SUPREME COURT OF QUEENSLAND

CITATION:	*Sinnamon v Maher & Anor* [2016] QSC 51
PARTIES:	**VINCENT SINNAMON by his litigation guardian MICHAEL SINNAMON** (plaintiff) **v** **DARREN PATRICK MAHER** (first defendant) **AAI LIMITED (ACN 005 297 807)** (second defendant)
FILE NO/S:	Brisbane No S2958 of 2015
DIVISION:	Trial Division
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	14 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2016
JUDGE:	Flanagan J
ORDER:	**1. The damages for management fees payable by the second defendant to the plaintiff are assessed in the sum of $635,714.** **2. In accordance with Order 7 of Martin J on 15 December 2015, the second defendant pay the assessed management fees in the sum of $635,714 to the administrator within 21 days of this order, whose receipt shall be sufficient discharge for the second defendant.** **3. In accordance with Order 8 of Martin J dated 15 December 2015, the Court orders that pursuant to section 59(2) of the *Civil Proceedings Act* 2001 interest on the assessed management fees in the sum of $635,714 is not payable if such sum is paid by the second defendant to the administrator in accordance with Order 2 above. If unpaid then interest accrues and is payable on the unpaid balance pursuant to section 58(3), from the date of order default.** **4. In accordance with Order 9 of Martin J made 15 December 2015, the second defendant pay the plaintiff's standard costs of and incidental to the assessment of damages for management fees within 21 days of their**

assessment or prior agreement between the second defendant and the administrator as to their amount.

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

CATCHWORDS: DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – PERSONAL INJURIES – GENERAL PRINCIPLES – Where plaintiff suffered personal injury as result of defendant's negligence - Where plaintiff is unable to manage own financial affairs – Where administrator is appointed to manage plaintiff's financial affairs – Where the administrator seeks to invest plaintiff's award – Where determination necessary to calculate management fees of the administrator

Civil Liability Act 2003 (Qld), s 57

Civil Proceedings Act 2011 (Qld), s 61(4)

Guardianship and Administration Act 2000 (Qld), s 12, s 51

Public Trustee Act 1978 (Qld), s 59(1)

Trusts Act 1973 (Qld), s 24(1)

Bell v Pfeffer [2009] QSC 209, applied

Gray v Richards (2014) 253 CLR 660; [2014] HCA 40, applied

Lewis v Bundrock [2008] QSC 189, considered

Todorovic v Waller (1981) 150 CLR 402; [1981] HCA 72, applied

Willett v Futcher (2005) 221 CLR 627; [2005] HCA 47, considered

COUNSEL: M Eliadis for the plaintiff
G Crow QC for the second defendant

SOLICITORS: Shine Lawyers for the plaintiff
Quinlan Miller & Treston Lawyers for the second defendant

Introduction

[1] On 2 December 2010 the plaintiff suffered personal injuries, including a severe traumatic brain injury, as a result of a pedestrian road traffic accident.[1] Proceedings were brought by his father as litigation guardian.

1 Exhibit 4.

[2] The plaintiff's claim was settled on 27 November 2015. The settlement was sanctioned pursuant to section 59(1) of the *Public Trustee Act* 1978 by orders made by Martin J on 15 December 2015. Relevantly his Honour ordered:

(a) that the second defendant pay the plaintiff primary damages in the sum of $1,651,500 clear of any rehabilitation expenses paid by the second defendant but inclusive of all statutory and other refunds, together with further damages for management fees to be agreed or failing agreement to be assessed ("the compromise sum");

(b) pursuant to section 12 of the *Guardianship and Administration Act* 2000 National Australia Trustees Limited (ABN 80 007 350 405) ("the administrator") be appointed administrator for the plaintiff to receive and manage the balance of the compromise sum after deduction of certain amounts;

(c) the administrator be empowered to invest all monies pursuant to section 51 of the *Guardianship and Administration Act* 2000;

(d) the proceeding otherwise be adjourned to the civil list for a hearing on the assessment of management fees.

