IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No. B3/2018/2189**
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
THE HONOURABLE MRS JUSTICE LAMBERT (DBE)
[2018] EWHC 2060 (QB)
BETWEEN:-

CHARLOTTE SWIFT

Appellant/Claimant

-and-

MALCOLM CARPENTER

Respondent/Defendant

RESPONDENT'S REPLACEMENT CONSOLIDATED SKELETON ARGUMENT

Summary of R's case on appeal

1. R's case may be summarised thus.
   a. The decision in *R v J* is binding on this court and cannot here be challenged. Nor is it open to this Court to set a different discount rate applicable to *R v J* claims.
   b. The appropriateness or otherwise of setting a different discount rate for *R v J* claims is a matter for the Lord Chancellor, in the exercise of his powers under section A1 of the Damages Act 1996 (as amended).
   c. While a court has the power pursuant to section A1(2) of the Damages Act 1996 to adopt a different discount rate applicable to the claim <u>as a whole</u> A has never sought to advance her case on that basis. Indeed, her claim was decided on the application of a discount rate of -0.75%. The jurisdiction under section A1(2) is not available to this Court in this appeal. If a different rate were set under that section it would apply to all other heads of loss.
   d. A cannot show that the application of *R v J* to the facts of her case results in any injustice because she cannot prove that she is likely to suffer a net loss, the evidence showing that she is unlikely to suffer one. Accordingly, any award would amount to over-compensation and would result in injustice to R.
   e. If, contrary to above, the court does depart from *R v J*:
      i. the parties agree that the potential alternative solutions set out in the summary appended hereto are not practicable solutions at this time for the reasons summarised therein;

ii. the most appropriate solution is to value any loss by reference to the value of hypothetical life and reversionary interests in the property;
iii. the most appropriate way to calculate that loss is by using a different discount rate (to that set by the Lord Chancellor);
iv. on the evidence, and this being a case where A has a lump sum award substantially greater than the additional cost of the property, the appropriate rate is 0.75%;
v. for cases going forwards where the applicable discount rate is -0.25% (not -0.75%) the court might indicate that the appropriate rate is likely to be 1.1%.

f. R's case, however, is that that solution is likely to amount to overcompensation in A's case.

Introduction

2. The Appellant and Respondent will herein be referred to as "A" and "R" respectively, and the Personal Injuries Bar Association as "PIBA". The case of *Roberts v Johnstone* and (in the appropriate context) the approach to assessing the losses caused by the need to expend capital on additional accommodation due to injury as derived from it and other cases will be referred to as *"R v J"*.

3. The bundles will be referred to as follows: Appeal Bundle as "AB", Supplementary Bundles as "SB", Expert Evidence Bundles as "EB", and Authorities Bundles as "Authorities".

Summary of relevant facts

4. The following key facts are relevant to this appeal.

a. At trial:

i. C lived in a house on Cardross Street, London W6, was 43.58 years old and her life expectancy was to age 89.01, a further 45.43 years;
ii. the discount rate applicable to her claim was then -0.75%;
iii. her life multiplier was 55.02;
iv. the additional capital cost of purchasing suitable alternative accommodation was held to be £900,000, although the award was nil;
v. C held two repayment mortgages secured on Cardross Street, each with a remaining term of approximately 10 years and 4 months: the outstanding

balances and interest payable on each in October 2017 were £68,800 at 1.65% and £77,540 at 1.45% respectively. R has sought clarification of the circumstances at April 2018 and awaits confirmation of the position from A.

b. Since trial C has purchased a new house on Dalling Road, London W6, and she has done so without incurring any additional borrowing costs.

Summary of the current law

5. In *George v Pinnock* [1973] 1 WLR 118 ("*G v P*") **[Authorities1/Tab7]**:
   a. The claimant's ("C") primary case that he should recover the whole of the additional capital cost of purchasing a bungalow as damages was roundly rejected as being without foundation, on the basis that C still had the capital in question in the form of the bungalow (@ 124H-125A, per Orr LJ) **[Authorities1/Tab7/124-125]**.
   b. An alternative argument that C would incur additional annual expenses on accommodation to those which he would have incurred but for his injury whether (i) in terms of the loss of income on the capital used to buy property or (ii) the cost of annual mortgage interest payable had that capital not been available was accepted, and it was held that C was "entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her accommodation would have been but for the accident" (@ 125C) **[Authorities1/Tab7/125]**. A lump sum was estimated by the court (with the agreement of the parties) on the evidence available.

6. In *R v J* [1989] 1 QB 878 **[Authorities1/Tab12]**:
   a. The capital cost of C's special accommodation was £86,500, and the value of his existing accommodation £18,000, giving an additional capital cost of £68,500, which amounted to some <u>18%</u> of the total award of <u>£377</u>,000 (whereas in this case £900,000 amounts to some 22% of the total award of £4,098,051).
   b. C's case was that he should recover the full capital cost of £68,500 on the grounds that a quantification which followed the *G v P* formula would produce a loss in excess of that sum - it would have produced £68,500 x 7% = £4,795 giving, on a multiplier of 16, £76,720 - and the lesser (full capital) sum should be awarded (@ 881D-F) **[Authorities1/Tab12/213]**. C also submitted that if the court was faced

with a choice between awarding insufficient damages to fund the accommodation or the full capital sum it should choose the latter (@884E-F)**[Authorities1/Tab12/216]**. C's arguments were rejected, Stocker LJ holding [891C-D] "It is apparent that once this figure exceeds the net total difference between the old and new premises, and thus does not comply with the reasoning behind *G v P* that the damages awarded for accommodation costs should not represent the full capital value of the asset, since this would remain intact at the date of the plaintiff's death and represent therefore a windfall to her estate" **[Authorities1/Tab12/223]**.

