

Update

Helmot v Simon at the Privy Council: The Decision

7 March 2012

Yesterday, the Judicial Committee of the Privy Council have handed down their Judgment in the appeal of the decision of the Guernsey Court of Appeal matter of *Helmot v Simon*. The justices were unanimous in their rejection of the defendant's appeal.

In this update, which follows our February 2012 update 'Helmot v Simon at the Privy Council: The Arguments', we look at the reasons given by justices of the Privy Council for rejecting the defendant's appeal of the Guernsey Court of Appeal that the discount rate to be applied to the multipliers used to calculate future losses should be 0.5% in losses not related to earnings and -1.5% for earnings related losses.

The lead Judgment was given by Lord Hope.

The differences in the legal and economic landscape between Guernsey and the mainland, as accepted by the parties, were acknowledged. The statutory developments on the mainland post *Wells*, both in terms of the statutory setting of the discount rate and the periodical payment regime, are not directly effective in the bailiwick and similar legislation has not been enacted. Common law is persuasive in Guernsey law and, as such, the state of the common law at the time of *Wells* was held to be most reflective of the present state of Guernsey law in this area.

The tenor of the Judgment was that effect needs to be given to the underlying principle of full compensation, that is to ensure that the injured party is put in as nearly as possible the position he or she would have been but for the accident; no better, no worse. The board accepted that, whilst the principle is of full compensation, perfect accuracy could not be achieved in a lump sum. It was acknowledged that a periodical payment order afforded better accuracy but this was unavailable in the jurisdiction. In their Judgments, therefore, the justices sought to give effect to the principle of full compensation via a lump sum, so far as possible.

The opinion of the board was that the appeal turned on the expert evidence before the court. The board were impressed with the evidence adduced on behalf of the plaintiff, Lord Hope commenting that "[The Respondent's expert's] credentials for giving evidence were... as impressive as they could possibly have been". The scope of the challenge of the plaintiff's evidence was limited, only one expert having been called, and, notably, the

defendant's expert did not dissent from the conclusions of the plaintiff's experts, save for emphasising the inherent variability of the possible outcomes. Effectively, in the eyes of the justices, the plaintiff's evidence was unchallenged.

The board upheld the decision of *Sumption J A* that the jurats were wrong to use the mainland discount rate as set by the Lord Chancellor as a starting point. Lord Hope differed in his reasoning from *Sumption*, however, saying that the jurats had erred not only because of the passage of time since the decision was made but that the Lord Chancellor had not followed the common law position in *Wells*. The Judicial Committee of the Privy Council therefore accepted that, on the basis of the evidence, the discount rate for non-earnings related losses should be as calculated by *Sumption J A*, namely 0.5%.

The justices saw no reason why a different discount rate could not be applied to earnings related losses; the common law arising out of periodical payments clearly recognises that wage inflation outstrips price inflation and to ignore this in considering the discount rate is to risk under-compensation in respect of the plaintiff's largest claim. Lord Dyson rejected the Defendant's argument of variable discount rates requiring justification by expert evidence, described as an *in terrorem* argument, as fanciful.

The conclusion of *Sumption J A* that the jurats had erred in rejecting the evidence put forward by the plaintiff for the differential between price and wage inflation was upheld by the justices. It was acknowledged that there was no relevant index or investment instrument akin to ILGS which reflects earnings inflation available and therefore reliance on expert evidence is required. Whilst it would not have been wrong of the jurats to reject such evidence if it was speculative and inherently uncertain, they did not reject it on that basis. Instead, the evidence was rejected because it followed general economic theory and general data. The justices acknowledged that the law does not demand precision in the assessment of future loss and that there was no reason in principle why the evidence could not be accepted; especially as the evidence itself was unchallenged.

Further, in this context, the phrase 'discount rate' was seen to be unhelpful. The issue is that of what adjustment to the number of years needs to be made to counteract the effect of accelerated receipt. Historically, it was assumed that the rate of return available to the injured party would more than offset the effects of inflation and therefore the choice of interest rate to be applied to the multiplier would always take the form of a discount. However, circumstances have changed, and the justices found there can be no objection to an adjustment to increase the number of years used as the multiplier, rather than discount it, to ensure that the lump sum is large enough to continue to meet losses in the future, if necessary.

The Judicial Committee of the Privy Council, therefore, upheld the decision of *Sumption J A*, that the economic evidence pointed to a differential between price and wage inflation of 2%, and that this gave a discount rate for earnings related losses of -1.5%.

In addition to their judgment on the issues in the appeal, the justices also considered the absence of a statutory regime providing the Court in Guernsey with the power to make periodical payment awards, and the benefits provided by such an award. Whilst the general opinion was that a change of this nature was best left to the legislative process, both Lady Hale and Lord Clarke do not rule out the possibility that this could be developed by the common law if such legislation is not forthcoming.

In a wider context, this emphasis by the justices of the inability of the Guernsey Court to award periodical payments could have the implication that where a periodical payment award is unavailable to a mainland injured party, for example because of a low limit of indemnity on the responding insurance policy, or, where an insurer may not be deemed to be sufficiently secure within the statutory regime. It could be argued that such an injured party is in the same position as a Guernsey plaintiff and therefore the approach to the calculation of the lump sum should follow this case.

Adding fuel to this fire is the comment made by Lord Clarke that, whilst under the Damages Act 1996 the court is not prevented from taking a different rate than that set by the Lord Chancellor if a party can show it is more appropriate in the case in question, the Court of Appeal has construed the subsection somewhat narrowly and shown a marked disinclination to fix a different rate. This comment appears to be an invitation for such a challenge to be made by claimants on the mainland which, in light of the above and in the absence of any sign of the Lord Chancellor's Review, is of particular concern for insurers.

Further information

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