



## DEANS COURT CHAMBERS

### Summary of the decision in *Swift v Carpenter*

#### Headlines

- Court of Appeal not bound by *Roberts v Johnstone*
- *Roberts v Johnstone* no longer achieves fair and reasonable compensation for injured claimants
- Damages calculated by awarding the additional capital cost of the new property less the present market value of the reversionary interest in that property
- Present market value of the reversionary interest calculated by using an annual rate of return of 5% over the claimant's life expectancy

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#### Facts:

- Claimant (C) aged 39 when injured in an RTA on 31/10/13.
- Sustained a below-knee amputation to the left leg and serious injury to right foot with significant ongoing symptoms and restrictions.
- C reasonably required a more expensive property, the additional capital cost being £900,000 (cost of new property £2,350,000 less cost of existing property £1,450,000).
- Lambert J held that she was bound by *Roberts v Johnstone (RvJ)* and awarded C nothing for the additional capital cost of a property.

## The Appeal

- The judge gave C permission to appeal so that the Court of Appeal could review the law in this area.
- PIBA was given permission to intervene on the appeal.
- The Court of Appeal permitted the parties to adduce evidence from expert economists and actuaries, mortgage experts and experts in the valuation of reversionary interests in property.
- The parties also agreed 3 'paradigm cases' to assist the court to consider the application of any proposed methodology to alternative facts.

## Unviable Options

- After the expert evidence was exchanged and joint statements prepared, the parties agreed that the following options were not viable in the individual case:
  - interest-only mortgage backed by a PPO;
  - life multiplier x mortgage payments, mortgage interest payments or rental costs;
  - loan from D to C with a charge on the property.

## Issues

- The parties agreed that the issues for the CoA were:
  1. Is the CoA bound by *RvJ*? To answer this, the CoA had to ask itself:
    - (a) does *RvJ* apply?
    - (b) is the court prevented from revisiting *RvJ*?
    - (c) if not, should the court revisit *RvJ*?
  2. If the CoA is permitted to re-examine the approach in *RvJ*:
    - (a) should the court award the full capital value of the incremental sum required?
    - (b) should the court award that sum, but reduced to reflect the value of the notional reversionary interest, i.e. the value of the 'windfall'?
  3. If the approach in 2(b) above is correct, how should the court value the reversionary interest?

## Bound by *RvJ*?

- On the status of *RvJ*, the CoA held that:
  - the methodology established by *RvJ* represented *authoritative guidance* as to how the courts should comply with the *legal principle* of fair and reasonable compensation but not overcompensation [80 and 220]].
  - *RvJ* applied to the facts of *Swift* but only as *authoritative guidance* [81 and 220].
  - guidance as to the assessment of damages in the context of personal injury is given by reference to the conditions of the day [79 and 220];
  - since *RvJ* did not establish *legal principle*, the CoA was entitled to revisit the guidance if it was “demonstrated to be ineffective in achieving the object of the relevant legal principles of law, namely full compensation without over-compensation, ...” [81].
  - the decision of the House of Lords in *Thomas v Brighton Health Authority* (heard with *Wells v Wells*) as to the rate to be applied to the calculation in *RvJ* was not binding on the CoA as to the methodology, because the methodology was not in issue [71].
  
- as to whether the CoA should depart from *RvJ*, it held that:
  - the formula in *RvJ* no longer achieves fair and reasonable compensation for an injured claimant [140, 212 and 219].
  - “it cannot be regarded as full, fair and reasonable compensation to award nil damages in respect of a large established need, on the basis that, if all relevant predictions hold good over many decades to come, there will arise a windfall to a claimant’s estate” [140].
  - an argument by D that C does not suffer a loss by using some of her damages to fund the additional capital cost, because she will be able to fund the shortfall in old age by way of equity release [*“the cash-flow model”*], was rejected, on the grounds that:
    - the degree of conjecture, the complexity and uncertainty of outcome “preclude the view that this approach can be regarded as providing fair and reasonable approach” [141];
    - such an approach “runs directly counter to the multiplier/multiplicand approach the court must take in calculating an award under discrete heads of claim” [142]
    - the extent to which C could make up the shortfall by investment etc. in old age was not capable of reliable projection in any event;

- such an approach would alter C's investment profile/strategy with a disproportionate level of investment in property which would necessitate a revision of the rate of return/discount rate the remainder of the award [143];
  - tying up damages in property required for future care etc. would constrain the capacity of C to protect herself from future contingencies and offends the principle that it is for the claimant to decide how to invest her damages [144].
- the 'windfall' argument should not be permitted to distract from the need for fair and reasonable compensation: "to withhold all damages for the purpose of avoiding an eventual windfall seems to me to put a secondary principle before a primary principle: to put the cart before the horse" [145].

### The New Methodology [*"Guidance"*]

- C should be entitled to the additional capital cost of the property less the value of the reversionary interest in the property [149].
- The Court heard expert evidence on various approaches to the valuation of this interest:
  - the typical market value of such an interest in the small market which already exists for the sale of these interests [153-156];
  - a valuation based on a "*fair and reasonable*" assessment of the value of the life interest and the reversionary interest, by reference to the notional cost of renting the property to the life tenant [163];
  - a valuation based on a "*fair and reasonable*" assessment of the value of the life interest and reversionary interest, by reference to the notional value of the income generated from the trust sum and based upon asset allocation which would provide a fair balance between income [the life interest] and capital growth [the reversionary interest] [172].
- The Court held that the correct approach was to use the **market value of reversionary interests**, notwithstanding the small size of the market [196 and 229].
- The evidence showed that investors in reversionary interests usually looked for an annual return of 6.2% to 7%. The Court of Appeal considered that a more "*cautious*" lower return than that was required, to reflect the small size of the market and the uncertainties of life expectancy which underpinned the rate of return [197].
- The Court therefore held that the appropriate rate was **5%** [197].
- Since a satisfactory method could be formulated to avoid the windfall, there was no justification for awarding C the full additional capital cost.

## The Formula

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

- Value of reversionary interest is:

$$\mathbf{R = (P - B) \times 1.05^{-L}}$$

- Where:

R = reversionary interest

P = value of property now required

B = value of property owned but for the accident

L = predicted life expectancy

- Damages award:

$$\mathbf{D = (P - B) - R}$$

- In the case of Mrs Swift:

- $P = \pounds 2,350,000$

- $B = \pounds 1,450,000$

- $L = 45.43$  (normal life expectancy derived from Table 2)

- Therefore:

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

- $D = (\pounds 2,350,000 - \pounds 1,450,000) - \pounds 98,087 = \pounds 801,913$

## Departing from The New Methodology

- “There may be cases where this guidance is inappropriate. However for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring.” [209]
- The Court has left open the possibility that a different approach may be required for short life expectancy cases, where the value of the reversionary interest, and therefore the deduction to the additional capital sum, will be much greater: “It may be that different considerations and arguments could be applied to that category of case”. [170]

**Revisiting “*the guidance*”**

- “... guidance of this character should only be revisited in response to really significant changes, and in the case of appellate guidance ... it will rarely if ever be right for that guidance to be departed from by a first instance court.” [221]

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