[3] The present proceedings concern the assessment of management fees.

[4] The administrator has provided an estimate of management fees dated 23 November 2015.[2]

[5] The second defendant has agreed to pay the following management fees:

(a) the NAT Trustee Fee in the sum of $321,529;

(b) Fund Manager Costs in the sum of $221,310;

(c) External Tax Return Submission costs in the sum of $14,418;

totalling $557,257.[3]

[6] The sole issue for determination is whether, as a matter of legal principle, the Super Platform Costs in the sum of $78,457 should be allowed. The actual quantum of the Super Platform Costs is not in dispute.[4]

The nature of the Super Platform Costs

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2 Exhibit 5.
3 Exhibit 1, Agreed Position Statement, para. 3.
4 Exhibit 1, Agreed Position Statement, paras. 4 and 5.

[7] The plaintiff called Ms Katrina Harper to give evidence. She is employed by the administrator as a Senior Associate, Principal, Personal Trusts. She has been employed by the administrator for eight years. Her duties include the investment of clients' funds. She presently oversees the affairs of approximately 40 clients who are primarily compensation trust clients.[5] The funds of most of her clients are invested in superannuation through the MLC Wrap Superannuation Fund. MLC is the wealth management division of the National Australia Bank.[6]

[8] According to Ms Harper the administrator manages clients' personal injury settlements within the superannuation environment because of both taxation and Centrelink benefits. It is Ms Harper's intention to invest at least part of the plaintiff's settlement in the MLC Wrap Superannuation Fund provided certain conditions of release, required by the superannuation trustee, are met.[7]

[9] On 28 January 2016 Ms Harper wrote to the MLC Wrap Superannuation Fund seeking to establish an account for the plaintiff. The first attachment to this letter relevantly states:

> "(The plaintiff's) monies are the proceeds of a compensation award. National Australia Trustees was appointed as his Financial Manager as he was deemed incapable of managing his own affairs and his disabilities will mean that he is not expected to obtain gainful employment in the future.
>
> Our intention is to make a non-concessional contribution to MLC Wrap of $1,552,625.45 in order to take advantage of (the plaintiff's) contribution limits.
>
> Prior to contributing these funds we are seeking confirmation that (the plaintiff) will meet the Total and Permanent Disability condition of release and that the above funds will be classified as Unrestricted Non-Preserved monies. We are therefore requesting that a pre-assessment be completed and have provided medical certificates in support of this."

[10] Ms Harper, based on her past experience, is "99.9 per cent" certain that the plaintiff will meet the necessary conditions of release.[8]

[11] On 23 November 2015 Ms Harper wrote to the solicitors for the plaintiff detailing the administrator's estimate of the trustee and investment management costs on a settlement amount of $1,549,197.[9] This calculation includes the Super Platform Costs of $78,457. The letter identifies these costs as follows:

> "**Superannuation Administration Costs** – this is not a NAT fee. This fee is applicable where NAT manages the client's personal injury settlement within the superannuation environment. NAT uses the MLC Public Office Superannuation Fund accessed via the MLC Wrap platform where superannuation is an appropriate strategy for the client."

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5 Transcript of proceedings, 18 February 2016, 1-6, lines 1-20.
6 Exhibit 2, MLC Wrap Super Series 2, Product Disclosure Statement p.4.
7 Transcript of proceedings, 18 February 2016, 1-10, lines 1-20.
8 Transcript of proceedings, 18 February 2016, 1-10, lines 43-46.
9 Exhibit 5.

