7BR
SEVEN BEDFORD ROW

Richard Baker Considers The Future For Accommodation Claims

JR v. Sheffield Teaching Hospitals was the first substantial case to come before the High Court following the change in discount rate from 2.5% to -0.75% in March 2017. That change brought about a global increase in the pleaded value of the claim from approximately £12 million to over £28 million, it also created uncertainty as to how the courts should approach claims for accommodation, and whether the type of approach advocated in *Roberts v. Johnstone* remains a workable solution.

Whilst it was anticipated that the decision of the Court of Appeal in *JR* might provide some clarity, the appeal was compromised days before it was heard by the Defendant offering to pay the full value of the additional accommodation required by the Claimant and discontinuing its own appeal on the question of lost-years. This was nothing less than a capitulation on the part of the Defendant and left the Claimant with no option but to accept. The reasoning behind why the Claimant accepted that offer is set out within the approval advice provided to the Court of Appeal, an ordinarily confidential document which is produced here with the agreement of the Claimant's Litigation Friend [approval advice].

Where does this leave Claimants who wish to bring claims for accommodation? On the face of it, the observation by William Davis J at first instance that: "*In JR's case I am satisfied that applying the Roberts v. Johnstone approach, which I am bound to do, leads to a nil award in relation to the cost of special accommodation"* remains binding. That statement should, however, be taken in context and, in my opinion, does not provide a sound jurisprudential basis for omitting claims for special accommodation from schedules of loss or from settlement.

In the nineteenth edition of *McGregor on Damages* the late Harvey McGregor observed that: /*"It is high time that the Roberts v. Johnstone problem was tackled and a fair and proper solution found and adopted… It is true that, as the discount rate lowers, the multipliers increase, but an examination of the figures in the tables in Ogden shows that the increases in the multipliers do not come anywhere near to balancing, or off-setting the effect of, the fall in the discount rate…Indeed should the discount*

rate move into the negative… the Roberts v. Johnstone method becomes unworkable; it would produce a nil award". (at 38-204)

This specific effect of the change in discount rate was recognised by William Davis J in *JR* :"*I consider that the editor of McGregor was quite correct when he opined that a fair and proper solution should be found to the conundrum of providing a claimant with the means to purchase special accommodation. He also was correct when he suggested that a negative discount rate would mean that the approach in Roberts v. Johnstone would lead to a nil award. But I am not in a position to find 'the fair and proper solution' to the problem as a whole. I am faced simply with the case of this Claimant".* (at paragraph 14 of the judgment)

The mechanical impact of a low discount rate upon the ability of the *Roberts v. Johnstone* mechanism to provide adequate compensation for special accommodation will not go away if the discount rate changes to a positive number. Applying a 1% discount rate to JR's accommodation need following the *Roberts v. Johnstone* produces the following result:

£800,000 x 1% = £8,000
£8,000 x 36.63 = £293,040

Short-fall in accommodation = £506,960

This can be contrasted with the same approach at the former 2.5% discount rate

£800,000 x 2.5% = £20,000
£20,000 x 27.35 = £547,000

Short-fall in accommodation = £253,000

Whilst it would be feasible, with a 2.5% discount rate, to make up the short-fall in accommodation costs by utilising JR's award of general damages, that would not be feasible with a 1% discount rate and it would be necessary for him to have utilised funds allocated to other necessary resources to purchase accommodation.

Other claimants would find themselves in an even less favourable position than JR, when relying upon *Roberts v. Johnstone*. A claimant with a shorter life-expectancy[1] or a claimant whose injuries resulted in a lower award of general damages would see the short-fall in the award for accommodation increase and their ability to meet that short-fall out of unallocated damages decrease.

The need for reform of *Roberts v. Johnstone* is clear. It was recognised as liable to create anomalies in *Manna v. Central Manchester Teaching Hospitals*, where Tomlinson LJ said: *"The exercise in which the court is thus engaged is in modern conditions increasingly artificial"* (paragraph 17) and described the formulation as: "*imperfect but pragmatic"* (paragraph 31). In approving the settlement in *JR*, Jackson LJ commented: *"It is clear that sooner or later this Court is going to have to grapple with the Roberts v. Johnstone issue in the new world"*.

