

The discount rate fallout continues

The discount rate fallout is set to continue, says Michael Mylonas QC



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If the mooted £1bn bill arising out of the new discount rate was not enough, it is obvious that the courts will now have to revisit the Roberts v Johnstone formula used to calculate an injured claimant's recovery for any necessary accommodation.

In *Roberts*, the Court of Appeal allowed the injured claimant to recover a percentage of the additional cost of housing for each remaining year of life. That percentage was fixed by reference to the yield on government securities (now index-linked gilts). This was thought to provide a fair assessment of the return that a conservative investor might recover on the money if it had been available for investment rather than a house purchase.

That approach ignores the almost universal reality that injured claimants don't generally have a spare and substantial pot of money waiting to be invested that is then diverted

into additional accommodation expenditure.

They aren't seeking compensation for the return they might have obtained had they not been obliged to spend additional funds on accommodation – instead they need help finding the money to buy the accommodation in the first place.

For many years it has been impossible for claimants to fund appropriate accommodation without borrowing money from their other heads of loss. In the Masters' corridor it was expressly recognised that funding of appropriate accommodation would require the claimant to 'burgle' funds from awards for pain and suffering, lost earnings, or therapies. The situation was most acute for badly damaged victims who required expensive accommodation and had short life expectancies.

In some situations canny advisers have been able to dodge the iniquity and impracticality of *Roberts*. Renting property and recovering the rental from the defendant is becoming more common, but this is not without difficulties. Those include the relative insecurity of tenure (compared to outright purchase) and the difficulty of finding landlords who are happy to agree to adaptations of the property.

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The resurgence of interest-only mortgages and the availability of periodic payment orders to cover the interest might go some way to providing a solution, but that would still require the claimant to fund a deposit. An alternative would be for the government to fund the outright purchase of a property subject to a reversionary interest on death, but that seems unlikely and unattractive given the current mood of austerity. Whichever routes are eventually followed by practitioners and the courts, it seems clear that the old and unfair methodology – which provided little justice at a discount rate of 2.5 per cent – cannot possibly survive a negative discount rate of -0.75 per cent.

But if not *Roberts*, then what? Given the shock announcement, it will take some time for the position to be clarified.

That casts into doubt all the settlement meetings and trials occurring daily up and down the country that include an accommodation claim. Urgent clarification of the proper approach is required. There is no argument that the claimant should not be unjustly enriched by an accommodation award, but for far too long now claimants have been deprived of proper compensation for the costs of additional or adapted accommodation. **SJ**