[12] The administrator's estimate of costs represents the net present value of these costs on a settlement amount of $1,549,197.[10] The letter states that the costs are calculated in a manner that complies with the decision of the High Court in *Gray v Richards* and have been validated by a consulting actuarial firm, Cumpston Sarjeant.[11]

[13] The amount of $78,457 is calculated by reference to a schedule of fees published in the MLC Wrap Super, Series 2, Product Disclosure Statement.[12] Ms Harper has prepared an amortisation schedule which sets out the Super Platform Costs. These fees are in accordance with those disclosed in the Product Disclosure Statement.[13] The amortisation schedule[14] is based on a settlement sum of $1,549,197. The assumptions upon which the Super Platform Costs are calculated is an annual drawing of $27,179, an earning rate of 0% and a discount rate of 5%. The amortisation schedule is based on a life expectancy of a further 57 years. The plaintiff was born on 11 March 1996 and is presently 19 years of age. Because of his injuries his life expectancy has been shortened by five years.[15] The amortisation schedule therefore assumes that the plaintiff has a life expectancy of a further 57 years. The schedule amortises (straight line) the investment portfolio over the plaintiff's assumed life expectancy. The notes to the amortisation schedule relevantly state:

> "The schedule assumes that 100% of the portfolio is held within the MLC Public Offer Superannuation Fund on the MLC Wrap Platform and provisions for such costs of accessing the super environment. The fees are:
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> - a Platform Admin Fee of 0.40% per annum on the balance below $200,000, then 0.3% per annum on the balance between $200,000 and $500,00 and then 0.5% per annum on balance above $500,000 capped at $3,700 per year
> - a super administration fee of 0.5% per annum on the balance of the super fund, capped at $1,000 per year; and
> - the fees are inclusive of GST."

[14] The notes further state that the schedule has been prepared using the *Gray v Richards* methodology.

The Order of Martin J dated 15 December 2015

[15] The compromise of the proceedings required the sanction of the Court pursuant to section 59(1) of the *Public Trustee Act* 1978 because the plaintiff was under a legal disability. The administrator was appointed pursuant to section 12 of the *Guardianship and Administration Act* 2000. The administrator was required to invest all monies received and held under the order pursuant to section 51 of the *Guardianship and Administration*

[10] Exhibit 5.
[11] Exhibit 5; the reference to *Gray v Richards* is to the decision of the High Court in *Gray v Richards* (2014) 253 CLR 660; [2014] HCA 40.
[12] Exhibit 2, p.20.
[13] Exhibit 2, p.20; Transcript of proceedings, 18 February 2016, 1-12, lines 15-24.
[14] Exhibit 6.
[15] Exhibit 5.

Act 2000. Section 51(2) states that the administrator may invest only in authorised investments. The term "authorised investment" is defined in schedule 4 to mean:

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

[16] Part 3 of the *Trusts Act* 1973 contains section 24 which deals with matters to which a trustee must have regard in exercising a power of investment. There are 15 matters in section 24(1)(a) to (o) that are identified and relevantly include:

- the need to maintain the real value of the capital or income of the trust;
- the risk of capital or income loss or depreciation;
- the potential for capital appreciation;
- the likely income return and the timing of income return;
- the length of the term of the proposed deposit;
- the probable duration of the trust;
- the effect of the proposed investment for the tax liability of the trust;
- the cost (including commissions, fees, charges and duties payable) of making the proposed investment.

[17] Each of these matters is identified in the administrator's letter to the solicitors for the plaintiff dated 23 November 2015.[16] The reference in the letter is to the "prudent person rule" rather than to section 24 of the *Trusts Act* 1973. It may be accepted that the administrator's decision to manage the plaintiff's personal injury settlement within the superannuation environment is made in accordance with the matters identified in section 24(1) including section 24(1)(l) which refers to the effect of the proposed investment for the tax liability of the trust. Ms Harper in cross-examination accepted that by placing a managed fund within a superannuation platform the income on the fund is taxed at a lower rate and in the long term the corpus grows.[17]

[18] The Order of Martin J made 15 December 2015 required the administrator, within 60 days of the date of the order, to give the Civil and Administrative Tribunal a management plan within the meaning of the *Guardianship and Administration Act* 2000 for approval.[18] The administrator is presently unable to provide a management plan until such time as the

16 Exhibit 5, appendix 2.
17 Transcript of proceedings, 18 February 2016, 1-14, lines 30-42.
18 Order 5 of the Order made by Martin J 15 December 2015.