Various alternative structures have been proposed. In *JR* William Davis J suggested an approach based on mortgage interest over 25-years. That approach was not discussed during the trial and is, in my view, flawed. How would the Claimant make capital repayments on the mortgage, and what would the Claimant do after the 25-year term had concluded? What if the Claimant had a life-expectancy of less than 25-years?

A multiplier/multiplicand approached for life, whether based on mortgage repayments, interest on mortgage repayments, or on rental costs would, with the present discount rate, result in the Claimant recovering more than the value of the accommodation if he had a long life-expectancy or facing a significant short-fall if he had a shorter life-expectancy. Assuming rental costs of £2,000 per month and ignoring an inevitably large landlord's premium and other incidental expenses, provides a total claim for rental accommodation of over £1.28 million in a client with JR's life-expectancy (the agreed life-multiplier was 54.34). Likewise, assuming a modest 2% interest rate on a mortgage on £800,000 provides a total claim of £853,440 over the Claimant's life-time. Whilst that disparity may alter with a fluctuating discount rate, there is a risk that dislocating the multiplicand from the method of

[1] JR was 24-years old at the date of trial and has a life-expectancy to age 70.

calculating the multiplier would create further injustice to one party or the other[2]. The approach would also be prone to inaccurate speculation, in that the Court would be expected to set the appropriate multiplicand to represent a loss that, in JR's case, would run over a period of 45-years. That process would be beyond the realistic abilities of any expert instructed to advise the parties, a point that was not lost on those representing JR. It also seems inevitable that the Claimant would be encouraged to simply invest any compensation for rent or mortgage interest in purchasing a property outright, thus achieving no different outcome than if the Claimant had been provided with the additional purchase price in any event, and probably providing a windfall on-top.

In my view, an approach based upon the Claimant being granted a life-interest in the accommodation is undesirable. The Claimant's family would face being evicted from their home by the tortfeasor upon the Claimant's death. Institutional Defendants would be required to manage a large trust portfolio; Claimants would be subjected to duties to maintain or restore properties upon termination of the trust; and, there would remain the issue of who would take the benefit, or bear the burden, of any alteration in the value of the property over the Claimant's life-time. This approach is also marred by the need for that structure to be agreed by both parties, it being beyond the power of the Court to order the parties to adopt it.

A structure whereby the Defendant agreed to meet the interest payments on a commercial mortgage on a PPO basis could provide a solution to the risk of fluctuating mortgage rates but it relies upon such a product being available on a full-life basis. No product exists at present and whilst it is not impossible that it will be created in the future it is unlikely that commercial lenders will be prepared to provide it in cases of long-life-expectancy where they might not expect repayment of their capital for 40 or 50 years. As applying this structure the Defendant would not retain any interest in the Claimant's property, it would be for the Claimant's estate to bear the costs of restoring the property for sale at the conclusion of the Claimant's life. The Claimant's estate would also obtain the windfall of any increase in the value of the property over the Claimant's life-time, or bear the burden of any decrease. The prospect of a mitigating such a windfall underpins the ratio in *Roberts v. Johnstone* and should cause the court to ask whether the structure achieves a desirable purpose. It is axiomatic that over

[2] McGregor on Damages (nineteenth edition) refers to the historical approach in whereby the multiplicand was set at 2% at a time when the discount rate was fixed at 4.5%, resulting in claimants recovering, at best, one thurd only of the capital cost of their new accommodation (38-201).

the course of a claimant's life-time, the Defendant may pay substantially more than the capital purchase price of the property in any event.

The Claimant in *JR* submitted that in the absence of a workable alternative structure, the Defendant should pay the full capital cost of the additional property required by the Claimant and arising from his disability. They were supported in that approach by the submission of the Personal Injuries Bar Association (intervening in the appeal). The Defendant's decision to compromise the appeal, on that basis, could be taken as demonstrating their concern that the Court of Appeal would do just that.

It is clear that the Court of Appeal will grapple with the proper method for assessing accommodation claims in the future. Until then, claimants should maintain the arguments presented by the Claimant in *JR*, that the defendant should pay the full capital cost of accommodation in the absence of a reasonable alternative proposal.

The Claimant's submissions on the appeal in *JR* can be read here [submissions]

The Claimants in *Manna v. Central Manchester Teaching Hospitals NHS Trust* and *JR v. Sheffield Teaching Hospitals NHS Trust* were represented by Derek Sweeting QC and Richard Baker of 7BR.