WLSQC HANDOUT: ALTERNATIVES TO ROBERTS v JOHNSTONE

APIL DAMAGES SIG 30 March 2017

Clearly the *R v J* formula does not work with a negative discount rate. However, no universally agreed better solution has been forthcoming for assessing future accommodation claims since 1989[1]. Pending resolution of this issue by the SC, claimants have three main choices:

1. Accept a calculation for future accommodation based upon the current regime i.e. nothing for *R v J* but a much higher award than we're used to for annual running and maintenance costs because of the higher lifetime multiplier;
2. Apply to adjourn the assessment of future accommodation pending authoritative guidance from the SC;
3. Challenge *R v J* by running one or more alternative options, potentially becoming involved in a leapfrog appeal to the Supreme Court[2].

Under the first approach, the calculation should be zero. Some ambitious defendants are arguing that the figure should be negative. However, C would simply withdraw any claim for *R v J* so the figure should be zero rather than be negative. Furthermore, there is a strong body of case law confirming that when assessing damages for future loss only like should be offset against like[3]. For example, the increase in value caused by adaptations (betterment) is offset against betterment costs. Arguably it would be wrong in principle for the notional loss investing in property now assumed due to the negative discount rate to be offset against other heads of loss such as increased running costs or relocation costs if no claim is advanced for increased purchase costs.

The second approach may not be open until several appeals are already underway or there is a need for further evidence.

The third approach is not unfamiliar to practitioners who have previously been involved in short life expectancy cases. There are a number of alternatives to *R v J* listed below. The difficulty is that many claimants are risk adverse and being caught up in the test litigation may give rise to additional concerns over and above the obvious costs risk including (i) D gets permission to cross appeal on other heads of future loss and the discount rate increases during the course of the appeal; and (ii) by the time the appeal gets to the SC the discount rate has become positive again and there is no longer any perceived need to intervene.

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1 In 1999 the Law Commission concluded that *R v J* was inappropriate in most cases and led to under compensation. However, they declined to recommend legislation because they perceived the resolution of the injustice to be too complex. In 2007 the MoJ failed to obtain a consensus to an alternative approach through its Consultation Paper on the Law of Damages.

2 The Criminal Justice and Courts Act 2015, s 63 amended Part 2 of the Administration of Justice Act 1969 so that the defendant's consent is no longer required for a leapfrog appeal from the High Court to the Supreme Court.

3 *Parry v Cleaver* [1970] AC 1, HL; *Longden v British Coal Corporation* [1998] AC 653.

ALTERNATIVE OPTIONS

1. Increased rent claimed as a lump sum or a PP linked to LPHRP[4]

The claim becomes very large over a lifetime when you build in: (i) relocation costs every few years including property finder costs, suitability report fees, removal fees, postal redirection etc; (ii) adaptation costs every few years; (iii) re-instatement costs; and (iv) a period of double rent whilst the next property is being found and adapted.

The problem is that it in practice most claimants do not wish to continue renting in the long term and logically it makes no sense to claim a lump sum for continued rent if C is provided with enough money to buy a suitable property.

Also if the increased rental claim is capped at the full capital difference between the uninjured property and the injured property, arguably the judge will be bound by *R v J* if in fact the intention is for C to buy a property rather than rent.

2. C takes out a mortgage – increased interest claimed as a PP

C takes out a mortgage at commercial rate [LIBOR + a percentage] which is claimed as a PP linked to the rate of interest.

This option is only likely to be available if a particular property is found and a quote can be obtained from a lender confirming that a mortgage is a viable option and what the rate of interest will be. In particular the precise interest rate charged will depend on loan to value. It is unknown whether this option has ever actually been tried in practice.

C may wish to consider offering a charge on the property to reflect the growth on capital difference (although this may be unattractive if C has dependants).

3. D takes out a mortgage and gives C life interest

It is doubtful that the court could order this, however, theoretically a willing D could agree to take out a mortgage to buy a property and give C a life interest in it. Again an actual property is likely to be required and it is unclear whether this been tested in practice.