Super Platform Costs' issue is resolved.[19] The Tribunal has granted an extension to 15 April 2016 for the administrator to lodge a management plan.[20]

Should the Super Platform Cost be assessed as part of the plaintiff's damages?

[19] In *Todorovic v Waller* (1981) 150 CLR 402 Gibbs CJ and Wilson J referred to the general principles which govern the assessment of damages for personal injuries:

> "In the first place, a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries. Secondly, damages for one cause of action must be recovered once and forever, and (in the absence of any statutory exception) must be awarded as a lump sum; the court cannot order a defendant to make periodic payments to the plaintiff. Thirdly, the court has no concern with the manner in which the plaintiff uses the sum awarded to him; the plaintiff is free to do what he likes with it. Fourthly, the burden lies on the plaintiff to prove the injury or loss for which he seeks damages."[21]

[20] The third principle was clarified by the High Court in *Willett v Futcher* (2005) 221 CLR 627. The question considered and answered by the High Court in *Willett v Futcher* was as follows:

> "…the central issue in the appeal to this Court is what kinds of costs of managing the damages awarded to a person incapable of managing his or her own affairs, whose incapacity was caused by the defendant's negligence, are to be allowed in assessing the damages allowed to that person. The question should be answered: an amount assessed as allowing for remuneration and expenditure properly charged or incurred by the administrator of the fund during the intended life of the fund. No distinction of the kind made at first instance by White J between investment advice and other services should be drawn in assessing that amount."[22]

[21] The High Court identified that the allowance to be made is for remuneration and expenditure properly charged or incurred:

> "The services properly to be provided by the administrator must first be identified. And the identification of what remuneration and expenditure is properly charged or incurred, as with the identification of the amount of remuneration and expenditure properly allowed, will require close attention to the statutes governing those matters."[23]

[22] The Court continued:

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[19] Exhibit 3, first paragraph.
[20] Transcript of proceedings, 18 February 2016, 1-8, lines 45-56.
[21] (1981) 150 CLR 402, 412 (Gibbs CJ and Wilson J).
[22] (2005) 221 CLR 627, 642 [49].
[23] (2005) 221 CLR 627, 342 [49].

> "In a case, like the present, where a plaintiff must have an administrator appointed to manage his or her financial affairs because the plaintiff's incapacity to deal with those matters was caused by the defendant's negligence, the plaintiff is awarded a lump sum of damages which is to compensate the plaintiff for losses past, present and future. In a case, again like the present, where the plaintiff will never be able to manage his or her affairs and will never be able to work, the damages awarded will often include a significant allowance for future economic loss. The plaintiff can make no decision about the fund. An administrator must be appointed. The administrator must invest that fund and act with reasonable diligence. It follows that the administrator will incur expenses in performing those tasks. The incurring of the expenses is a direct result of the defendant's negligence. The damages to be awarded are to be calculated as the amount that will place the plaintiff, so far as possible, in the position he or she would have been had the tort not been committed. That requires comparison with the position the plaintiff would have been in without the award of a lump sum for damages. It does not, as the distinction adopted by White J supposes, require or permit comparison with the position that the plaintiff would have been in had the disabling injuries not been sustained but the plaintiff none the less had a lump sum to invest. That comparison is irrelevant and inapt. In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the fund at the end of the period."[24]

[23] In *Gray v Richards* (2014) 253 CLR 660 the High Court had to consider two questions arising out of the refinement of the operation of the third principle stated in *Todorovic v Waller*:

> "The first question is whether an incapacitated plaintiff is entitled to recover costs associated with managing that component of damages which has been awarded to meet the cost of managing the lump sum recovered by way of damages. The second question is whether an incapacitated plaintiff is entitled to recover costs associated with managing the predicted future income of the managed fund."[25]

