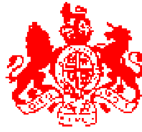

# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 13 of 2015**

Between:

**TINEE HARVEY**

Appellant

**-v-**

**DENNIKA WARREN**

Respondent

**CIVIL APPEAL No. 14 of 2015**

Between:

**COLONIAL INSURANCE COMPANY LIMITED**

Appellant

**-v-**

**KATE AND JAMES THOMSON**

Respondent

---

**Before:** **Baker, President**
**Bell, JA**
**Riihiluoma, JA (Acting)**

**Appearances:** Andrew Hogarth, QC and Craig Rothwell, Cox Hallett Wilkinson Limited, for the Appellants
Martin Porter, QC and Jai Pachai, Wakefield Quin Limited, for the First Respondent
David Westcott, QC and Paul Harshaw, Canterbury Law Limited, for the Second Respondent

**Date of Hearing:** **16, 17 March 2016**

**Date of Judgment:** **1 April 2016**

**JUDGMENT**

*Applicable discount in assessment of damages covering future losses - appropriate investment vehicles for United Kingdom and Bermuda resident claimants*

**BELL, JA**

**Introduction and the Chief Justice's Ruling**

1. In the case of *Helmot v Simon* in the Guernsey Court of Appeal (Guernsey Law Reports [2009 – 10] GLR 465), Sumption JA (as he then was) began his judgment with the following sentence:

> "This appeal raises important questions about the assessment of long-term future damages in personal injury actions, a subject which has been much litigated in England but on which there is no authority in Guernsey."

The position in Bermuda was the same as that in Guernsey, in terms of the lack of Bermudian case authority, until Kawaley CJ dealt with the issue of the assessment of the appropriate discount rate for future losses in the context of three cases which he had directed should be heard together, with provision for expert evidence. In two of those cases, the Chief Justice had made a provisional order that there should be a discount rate of 3 percent, but in one of them it had been urged upon him that the court should adopt a zero rate of discount, without hearing expert evidence. This led the Chief Justice to call for expert evidence from an economist, actuary or chartered accountant, addressing the following issues:-

> (i) what is the most appropriate measure in Bermuda for the rate of return on a lump sum conservatively invested (e.g. ILGS/US TIP securities/local bank term deposit rates)?
> (ii) what provision if any should be made for a gap between price and earnings inflation? and
> (iii) within the constraints of a modest retainer and providing a very basic guide, what range of discount percentage appears appropriate for the 2nd Defendant's case?

2. By way of background, the Chief Justice had, at the outset of his judgment in this case, expressed the broad issue in the following terms:-

> "When claimants in personal injuries cases are awarded a lump sum in respect of future loss, the need has historically arisen to adjust the award to take into account the commercial reality that a lump sum prudently invested over the term of the assessment period could well result in a benefit greater than the amount of compensation the claimant is properly entitled to receive."

He then referred to the basic methodology of the necessary calculation, which requires identifying the amount of compensation due on an annual basis, whether it be loss of earnings or the annual cost of care (the multiplicand), and the number of years for which such compensation should be paid (the multiplier), typically calculated on the basis of normal life expectancy, and then combining the two, with a discount factor to deal with the point made in the quotation above. Particularly in times of more significant returns on capital than may be the case today, the discount, even at 4 or 5 percent, would have a significant effect on the total lump sum (reducing it in total), so as to ensure that the claimant would not be over-compensated. The object of the discount was to arrive at an amount which would generate the necessary annual amounts, allowing for future inflation, on the assumption that the plaintiff drew on the whole of the income and a sufficient portion of the capital to exhaust it at the expected time of the plaintiff's death. As the Chief Justice observed, for many years Bermudian courts and practitioners had relied on the English Ogden Tables, named after Sir Michael Ogden QC, which tables set out the appropriate multipliers for claimants of different ages and various potential award periods, together with a range of adjustment rates which could be selected to suit the justice of the particular case. Before the English case of *Wells v Wells* [1999] 1 AC 345, the adjustment rate had typically been between 4 and 5 percent.

