IN THE COURT OF APPEAL (CIVIL DIVISION) **APPEAL NO. BS/2018/2189**

ON APPEAL FROM THE HIGH COURT

QUEEN'S BENCH DIVISION

THE HONOURABLE MRS JUSTICE LAMBERT (DBE)

[2018] EWHC 2060 (QB)

B E T W E E N :

CHARLOTTE SWIFT **Appellant/Claimant**

- and –

MALCOLM CARPENTER **Respondent/Defendant**

- and -

PERSONAL INJURIES BAR ASSOCIATION **Intervener**

REPLACEMENT SKELETON ARGUMENT

on behalf of the **PERSONAL INJURIES BAR ASSOCIATION**
for the Appeal to be heard on 23rd June 2020

INTRODUCTION

1. PIBA remains neutral as to the ultimate outcome in the Appellant's individual case.

2. PIBA submits that there are three issues at the core of this appeal:

   2.1. Is the ***Roberts v. Johnstone*** approach tied to the discount rate fit for purpose (i) generally, and/or (ii) at times of a negative discount rate?

   2.2. To what extent is the Court of Appeal bound by ***Roberts v. Johnstone*** and/or ***Wells v. Wells*** insofar as the latter ties the ***Roberts v. Johnstone*** annual allowance to the discount rate?

23. Assuming that it is open to the Court to depart from a strict application of ***Roberts v. Johnstone***, is there a better basis upon which to assess compensation which produces a fair and reasonable award in the Appellant's case and generally?

3. PIBA has not yet had sight of the skeleton arguments from the parties. In particular, it is not known what alternative bases for compensation they will advance if the Court is against them on their primary cases[1].

4. PIBA's position is: (i) ***Roberts v. Johnstone*** is no longer fit for purpose; (ii) it is open to the Court to depart from ***Roberts v. Johnstone***/***Wells v. Wells*** on this issue; and (iii) the reversionary interest model is the most appropriate basis for the assessment of lump sum compensation in this case and generally; if that model is not considered viable then a ***Roberts v. Johnstone*** type calculation with a positive annual percentage rate or full capital cost would have to be considered.

5. This document builds upon the observations and arguments advanced in PIBA's original submissions in the light of the expert evidence obtained and the development of the issues as the appeal has progressed.

6. PIBA has been allocated 30 minutes for oral submissions but 25 pages for written submissions; accordingly this document is a little less skeletal than might otherwise be expected.

7. PIBA is conscious of its role as an intervener and the need to avoid repetition of the arguments advanced by the parties. Unfortunately, as we have not had sight of the Skeleton Arguments of the parties there may be some unintended repetition in this document.

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1 It is anticipated that the Appellant's primary case will be full capital cost without reduction, and the Respondent's will be the continued use of the **Roberts v. Johnstone** calculation tied to the statutory discount rate producing a nil award in the Appellant's case and in all cases where the discount rate is 0% or less.

UNDERLYING PRINCIPLES

The purpose and measure of an award of damages for personal injury

8. A claimant is entitled to damages calculated to place her as closely as possible in the position that she would have been absent her injury [***Livingstone v. Rawyards***].

9. The touchstone for the assessment of damages is reasonableness.

10. Where an award of damages results in an unavoidable collateral benefit to the claimant, there can be no reduction in the award of damages to reflect that benefit [***Lagden v. O'Connor***]. Conversely, where that collateral benefit can be reasonably and fairly avoided without requiring the injured party to "*incur a loss, bear a burden or make unreasonable sacrifices*" then the course which avoids that benefit should be taken [see Lord Hope in ***Lagden v. O'Connor*** @1080D].

The extent to which the defendant's position/interests are to be taken into account when assessing damages for personal injury

11. It is legitimate to take into account the position of defendants generally when assessing general damages for pain, suffering and loss of amenity [see Lord Woolf MR @ §27 and §38 in ***Heil v. Rankin*** and Lord Briggs @ §26, §28 and §33 in ***Attorney General of St Helena v. AB and Others***].

12. It is not permissible to take into account the position or interests of defendants, individually or collectively, in the assessment of compensatory damages for special damages or future losses; there is no room for any judicial scaling back of the award to reflect the defendant's financial position or other interests. In this regard we refer to Lord Lloyd in ***Wells v. Wells*** [@ 364A],

> *… The purpose of the award is to put the plaintiffs in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial*

scaling down. Current awards in the most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce awards, if properly calculated, because they seem very high than there is to increase awards because the injuries are very severe.

The value of certainty and consistency in the assessment of damages

13. PIBA acknowledges the need for certainty and consistency in the assessment of damages. As stated by Lord Neuberger and Baroness Hale in ***Knauer v. Ministry of Justice***,

> *21. Furthermore, it is important not to undermine the role of precedent in the common law. Even though it appears clear that both the reasoning and conclusion on the point at issue in* ***Cookson v Knowles*** *and* ***Graham v Dodds*** *were flawed, at least in the light of current practice, it is important that litigants and their advisers know, as surely as possible, what the law is. Particularly at a time when the cost of litigating can be very substantial, certainty and consistency are very precious commodities in the law. If it is too easy for lower courts to depart from the reasoning of more senior courts, then certainty of outcome and consistency of treatment will be diminished, which would be detrimental to the rule of law.*

14. PIBA acknowledges the importance of this principle when this Court is being invited to revisit its own earlier decisions. However, the principle is of wider importance. The Court will be keen to identify a basis for the assessment of compensation which, to the greatest possible extent, is clear, consistent and certain so that litigants and their advisers can make meaningful predictions as to the likely award of damages to facilitate reasonable and sensible compromise. This is important when the Court considers the alternatives to the current ***Roberts v. Johnstone*** approach.

