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Swift v Carpenter: *Calculating Accommodation Capital Costs*
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Tilting at Windfalls: *Swift v Carpenter* and Accommodation Capital Costs

By Jack Castle

In a long-awaited judgment, the Court of Appeal in Swift v Carpenter [2020] EWCA Civ 1295 has ruled on the quantum of the award for additional capital cost of new accommodation following an accident in an age of negative discount rate. How is it now calculated? When does the formula apply?

Introduction

1. In a significant judgment for personal injury practitioners, the Court of Appeal in *Swift v Carpenter* [2020] EWCA Civ 1295 has found that costs for purchasing accommodation required as a result of the injuries sustained in an accident should be calculated by this formula:

   $$\textbf{Value of Difference} - (\textbf{Value of Difference}/1.05^{\text{Life expectancy at trial}})$$ [1]

   where 'Value of Difference' means the difference between the value of the property now required and the value of the Claimant's existing accommodation. Life expectancy will be calculated by reference to Tables 1 or 2 of Ogden 8, except where the court has made a definitive determination as to life expectancy (in which case Table 36 should be adopted).

2. In *Swift v Carpenter* itself, Mrs Swift was found to require a series of adjustments to her home following a road traffic accident. The adjustments required were,

[1] I have drawn on a note by Mr Derek Sweeting QC, leading counsel for the Appellant, (https://app.simplenote.com/p/XFG9Zh#fn-1) in deriving this formula.

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among other things, more space: Mrs Swift would have to move house. The difference in cost between the house she would need post-accident and her current house was held to be £900,000.

3. However, Mrs Justice Lambert at first instance considered herself bound, as a matter of law, to award Mrs Swift £0 for this head of loss. Two issues intersected to bring about this result.

The Problem: Negative Discount Rates and Awards for Additional Capital Costs

4. The first was the Court of Appeal authority *Roberts v Johnstone* [1989] QB 878. Considering awards for additional capital costs, the Court of Appeal said '*the damages awarded for accommodation costs should not represent the full capital value of the asset, since this would remain intact at the date of the plaintiff's death and represent therefore a windfall to her estate*' (*Roberts v Johnstone,* 891], overcompensating her.

5. The approach said to negate this 'windfall' in 1989 was originally 2% (as a discount rate) of the additional cost of the accommodation, multiplied by the appropriate multiplier. This represented '*the real net rate of return in foregoing the use of money whilst at the same time allowing for an increase in the capital value of the property'* (*Thomas v Brighton Health Authority* [1999] 1 A.C. 345, 360).

6. This approach worked at a time of high interest rates and rising property prices. Because this investment was said to be risk-free, (the Claimant was protected against inflation by the increase in value of the house) this approach and discount rate was appropriate. When the Lord Chancellor began setting discount rates in 2001, the chosen rate of 2.5% was used in the *Roberts v Johnstone* calculation.

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7. The second issue is the current discount rate. On 20 March 2017 the discount rate became -0.75%. It is currently -0.25%. This reflects the present economic climate of historically low interest rates.

8. A negative or zero discount rate will mean the expected rate of return on the use of the money would always be zero (or less than zero). The rate-of-return-only approach in *Roberts v Johnstone* inevitably meant that, after March 2017, it was mathematically impossible for a Claimant to recover additional accommodation capital costs.

Swift v Carpenter: The Solution?

9. A number of approaches to this problem were canvassed before the Court of Appeal in *Swift v Carpenter*. Eventually, the Court decided that the approach should be to try to calculate the 'windfall' to the Claimant's estate and subtract it from the up-front damages award. It held the way to achieve this was through a calculation of the 'reversionary interest'.

10. The value of a reversionary interest is the value of trust property when it 'reverts' to the trust after a life interest in it is extinguished. Where a Claimant is injured for life they will need support until their death; the 'extra' value that enters their estate is therefore the 'windfall' the Court is seeking to avoid. Clearly, however, this is a difficult sum to perform because (i) it is somewhat artificial; (ii) it relies on knowing what the value of, in Mrs Swift's case, a £2.35m house in prime London will be worth on her death (at the time of trial, she was only 43 years of age).