4. D buys a property and gives C a life interest

Similar to option 3 but the property is bought outright rather than with a mortgage. Essentially this is a reversal of *R v J* with D tying up its capital and taking the long-term property investment risk. Again only works with an identified (and agreed) property as there are likely to be disputes about

5. D pays full capital difference or gives C an interest free loan for the full capital difference

D pays to or loans C the full capital difference between the cost of the property needed now and the uninjured property – with or without the following add ons:

(a) the property can be bought and held on trust for D (perhaps with a charge for C reflecting the uninjured purchase costs if credit is given for these in the claim); or

(b) C buys the property and grants a charge to D reflecting the capital difference and the growth in the same (unless considered a collateral benefit); or

[4] Index of private housing rental prices in Great Britain published by the ONS.

(c) C gives credit against the full capital costs for the present day value of the long-term expected net investment returns on the capital difference over his or her lifetime (i.e. an offset is made to take account of the perceived "windfall" to the estate); or

(d) C gives credit for the likely cost of borrowing (based upon long-term evidence regarding mortgage rates) which would have been incurred on the uninjured property (however, this is limited to the claimant's life expectancy so someone with a short life expectancy or who has already paid of their mortgage is not disadvantaged).

6. *R v J* theoretical approach is kept but with a different percentage applied

A theoretical approach similar to *R v J* is applied however a different annual percentage is used other than the discount rate, for example:

(a) 2% pa is applied as per the interest rate on general damages (and the original decision in *R v J*), in order to compensate C for being kept out of his or her money;

(b) Alternatively a rate reflecting the difference between long-term uninjured net real investment returns (in equities) and the net real investment returns on property.

One further option may be available in short life expectancy cases:

7. Short term fixed loan

Take out a fixed rate loan, paid by way of periodical payments using C's award of general damages as security (depending upon property value and size of loan required).

TACTICAL CONSIDERATIONS

(1) Avoid applications for large interim payments – pending guidance from the SC, interlocutory judges are likely to be even more conservative than usual when applying *Eeles v Cobham* criteria unless there is an urgent and pressing need to purchase a property and other heads of future loss can be capitalised.

(2) If possible, explore extending and adapting existing accommodation (even if not ideal) assuming that produces a better result.

(3) Obtain funding for C to rent suitable accommodation which will provide the necessary evidence and costings for running the alternative long-term rental claim approach (NB C will usually need to be in more suitable temporary accommodation in any event whilst the long-term property is found and even when found, it can often take 12-24 months to purchase, go through planning, adapt and move into the long-term property).

(4) Keep C's options option – D may argue that it is for C to pin his or her colours to the mast and put forward one option. Given the importance of the issue in respect of a large number of claims, arguably C should be entitled to advance a number of

different options[5]. All lower courts will be bound by *R v J*, however, it may be possible to adopt an approach by consent regarding options not even open to the SC.

(5) Whether C has identified a particular long-term property (which may otherwise limit some of the available options).

(6) Building from scratch – may now seem attractive if C already has the land and the additional build costs are claimed as adaptation costs. However, be wary of the likely betterment credit following the build. Also, arguably, any plot which needs to be bought and the build costs associated with the underlying "but for" property may still be caught by *R v J*[6].

(7) Type of defendant – PI insurer or an organisation such as the NHSLA or MIB – is D constrained by certain inflexible policy dictates or might there be some scope to consider novel approaches.

(8) Timing of trial – window of opportunity; listing for trial as soon as possible; potential delay to handing down of judgment.

(9) Consider the need for expert financial or actuarial evidence.

(10) Consider the timing of the expert evidence – whether to seek permission to adduce at first instance (even though the first instance court will be bound by *R v J*) or to seek permission to adduce such evidence in support of the appeal.

(11) Consider seeking chancery counsel's advice regarding the court's powers in terms of purchase of property / trusts / charges on property etc.

(12) Resolve as many heads of future loss as possible so as to put less at risk by needing to pursue a leapfrog appeal.

(13) Consider making broken down Part 36 offers.

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5 See, for example, the Court of Appeal's acceptance that it was reasonable for the claimant to advance a number of alternative indices as alternatives to the RPI in *Tameside and Glossop NHS Trust v Thompstone* [2008] EWCA Civ 5.

6 Suggested by MacDuff J in the course of argument in *Pankhurst v MIB* [2009] EWHC 1117 (QB).