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Swift v Carpenter

A Summary

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Introduction

In perhaps the most eagerly anticipated decision of the last few years, the Court of Appeal has handed down its decision in *Swift v Carpenter* [2020] EWCA Civ 1295. The issue at stake concerned the valuing of claims for damages where an injured Claimant was obliged to purchase alternative accommodation as a consequence of injuries suffered. The approach set out in *Roberts v Johnstone* [1989] QB 878 had become otiose in the era of negative discount rates which led to a nil award.

The scope for such an award arises in any claim for long-term disability where mobility is affected.

Mrs Swift suffered serious injuries in a road traffic accident, which led to an amputation of her left lower leg and significant disruption of the right foot. She had continuing complications and ongoing difficulty and was only 39 years of age at the time of the accident. Whilst new accommodation for her was required, and the additional capital cost of special accommodation was put at £900,000 more than the value of her existing home, Lambert J, at first instance, declined to make any award, considering herself bound by the decision in *Roberts'* case.

Summary

- *Roberts v Johnstone* is no longer binding authority, a new approach to damages is set out, achieved by calculating the additional capital cost of a new property, less the present market value of the reversionary interest in the property;

- The present market value of the reversionary interest is calculated using an annual rate of return of 5% over the period of the Claimant's life expectancy;

- The Court of Appeal has conducted a comprehensive review of the law in this area, assisted by the intervention of the Personal Injury Bar Association;

- The guidance proposed should apply to long term injury cases for the foreseeable future. It should only be necessary to revisit it in response to "*really significant changes*".

The Appeal

The Appellant was permitted to adduce new expert evidence relating to mortgage packages backed by periodical payment orders to enable the Court to consider alternative submissions. PIBA put before the Court three agreed scenarios to assist. These "paradigm cases" are appended to the judgment as annex 1.

The full judgment can be found here.

The issues were identified by Irwin L.J., who gave the leading judgment, as follows:

> *"36. The issues remaining live in the appeal can be summarised as follows. The first is a legal issue: is this court bound by the decision in Roberts v Johnstone? That issue subdivides into three questions: does Roberts v Johnstone apply? If yes, is the court prevented from revisiting Roberts v Johnstone? If no, should the court revisit Roberts v Johnstone? If the answers to those questions permit the court to re-examine the approach in Roberts v Johnstone, then the questions arise, should the court award the full capital value of the incremental sum required? Alternatively, should the court award that sum but reduced to reflect the value of the notional reversionary interest, in other words the value of the "windfall"? If the latter approach is correct, how should the court reach a conclusion as to the value of the reversionary interest?"*

The answer to the first question was that the Court was not bound by *Roberts v Johnstone*, which represented guidance, rather than legal principle. Conditions had changed so as to make its approach unjust. The approach to calculation of personal injury damages had altered. The case was distinguishable from *Knauer v Ministry of Justice* [2016] UKSC 9. It was right in the circumstances to depart from the guidance in *Roberts'* case.

> *"79. Many of the decisions at an appellate level bearing on the approach to calculating damages are explicitly based on the conditions of the day. The decision in Wells v Wells was so. Guidance is given often with an express indication that the guidance is based on changed conditions, and might be altered by future changes, albeit implicitly significant rather than trivial changes. Where such guidance is given by an appellate court as to how best, in the currently prevailing circumstances, to comply with legal principle (in this instance fair and reasonable compensation but not overcompensation) then it seems to me conceptually correct to recognise that it is guidance, and not an enunciation of legal principle. The practical consequences for litigation will be little different. Litigants and judges at first instance will not depart lightly from such guidance: the costs risks in personal injury litigation represent a formidable discipline. But there would be a diminished risk that guidance as to practice will long outlive the conditions which gave rise to it."*

Irwin L.J. then turned to the question of whether the approach laid down in *Roberts* should be altered.

The problem before the Court was articulated by the expert economists called by each party, Dr Llewellyn for the Appellant and Mr Wilson for the Respondent.