3. As the Chief Justice noted, calculation of the appropriate discount rate has for some time been far less problematic in England and Wales, as a result of two legislative initiatives not applicable to claimants under Bermudian law. First, the Lord Chancellor in England and Wales is now empowered by statute to fix the appropriate discount rate, and in 2001 this had been fixed at 2.5 percent. Secondly, English courts are now empowered by statute to make periodical

payment orders in respect of future loss awards in personal injury cases. Bermuda courts continued to follow the older English common law authorities suggesting a discount rate of between 4 and 5 percent, until the suggestion that the court should adopt the zero percentage rate previously mentioned, without hearing expert evidence. The Chief Justice recognised that while he was making particular findings for the purposes of the three cases before him, his ruling sought to lay down principles of general application, which he hoped would be applied in other similar cases, without the need to adduce similar expert evidence as had been given before him.

4. Before the Chief Justice there was evidence given by three experts, in the form of one economist, Dr. John Llewellyn, called by the Plaintiff Thomson, and one actuary, Mr. Christopher Daykin called by all three Plaintiffs, with one actuary, Mr. Peter Gorham, called for the Defendants.

5. Having set out the issues in broad terms the Chief Justice asked himself the question whether there should be a new Bermudian law position on discount rates. He referred to the submissions of the claimants in the cases before him that the Court should follow the Privy Council's decision in *Simon v Helmot,* on appeal from the Guernsey Court of Appeal [2012] UKPC 5, and adopt the approach to discount rates which had been established by the House of Lords in *Wells.* The defendant insurers had contended in broad terms that, having regard to the economic realities applicable in Bermuda, the more nuanced approach adopted by the Hong Kong Court of First Instance in *Chan Pak Ting v Chan Chi Kuen* [2013] HKCFI 179 should be preferred.

6. The Chief Justice then reviewed the English cases on the one hand and the Hong Kong case on the other. He concluded that *Chan Pak Ting* had to be understood in the context of its facts, and particularly the fact that investment in ILGS (Index Linked Government Securities, or Index Linked Gilts), the form of investment held to be appropriate in the English cases, was not even a potentially available investment income for the hypothetical reasonable Hong Kong plaintiff. The Chief

Justice concluded that the principal authorities to which he had been referred in argument and which he had at that part of his judgment summarised, did not support a finding that, as a matter of pure law, the assessment of damages rules should be changed. He referred to the oft-cited passage in the judgment of Lady Hale in *Helmot* in the Privy Council, where she had indicated (para. 60):

> "The only principle of law is that the claimant should receive full compensation for the loss which he had suffered as a result of the defendant's tort, not a penny more but not a penny less. Allied to this is the principle, which no one in this case has sought to attack, that damages must be expressed as a lump sum payable now…"

The problem with that eminently fair and sensible principle is that it is easier said than done. As Sumption JA recognised in his judgment in *Helmo*t (paragraph 7), when commenting on the problems associated with the calculation of lump sum awards, and particularly the factors to be taken into account, because there is no procedure available for revising a lump sum award in the light of future events as they occur, it is necessarily the case that while an assessment can be made which is correct on the balance of probabilities when the award is made, it is almost certain to be wrong in the event, possibly by a considerable amount.

7. The Chief Justice then turned to the expert evidence before him. It is convenient at this point to refer to the fact that one of the cases on which the Chief Justice had ruled (Talbot) was not the subject of appeal. In relation to the other two Plaintiffs, Thomson and Warren, the former had returned to the United Kingdom where an investment in ILGS was in practical as well as hypothetical terms available to her, and the latter had remained a resident of Bermuda, where such an investment was not available to her, quite apart from the complication of currency conversion. Consequently, consideration needed to be given to an investment in TIPS (Treasury Inflation-Protected Securities), the US equivalent of ILGS. Further, in the case of TIPS, consideration needed to be given to the appropriateness of such an investment in the context of a comparison between

the US and Bermuda economies, and whether such difference as might exist would require some further adjustment.