15. The Court will need to consider whether a "*one size fits all*" approach is a viable solution or whether alternative approaches are available for consideration on a

case by case basis. The former is obviously preferable but must be consistent with fair and reasonable compensation.

16. The only certainty in accommodation claims at present is that litigants and their advisers are compromising these claims on inconsistent bases driven by risk and uncertainty as to the outcome of this appeal.

The prohibition on awarding the full capital cost of a property

17. ***George v. Pinnock***, ***Roberts v. Johnstone*** and ***Wells v. Wells*** confirm that a claimant cannot recover the full capital cost of meeting her accommodation needs. That principle rests entirely upon the "*windfall*" principle.

The Court of Appeal's power to depart from its own previous decisions

18. The Court of Appeal's power to depart from one of its own previous decisions is extremely limited. The classic definition of the scope of that power is ***Young v. Bristol Aeroplane Co Ltd***.

19. It has been argued that there is an additional exception to the doctrine of precedent where the application of a prior decision of the Court to Appeal to a new situation would produce an unjust result [see ***R (DN (Rwanda)) v. Home Secretary*** @ §40]. However, if and insofar as that rule exists it must be interpreted narrowly and would appear to be limited to cases where the decision affects the liberty of the subject [***R (DN (Rwanda))*** @ §41].

The application and scope of the *Roberts v. Johnstone* formula

20. The ***Roberts v. Johnstone*** formula depends upon two key assumptions: (i) that the claimant will pay for the additional accommodation out of her own capital ["**the first assumption**"]; and (ii) that the capital invested will be risk-free over the period of the award, and protected against inflation by a corresponding increase in the value of the house ["**the second assumption**"]. Where those assumptions hold good, "*What the plaintiff has therefore lost is the income which the capital would have earned over the period of the award after deduction of tax.*" [Lord Lloyd in ***Wells . Wells*** @ 380].

21. As stated by Tomlinson LJ in ***Manna v. Central Manchester University Hospitals NHS Trust*** [@ §17], "*The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation.*"

22. PIBA questions upon what basis ***Roberts v. Johnstone*** applies where that assumption does not hold good? The Appellant requires £900,000 to fund the purchase of the property. If one takes £130,000 for the PSLA award [as suggested by the Respondent] then she has to find a further £770,000. The only way that the Appellant could possibly do that is by tying up a substantial proportion of her compensation awarded for identified future losses and expenses[2]. Contrast that with the facts of ***George v. Pinnock***, ***Roberts v. Johnstone***, and ***Thomas v. Brighton Health Authority*** where the award for pain, suffering and loss of amenity ["**PSLA**"] exceeded the additional property costs.

23. In the overwhelming majority of today's cases, the capital required to fund the property purchase substantially exceeds the PSLA award as house price rises have far exceeded increases in PSLA awards.

24. If one of the central assumptions underpinning ***Roberts v. Johnstone*** is displaced, upon what basis is the ***Roberts v. Johnstone*** formula imposed? On the facts of the Appellant's case, she does not have surplus capital which she could reasonably be expected to use to fund the property purchase – the first assumption therefore does not hold good.

25. If that is correct then ***Roberts v. Johnstone*** does not apply and it is open to the Court to consider the appropriate compensation model with the straightjacket of the ***Roberts v. Johnstone*** formula removed. That does not require the Court to depart from ***Roberts v. Johnstone***; it simply recognises the limited scope and application of the rule in ***Roberts v. Johnstone***.

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[2] It is now common ground that at present there is no suitable mortgage product available to her.

26. PIBA addresses the argument that the Appellant/claimants generally should be required to invest their damages in the purchase of a property with a view to securing some form of equity release product in later life under "**Equity release**" at §76-79 below.

<u>The extent to which the adoption of the discount rate in the *Roberts v. Johnstone* calculation in *Wells v. Wells* is binding on the Court of Appeal</u>

27. This issue only arises if the Court considers itself bound to apply ***<u>Roberts v. Johnstone</u>*** on the facts of the Appellant's case.

28. Undoubtedly, as a matter of precedent any statement of principle, law or practice of the House of Lords in ***<u>Wells v Wells</u>*** is binding on the Court of Appeal.

29. PIBA submits that the Court of Appeal's ability to depart from the adoption of the discount rate in ***<u>Wells v. Wells</u>*** depends upon whether that decision was a statement of principle, law or practice, or simply the setting of a guideline.

30. Arguments in favour of ***<u>Wells v. Wells</u>*** simply setting a guideline are:

    30.1. The principle issue in ***<u>Wells</u>*** was the setting of the discount rate. The House of Lords was clear that that involved the setting of a guideline [see Lord Lloyd @ 375C-376B and Lord Steyn @ 388D; see also the analysis of Mr Justice Jay in ***<u>LHS v. First Tier Tribunal (Criminal Injuries Compensation)</u>*** @ §22]. If the underlying rate was no more than a guideline, it seems illogical to suggest that the adoption of that guideline rate in the ***<u>Roberts v. Johnstone</u>*** calculation was a binding statement of law, principle or practice.