c. The Court of Appeal held that the appropriate rate of return by which to measure the loss of return on the additional capital invested in the property (and hence the multiplicand) was not the mortgage interest rate (then 7%) but the tax-free return on risk-free investment in government stocks (then 2%) bearing in mind that the "inflation and risk element are secured by the rising value of such property, particularly in desirable residential areas" (@ 892G-893A)**[Authorities1/Tab12/224-225]**. The object of the calculation is "to avoid leaving in the hands of the plaintiff's estate a capital asset not eroded by the passage of time; damages in such cases are notionally intended to be such as will exhaust the fund contemporaneously with the termination of the plaintiff's life expectancy" (@ 893B)**[Authorities1/Tab12/225]**.

d. The *R v J* method therefore assumes:

   i. C will pay for the additional accommodation out of his own capital.

   ii. The capital input will be risk-free over the period of the award and protected against inflation by maintaining its value in real terms, such that C has only lost the income which the capital would otherwise have earned over that period.

   iii. The lost income is therefore not to be calculated by reference to a normal rate of interest (which includes elements such as taking a risk of loss or reduction of capital) but only by reference to the going rate for foregoing the use of the capital.

   iv. The appropriate rate for that is the rate of return on investing in the capital in government stocks, then 2%.

7. *R v J* was adopted by the House of Lords in *Thomas v Brighton Health Authority* [1999] 1 AC 345 *("Thomas")***[Authorities1/Tab16]**, heard with *Wells v Wells*, both sides accepting that *R v J* was correctly decided but disputing how it should be applied. In that case the additional capital cost was £60,000 and was paid for by a mortgage and the question was how that cost should be reflected in an award of damages. Lord Lloyd, with whom the other Lords agreed on this point, held that the appropriate rate was the discount rate, not the mortgage interest rate (notwithstanding the use of a mortgage to fund the purchase).
    a. "Obviously the plaintiff is not entitled to the additional capital cost, since the larger house is a permanent addition to the family's assets. It will be there, and could be realised, at the end of the period covered by the award." (@ 380A)**[Authorities1/Tab16/331]**.
    b. "It is to be assumed that the plaintiff will pay for the additional accommodation out of his own capital. It is further to be assumed that the capital input will be risk-free over the period of the award, and protected against inflation, by a corresponding increase in the value of the house…..Since the capital input in the new accommodation is free of risk, or virtually free of risk, it is only the second of the two elements of interest that the plaintiff has lost, namely, the "going rate" for foregoing the use of the money" (@ 380C-E)**[Authorities1/Tab16/331]**.
    c. The rate of investment return or loss of use of the capital should be the same as the rate of return on ILGS and the same rate as the rate taken to calculate future losses i.e. the applicable discount rate, which he determined then to have risen from 2% to 3%. "This therefore is the rate which should now be taken for calculating the cost of additional accommodation. It has two advantages. 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" (@ 380H-381A)**[Authorities1/Tab16/331-332]**. Implicit in that statement is the recognition that the Lord Chancellor would have the decision in *Thomas* firmly in mind when setting a discount rate, including a negative rate as has happened twice recently.

8. The ruling by the House of Lords (as part of the ratio) that the *R v J* multiplicand would be determined by the discount rate (as set by the Lord Chancellor) is binding on this Court and is not open to challenge in the Court of Appeal.

9. By section 10 of the Civil Liability Act 2018, and with effect from 20 December 2018, a new section and a new schedule A1 were inserted into the Damages Act 1996 (for England and Wales), creating a new framework for the setting of the discount rate by the Lord Chancellor. Section A1 had the effect of amending the former section 1 by the insertion of a new subsection (4) in bold below (whereas subsections (1)-(3) remained the same):

> *"(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.*
>
> *(2) Subsection (1) does not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.*
>
> *(3) An order under subsection (1) may prescribe different rates of return for different classes of case.*
>
> ***(4) An order under subsection (1) may in particular distinguish between classes of case by reference to—***
>
> > ***(a) the description of future pecuniary loss involved;***
> >
> > ***(b) the length of the period during which future pecuniary loss is expected to occur;***
> >
> > ***(c) the time when future pecuniary loss is expected to occur.***
>
> **[Authorities3/Tab36/861-862]**

10. This legislative change empowered the Lord Chancellor to set different discount rates for different classes of case by reference to (a) different heads of future loss (e.g. the capital cost of alternative accommodation) (b) the length of the period during which that loss is expected to occur and (c) the time when that loss is expected to occur.
    a. When the then Lord Chancellor set the first negative discount rate (-0.75%) in 2017, she knew that the impact of setting that rate would result in a nil award under *R v J*, given the judgment of their Lordships in *Thomas.*
    b. The same can be said when the then Lord Chancellor set the second negative discount rate (-0.25%) in 2019. In addition, he could have set one or more different discount rates in respect a claim for the cost of alternative accommodation, by reference to the criteria set out in s.A1(4)(a)–(c). He did not, however, choose to exercise that power.