8. The various experts' reports comprised some 165 pages, and we in this court were spared the full appendices and provided only with selected extracts, which themselves made up a substantial binder, even though, in the way of such matters, the references made to us from the appendices were relatively minimal, which is not to say that the material to which we were taken was not important; it clearly was. But the point of referring to the volume of material is to explain that I see no need to duplicate or even to try to summarise the exercise which the Chief Justice conducted in his judgment, of setting out the principal findings of the three experts. It is in my view sufficient to refer to the relevant parts of their reports in the context of the grounds of appeal and the arguments made before us, which I shall do in due course.

9. Against the background of his summary of the experts' reports, the Chief Justice then moved on to consider the applicable legal policy parameters in Bermuda. He started with *Crockwell v Haley* [1993] BDA LR 7, in which the Bermuda Court of Appeal had approved the approach commended by the House of Lords in *Cookson v Knowles* [1989] AC 556, and which had led the court to adopt a relatively simple approach of assuming a 4 to 5 percent interest rate being earned on the hypothetical sum to be invested. The Chief Justice then moved on to *Wells,* and set out an extensive citation from the judgment of Lord Lloyd, which itself detailed the historical development of the Ogden Tables. The extract closed with a reference to a consultation paper prepared by the Law Commission, which shared the views of the majority of respondents that a practice of discounting by reference to returns on ILGS would be preferable to the present arbitrary presumption. Notably, the Law Commission concluded that ILGS by that time constituted the best evidence of the real return on any investment "where the risk element is minimal". This latter consideration comes very much into play on a consideration of the experts' reports in the case before us. Having referred to the

Law Commission's consultation paper, Lord Lloyd concluded that theirs was "a very strong recommendation indeed."

10. The Chief Justice then turned to consider *Simon v Helmot*, both in the Privy Council and earlier in the Guernsey Court of Appeal. He noted that no changes in the legal principles for the assessment of damages were involved, but rather a better forensic tool was being deployed in the assessment process. The Chief Justice then referred to the fact that the conclusion of the courts in those cases was, strictly speaking, based on the facts of the case, but carried on to make the following statement:

> "However, this Court is bound as a matter of mixed law and fact to deploy "*the best tool that is available*" to ensure that personal injuries claimants are fully compensated when assessing damages generally and damages for future loss in particular. The views expressed by the House of Lords in 1999 and the Privy Council in 2012 as to what the best tools available are ought, in my judgment, to be given considerable deference – in the absence of clear evidence that a better tool is now available."

11. The Chief Justice then referred to the criticisms of the ILGS tool to be found in *McGregor on Damages*, on which reliance had been placed by counsel for the Defendants, the Appellants before this Court. Much of that criticism appeared to have been aimed at the statutory discount rate fixed by the Lord Chancellor in England and Wales.

12. The Chief Justice next turned to consider the appropriate investment for a Bermudian claimant, for whom the tool of ILGS would not be available, the position of Ms. Warren. The Chief Justice referred to the evidence of Mr. Gorham, which he said primarily attacked an investment on TIPS on the ground that a Bermudian making that investment would have changed from a low-risk investment to having accepted the increased risk consequent upon the potential for an inflation mis-match between Bermuda and the United States. However, in cross-examination, Mr. Gorham had conceded that TIPS would be a viable investment for a Bermudian investor if one assumed that the inflation rate

linkage between Bermuda and the US would not change, and further, had conceded in cross-examination that the relationship between the Bermuda and US economies went beyond his area of expertise. However, this issue was very much within the area of Dr. Llewellyn's expertise, and he insisted that the best assumption to make was the long-term linkage between the Bermudian and US economies. The Chief Justice commented that he found Dr. Llewellyn's evidence overall very convincing indeed. Between paragraphs 89 and 90 of his judgment, the Chief Justice referred to various factors which might potentially have affected his view, and indeed the skeleton argument on behalf of the Appellants in relation to the case of Warren set out many of these factors. The problem from the Appellants' point of view in the Warren case was that no countervailing expert economic evidence had been called before the Chief Justice, and he was plainly able to accept, as he did, the evidence of Dr. Llewellyn. I will come back to that issue when addressing the grounds of appeal. Suffice to say that the Chief Justice did accept the expert evidence, primarily that of Dr. Llewellyn on this issue, that TIPS are investment instruments available for consideration by a prudent Bermudian claimant, because of the strong ties between the Bermudian and US economies. He noted that there needed to be an adjustment to the discount rate because price inflation in Bermuda was projected to be on average 0.5 % per annum over the US CPI.