> *"84. Both these experts agree that there is an intrinsic problem in compensating for a more expensive house purchase than would otherwise arise. As Mr Wilson put it, this is fundamentally because "housing does not just provide the owner with somewhere to live. It also represents a capital asset which can be sold…". Mr Wilson points out that what has become termed "the windfall problem" is not confined to an award of lump sum damages to cover such additional capital cost. He says: "it would be no different if the defendant provided a periodical payment of a more expensive property, or indeed if the defendant provided an interest-free loan…. In all these cases the claimant, as the beneficial owner of the property, would benefit from any additional capital gain that accrued as a result of owning a more expensive house…. The only circumstances where this windfall problem does not arise is when the claimant does not own property."*

Irwin L.J. concluded as follows on the basis of the economic evidence:

> *"100. Standing back from the economic evidence, in my judgment some conclusions arise. Although it may be the safest prediction, I accept from Dr Llewellyn's evidence that it is no longer a "safe prediction" that property prices will rise or even hold their value over the ensuing decades. We are not in the same era as the court in Thomas, where the experts agreed that property prices would rise to keep pace with inflation. I accept that the "user cost of housing" is a valid economic tool for historical analysis, taking into account as it does the gain in capital value normally only realised on death. It is a separate question whether the user cost of housing is an appropriate yardstick for full, fair and reasonable compensation to an injured claimant during life. Even as an academic approach, the user cost of housing as a predictive tool in relation to an individual appears to me to have a high degree of uncertainty, perhaps particularly starting from such a turbulent economic and financial climate as obtains in mid-2020."*

Actuarial evidence was also called, assessed by the Court from paragraph 102 onwards.

Weighing all of this evidence up the Court concluded:

> *"140. I can state my conclusions on this issue quite briefly. It is my view that, in the context of modern property prices and a negative discount rate, the formula in Roberts v Johnstone no longer achieves fair and reasonable compensation for an injured claimant. In my view, it cannot be regarded as full, fair or reasonable compensation to award nil damages in respect of a large established need, on the basis that, if all the relevant predictions hold good over many decades to come, there will arise a windfall to a claimant's estate. Nor is it fair or reasonable compensation to follow the Roberts v Johnstone approach on the basis that if all the same predictions hold good, there will in addition*

be in existence a suitable market to enable a claimant, by then elderly or aged, to release equity at a reasonable cost and without unacceptable disruption.

The Court thus had to consider an alternative and better approach. In doing so, the Court had to grapple with assessment of the value of the reversionary interest:

"150. Before examining the evidence on this issue, it is worth emphasising a preliminary point. The Respondent agrees that if the Roberts v Johnstone approach is set aside, then the 'cash-flow' analysis which they advance as an approach to valuing the reversionary interest is not a practical means of determining the proper level of compensation in individual cases. Such an approach would require detailed expert actuarial evidence on each side. That evidence could only be crystallised once the capital cost difference between the "un-injured" house and the "injured" house had been agreed or established by the court. The "cash-flow" model is advanced as relevant to the level of discount to be applied generally. It is agreed that the proper approach is to establish as a capital sum what award is required to fund the purchase of the house required, and then to establish a practicable approach to the calculation of a single sum to be deducted, representing the value of a reversionary interest in the windfall. In reality, this comes down to the question of what discount rate should be used for the calculation."

Conclusion

The conclusions are summarised from paragraph 202 onwards:

"205. The principles of law by which this court is bound can be summarised in two propositions: firstly, that a claimant injured by the fault of another is entitled to fair and reasonable, but not excessive, compensation. Secondly, as a corollary of that fundamental principle, in relation to the head of claim with which we are concerned, the award of damages should seek so far as possible to avoid a "windfall" to a claimant, or more realistically to his or her estate.

"206. There are well established examples in the field of tort where a degree of overcompensation has proved unavoidable. They are helpfully digested in McGregor on Damages 20th Edition Paragraphs 2–005/8. If it were to prove impossible here to award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence. I emphasise however that such an analysis is not necessary for my decision in this case. In my view it is possible, adopting the usual pragmatic approach to the law of compensation in tort, to make a fair and reasonable award in such cases while at the same time taking reasonable steps to avoid over-compensation.