11. It is not now for this Court to set a different rate in respect of an *R v J* claim.
    a. Any change to the discount rate is a matter for the Lord Chancellor exercising his powers under section A1 of the Damages Act, per Lord Lloyd in *Thomas* (@ 380H - 381A)**[Authorities1/Tab16/331-332]**, which enables a different rate to be set for *R v J* claims if the Lord Chancellor sees fit (and even different rates for different periods of claim).
    b. At the time that Thomas was decided the rate was set at 3% but:
        i. that was the appropriate rate net of tax for a risk-free investment, whereas the discount rate now assumes that personal injury claimants are considered to be low-risk not risk-free investors (pursuant to Section 4(3) of Schedule A1 to the Damages Act 1996);
        ii. ever since the discount rate of 3% adopted in Thomas, real rates of return have steadily fallen.
    c. The decision of the Lord Chancellor to set a negative discount rate notwithstanding the impact it has on the *R v J* claim cannot be said to be illogical or inappropriate.

***R v J* cannot and should not be overruled**

12. The decision of the Court of Appeal in *R v J* is binding on this Court.
    a. This Court is bound by its own decision and cannot bring itself within any of the three exceptions in which the Court of Appeal is permitted to depart from its earlier decision: see *Young v Bristol Aeroplane Ltd* [1944] 1 KB 718 per Lord Greene MR @ 725-6 and 729-30**[Authorities1/Tab4/52-53&56-57]**.
        i. *R v J* was not decided per incuriam.
        ii. This is not a case where there are conflicting decisions by this Court.
        iii. *R v J* is not a decision which cannot stand in the light of a decision by a higher court: on the contrary, a higher court has approved it.
    b. In *Knauer v MOJ* [2016] UKSC 9 **[Authorities2/Tab29/740-742]** the Supreme Court was bound by the previous decision in *Cookson v Knowles* [1979] AC 556 as to the date from which the multiplier was to be calculated in claims under the Fatal Accidents Act 1976, which was held not to be a mere judicial guideline. The Supreme Court relied upon the Practice Statement (Judicial Precedent) 1966 in order to depart from the established law.

c. The methodology set down in *R v J* – R submits the methodology is not a mere judicial guideline - has been approved, adopted and developed by the House of Lords as part of the decision in *Thomas*.

d. The fact that *R v J* may be imperfect does not mean that the law should be changed. "Perfect justice is not attainable: nor would it be wise in the search for the nearest approximation to justice to abandon principles already judicially determined, whatever one's "saucy doubts and fears"" (*Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 (HL) per Lord Scarman @ 184B)**[Authorities1/Tab9/162]**.

e. Despite numerous reviews of the *R v J* method namely (i) the Law Commission (Law Com No 262 of 1999)**[Authorities3/Tab38]**, (ii) the DCA Consultation Paper on the Law of Damages of 2007**[Authorities3/Tab39]**, and the MOJ Response to that Consultation of 1.7.2009**[Authorities3/Tab42]**, and (iii) the Report on Accommodation claims by the Civil Justice Council dated 29.10.2010**[Authorities3/Tab43]** which was commissioned to make recommendations for changes to the existing law, and which by a majority concluded that change required legislation, the Government has not legislated for any change. Furthermore, the Civil Justice Council only recommended legislative change to provide alternative solutions to stand alongside the *R v J* methodology, not to do away with *R v J*.

f. If and in so far as A invites this Court to adopt a different rate of return (not the applicable discount rate) in respect of the *R v J* calculation that is not something which this Court is able to do: this Court is bound by the decision in *Thomas* to the contrary effect.

g. It was open to A to argue at trial, pursuant to section 1(2) of the Damages Act 1996 (in its then unamended form) **[Authorities3/Tab36/868-869]**, and prove that it was "more appropriate" for the court to adopt a different discount rate in this case generally (i.e. some rate other than -0.75%), but she did not do so and that forms no part of her appeal. Even if she had, R submits it would have been to no avail.

    i. The phrase "more appropriate", was interpreted by the Court of Appeal in *Warriner v Warriner* [2002] EWCA Civ 81: it "*must be interpreted in its proper context, which is that the Lord Chancellor has prescribed a rate pursuant to section 1(1) and has given very detailed reasons explaining what factors he took into account in* *arriving at the rate that he has prescribed. I would hold that in deciding whether a different rate is more appropriate in the case in question, the court must have regard to those reasons. If the case in question falls into a category that the Lord Chancellor did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return and (b) are shown from an examination of the Lord Chancellor's reasons not to have been taken into account, then a different rate of return may be "more appropriate*"" per Dyson LJ @ 33**[Authorities1/Tab18/422-423]**.

ii. In any event any such case would have required a detailed analysis of the impact of the discount rate on all her other heads of loss, which have all been assessed on the basis that a discount rate of -0.75% was appropriate.

13. Even if it were open to this Court to depart from the decisions in *R v J*, and *Thomas*, it would not be right to do so because A cannot prove that she is likely to suffer any net loss.

a. Since the adjournment of her appeal A has bought her alternative accommodation without incurring any additional borrowing. That is entirely consistent with *R v J* as endorsed in *Thomas*, namely that she will use her own capital to fund the purchase. It also shows that she is not impecunious. R's case in July 2019 was that her likely losses were unlikely to exceed some borrowing costs in later life which would be offset by the windfall. That has been borne out by her actions.

b. As a matter of law:

i. any elements of inflation and risk involved are secured by the rising value (see *Thomas*); and

ii. the loss she will incur is on the potential returns she is likely to achieve on a without risk investment (see the statement of the Lord Chancellor dated 27.2.2017 when setting the discount rate of -0.75%).

c. The evidence shows that investment in property has increased in real terms over time: see Dr Llewellyn and Mr Wilson who agree that house prices have increased by around 1.9% p.a. above RPI over the past 45 years and even more if averaged over the past 50 years (para 16 of the joint statement **[EB2/Tab13/508-9]**). Over the longer-term future Mr Wilson's evidence is that a positive real return is the much more likely outcome (para 30 of the joint statement **[EB2/Tab13/509-510]**) albeit at a rather lower rate than the historic average.