    30.2. The House of Lords recognised that the discount rate itself could be modified in changed economic circumstances [see Lord Steyn @ 382D and 388D/E and Lord Hutton @ 404H] or "*to meet the demands of particular cases*" [Lord Clyde @ 397H] or in "*very exceptional cases*" [Lord Hutton @ 405D]. If the discount rate itself should not be regarded as "*immutable*" but could be modified, for example, in response to "*marked* *change in economic circumstances*" [Lord Steyn @ 388E], upon what basis is the rate in the ***Roberts v. Johnstone*** calculation to be regarded as immutable and tied to the discount rate despite marked change in economic circumstances?

30.3. The rate to be applied in the ***Roberts v. Johnstone*** calculation was "*the 'going rate' for foregoing the use of money*" [Lord Lloyd @ 380D]. Changing the annual rate from 2% in ***Roberts*** to 3% in ***Wells*** did not require the House of Lords to overrule or reject the approach taken in ***Roberts***; it was not changed on principle; the 2% rate in ***Roberts*** was not "*sacrosanct*" and the House of Lords merely substituted 3% for 2% to reflect the change in ILGS average net returns, rather than reflecting any statement of principle, law or practice.

30.4. By definition, the "*going rate*" for foregoing the use of money must be amenable to review and change in the light of changed economic circumstances. That is entirely consistent with the setting of a guideline.

30.5. The selection of the discount rate as the rate for the ***Roberts v. Johnstone*** calculation was not based upon principle, but rather the fact that it had two practical "*advantages*", namely, "*In the first place it is the same as the rate for calculating future loss, Secondly it will be kept up to date by the Lord Chancellor when exercising his powers under section 1 of the Act of 1996.*" [Lord Lloyd @ 381A].

30.6. Note the analysis of Tomlinson LJ in ***Manna v. Central Manchester University Hospitals NHS Trust*** and his observation that "*the rate now **conventionally applied** in the calculation is 2.5%*[3]." [***emphasis*** added] [§16]

31. If the adoption of the discount rate in the ***Roberts v. Johnstone*** calculation was no more than the setting of a guideline then PIBA suggests that it is open to the

3 The then prevailing discount rate.

Court of Appeal to depart from that guideline provided there are sufficient and proper grounds to do so.

32. The jurisdiction to depart from such a guideline is to be exercised sparingly. The individual speeches in ***Wells*** recognise the existence of the jurisdiction to depart from the guideline discount rate, but describe the threshold or gateway to that jurisdiction in different terms,

32.1. Lord Lloyd – The guideline should be "*subject to the same flexibility as is to be found in section 1(2) of the Act of 1996.*" [375F].

32.2. Lord Steyn – "*only a marked change in economic circumstances should entitle any party to reopen the debate in advance of a decision by the Lord Chancellor*" [388E].

32.3. Lord Hope – Adjustments for the impact of higher rate tax on particular awards could be made "*in exceptional cases*" [393E] and "*Adjustments may have to be made to that [3%] rate in the light of significant changes in the yield on I.L.G.S. in the future.*" [393F].

32.4. Lord Clyde – The rate of 3% "*can serve as a general guide, open to modification and adjustment to meet the demands of particular cases.*" [397H]

32.5. Lord Hutton – The rate of 3% should be adopted until the Lord Chancellor prescribes a different rate or "*unless there is a very considerable change in economic circumstances.*" [404H].

32.6. Lord Hutton – "*it would be open to plaintiffs in very exceptional cases to contend that a higher multiplier should be taken.*" [405D]

33. As far as PIBA is aware, the Courts have exercised the jurisdiction to depart from the ***Wells v. Wells*** guideline discount rate in one case only. In ***Helmut v. Simon***, a Guernsey case, the Privy Council upheld the decision of Sumption JA [sitting the Guernsey Court of Appeal] where he held that the appropriate discount rates in Guernsey were -1.50% for earnings related losses and 0.5% for all other losses. In the Privy Council, Lord Dyson proceeded on the basis that

the jurisdiction to depart from the ***__Wells__*** guideline rate required "*marked change in economic circumstances*" before the debate could be reopened [see §107].

34. Whatever the precise terms of the gateway to the jurisdiction to depart from the guideline discount rate, PIBA submits that marked change in economic circumstances is sufficient to engage that jurisdiction [see ***__Helmut v. Simon__***].

35. If marked change in economic conditions is sufficient to engage the jurisdiction to alter the underlying guideline rate, PIBA submits that by extension it is sufficient to engage the jurisdiction to alter the guideline rate for the ***__Roberts v. Johnstone__*** calculation. The setting of a negative discount rate, itself reflecting marked change of economic circumstances, is sufficient to engage that jurisdiction.

__Reliance upon inflation in the calculation of loss__

36. The Respondent's previous "*no loss*" or "*reduced loss*" arguments rely, in part, upon the assertion that any expense to the Appellant is offset by "*accruing equity*" [see for example **Respondent's Supplemental Skel §8, §12(c) and (d) @ SB2/Tab2/pp.14-15**]. The reference to "*accruing equity*" is a reference to positive house price inflation such that the Appellant's equity in the property is predicted to increase over time.

