

Briefing Note:

When *Roberts v Johnstone* shuts the door on property

The advent of periodical payments, with reduced lump sum awards, has brought accommodation claims into sharper focus. In cases where life expectancy is short, the problem is particularly acute, since the *Roberts v Johnstone* calculation yields little by way of damages compared to the capital required. The problem is aggravated in cases where the Claimant lives in an area of high property prices.

Renting is the obvious solution to overcoming the need for capital to purchase accommodation where there is full recovery. However, the practical difficulties of finding a landlord prepared to permit the necessary adaptations and a restricted supply of potentially suitable properties often rule out the rental option.

The case of *Ryan St George v The Home Office*, illustrates both the problem and a solution. The Claimant's injuries affected his life expectancy, but there was a broad range of medical opinion about his likely survival. Even on the most optimistic assumption, his life expectancy was significantly impaired. The Claimant lived in a London borough, in rented accommodation that was wholly unsuited to his needs. Thus he had to move, and he had no capital to transfer to another property. He needed to remain in the same area to stay close to family, who play a key role in his care.

Even on the most optimistic assessment of life expectancy, the *Roberts v Johnstone* calculation would yield a small proportion of the capital required to purchase a suitable property in that particular location. With such a range of opinion on life expectancy, at trial, there would clearly be a risk of recovering even less.

Fortunately, it proved possible to find suitable rented accommodation. This opened the door to an award of periodical payments for rent, instead of a *Roberts v Johnstone* claim for loss of use of capital. Furthermore, there were no issues on causation or liability to take into consideration, thus paving the way for meeting the Claimant's need with an award of periodical payments.

Clearly, it was imperative to ensure that periodical payments would, so far as possible, maintain their real value over time. Precision in that objective is usually a desirable quality, especially if the duration of the loss is long. However, as already referred to, even on the most optimistic view, the Claimant's life expectancy in this particular case is modest. In other words, the goal of precision is a relative one, and any imprecision in periodical payments must be viewed in context of the imprecision of a lump sum over a short duration of loss.

In any case where life expectancy is subject to a high degree of uncertainty, but is nevertheless likely to be relatively short, a lump sum would leave unacceptably high mortality and investment risks with the Claimant. Periodical payments would transfer these risks to the Defendant.

Thus, even if the periodical payments prove not to meet precisely 100% of the Claimant's need, he can be certain they will provide a very high proportion of it, year in, year out during his lifetime. A lump sum would clearly expose the Claimant to the significant chance of damages being exhausted prematurely. I therefore took the view that, financially at least, it was better to be "about right" with periodical payments than "precisely wrong" with a lump sum.

Time did not permit, and circumstances did not require, the gathering of expert evidence on any more precise measure of rental costs as a link for the periodical payments. In a different case with a longer duration of loss, it may be appropriate to consider whether a suitable alternative index, or measure, of rental costs could meet the requirements set out by Mackay J, in the Court of Appeal Judgment in the *Thompson* group of cases, i.e.

His Honour Judge Bullimore took the view that the exercise is bound to be a comparative one but that any alternative that was unsuitable would have to be rejected. That must be right, and before Mackay J the criteria for suitability were hardly an issue. He identified them in the following words:-

"70. Before considering individual measures proposed I should consider the criteria that should be applied when making what I consider to be a comparative assessment as to whether each meets the test of fairness of appropriateness defined above.

"71. The experts helpfully agreed the criteria for the suitability of an index as being:-

- i) accuracy of match of the particular data series to the loss or expenditure being compensated;*
- ii) authority of the collector of the data;*
- iii) statistical reliability;*
- iv) accessibility;*
- v) consistency over time;*
- vi) reproducibility in the future;*
- vii) simplicity and consistency in application*

"This appears to me an entirely appropriate and sensible list of the qualities which are to be looked for. Mr Hall sought to add that the candidate measure should be "free of distorting factors". Dr Wass, more realistically in my view, said that that is in effect asking for the impossible though it should be as free as possible.

Whilst it is possible to isolate rent as a component of the RPI (there is an underlying index for rent), in these circumstances, the RPI was an uncontroversial (since it is the “default” method of indexation) and acceptable link for the periodical payments covering rent.

Clearly, there is bound to be uncertainty about the renewal of any property lease. An integral part of the negotiated settlement was, therefore, an additional lump sum to cover a specified number of property moves during the Claimant’s lifetime, plus one move as a contingency.

Conventionally, it is usually necessary to raid some, or all, of an award for General Damages to meet the capital need for property. However, the solution found here means that general damages will remain available as a true and liquid (accessible) contingency fund. Likewise, the award for future loss of earnings, which is also a potential source of capital for property, remains intact. Thus, even if the periodical payments fail to keep pace with increases in rent, there are funds available to draw upon without compromising other future needs.

Whilst this approach is unlikely to find favour generally, it clearly offers a workable solution to a very significant practical problem in cases where *Roberts v Johnstone* fails. At the approval hearing in *St George* Mr Justice Mackay indicated that he considered that the course adopted in that case of rental payments being made by way of periodical payments should have a more general application in other suitable cases.

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