[24] The first question was answered by the High Court in the affirmative and the second question in the negative. The issue arising from the second question was referred to by the Court as the "fund management on fund income" issue.[26] The High Court accepted that where an administrator is appointed who is required to invest the fund and act with reasonable diligence it follows that the administrator will incur expenses in performing those tasks and the incurring of those expenses is a direct result of the defendant's negligence.[27] The Court further observed:

> "In addition, the question of reasonableness of fund management expenses is not at large as a matter of judicial discretion. The court does not make an open ended judgment about the reasonableness of the fund management

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[24] (2005) 221 CLR 627, 643 [51].
[25] (2014) 253 CLR 660, 666 [5].
[26] (2014) 253 CLR 660, 668 [16].
[27] (2014) 253 CLR 660, 674 [45].

expense component of damages. The court is not concerned to regulate the market for the provision of fund management services. The court's concern is to ensure that the plaintiff's actual loss is compensated. There is, for example, no scope for the court to say that the amount is simply 'too much' as a matter of intuition or impression if the plaintiff has no practical ability to bargain for a lesser charged."

[25] In the present case there is no issue as to the quantum of the Super Platform Costs.[28] Nor is it disputed that the proposed investment of the funds using a superannuation platform is both an authorised and prudential investment.

[26] In *Gray v Richards* the High Court did not accept that the cost of managing the income generated by the fund to ensure that it maintains a net income at a given rate is a compensable loss.[29] The Court identified a number of reasons for this conclusion:

> "…it is distinctly inconsistent with the second of the *Todorovic v Waller* principles, which operates on the assumption that the capital and income of the lump sum damages awarded in respect of future economic loss will be exhausted at the end of the period over which that loss is expected to be incurred. And finally, the cost of managing the income generated by the fund is not an integral part of the appellant's loss consequent upon her injury. One could view that cost as an integral part of that loss only if one were to assume that the income of the fund will, in fact, be reinvested in the fund and thereby swell the corpus under management. That assumption cannot be made, given drawings from the fund may exceed its income. Further, that assumption should not be made given that to do so would be contrary to the third of the *Todorovic v Waller* principles.
>
> Section 127 of the MACA does not warrant a different view. Under section 127 the discount rate is now set at 5%. That prescription reflects a judgment by the legislature as to the appropriate discount rate, having regard comprehensively to inflation, changes in wages and prices, and impost on the income of the fund. Such impost include the cost of managing that income. Section 127 does not, either expressly or impliedly, invite the making of an assessment of damages calculated to maintain a net income from the fund of 5% per annum."[30]

[27] The second defendant does not suggest that any part of the Super Platform Costs in the sum of $78,457 constitutes the cost of managing the income predicted to be earned on and reinvested as part of the funds under management. This was the subject of a specific concession by Senior Counsel for the second defendant.[31] It is also correct as a matter of fact when one has reference to the amortisation schedule (exhibit 6) and how the Super Platform Costs are calculated.[32] The amortisation schedule also states that the schedule has been prepared using the *Gray v Richards* methodology.

[28] Exhibit 1, Agreed Position Statement, paras. 4, 5 and 8; Transcript of proceedings, 18 February 2016, 1-12, lines 10 and 11.
[29] (2014) 253 CLR 660, 679 [66].
[30] (2014) 253 CLR 660, 679 [66]-[67].
[31] Transcript of proceedings, 18 February 2016, 1-28, lines 41 to 47; 1-29, lines 1 to 3.
[32] See [13] above.

[28] The Super Platform Costs are challenged by the second defendant on the basis that the notional income tax on the compromise sum has already been taken into account in the selection of the discount rate of 5% for all future heads of damage. Accordingly, the plaintiff should not be entitled to seek the additional cost of investing in a superannuation platform because this will further reduce the likely tax payable by the plaintiff.[33] Senior Counsel for the second defendant expressed the submission as follows:

> "If you choose an investment that has an advantage to you currently because – or the plaintiff currently because it is in a lesser tax environment, then, what you are attempting to do is to obtain a greater than normal market return, and we would say the incidence of notional tax is rolled up in the 5%. And so, you are seeking – you are requiring the defendant to pay for something that it should not be required to do. … if the purpose of the expense is to attempt to obtain a greater level of return on investment through reduction in tax, you can't do that, because the damages have already been assessed at $1.5 million, and because the third principle of *Todorovic v Waller* says so, that how the plaintiff wishes to use their money is a matter for them."[34]

[29] In essence, the second defendant submits that if the Super Platform Costs constitute part of the damages award, the Court would be impermissibly supplementing the award to allow the plaintiff to gain a higher rate of net return.[35] This submission should be rejected.