d. Having purchased the property without incurring any further borrowing costs, the probability is that C is unlikely to incur any such costs, if at all, until later life. The mortgage experts agree that the most suitable product for A in 35 years' time is likely to be a lifetime mortgage (section 6 of the joint statement). On the evidence of Ms Angell the likely cost to A (in terms of the amount she needs now to fund that future borrowing) will be between £266,384 and £399,576 depending on the interest rate (see Table 7.2 on page 24 of her report **[EB2/Tab8/459]**). Mr Wilson's evidence is that mortgage rates are expected to average around 4.1% in the long run (see para 4.4.1 of his report **[EB1/Tab5/141]**), such that the cost to A is more likely to be at the bottom of Ms Angell's range, somewhere between £266,384 (@ 4%) and £332,980 (@ 5%).
e. As against that cost, however, A must give credit for (i) the £900,000 windfall which will pertain at the end of her life and (ii) the saved borrowing costs on the mortgage she is now able to pay off early. In those circumstances it is hard to see how there is likely to be any net loss to A whatsoever.
f. An analysis of A's case by reference to the User Cost of Housing ("UCOH") also confirms that general proposition. The UCOH is a measure of the net cost to A of acquiring her housing for a specific period after offsetting the revenue that is obtained from selling that property at the end of that period (see paras 3.4 and 4.1 of Mr Wilson's report)**[EB1/Tab5/134-135]**. At para 4.4.8 of his report Mr Wilson addresses the issue of the reliability of the UCOH forecasting, and it seems that past forecasting of the UCOH has proved reasonably reliable (a 0.2% margin of error over the past ten years) **[EB1/Tab5/145-6]**. The forecast for the next 30 years is as follows (assuming a discount rate of -0.75%):
    i. a real return of 0.6% per annum for a borrower;
    ii. a negative return of -0.9% for a saver;
    iii. those rates must be blended for someone who is both a saver and a borrower over the relevant period but for someone like A who is likely to be a saver for a longer earlier period (achieving a gain) before becoming a borrower for a shorter later period (suffering a cost), it is clear that A is unlikely to suffer a net loss over the whole period. Some net loss would only be likely to arise in a case where a claimant borrows over all or a significant majority of remaining life.

Options if the Court considers it is not bound by *R v J* and *Thomas*

14. If, contrary to R's submissions, the Court considers that it can depart from *R v J* in this case (or the Court considers it wishes to give its views on any alternative solutions having heard the evidence from experts which was not relied upon at first instance) the potential solutions open to it appear to be:
    a. analysing the award cash-flows and awarding the likely future accommodation costs as identified by such analysis;
    b. awarding the full capital value;
    c. awarding the potential lifetime borrowing costs; or
    d. attempting to value A's loss by considering the value of life interest and/or reversionary interest.[1]

15. Whilst other solutions may be considered fairer, such as a lifetime loan with a charge on the property, the Court does not have the power to order such solutions and they cause regulatory and practical difficulties. Insurers are not generally regulated to provide finance secured by an interest in property and A may have legitimate objections to R (or more accurately R's insurer) taking an interest in her family home into the future.

16. R's case is that, if an alternative solution were to be used it should be a form of (d). While (a) gives the more accurate assessment it is not a practical approach. Valuing a claimant's loss (and the windfall element of the capital sum) by reference to a different discount rate enables the Court to balance the different interests of A and R, taking into account whether A can fund the property from capital and the windfall she will receive if and when she realises the additional equity in the property.

17. In a case like this where A's lump sum damages substantially exceed the additional capital costs of a property, that rate should be in the region of 0.75% when the discount rate is -0.75%.

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[1] PIBA and R have suggested that it would be helpful to identify solutions being proposed by the parties prior to exchange of skeleton arguments. R suggested it was for A (as appellant) to do so first with R to follow but A has not agreed to that. R does not therefore know whether A intends to propose solutions not covered in the Appellant's Notice and has done his best to anticipate the solutions that may be proposed. It may be necessary for R to respond further if A were to further alter the case she pursues.

General considerations when looking at alternative solutions

18. When looking at other options the Court should take into account the following facts and matters.

    a. After allowing for the value of any property (or additional property) acquired and the potential for capital growth, the 'cost' of property ownership is limited: where borrowing is unnecessary the historic UCOH has been negative in all but two 5-year periods over the last 45 years and the average UCOH for borrowers over that period has also been negative: see table for historic costs at §4.3.4 of Alan Wilson's report **[EB1/Tab5/140]**. Future forecasts are for slightly positive costs for a borrower: table at §4.4.5 of Alan Wilson's report **[EB1/Tab5/143]** and negative for a saver if the opportunity cost of capital is treated as the discount rate (as occurred in *Thomas*): table at §4.4.6 of Alan Wilson's report **[EB1/Tab5/144]**.

    b. In *Thomas* the House of Lords adopted a rate of 3% for valuing the accommodation element of the loss when ILGS returns were in the region of 3.8% gross, reducing that rate to 3% to allow for tax (@374E-H)**[Authorities1/Tab16/325-326]**. Current levels of return on all investments are substantially lower than in 1998 (this is commented on generally by some experts but is, perhaps, best illustrated by the July 2019 12-month average yield of -1.76% pa [Daykin: **EB1/Tab4/119**]). The house purchase in *Thomas* was in fact financed by a mortgage. Whilst the mortgage interest rate is not clear from the reports it would have been substantially higher than currently available rates. Thus, since *Thomas* both investment returns and mortgage rates have declined significantly: any departure from *Thomas* must bear that in mind when considering the 'landing point'.