"207. If the Roberts v Johnstone approach is set aside, then the Respondent has conceded that the 'cash-flow' analysis is not a practical means of determining the proper level of compensation in individual cases. It is here advanced as evidence bearing on the general decision as to the proper discount rate. For the reasons given, I am sceptical of the fragility of the "cash-flow" analysis, however I have borne that approach, and the outcome advanced by Mr Robinson, in mind as a reference or check.

"208. For the reasons I have given, it appears to me that a market valuation is a more apt approach towards establishing the current value of a reversionary interest, which will not mature for many years. However, in response to the limited existing market and the other evidence given, I have reached a deliberately cautious view as to the appropriate discount at 5%.

"209. I reject the suggestion from the Respondent that it is inappropriate to apply the Ogden table 28 multiplier to life expectancy when calculating the amount to be deducted in respect of the windfall. The court has reached a decision on the Appellant's life expectancy. It seems to me appropriate to treat that decision as a term certain for the calculation.

"210. I accept the submission of the Intervener that this guidance should not be regarded as a straitjacket to be applied universally and rigidly. There may be cases where this guidance is inappropriate. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring.

"211. For those reasons, I would quash the decision of the judge declining to make any award in respect of an identified need for £900,000 to purchase a more expensive house. In my view the appropriate award, applying a 5% discount rate, and therefore taking the value of the reversionary interest to be £98,087, would be damages of £801,913, and I would so order. To that extent and with that outcome I would allow the appeal."

Calculation

This establishes a clear approach to the valuation of an accommodation claim.

Daryl Allen QC, instructed by PIBA, intervening, has prepared a useful formula, as follows setting out the approach to be taken.

"The Formula

The correct approach for the valuation of an accommodation claim is now as follows:

- *Value of reversionary interest is: $R = (P – B) \times 1.05^{-L}$*
- *Where:*

  R = reversionary interest

  P = value of property now required

  B = value of property owned but for the accident

  L = predicted life expectancy
- *Damages award: D = (P – B) – R"*

In the case of Mrs Swift herself, that led to the following calculation:

- *P = £2,350,000*
- *B = £1,450,000*
- *L = 45.43 (normal life expectancy derived from Table 2)*
- *Therefore:*

  $R = (£2,350,000 - £1,450,000) \times 1.05^{-45.43} = £98,087$

  D = (£2,350,000 - £1,450,000) – £98,087 = £801,913

and thus the award of £801,913.

The Future

Whilst the Court acknowledged that there would be some cases where the guidance was inappropriate, it anticipated that it would be enduring for cases of longer life during periods of negative or low positive discount rates. The possibility that a different approach would be required for short life expectancy cases was acknowledged, where the value of the reversionary interest and thus the deduction to the additional capital sum would be greater. The Court said expressly that different considerations could apply in that category of case.

Nonetheless, Nicola Davies L.J. emphasised the enduring nature of the guidance now given.

> *"215. There is a real need for effective guidance by the courts in this area of personal injury law. As all who practise in this field are aware, many cases never reach trial. Negotiations leading to the narrowing of claims and settlement are an integral part of such litigation. What is required is clear and workable guidance by the court which should enable practitioners to provide legally sound and practical advice."*

It is thus the case that the guidance will only be revisited in response to really significant change. Being Appellant guidance, it will rarely be right for a first instance Court to depart from it.

Where does this leave practitioners? Firstly, the *Roberts* problem is now resolved, in a way that provides clarity as to calculation and the evidence upon which calculations will be based. It will apply to all first instance cases, where the survival period is long – noting the issue of short life expectancy which may find its way to the Courts in time. Secondly, cases which have proceeded on an assumption that no accommodation award would be made need to be revisited. Existing Part 36 offers will need to be thought about and revised, upwards in the majority of cases. Finally, market valuations will be required as a necessary part of the expert evidence in accommodation cases moving forward.

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9 October 2020

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