[30] The 5% discount rate is found in section 61(4) of the *Civil Proceedings Act* 2011 which is engaged by virtue of section 57 of the *Civil Liability Act* 2003. Section 57 provides:

> "**Discount rate for calculating present value of future loss or gratuitous services**
>
> (1) When assessing an amount of damages as a lump sum for a future loss or gratuitous services, the amount must be the present value, calculated using the prescribed discount rate, of the future loss or gratuitous services.
>
> (2) In this section—
>
> ***prescribed discount rate***, for an award, see the Civil *Proceedings Act 2011*, section 61."

[31] Section 61(4) of the *Civil Proceedings Act* provides:

> "(4) In this section—
>
> ***prescribed discount rate***, for an award, means—
>
> (a) the discount rate prescribed under a regulation as in force when the award is made; or
>
> (b) if a discount rate is not prescribed under a regulation when the award is made—5%."

[33] Second defendant's written submissions, para. 2.7.
[34] Transcript of proceedings, 18 February 2016, 1-33, lines 25-30 and lines 40-45.
[35] Transcript of proceedings, 18 February 2016, 1-34, lines 12-15.

[32] The second defendant referred to the decision of Dutney J in *Bell v Pfeffer* [2009] QSC 209. In that case his Honour, by reference to *Todorovic v Waller*, identified that a court is required to assume at the time of judgment that while the rate of return on the administered sum might vary above or below 5% over a period of time, and particularly over a long period of time, the average real return would be in the order of 5% net.[36]

[33] His Honour, by reference to the passage from *Willett v Futcher* quoted in [22] above, noted that a plaintiff is entitled to all the direct costs associated with holding and deriving an income stream from the fund created by the award of damages.[37] Similar to the present case Dutney J was concerned with management fees for an investment in a superannuation fund. In my view, upon proper analysis, the decision in *Bell v Pfeffer* does not assist the second defendant. In allowing the management fees in respect of the superannuation investment, his Honour stated:

> "…they represent a direct cost of earning an investment return. In either case, where the actual investment of the fund is contracted out by the administrator to the Select Fund, these amounts should be treated as monies expended by the administrator on behalf of the plaintiff and chargeable against the estate since the estate ultimately bears that cost. The total of both the Select Fund fees and the MER's are a known fixed cost at the time the money is placed with the Select Fund. I am thus satisfied that both of the amounts charged by the Select Fund for its own use and the amounts which it pays to its underlying investment managers can properly be claimed by the administrator as expenses in addition to the commission payable under s 41 of the Act. This seems to me to represent the real cost difference between an injured plaintiff with a lump sum to provide a regular fixed income over a defined term and another person receiving a periodic income with no lump sum to invest."[38]

[34] In arriving at that conclusion his Honour expressly rejected an argument that as courts compensate plaintiffs on the basis they will obtain a 5% after tax real rate of return that the management fees are also effectively built into the statutory 5% discount rate. In rejecting this argument, his Honour stated:

> "I am unable to accept the argument. The PDS makes it plain that fees are charged both by the Select Fund and by those to whom the Select Fund entrust the actual investment of the Fund. Those fees are capable of precise calculation being based upon fixed percentages of the amounts under investment. The fixed percentages of the invested sum charged for management fees bears no relationship to the returns paid in any given accounting period. By this I mean that the rate at which such fees are charge bears no relationship to the investment outcome. The same fees are paid whether the underlying funds make a profit or a loss. Thus, in my view, whether they are deducted by the underlying fund manager before payment of a net amount or paid in arrears by the Select Fund, they represent a direct cost of earning an investment return. In either case, where the actual investment of the fund is contracted out by the administrator to the Select Fund, these amounts should be treated as monies expended by the

[36] [2009] QSC 209, [13] (Dutney J)..
[37] [2009] QSC 209, [20] (Dutney J).
[38] [2009] QSC 209, [40] (Dutney J).