    c. As noted above, Ms Angell's cash-flow modelling using a lifetime mortgage in later life to fund any shortfall in damages would give a cost of £266,384 to £332,980 (interest rates @ 4%-5%), leaving out of account the reversionary interest that would accrue [Table 7.2: **EB2/Tab8/459**]. That represents the actual cost to A during her lifetime of adopting such a method to meet her losses (using only sums awarded to her as damages in the claim and meeting her assessed needs as they arise) and ignores (in those figures) the windfall that would accrue if she were to downsize or sell-up (for example is she were to move into a residential home) or upon death. By looking at the graph prepared by Mr Robinson **[EB2/Tab18/597]** it can be seen that such costs would be equivalent to a life-interest calculated at a yield of roughly 0.75% to a little under 1.1% (1.1% =

£348,000 §4.23 of DR's report **[EB2/Tab18/586]**). It should be emphasised that Ms Angell's modelling relates to the costs before windfall and that, after taking the windfall into account, there is no loss.

d. A's ability to invest general damages in property. In many cases the general damages will represent much, if not all, of the additional property costs (93% in paradigm 1, 62.5% in paradigm 2 and 40% in paradigm 3). In A's case her general damages are approximately 14% of the total capital cost of the additional accommodation which reflects the relatively high cost of property in the area of London in which she lives: it must be remembered that A's claim reflects the substantial costs of London properties and outside London accommodation costs tend to be much more modest;

e. As is also highlighted above, whilst in some cases property costs may have increased in comparison to general damages (in *R v J* the additional property costs were 91% of the general damages award), the value of damages awards have increased substantially and the capital property cost can often be a tiny fraction of the overall damages award. The funding of increased property costs can therefore still commonly be achieved utilising only damages that will not need to be relied upon until later in life.

Cash-flow analysis

Pros

- provides a reasonable model of actual likely costs and windfall, and therefore the loss (if any)

Cons

- impractical as a general approach as it requires actuarial evidence

19. R does not make further submissions on this approach here. It supports R's primary case that there is simply no loss on the basis of established authority binding on this Court.

20. Whilst this approach is likely to help a court make the most accurate assessment of the actual likely loss – and this is the aim: *Thomas* per Lord Lloyd @ 364A-B **[Authorities1/Tab16/315]** - in any individual case R acknowledges that its practical utility is limited due to the information and time required to carry out such modelling.

Full capital cost

Pros

- every claimant can afford to buy the property identified as required by the Court

Cons

- every claimant will be overcompensated: if the claimant purchases property then he will have a capital asset that can be used in life to provide security for access to capital and upon death will form part of the claimant's estate

21. It is well established that the full additional capital sum amounts to overcompensation.
    a. See: *G v P* per Orr LJ @ 124H-125A **[Authorities1/Tab7/124-125]**; *R v J* per Stocker LJ at 891C-D **[Authorities1/Tab12/223]**; *Thomas*, per Lord Lloyd @ 380A-B **[Authorities1/Tab16/331]**; and Lord Hope in *Wells v Wells* [1999] 1 AC 345 @ 390B-C **[Authorities1/Tab16/341]**.
    b. The Law Commission concluded in its report on Damages for Personal Injury (Law Com No 262 of 1999, at §§4.11 & 4.16) **[Authorities3/Tab38C/894&896]** that such an outcome would be unacceptable and unduly harsh on defendants.
    c. In its response to the MOJ Consultation Paper (7/2007) on the Law of Damages, PIBA submitted (at §29, and its paper was adopted by PNBA) **[Authorities3/Tab40/950-951]** that such an outcome would have the benefit of simplicity but "would mean that the claimant enjoys a potential windfall at the expense of defendants without any logical justification".
    d. Such an outcome would be all the more unjust in times of a negative discount rate.

Interest costs of lifetime borrowing

Pros

- would provide a claimant who can and will obtain such borrowing with the means to fund borrowing costs

Cons

- it will not provide an accurate assessment of the loss in any case in which the claimant will not incur lifetime borrowing costs
- such borrowing may not be available

- claimants would receive a windfall if there is any increase in capital values in nominal terms: even if property prices were to stay static in real terms, the nominal increase in value would lead to a substantial windfall over time
- lifetime borrowing costs will often produce a cost in excess of the full capital sum
- there are calculation difficulties as the capital advance is fixed at the outset of borrowing (and in many cases the property has not even been identified at trial) so a multiplicand x multiplier approach cannot be simply adopted

22. In A's case this would produce a manifestly unfair result. A has not borrowed to purchase her property and is unlikely to do so until later life (if at all) when she may require access to that part of her capital to fund her annual losses.