37. The Respondent contends in particular that the Appellant will accrue equity in the property "*at a faster rate than the statutorily assumed investment return on the additional capital required.*" [**Respondent's Supplemental Skel §12(c) @ SB2/Tab2/p.15**].

38. The Respondent's specific reliance upon house price inflation to establish no loss or reduced loss is best illustrated at §24-26 of his Supplemental Skeleton Argument [**SB2/Tab2/p.18**].

39. The Respondent's experts also rely upon predicted house price inflation within their analysis of (i) whether there is a loss, and (ii) how that loss, if established, should be calculated. We refer to the following examples:

39.1. __Wilson__ §4.4 [**EB1/Tab5/p.140**] – (i) The formula for user cost of housing for "*a borrower*" is: *Post-tax mortgage rate* minus *House price inflation = User cost* [**see EB1/Tab5/p.138**]; (ii) the user cost of housing for "*a saver*" is: *Deposit rate/Investment return rate* minus *House Price inflation = User cost* [**see EB1/Tab5/p.138**].

39.2. Wilson Section 6 [**EB1/Tab5/p.153**] – See 4th, 5th and 6th bullet points.

39.3. Clark Section 9 [**EB1/Tab6/p.189**] – The "*Real Growth Rate*" which forms part of the ***Sportelli*** calculation of the "*present value of the freehold reversion deferred to the term date of the lease*" refers to predicted "*long term growth rate in house prices net of inflation*" [**see §9.15 @ EB1/Tab6/p.189 and §9.28(b) @ EB1/Tab6/p.200**].

39.4. Angell – Her equity release model "*does require a significant number of assumptions which are uncertain and rely on expert judgement. These include house price inflation ….*" [**§2.24 @ EB2/Tab8/p.444**]. Her analysis and her calculations are premised upon an assumed "*house price inflation*" rate of 3.20% p.a. [**§4.5 @ EB2/Tab8/p.448 and §4.8 @ EB2/Tab8/p.449**] and an assumed "*inflation rate for all other heads of loss of 3.10% per annum*" [**§4.8 @ EB2/Tab8/p.449**].

40. The Respondent's expert in the valuation of reversionary interests, Mr Robinson, also relies upon inflation in his "*fair and reasonable*" valuation: his 50/50 equities and index-linked gilts investment calculation assumes an investment return of 1.1% above inflation [**§4.22 @ EB2/Tab18/p.586**]. It appears, though it is not clear, that this is 1.1% above RPI [see his **§4.19 @ EB2/Tab18/p.586**].

41. Is it permissible to rely upon predicted house price inflation [or inflation generally] in the quantification of loss? PIBA submits that it is permissible to do so **only** when setting the multiplier; it is not permissible to do so when calculating the multiplicand or any other element of the loss calculation. We refer to the following:

41.1. **Cookson v Knowles** – see Lord Diplock @ 569-571; Lord Fraser @ 575-577.

41.2. **<u>Lim Poh Choo v Camden and Islington Area Health Authority</u>** – see Lord Scarman @ 193.

41.3. **<u>Wells v. Wells</u>** – see Lord Hope @ 391B; Lord Hutton @ 403B.

41.4. **<u>Cooke v. United Bristol Healthcare NHS Trust</u>** – Holding @ 251 E/F; Laws LJ @ §28-32; Dyson LJ @ §38-40 and §44; Carnwarth LJ @ 51-56.

42. The fallacy of seeking to make predictions about inflation is best captured by the observation of Lord Scarman in ***<u>Lim Pho Choo</u>*** [193],

> *… it is pure speculation whether inflation will continue at present, or higher, rates, or even disappear. The only sure comment one may make upon any inflation prediction is that it is as likely to be falsified as to be borne out by the event.*

43. The prohibition against taking inflation into account save for calculating the multiplier is best reflected in the judgment of Laws LJ in ***<u>Cooke v. United Bristol Healthcare NHS Trust</u>*** [§30],

> *… Once it is accepted that the discount rate is intended in any given personal injury case to be the only factor (in the equation ultimately yielding the claimant's lump sum payment) to allow for any future inflation relevant to the case, then the multiplicand cannot be taken as allowing for the same thing, or any part of it, without usurping the basis upon which the multiplier has been fixed. And it must be accepted that the discount rate was so intended: by the House in **<u>Wells</u>**, by Parliament in the 1996 Act, and by the lord Chancellor in making his order under the Act. …*

44. PIBA suggests that the Respondent's reliance upon inflation in the calculation of loss [beyond the setting of the discount rate and calculation of the multiplier] would appear to offend that prohibition.

45. As is made plain in ***<u>Cooke</u>***, inflation was taken into account by the Lord Chancellor when setting the 2.5% discount rate in 2001 [see quoted extract from the Lord Chancellor's Statement dated 27th July 2001 @ 261F in ***<u>Cooke</u>***]. The same applies to the setting of the -0.75% discount rate in 2017 [see §7 and §8 of the Lord Chancellor's Statement dated 27th February 2017 @

Authorities3/p.1003] and the -0.25% discount rate in 2019 [see §9 and §14 of the Lord Chancellor's Statement dated 15th July 2019 – **Authorities3/p.1095**].

46. If inflation has already been taken into account in setting the statutory discount rate then, *if that discount rate is to be applied*, inflation cannot be taken into account when calculating the multiplicand; it cannot feature in any other phase of the assessment or calculation of loss.

