on so much of the money as is from time to time unpaid. The prescribed rate is 10 per cent (s 4 *Supreme Court Regulations* 1998 (Qld)). Mr Grant-Taylor for the plaintiff submitted that there was no reason why the ordinary rule should not apply. There is no evidence why payment of all or part of the sum awarded has not been made. However it is established that the fourth defendant has agreed to pay and has been paying costs of care consistent with the judgment until the judgment moneys are paid or the fourth defendant is otherwise instructed. It is agreed that the amounts so far paid must be taken into account in calculating interest. The amount so far paid is \$14,124.
- [16] The agreement on the amount of \$119,830.00 for management fees was reached on 11 March 2003. It was submitted by Mr Williams that the delay in settling that aspect of the matter was due to the plaintiff, prior to the decision in *Willett v Futcher*, demanding a significantly higher amount than could be justified. However at that time there was a Court of Appeal decision tending to support a higher sum and it seems to me to be unrealistic that senior counsel would in the circumstances advise that a significantly lower sum should be accepted. I am satisfied also that the hearing of the argument on the issue earlier was necessarily delayed because of unavailability of the defendant's counsel when it could have been disposed of.
- [17] It was not apparently mere recalcitrance on the part of the fourth defendant in not paying the amount already quantified. However the fourth defendant has not challenged that the plaintiff is entitled to the specified sum awarded in the judgment. The plaintiff has been denied the opportunity to invest that money in the interim period.
- [18] Mr Williams submitted that s 48 of the *Supreme Court Act* had not begun to operate on the judgment because, in addition to the quantified sum a further sum determined to be payable in respect of management costs was to be added to it. I am not persuaded that s 48 does not apply in the circumstances of the case. The reality was that judgment was given for \$1,885,276.00 at that time and provision was made to allow for that sum to be increased by a sum yet to be determined. However, as previously noted the fourth defendant has been paying for care in substitution for expenditure that would be incurred by the plaintiff once damages were paid. There is no evidence whether the fourth defendant was put on notice in a timely way that the point was going to be taken that 10 per cent interest would accrue if at least the quantified judgment sum was not paid.
- [19] In my view, on the state of the evidence, an order should be made that accepts that interest should be paid but not at the statutory rate for reasons that have been

referred to. I propose to allow interest at the rate of 7 per cent on the original amount of \$1,885,276.00 for the period from judgment until 21 days after the delivery of this judgment, or earlier payment of the amount fixed pursuant to these reasons. If the moneys are not paid before 21 days have elapsed from the date of these reasons, in the absence of agreement to the contrary between the parties, further interest will fall to be determined under s 48. I have not overlooked that payments for care have been paid periodically over the intervening period and should be deducted from the sum upon which interest is calculated. As against that, for part of the period, the judgment had reflected the amendments under *UCPR* 388. The use of the original figure represents a compromise in the interests of non-proliferation of different figures.

[20] The orders are as follows:

1. Pursuant to s 59(1) of the *Public Trustee Act* 1978 (Qld), terms of settlement of this proceeding agreed between the parties, in so far as the same relate to the amount of \$119,830.00 to be recovered by the plaintiff by way of administration and management fees, be approved and sanctioned.
2. The order of 7 October 2002 be varied by, in paragraph 1 thereof, deleting the expression "1,885,276" and inserting in lieu thereof the expression \$1,918,215.75".
3. National Australia Trustees Limited ("the Administrator") be appointed Financial Administrator to administer the moneys to be paid to it on behalf of the plaintiff after payment of the sums referred to in paragraphs 10(a) and 10(b) hereof.
4. The Administrator take possession of and control and manage the trust fund to be constituted by the balance of the moneys referred to in paragraph 10 hereof in such manner as the Administrator thinks fit for the benefit of the plaintiff generally with the powers and duties defined and conferred by the *Trusts Act* 1973.
5. The Administrator have power to invest for and on behalf of the plaintiff pursuant to s 51 of the *Guardianship and Administration Act* 2000 (Qld).
6. A copy of this order be delivered forthwith to the Administrator by the plaintiff's solicitors.
7. The Registrar forthwith give a copy of this order to the Guardianship and Administration Tribunal.
8. In addition to the revised judgment sum of \$1,918,215.75 referred to in paragraph 2 hereof, the fourth defendant pay the plaintiff the sum of \$119,830.00, being the amount agreed by way of administration and management fees as provided for in paragraph 1 hereof.
9. In addition to the revised judgment sum of \$1,918,215.75 referred to in paragraph 2 hereof, the fourth defendant pay the plaintiff interest at the rate of 7% on the sum of \$1,885,276 for a period (unless the parties agree otherwise) from 7 October 2002 until 21 days after the date of this order, or, if payment of the sums referred to in paragraph 10(c) hereof is made on an earlier date, for the period until that date.
10. The judgment sum of \$1,918,215.75, together with the amounts of \$119,830.00 and interest referred to in paragraph 9 hereof respectively, be paid by the fourth defendant as follows:
 - (a) To the Health Insurance Commission, such sum as is necessary to satisfy the statutory charge maintained by that entity, the receipt of

- the Health Insurance Commission therefor to be a sufficient discharge to the fourth defendant.
- (b) To Centrelink, such sum as is the subject of a formal recovery notice, the receipt of Centrelink therefor to be a sufficient discharge to the fourth defendant.
 - (c) To the plaintiff's administrator appointed under paragraph 3 hereof, the balance of the judgment sum of \$1,918,215.75 and the amounts of \$119,830.00 and interest referred to in paragraph 9 hereof respectively, whose receipt therefor shall be a sufficient discharge to the fourth defendant.
11. Subject to paragraph 12, the fourth defendant pay the applicant's costs of and incidental to the application to be agreed, or if not agreed, to be assessed.
 12. Insofar as the application relates to costs of and incidental to the proceedings, the application be adjourned to a date to be fixed, with costs reserved.
 13. The time for making submissions as to costs of and incidental to the proceedings be extended for a period of 14 days after determination by the Court of Appeal of the appeal now pending therein or other determination of the appeal.
 14. The parties and the Administrator be at liberty to apply for further directions as to the disbursement of the moneys to be held in trust as aforesaid.