23. In *R v J* itself almost identical arguments were rejected (§6(b), above).

Valuing the life/reversionary interest

Pros

- is an attempt to measure a claimant's loss in cases where special circumstances (such as lack of capital to fund any purchase) do not arise
- can be approached by the same calculation method as *R v J* (albeit using a different discount rate depending upon that set by the court) so is a familiar calculation (if not concept)
- allows for the windfall by seeking to identify the values of hypothetical life and reversionary interests

Cons

- sensitive to the discount rate set
- does not address the issues that may arise in "very short life expectancy" or "very low damages" cases where a claimant may not be able fund any property purchase: the approach necessarily involves higher awards being made to claimants with longer life expectancies who will typically have significantly higher damages

24. The valuation of a hypothetical lifetime and reversionary interest in the property replicates the approach taken by the House of Lords in *Thomas* but for slightly different reasons. In *Thomas* the outcome was effectively a valuation of the lifetime interest of the claimant in

an investment which provided a yield of 3% whilst the capital value grew in line with inflation – so 0% real growth. The 'valuers' in this case (Clark, Robinson and Watson) adopt a similar approach although Robinson and Watson consider the likely yield of a hypothetical investment (whether in a different type of asset or a hypothetical rented property) and use that yield to then calculate the values of a life interest and reversionary interest. The calculation of the life interest is:

capital value x yield x multiplier (at yield 'rate') = value of life interest

which compares with the post-*Thomas* methodology of:

capital value x discount rate x multiplier (at discount rate) = cost of life interest

25. For example, looking at Mr Watson's report, Appendix 1 **[EB2/Tab16/556]** the equation he gives:

.03	x	$[1.03^{-1} + 1.03^{-2} + \ldots\ldots + 1.03^{-46.5}]$	= 0.747
(yield/discount rate)	x	multiplier	

is in the form of a discount rate (3%) multiplied by a multiplier for a fixed period of 46.5 years. It is very slightly different from using a Table 28 Ogden multiplier, because the Table 28 Ogden multiplier assumes that returns accrue throughout the year whereas Mr Watson's calculation accrues returns at the end of each year.

3%	x	25.275 (Table 28)	= 0.758

Neither make allowance for mortality although that can be done (as it is for other losses) by using Table 1 or 2 when appropriate.

26. The approach is therefore familiar to a PI lawyer or judge and relatively straightforward to apply. However, if applied as a general solution, assumptions are made about yield which are not related to the actual situation of the Claimant. That was done in *Thomas*: when the House of Lords applied the discount rate to the calculation of the accommodation costs

it produced a balance between both parties and applied the same assumptions as to investment returns that it applied to other heads of loss.

27. In this case, when looking at accommodation alone the valuers (Robinson, Watson, Clark) effectively suggest different yields which may be used to balance the respective interests.

28. The Court, though, should be particularly careful if it considers applying a different 'yield' to accommodation claims from that used for other heads of loss. In most cases where accommodation losses arise the claimant has a large pool of damages which, whatever the actual situation, the Court assesses on the basis that capital will be invested in low-risk, low-return assets. The Court should not assume that for accommodation alone a claimant, who has a large pool of such damages available, would be achieving a significantly higher return with her capital. To do so tips the balance against a defendant when assessing accommodation claims compared to the way in which other heads of loss are assessed.

29. In *Hodgson v Trapp* [1989] AC 807, 826, Lord Oliver of Aylmerton emphasised that damages should be exhausted by the end of the period for which any loss continues and the claimant should not be in a better position at the end of that period**[Authorities1/Tab13/248]**.

30. Depending upon the approach adopted by the valuers a range of discount rates is suggested (many are helpfully illustrated on a graph by Mr Robinson at **[EB2/Tab18/597]**):

0.5% to 3%	The range Mr Robinson would expect valuers to consider reasonable when conducting a fair and reasonable valuation (§4.24) **[EB2/Tab18/586]**
1.1%	Mr Robinson's own valuation within that range (§4.20-23) **[EB2/Tab18/586]** using his usual approach to a fair and reasonable valuation
1% to 1.5%	Mr Robinson's approach (§6.18) **[EB2/Tab18/591]** utilising reasoning underlying the -0.25% discount rate decision (adjusted to reflect the actual -0.75% discount rate used in this case)
1.75%	Mr Clark's approach using the approach adopted in leasehold/freehold valuations, adjusted to reflect a risk-free rate of return of -0.75% (§9.39) **[EB1/Tab6/206-207]**

1.8% to 2.2%	Mr Robinson's approach using a net rental yield, but based upon assumptions as to rental yield and expenses (§5.6-5.9) **[EB2/Tab18/587-588]**
3%	Mr Watson's first "purely illustrative" assumed rental yield without knowing actual yield (§16.1 cf. his answer to questions on this) **[EB2/Tab16/552 & Tab17/572]**
6%	Mr Watson's second "purely illustrative" assumed rental yield without knowing actual yield
6.6%	Mr Watson's calculated yield based upon the very limited auction market of which he has knowledge (§16.1 cf.11.2) **[EB2/Tab16/552 cf 548].**

The valuers all take different approaches to mortality allowance: Mr Robinson uses the tables he normally uses which are not the same as the Ogden Tables; Mr Watson and Mr Clark both assume that the given life expectancy is exact.

Determining Yield from Market Valuation

31. This is evidenced by Brian Watson, who himself discounts it in a case such as this where a claimant retains the reversionary interest [§10.25 **EB2/Tab16/547**]. A has bought her property and retains the reversionary interest in it. As the court cannot create the lifetime and reversionary interests, any valuation of the life or reversionary interest is necessarily hypothetical. Thus any 'market' valuation approach is not appropriate here.