47. It was common ground between the parties at trial that the statutory discount rate applied; that appears to remain the case on the appeal. In those circumstances house price inflation [or any other form of inflation] cannot feature in the calculation of the multiplicand or the calculation of loss other than when setting the multiplier by reference to the statutory discount rate.

48. PIBA recognises the Court has a limited discretion to depart from the statutory discount rate [**see s.1(2) of the Damages Act 1996**]. That discretion is exercisable where "*any party to proceedings shows that it is more appropriate in the case in question.*" The Court of Appeal has confirmed that that discretion is to be exercised in very limited circumstances,

> "*… only if the case came into a category which the Lord Chancellor had not considered or had special features or circumstances which were material to the choice of rate of return and were shown from an examination of the published reasons not to have been taken into account by Lord Chancellor might a different rate be more appropriate …*" [***Warriner v Warriner***, holding @ 1703D-F]

49. As was made clear in ***Cooke***, inflation is already taken into account in setting the statutory discount rate; arguments as to different levels of inflation for different heads of loss do not come within the s.1(2) discretion.

50. PIBA submits that as a matter of law it is not permissible to rely upon predicted house price inflation in the calculation of loss when it is already provided for in the discount rate and the multiplier.

51. If the Court is persuaded that it is permissible to consider predicted house price inflation in the calculation of loss beyond the setting of the multiplier, then it will have to consider the expert evidence of the economists, in particular the

debate between them as to whether sufficiently confident predictions can be made as to long term [or any term] house price inflation.

52. For the avoidance of doubt, Mr Watson's approach to valuation of the reversionary interest, whether on the "*market value*" basis or the "*fair and reasonable*" basis, leaves inflation [house price or other] out of account.

FITNESS FOR PURPOSE

53. ***Roberts v. Johnstone*** is no longer fit for purpose.

54. A catastrophically injured claimant requires adapted accommodation for life. Unless she already owns a property suitable for adaptation she will need to purchase a property which can be adapted; such a property is invariably more expensive than the property she owns – as illustrated in the Appellant's case and the Paradigms. Any compensation formula which produces a nil award where the claimant requires, for example, capital of £900,000 cannot be fair, reasonable or correct. Any approach which requires the claimant to rely upon the hope that some financial product might exist 30 or 40 years into the future which may [or may not] allow her to access capital tied up in the property similarly cannot be fair, reasonable or correct.

55. The artificiality and unfairness of the ***Roberts v. Johnstone*** approach has already been recognised by this Court [Tomlinson LJ] in ***Manna v. Central Manchester University Hospitals NHS Trust***,

> *17. The exercise in which the court is thus engaged is in modern conditions increasingly artificial. The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation. But in modern times residential property prices have increased rapidly while general awards for pain, suffering and loss of amenity have remained at their traditional levels. Whilst Peter is no doubt robbed to pay Paul, it must often be the case that the accommodation assessed by the court as suitable is simply not purchased. A further problem confronts the claimant with*

immediate and pressing needs but a relatively short life expectancy. The adoption of the appropriate multiplier in his case, when allied to the 2.5% notional return upon investment, will lead to a relatively modest award and a large shortfall between it and the cost of acquiring the property which is acknowledged to be required to meet the claimant's needs during his admittedly short life expectancy. ….

18. ….

19. … [S]ociety as a whole would not perhaps understand that an award elaborately structured in a manner which will ostensibly permit the attainment of objectives desirable in the interests of the disabled claimant might not in fact succeed in enabling the claimant even to acquire the accommodation deemed appropriate for his care. …

56. Paradigm (3) is the classic example of the short life expectancy case where the imposition of the ***Roberts v. Johnstone*** approach produces an unworkable "*solution*".

DEPARTING FROM *ROBERTS v. JOHNSTONE*

57. See §20-35 above.

THE ALTERNATIVE MODELS FOR ASSESSING COMPENSATION

Reversionary interest

58. PIBA submits that the reversionary interest model is the appropriate basis upon which to assess compensation:

58.1. it identifies and values the claimant's disability related need: a life tenancy in a suitable adapted property, i.e. the life interest in that property;

58.2 the claimant must give credit for the reversionary interest;

58.3. it removes the reversionary interest or the "*windfall*" from the award of damages;

58.4. it is consistent with the fundamental principle in ***George v. Pinnock***, ***Roberts v. Johnstone*** and ***Wells v. Wells*** – the claimant does not recover the full capital cost of the property;

58.5. the claimant can elect to sell the reversionary interest or invest her own funds to purchase it herself;

58.6. the defendant is not required to fund the purchase of the reversionary interest

58.7. the claimant's compensation for accommodation would be exhausted upon her death: the reversionary interest would pass to a third party purchaser or to the claimant's estate if the claimant herself made up the shortfall and, in effect, purchased the reversionary interest;

58.8. it provides a high degree of certainty and consistency, which can be achieved by either (i) the setting of a guideline rate from which the Courts can only depart where the evidence/circumstances demand it, or (ii) identifying the limited evidence required in order to calculate the rental yield/rate in an individual case[4];

58.9. it can be applied in all cases, irrespective of life expectancy;

58.10. it should cater for the "*hard*" short life expectancy cases: reversionary interests in those cases should be the most attractive to/viable for reversionary interest market investors;

58.11. the underlying calculation does not vary by reference to the change in the discount rate – there is no "*flip-flopping*" between nil awards or partial awards depending upon whether the discount rate sits above 0% or not;

58.12. it does not depend upon speculative predictions as to long-term house price inflation, mortgage interest or taxation trends.