11. The method chosen by the Court of Appeal was an attempt to sidestep these difficulties. Irwin LJ decided that the correct approach was to ask what rate of return (compounded over the course of the inhabitant's life interest) would an investor require to purchase that reversionary interest at the date of trial. By

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reference to expert evidence on the small market in reversionary interests, Irwin LJ held – conservatively – that an investor would want a 5% annual rate of return, realisable on the death of the life tenant.

12. Note that this is nothing to do with trying to predict house prices nearly half a century from now. This is simply the amount of money that would need to be invested now, at 5% per annum, to achieve the *current* difference in value between the Claimant's current home and the home the Claimant requires post-accident on the date the Claimant dies. That is the 'windfall', and that is what the Court now requires practitioners to work out.

How to Calculate Additional Capital Cost

13. Awards for additional capital costs are now calculated according to the formula above. This is not as alien a calculation as it first appears. It applies a discount rate of 5% for advance receipt of the additional capital cost for a term certain of the Claimant's expected life, which is then subtracted from the additional capital sum. The temporary need for a scientific calculator will no doubt be abated by a prompt amendment to the Ogden 8 tables to provide for a 5% column (a rate last seen in the 6th edition of the Ogden Tables).

14. There are, however, some pitfalls, exceptions and potential arguments to be had about calculating additional capital costs that the Court of Appeal conspicuously leaves to first instance judges to resolve on the facts of individual cases.

Room for Manoeuvre?

15. The Court of Appeal considered itself bound by two over-arching principles: the Claimant is entitled to fair and reasonable, but not excessive, compensation, and

that the award of damages should seek to avoid a windfall. Those principles stand (at [205]).

16. Presumably speaking within these two principles, at [210] the Court said:

> *this guidance should not be regarded as a straitjacket to be applied universally and rigidly. 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.*

17. The main judgment of Irwin LJ therefore gives 3 potential areas of dispute: (i) the life expectancy of the Claimant is too short for the *Swift v Carpenter* guidance to bring about a fair result; (ii) if the discount rate changes to a positive rate, the guidance may not apply; (iii) "Particular circumstances", which is invitingly broad.

18. The concurring judgment of Underhill LJ notes two issues in particular.

19. First, the logic of awarding a sum for accommodation less than the sum of the actual present cost of the accommodation has always been defended on the basis that the Claimant would have to 'rob Peter to pay Paul'; that is, borrowing from damages awarded under other heads of loss to make up the shortfall in the capital needed to actually buy the accommodation.

20. In cases with a long life expectancy, a discount rate of 5% '*will mean that the shortfall between the cost of the additional element and the amount awarded will typically be comparatively small and, as Irwin LJ puts it at para. 185, the gap between the need and the damages following deduction of the present value of reversionary interest should be capable of being bridged without creating substantial difficulties for the claimant. The position will be different in short life-expectancy cases* […] *As Irwin LJ says at paras. 170 and 209, these may require a different approach'* (at [228]).

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21. Does this mean that whether a case is a 'short' or 'long' life expectancy is informed also by the calculated value of the shortfall, and potentially by quantum awarded under other heads of loss? At what level of shortfall should '*pragmatism and practical justice*' ([226]) intervene?

22. Second, Irwin LJ's assumes that the 'windfall' will occur on the Claimant's death, no sooner. Any pre-death sale of the house (downsizing, or a move to a nursing home, or living with a relative late in life) would have the same '*incremental requirement*' over and above the house they would have lived in but-for the tort (at [147]). The need will always be there, until death, with associated capital costs.

23. This is not necessarily the case, and early release of capital may not happen so rarely as to be discounted. Although Underhill LJ agrees with the result, and accepts a certain level of overcompensation may occur if capital is released pre-death, he does so '*except perhaps in unusual circumstances where the probability of a substantially earlier release of capital was high*' (at [229]).

24. Finally, the Court of Appeal in *Swift v Carpenter* rightly noted that this guidance only holds good in the present economic circumstances. It seems inevitable that the Court of Appeal in some future case will hold *Swift v Carpenter* no longer pertains due to changed economic circumstances in the UK, meaning the above formula no longer fairly compensates the Claimant, like *Roberts v Johnstone* before it. In the meantime, the decision provides some welcome clarity to the quantification of accommodation claims which, in an enduring era of a negative interest rate, is long-overdue.

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