32. Further, the 'market' valuations relied upon by Mr Watson do not provide an appropriate guide to any alternative valuation to *R v J* in any event bearing in mind the evidence of Mr Daykin and Ms Angell in their joint statement (@ para 3.2(E) **[EB2/Tab14/517]**)that a market approach requires the Court to be able to draw a **robust** set of underlying assumptions from the market in question; and, as R submits, the need for any such market to be analagous.
    a. The market is tiny and shrinking: §6.1 of Mr Watson's report **[EB2/Tab16/540]** is misleading to the casual reader. When Mr Watson says that in recent years "no more than 4 or 5" reversionary interests have been sold at auction each year, he appears to mean that since 2015 no more than 3 such interests have been sold in

any single year (2016). In the other years the number of such interests sold are 2 (2015), 1 (2018, 2019) and 0 (2017) **[EB2/Tab17/568]**;

b. His report is based upon only 3 examples of reversionary interest sales from 'recent years' – those being 2011, 2015 and 2018 respectively - and Mr Watson has declined to give details of other examples as it is asserted on his behalf that that is too onerous **[EB2/Tab17/569 and SB2/Tab15/150]**.

c. Mr Watson has declined to provide full details of the sales relied upon and the information given to purchasers, in particular the terms of the trust. That is of clear importance as Mr Watson acknowledges that most trust expenses are deducted from trust capital rather than income (Answer to Request 14 **[EB2/Tab17/571]**).

d. None of his three sales relates to the London property market **[EB2/Tab16/538-539 & Tab17/568]**, and all relate to life tenants significantly older than A and aged between 67 and 81.

e. The assets in the sales he identifies (§5.9)**[EB2/Tab16/538-539]** are significantly different from a single London residential property with which the Court is here concerned.

f. The property valuations are 'drive by' and the basis of other valuations remains unclear.

g. The life expectancy figures adopted by Mr Watson do not correlate with those underlying the Ogden Tables used for assessment of all other losses which give life expectancies (Mr Watson's in brackets) of:

Male 67	19.74 (18.0),
Female 81	10.02 (9.9), and
Male 72	15.72[2] (14.7).

Determining yield from rental yield

33. This approach to determining the appropriate yield/discount rate to be used in accommodation claims is not practical: it would require expert evidence as to a rental (and R will argue) expense valuation and also taxation so as to arrive at the net rental yield for any potential property considered by a court. Furthermore, the property has usually not been identified prior to trial.

[2] Figures taken from Tables 1 and 2, 0%, of current Ogden Tables.

34. This is not an approach which the Court can adopt in this case in any event: there is a complete lack of appropriate evidence of rental yield in this case. The closest that one gets are figures produced from a website 'survey' referred to by Mr Watson and which give figures of 2.05% and 2.45% for gross yields for London postcodes W8 and W1 respectively (§10.20 cf. his answer to questions)**[EB2/Tab16/546 cf EB2/Tab17/571]**.

35. Even were those figures to be used as a starting point then it is necessary to consider the likely net yields. Mr Watson's suggestion that it is appropriate to use gross rental yields when considering the appropriate valuation of different interests in a property is misconceived. A is never going to and does not pay rent. Her access to capital means that she has purchased a property which provides her with a much cheaper alternative to renting one. The task the experts should be trying to consider is a fair and reasonable valuation of the hypothetical interests in that asset. When doing that it is the income generating potential of that asset which should be considered if a rental approach is used. In any event, even if the Court does not accept that, A has received damages for the ongoing costs of insuring, running and maintaining the additional accommodation and any consideration of gross rental yields (where such costs would fall on the landlord) will then involve double counting.

36. There is no evidence available of the likely rental costs (noting that this approach is one floated by PIBA's expert after R had served his original expert evidence and not yet forming part of A's pleaded case). In *Earl of Cadogan v Sportelli*[3] (Lands Tribunal, 15 September 2006) @§34 **[Authorities2/Tab22/527]** evidence in respect of a gross rental yield of 4.8% suggested the net rental yield was 2.45% (-1.35% costs) and the owner/occupier net yield was 3.66% (-1.14%). If such expenses were applied to the rental yields of 2.05% and 2.45% identified in the website referred to by Mr Watson that would give a range of rental yields of 0.7% to 1.31%.

37. R does not rely on such figures as 'evidence' of any appropriate yield and observes that Mr Robinson's assumptions appear too generous to A if such yields and expenses are correct. R's case is that this is not the appropriate basis for assessing any loss. If, however, the Court disagrees, then the 'evidence' that there is points to a very much lower rate than the 'purely illustrative' 3% used by Mr Watson, and somewhat lower than the figures Mr

[3] This case was appealed to Court of Appeal and then overturned by the House of Lords in respect of issues relating to the 'hope value' of properties: the decision in respect of valuation was not appealed.

Robinson gives in his illustration based upon his starting assumptions (1.8% to 2.2%). The figure, based on the material available is somewhere in the region that Mr Robinson would have adopted for a fair and reasonable valuation: 1.1%.

Determining Yield in Other Ways

38. In reaching a fair and reasonable valuation of the asset Mr Robinson would treat the 'property' as an asset which was capable of investment in a mix of equities and gilts to provide protection of the asset against inflation whilst providing some income. In doing that Mr Robinson is adopting similar reasoning to that used in *Thomas* where the House of Lords considered the return on an investment which the capital could otherwise be invested in if it had not been used to purchase the property, albeit Mr Robinson's hypothetical investment adopts underlying assumptions different to those underlying the discount rate.

39. In adopting his approach Mr Robinson is adopting a higher-risk investment model although he does this to balance the interests of life tenant and remainderman when the underlying asset is being sold: there would be little purpose in selling an asset if the life tenant received nothing from that sale because a yield of 0% or less was chosen.

40. If the Court were to determine yield in this way then Mr Robinson's approach in this respect (even though Mr Robinson prefers the cashflow model himself) – an approach which produces a yield of 1.1% - is the one which reaches the fairest accommodation between A and R whilst recognising that all other heads of loss have been valued on the basis of A only being able to achieve a significantly lower rate of return.