[4] On Mr Watson's "*fair and reasonable*" approach all that is required is (i) the value of the suitable property, and (ii) an estate agent's assessment of the likely annual rent for that property. Annual rent ÷ Property value = Rental yield. At present the parties already obtain evidence as to (i) for the ***Roberts v. Johnstone*** calculation. All that is required in addition therefore is evidence as to likely rent if the property was placed on the rental market.

59. The Court will have to consider the methodologies suggested for valuation of the life and reversionary interests: (i) market value [Watson]; (ii) fair and reasonable value based upon notional rental yield [Watson]; and (iii) fair and reasonable value based upon mixed investment [Robinson].

60. PIBA does not know whether the Respondent will seek to rely upon the evidence of Mr Clarke, the leasehold/freehold enfranchisement expert, as a basis for a reversionary interest model. PIBA notes that Mr Clarke's methodology and the analogy he seeks to draw is not supported by either of the experts specialising in reversionary interest valuation [Watson/Robinson]. PIBA proceeds on the assumption that Mr Clarke's methodology is not to be advanced as the basis for the reversionary interest model.

61. Messrs Watson and Robinson are to give oral evidence. They have explained their methodologies in their reports and answers to questions.

62. Mr Watson's market value approach is the value he would expect a reversionary interest to secure on an open market sale. His estimation of the market value reflects his experience over many years of investor behaviour and the annual percentage returns sought on these investments, effectively 6-7% per annum.

63. Mr Watson's fair and reasonable valuation based upon rental yield is a "*rental equivalence approach*". That approach was ultimately adopted for the cost of housing costs in the Consumer Price Index including Housing ["**CPIH**"] [**see Wilson §3.2 @ EB1/Tab5/p.133**]. Mr Wilson, the Respondent's expert economist, accepts that "*The rental equivalence approach could also be applied in principle to personal injury cases even if the claimant is expected to be an owner-occupier.*" [**Wilson §3.4 @ EB1/Tab5/p.134**].

64. Mr Watson's approaches simply require a guideline rate for investor return [market value] or details of the rental yield [fair and reasonable value]. The underlying calculations can be easily performed [**see Appendix 2 to Watson report @ EB2/Tab16/p.557** for the illustration in the Appellant's case].

65. PIBA's understanding of Mr Robinson's evidence is that he calculates the present day value of the reversionary interest on the following "*investment basis*":

65.1. The objective is to calculate how much capital the remainderman needs today to invest in order to secure a return of the present day value of the property **plus inflation** at the date of expiry of the trust.

65.2. To carry out that calculation he assumes a mixed investment strategy of 50% equities and 50% index linked bonds [such as Government bonds].

65.3. He relies upon published "*spot rates*" for the Net Dividend Yield on the FTSE All-Share Index of UK equities and the FTSE Over 15 year Index-Linked Gilt Index.

65.4. The average of those returns provides him with an assumed rate of return above inflation for the invested funds.

66. It therefore appears that his approach relies upon snapshot investment returns on a given day. It also assumes that the same investment return, based upon historic data, will continue for the next 40 years. It is of note that Mr Robinson's own evidence demonstrates that in the space of two weeks the investment return rate he would use in his calculation changed from 1.1% to 1.3% [**Robinson Replies @ EB2/Tab19/p.603**]. Current market conditions will probably see that rate significantly change again.

67. PIBA questions whether such an approach is likely to achieve the consistency, certainty and predictability that litigants, their advisers and the Courts require. Bespoke actuarial calculations, tailored to the assumed rate of return, will be required and will have to be repeated in the event of significant change by the date of trial and/or by the date of final judgment.

68. Further, Mr Robinson's investment approach to fair and reasonable valuation does not appear to take into account the real value to the life tenant or the characteristics of the underlying asset. On his own evidence, Mr Robinson would value the life interest in £900,000 of gold bars in exactly the same way

<u>and producing exactly the same valuation</u> as the value of the life interest in rent-free occupation of a £900,000 property [**see Robinson Replies §4 @ EB2/Tab19/p.603**]. PIBA questions the legitimacy/reasonableness of this approach where the real value of the life interests are plainly different. As Mr Robinson himself describes, "*a life interest in a safe full of gold bars should be worthless, as no income is generated, and so the remaindermen should receive the entire amount.*" [**Robinson §4.13 @ EB2/Tab18/p.585**]; the life interest in a residential property which provides rent-free accommodation for life could not sensibly be described as "*worthless*".

69. Mr Robinson's approach is, essentially, discounting the value of the reversionary interest for accelerated receipt based upon predicted investment return.

70. Mr Watson has addressed the value of the lifetime interests and the reversionary interests in the paradigm cases; Mr Robinson has not done so. Given the shorter life expectancies, it is anticipated that the value of the reversionary interests will be proportionately higher than his calculation in the Appellant's case.

71. If and insofar as the reversionary interest model envisages that the claimant may in fact sell the reversionary interest on the open market, consideration will have to be given to the practicalities of that, and to the ability and appetite of the market to invest in such reversionary interests.

