

PRACTICE UPDATE

“In *Gray v Richards* [2014] HCA 40, the plaintiff appealed against the adverse findings in the NSW CA. The High Court unanimously found the plaintiff was entitled to the cost of fund management on fund management on the basis that it was not open to challenge these charges, which had been found to be “entirely reasonable” below, a decision not challenged in the High Court. The expenses were an integral part of the cost of fund management [45] and accordingly, should be allowed. However, in respect of fund management on future fund income, the appeal was not allowed. No assumption could be made as to what would happen in this regard in respect of the fund. It could not be assumed that the income of the fund would, if any, equate with the discount rate.

The consequence is that on an agreed verdict of \$10 million plus fund management, the damages for fund management allowed in the NSW CA of \$1,495,000 are increased by \$539,000 to \$12,151,000 in total. The amount not allowed for fund management on income into the fund would have been a further \$117,000 or 18% of the additional sum claimed in the High Court. Accordingly, the plaintiff/appellant succeeded as to the overwhelming bulk of the additional damages claimed for fund management.

Astute negotiators for such plaintiffs and astute fund managers will no doubt in the future ensure that there is 100% recovery of the cost of managing the allowance for fund management by it being levied only on the decreasing capital of the fund and not on the income but at a rate which produces the same or similar ultimate charges. Accordingly, it is likely that the whole of fund management will be recoverable if this course is pursued. It is noted that both the NSW Trustee and Guardian and private fund managers have shown themselves willing in the past to negotiate in respect of the regime of future charges and indeed, to offer discounts to those for whom very large sums of money are being invested and managed, such as this severely disabled plaintiff.”

“*Gray v Richards* [2011] NSWSC 877 (Harrison AsJ)”