41. R submits, however, that the more appropriate rate to adopt if this approach were used is 0.75% (not 1.1%) for the following reasons.
    a. That rate helps to reflect the fact that A has been awarded a substantial sum of money on the assumption that her returns will be -0.75%: in the trust situation Mr Robinson is considering, he values the property on its own and his valuation ignores the fact that other matters between the parties have been dealt with on a much lower valuation of the potential return.
    b. Mr Robinson's valuation is much closer to the approach taken under the amended Damages Act 1996 to the setting of the discount rate (which led to a discount rate of -0.25%). A reduction of slightly under 0.5% from Mr Robinson's yield rate

would reflect that fact. The Court could indicate on that basis that going forward with the discount rate at -0.25% the appropriate yield to use would be slightly higher than 0.75%.

c. It falls at the bottom end of Ms Angell's cashflow calculations of A's actual costs likely to be incurred. As such costs do not make provision for the windfall that would occur in such cases, that reflects an appropriate balance between A and R if the Court is going to depart from *R v J* and the requirement to allow for the windfall.

d. It rounds to the nearest quarter of a per cent. Tables are not available for that rate but it may be anticipated that such tables would be produced quickly as they have been for the other discount rate changes to -0.75% and -0.25% where tables were not available at the time the change was announced.

42. Mr Clark adopts an approach which is used in valuing leasehold and freehold interests for enfranchisement purposes. Mr Clark updates and transfers the reasoning used in freehold valuation (which adopted a risk-free rate of return of 2.25% in 2006) to this case where the risk-free rate of return is -0.75% and concludes that a discounting rate of 1.75% would reflect the reasoning in the enfranchisement market adjusted to the PI defined rate of return.

43. When considering such approach it is important to note that this market appears to be heavily influenced in the leaseholder's favour by regulation and political concerns: eg, the terms of reference for the Law Commission when producing its recent report on leasehold home ownership required the Law Commission to report on options to reduce the price payable for enfranchisement **[Law Commission Report No 387]**.

44. It is understood that A does not challenge that evidence. R whilst producing that evidence to enable the Court to be fully informed, will submit that such rate is too high. It is based upon a conclusion that the real growth rate and risk premium for such property requires a +2.5% adjustment to the risk-free rate of return used (-0.75% + 2.5% = 1.75%), whereas *Thomas* concludes that no adjustment is necessary: an approach which is supported by Mr Wilson [§4.2.4 **EB1/Tab5/137]**.

45. On any approach though, the discount rate/yield adopted should not exceed that 1.75% rate, derived as it is from the approach in a market which appears to favour the leaseholder

(the life tenant in our example), and in the absence of evidence that the sum of risk premium and real growth rate exceed 2.5%.

Summary on alternative approaches

46. If the Court considers alternative approaches the reversionary interest approach (which effectively adopts an *R v J* approach at different discount rates) is the most practical approach in most cases: i.e. where there are substantial damages.

47. That approach, though, requires an appropriate yield or discount rate to be adopted to reflect the balance between the parties' and the substantial windfall that can be utilised by a claimant prior to death if they wish or will accrue to their estate on death.

48. Any movement away from the -0.75% rate that applies generally in this case should be limited given the evidence available. A rate of 0.75% is appropriate.

Saved Borrowing Costs

49. PIBA advances the argument that A should give credit for saved borrowing costs: A receives her damages for future losses, including future loss of earnings now, and is therefore enabled to avoid interest by paying off borrowing which would have been paid off from such future loss of earnings immediately.

50. PIBA suggests that where such costs relate to the cost of accommodation, i.e. mortgage costs, that saving should be set off against any award for damages for such loss.

51. That approach makes sense where an award of damages for capital accommodation costs is made: A would have been required to incur that cost as part of acquiring equity in her 'but for' property and such cost could be added to her 'but for' equity when calculating the award for accommodation capital costs.

52. Ms Angell calculates a sum of £6,515 [§6.16 **EB2/Tab8/455**] although the figures she uses are not accurate April 2018 figures and reflect apparent changes in both the outstanding borrowing and interest charged between April 2018 and November 2019. R has requested information from A and will provide the Court with calculations based upon the actual figures when they are available.

Paradigms

53. The paradigms are not real cases and do not arise for decision in this appeal.

54. The central problems that arise in difficult accommodation cases result either from a short life expectancy and/or from an award of a PPO leaving a claimant with a small lump sum, and an inadequate one with which to fund any property purchase. Neither problem arises in this case.

55. There is more than one potential solution to any unfairness resulting in these types of case, but none involves finding that solution in this appeal.
    a. As to short life expectancy cases:
        i. the Lord Chancellor can set one or more different discount rates applicable to such cases (as defined by him) pursuant to section A1(4) of the Damages Act 1996; and/or
        ii. Parliament can legislate to provide for one or more solutions which can stand as an alternative to *R v J*, in a way which is not currently viable.
    b. As to small lump sum cases:
        i. the Lord Chancellor cannot set a different discount rate applicable to such cases (as defined by him) pursuant to section A1(4) of the Damages Act 1996 but Parliament can legislate to enable him to do so; and/or
        ii. Parliament can legislate to provide for one or more solutions which can stand as an alternative to *R v J*, in a way which is not currently viable; and/or
        iii. a court could adopt a different discount rate for such a case as a whole if it is more appropriate for it do so pursuant to section A1(2) of the Damages Act 1996. That may be appropriate where the bulk of future losses are taken in the form of PPO as any PPO would not alter if an alternative discount rate was used.

19.3.2020

William Audland QC
Richard Viney