<u>Full capital cost</u>

72. PIBA stands by its original submissions that absent some other appropriate basis for the assessment of compensation, if the windfall to a claimant's estate is an *unavoidable* collateral benefit then consideration has to be given to an award based upon the full capital cost of purchasing the property [see ***<u>Lagden v. O'Connor</u>***].

73. However, the reversionary interest model identifies and values the life interest/the reversionary interest and requires the claimant to give credit for the present day value of the reversionary interest, i.e the windfall. Assuming

that the reversionary interest model is consistent with all other common law principles for the calculation of loss, the only issue that arises is whether requiring the claimant to give credit for the reversionary interest requires her "*incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of [her] damages*" [Lord Hope in ***Lagden v. O'Connor***].

74. If a market for reversionary interests exists and it is reasonable to anticipate that the claimant could achieve the value placed on her reversionary interest at a market sale, then it seems difficult to argue that the reversionary interest model places an unreasonable burden or demand on her. However, different considerations may arise if the value placed on the reversionary interest significantly exceeds its market value.

75. A ***Peters*** style undertaking might be a solution to the windfall issue if a binding undertaking is given to repay the capital sum following the claimant's death[5]. If such an undertaking was given and was acceptable then an award of full capital cost could be made.

Equity release

76. The Respondent's actuary, Ms Angell, proposes an equity release model whereby the Appellant utilises her compensation from other heads of loss to fund the purchase and then releases her tied up capital via some form of equity product at age 78/79 [**see Angell Section 7 @ EB2/Tab8/p.456**]. It is not known whether the Respondent will advance this as a model for the assessment of compensation.

77. Ms Angell's model relies upon the following assumptions:

    77.1. that equity release products will be available (i) generally, and (ii) for the Appellant thirty five years from now;

    77.2. equity release borrowing costs at that time of 4%, 5% or 6% per annum;

    77.3. house price inflation of 3.2% and inflation for other heads of loss of 3.1%.

78. PIBA does not support the adoption of this model:

[5] Such an undertaking would have to extend to the deceased claimant's personal representatives/estate.

78.1. the Respondent's own mortgage expert confirms that

(i) a "*Home Reversion Plan*" for the Appellant "*would be unlikely*" [**Baxter §5.3.1 @ EB1/Tab7/p.293**] and arranging a "*Retirement Interest Only*" loan "*will be difficult*" [**Baxter §5.3.2 @ EB1/Tab7/p.294**]; and

(ii) there are only two "*Lifetime Mortgage*" products currently available which could possibly meet the Appellant's needs given the level of borrowing required [**Baxter §5.3.1 @ EB1/Tab7/p.293**];

(iii) his own ultimate conclusion is, "*I am unable to predict what later life lending products will be available in 35 years' time.*" [**Baxter §7.1.6 @ EB1/Tab7/p.301**];

78.2 there is no expert evidence as to predicted *equity release* mortgage rates thirty five years from now;

78.3. incorporating predicted house price inflation into the calculation of the multiplicand would appear to offend the principle set out at §43 above;

78.4. it is difficult to see how it could apply in anything other than long life expectancy cases.

79. The equity release model would require a claimant to rely upon the hope/possibility of (i) the existence of a financial product, many years from the date of assessment, (ii) that the rate of interest assumed in the calculation is sufficient to cover the interest actually charged, and (iii) that house price inflation in fact mirrors that assumed in the calculation. PIBA suggests that that would require a claimant to "*bear a burden or make unreasonable sacrifices in the mitigation of [her] damages*" [see ***Lagden v. O'Connor***].

A *Roberts v. Johnstone* type calculation based upon the user cost of housing

80. The economists appear to agree that the user of cost of housing represents a "*valid analytical approach*" to assess accommodation costs [**Economists JS § 31 @ EB2/Tab13/p.510**]. Where they differ is on the issue of whether the relevant variables and the relevant user costs can be forecast "*for more than just a few years ahead with a* *sufficient degree of certainty.*" [**Economists JS §35 @ EB2/Tab13/p.510**]. Dr Llewellyn, for the Claimant, says not; Mr Wilson, for the Defendant, says they can.

81. Mr Wilson's evidence as to future user cost of housing for the next 30 years is as follows:

81.1. for a borrower [excluding house price inflation] is 3.83% [**see Wilson Table @ EB1/Tab5/p.143**];

81.2. for a saver[6] [excluding house price inflation] based upon the "*deposit rate*" is 1.54% [**see Wilson Table @ EB1/Tab5/p.144**];

81.3. for a saver [excluding house price inflation] based upon RPI - 0.75%[7] is 2.32% [**see Wilson Table @ EB1/Tab5/p.144**];

81.4. for a saver [excluding house price inflation] based upon CPI + 1.25%[8] is 3.20% [**see Wilson Table @ EB1/Tab5/p.144**].

82. He recognises but does not provide forecasts for a rental equivalence approach.

83. The Court may wish to consider the extent to which, if at all, the user cost of housing might offer a basis upon which an annual guideline positive percentage rate could be set for a ***Roberts v. Johnstone*** type calculation. In principle a guideline rate could be set, from which first instance Courts could depart in the event of "*marked change in economic conditions*", "*exceptional circumstances*" of where fairness to the parties demanded it.