> administrator on behalf of the plaintiff and chargeable against the estate since the estate ultimately bears that cost."[39]

[35] I accept the correctness of his Honour's analysis. Further, in circumstances where there is no question as to the appropriateness of the proposed investment, the present taxation advantages of such an investment are in my view irrelevant. The Super Platform Costs constitute a fee payable by the administrator to the trustee of the superannuation fund. They are the very types of fees contemplated by *Willett v Futcher* and *Bell v Pfeffer* as properly constituting part of a damages award. No statement in *Willett v Futcher* nor indeed in *Gray v Richards* requires the Court to investigate the present tax advantages of a particular investment. Such an inquiry would in any event be fruitless. Any present tax advantages in investing in the superannuation environment are, of course, subject to change.

[36] The second defendant relied on the statement made by the High Court in *Todorovic v Waller* adopting a discount rate of 3%:

> "This rate is intended to make the appropriate allowance for inflation, for future changes in rates of wages generally or of prices, and for tax (either actual or notional) upon income from investment of the sum awarded. <u>No further allowance should be made for these matters.</u>"[40] (Second defendant's emphasis)

[37] The second defendant submits that the fee of $78,457 constitutes a "further allowance" because it reduces the likely tax payable by the plaintiff. The statement in *Todorovic v Waller* that "no further allowance should be made for these matters" does not have the effect as contended by the second defendant. As stated by Martin J in *Lewis v Bundrock* [2008] QSC 189:

> "It seems tolerably clear that the High Court, in arriving at the discount rate of 3%, took into account the incidence of taxation and, in doing so, should not be regarded as having ignored the prospect of the deductibility of expenses affecting the taxation otherwise payable."[41]

[38] The question his Honour was addressing in that case was whether the tax deductibility of part of the management fees and the financial advantages the plaintiff would thereby enjoy should be brought to account in the calculation of those fees to arrive at the plaintiff's true (after-tax) loss. The mere fact that a particular investment may achieve present taxation advantages is ultimately irrelevant in determining whether the management fees properly constitute part of the plaintiff's damages award. It is sufficient to constitute part of the award of damages that the Super Platform Costs are an actual cost to be incurred by the administrator during the intended life of the fund.

Disposition

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[39] [2009] QSC 209, [40] (Dutney J). The reference by his Honour to "PDS" is a reference to the Public Disclosure Statement of the relevant superannuation fund namely the Select Fund.

[40] (1981) 150 CLR 402, 409..

[41] [2008] QSC 180, [25] (Martin J).

[39] The Court makes the following orders:

1. The damages for management fees payable by the second defendant to the plaintiff are assessed in the sum of $635,714.

2. In accordance with Order 7 of Martin J on 15 December 2015, the second defendant pay the assessed management fees in the sum of $635,714 to the administrator within 21 days of this order, whose receipt shall be sufficient discharge for the second defendant.

3. In accordance with Order 8 of Martin J dated 15 December 2015, the Court orders that pursuant to section 59(2) of the *Civil Proceedings Act* 2001 interest on the assessed management fees in the sum of $635,714 is not payable if such sum is paid by the second defendant to the administrator in accordance with Order 2 above. If unpaid then interest accrues and is payable on the unpaid balance pursuant to section 58(3), from the date of order default.

4. In accordance with Order 9 of Martin J made 15 December 2015, the second defendant pay the plaintiff's standard costs of and incidental to the assessment of damages for management fees within 21 days of their assessment or prior agreement between the second defendant and the administrator as to their amount.

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