

Appeal Handed Down in *Swift v Carpenter* [2020] EWCA Civ 1295

The Judgment has now been handed down in this long-awaited appeal in which William Audland QC and Richard Viney appeared for the Respondent.

This test case challenged whether the previous approach, set out in *Roberts v Johnstone*, was correct and clarifies the correct approach to calculating accommodation claims.

Background

The Appellant sustained serious leg injuries in a road traffic accident in October 2013 which ultimately lead to a below-knee amputation of the left leg and a serious injury to the right foot. At trial in 2018, she was awarded more than £4m damages on the basis of a normal life expectancy (assumed by the parties to be to 89, around 46 years from trial). Lambert J assessed the capital cost of the required special accommodation was £900,000 more than the Appellant's current home, but held that she was bound by the decision in *Roberts v Johnstone* and therefore awarded no damages for accommodation.

The Appellant appealed to the Court of Appeal who, in addition to hearing from both the parties, received submissions from the Personal Injuries Bar Association, and heard expert evidence from expert economists, actuarial experts, mortgage experts, and experts in the valuation of reversionary interests in property. The parties agreed three "paradigm cases" to allow the court to consider the application of any proposed methodology to the facts.

The Appellant argued that the Court had the power to revisit *Roberts v Johnstone* and that it should do so because it was no longer fit for purpose in light of the new discount rate. The Respondent argued that the court was bound by *Roberts v Johnstone*.

When the case was heard in June 2020, the parties agreed that the following options which had previously been mooted were not viable in the case: interest-only mortgage backed by a PPO (previously favoured by the authors of a 2010 report from the Civil Justice Council); life multiplier multiplied by mortgage payments, mortgage interest payments, or rental costs; lifetime cost of renting a property; and a loan from the defendant to the claimant with a charge on the property. It was agreed that the questions for the Court to decide were:

1. Is the Court bound by *Roberts v Johnstone*? This subdivided into three questions:
 - a. Does *Roberts v Johnstone* apply?
 - b. If yes, is the court prevented from revisiting *Roberts v Johnstone*?
 - c. If no, should the court revisit *Roberts v Johnstone*?
2. If the Court is permitted to re-examine *Roberts v Johnstone* what approach should be taken?
 - a. Should the court award the full capital value? Or
 - b. Should the court award the full capital value less a sum to reflect the value of the reversionary interest?
And
 - c. If (b), how should this be calculated?

The Judgment

Irwin LJ handed down the Court of Appeal's unanimous decision. The Court held that *Roberts v Johnstone* did not establish a legal principle but instead provided authoritative guidance as to how the courts should apply the legal principle of full, fair and reasonable compensation without, if possible, overcompensation. It could not be regarded as full, fair or reasonable compensation to award no damages in respect of a large established need, simply on the basis that if all relevant predictions hold good there would be a windfall to the claimant's estate. The formula

in *Roberts v Johnstone* therefore needed to be revisited.

Turning to the second question, the lump sum full capital value would provide a windfall to the Claimant so should be avoided if possible. The Court held that it was possible to calculate the reversionary interest and that this was the appropriate method of calculation.

Looking at how to calculate the reversionary interest to be deducted from the capital value, generally such a windfall would only arise after a claimant's death. For this reason it should not be assessed now, but calculated on the basis of the market value of the reversionary interests. This was the case even though the market for this type of property is very small (only 1-2 sales a year). The Court took a cautious approach to returns and held that the appropriate rate was 5%.

Analysis

The Court of Appeal has answered the questions that have troubled practitioners and courts for many years and particularly since the change in the discount rate over three and a half years ago. A new method of calculation of accommodation claims has been set out and this is to be welcomed as providing greater certainty to practitioners and their clients.

Practitioners should be cautious, however, of cases which do not fit the model of *Swift v Carpenter*. Irwin LJ was clear that "*there may be cases where this guidance is inappropriate.*" These will be in particular cases with short life expectancies (although how short may be a subject of debate). Similarly, should the discount rate move above a "*low positive*" figure, say 1%, it may be questioned whether this new guidance remains applicable.

For more details, look out for 12KBW's webinar which will be broadcast at 4pm on 9 October 2020 and will feature William Audland QC, John-Paul Swoboda and Vanessa Cashman. To access the webinar, follow this link: [Swift v Carpenter: The Judgment](#). The full text of the judgment can be accessed [here](#).

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