84. An example of the adoption of guideline rates but with preserved judicial flexibility and discretion are the "*conventional*" economic dependency percentages in Fatal Accidents Act claims [66.67% for a surviving spouse and 75% for a spouse with dependent children] which are adopted "*unless there is striking evidence to make the conventional figure inappropriate because there is no departure from the principle that each case must be decided on its own facts.*" [see

6 A saver suffers the loss of the "*opportunity cost of capital*"

7 This is the rate of return which a personal injury claimant such as the Appellant is predicted to obtain after tax under the -0.75% discount rate.

8 This is the assumed rate of return required by a personal injury claimant after tax and expenses suggested by the Government Actuary Department and adopted by the Lord Chancellor when setting the most recent discount rate at -0.25%.

O'Connor LJ in ***Harris v. Empress Motors Ltd*** @ 217A-B]. Similar "*conventional*" guideline discounts are applied to calculate surplus income in "*lost years*" calculations.

85. A lump sum award based upon user cost of housing would have to be subject to (i) a cap limiting the award to no more than the full capital cost, and (ii) application of the reversionary interest model where that cap is engaged.

A *Roberts v. Johnstone* calculation based upon notional mortgage interest costs

86. This is, in effect, the user cost of housing for a borrower, which is considered by the economists. As set out above, only Mr Wilson provides a forecast of user housing costs for a borrower, which he predicts in the Appellant's case will be 3.83% over a 30 year period [excluding house price inflation].

87. PIBA acknowledges that the Court of Appeal in ***Roberts v. Johnstone*** specifically rejected notional mortgage interest rates as the appropriate measure of the loss. The same could be said of the House of Lords decision in ***Thomas v. Brighton Health Authority***, albeit the mortgage interest point was not argued and the debate between the parties was simply whether a conventional 2% rate [as in ***Roberts v. Johnstone***] or the discount rate should be applied.

88. If the Court is satisfied that the setting of the ***Roberts v. Johnstone*** rate was simply the setting of a guideline rate which is susceptible to review in changed economic conditions, it would be open to the Court to alter the rate to reflect notional mortgage interest costs in the changed economic conditions.

89. A lump sum award based upon notional mortgage interest costs would have to be subject to (i) a cap limiting the award to no more than the full capital cost, and (ii) application of the reversionary interest model where that cap is engaged.

A lump sum award or PPO award based upon actual mortgage interest costs

90. It is agreed that there are presently no mortgage products which would be suitable for the Appellant or which could be secured against a PPO.

91. A claimant with intact earning capacity and a secure income could potentially obtain a mortgage [see Paradigm (2)]. In such a case a lump sum award or PPO award based upon actual mortgage interest costs *might* be available.

92. A lump sum award based upon actual mortgage interest costs would have to be subject to (i) a cap limiting the award to no more than the full capital cost, and (ii) application of the reversionary interest model where that cap is engaged.

93. PIBA can see no reason in principle why mortgage interest costs could not be the subject of a PPO provided that a suitable index, satisfying the requirements of an index set out in ***Thompstone v. Tameside and Glossop Acute Services NHS Trust*** [see §56-58], could be identified[9].

94. PIBA submits that detailed consideration of the viability of the PPO/lump sum based upon actual mortgage interest costs is deferred until a case presents itself in which the claimant has in fact secured a mortgage or a robust "*in principle*" agreement for a mortgage.

A loan from the defendant/the compensator with a charge over the property

95. The Court does not have the jurisdiction itself to make an award on this basis.

96. The Court may have the jurisdiction to make an award of the full capital costs where the claimant provides a binding ***Peters*** type undertaking to repay to the defendant/the compensator the sum awarded upon the death of the claimant [see §75 above].

THE PARADIGMS AND WIDER APPLICATION OF THE REVERSIONARY INTEREST MODEL

97. The reversionary interest model can be applied to each of the paradigm cases.

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9 The Respondent's mortgage expert [Baxter] and economist [Wilson] have identified three indexes which they consider to be ***Thompstone*** compliant and suitable.

98. If the market value approach is adopted then the claimant could achieve 100% compensation by combining the sum awarded [the value of the life interest] and the proceeds of a market value sale.

99. A market value sale would be particularly attractive for a claimant with a short life expectancy for whom it would be very difficult to tie up compensation allocated to other essential heads of loss [see Paradigm (3)]. The short life expectancy case is precisely the sort of reversionary interest which could be of greatest attraction to a potential investor and most likely to lead to a sale. That said, there is a degree of uncertainty as to whether the market will embrace this new source of reversionary interests.

100. The market value of the reversionary interest in a long life expectancy case will be low. Mr Watson fairly questions the viability of a market sale for such a reversionary interest. However, in a long life expectancy case, where the market value of the reversionary interest is low, the claimant's PSLA award should provide a source of capital which the claimant could *elect* to use to purchase the life interest [see Paradigms (1) and (2)]. The claimant would be, in effect, the buyer of the reversionary interest.

101. The shortfall between a "*fair and reasonable*" valuation of the life interest and the market value depends upon which approach is adopted and the relevant rental yield [Watson] or investment return [Robinson]. The fair and reasonable valuation of the reversionary interest is likely to exceed the market value of the reversionary interest in the overwhelming majority of cases.

DARRYL ALLEN QC

RICHARD WHITEHALL

10th March 2020