13. The Chief Justice concluded this part of his judgment by rejecting the submissions made on behalf of the Defendants before him that Bermuda's economy could be said to be more similar to Hong Kong's than to Guernsey's, so that ILGS could not fairly be regarded as risk-free investments for Bermudian claimants.

14. The Chief Justice then moved on to consider the respective positions of the two expert actuaries. He referred to the fact that Mr. Daykin's analysis was based on the premise that a prudent claimant seeking full compensation would invest in the most low-risk inflation-protected instruments, such as ILGS or TIPS. The authorities do of course accept that the prudent claimant may well choose to

invest in higher risk investments, but such a decision on a claimant's part does not affect the basis for the calculation – see, for instance, Sumption JA at paragraph 52 of his judgment in *Helmot*: - " In future the courts of Guernsey, when assessing recurring future losses of earnings and care costs, should take as their starting point the assumption endorsed by the House of Lords in Wells v. Wells that the plaintiff will invest any lump sum awarded in UK index-linked gilts, whether or not he actually intends to do so". Similarly, Lord Lloyd in his judgment in *Wells* at page 15 said - "How the plaintiffs will in fact invest their damages is, of course, irrelevant. That is a question for them. It cannot affect the calculation."

15. And, as Mr. Westcott QC for the Respondent Thomson submitted, in such an event, it was the claimant who should take any benefit from having invested with a greater degree of risk, not the Defendants. This is in sharp contrast to Mr. Gorham's evidence that an investment made by claimants in ILGS or TIPS in today's economic conditions was both wholly unrealistic, and likely to result in over-compensation. As I have indicated, the authorities are clear that the actual investment made by a claimant is not the appropriate test. Specifically, Mr. Gorham testified that he had taken into account what a reasonable plaintiff would do, while conceding under cross-examination that on his investment model, between 50 and 33 percent of plaintiffs would not have sufficient funds. The Chief Justice indicated (paragraph 93 of his judgment) that he viewed this approach on Mr. Gorham's part as representing "a stunning dilution of the prevailing legal policy preference, in the future loss discount rate calculation context, for a hypothetical investment in an instrument likely to generate a risk-free rate of return."

16. The argument before us tended to focus on Mr. Gorham's evidence in relation to the 50% figure (50% of claimants being under-compensated, and 50% being over-compensated) when compared with Mr. Daykin's evidence that the objective should be that 90% of claimants were sufficiently compensated. It seems to me to be a mistake to focus too much on these different percentages, which were not at

the heart of the real matter in issue between the two actuaries. The key is to be found in the words "a risk-free rate of return." The reason that the Chief Justice viewed Mr. Gorham's approach as representing a stunning dilution of the prevailing legal policy preference was not in relation to his assessment as to the percentage of plaintiffs who might be under-compensated when compared with those who might be over-compensated, but Mr. Gorham's departure from the principle of a risk-free rate of return, such as provided by ILGS, in favour of a mixed portfolio comprising a combination of bonds and equities. Indeed, the tables prepared by Mr. Gorham, which advocated a discount rate of between 2 and 2.5%, were founded on a portfolio mix of between 60 and 70% equities, and 30 to 40% bonds. With all respect to Mr. Gorham, that portfolio mix is not what the authorities had in mind when looking for a risk-free investment, and that was the essential difference between the positions of the two actuaries, and no doubt the reason that the Chief Justice used the language that he did in paragraph 93 of this judgment, referred to above. Put another way, the reason for the Chief Justice's preference for the evidence of Mr. Daykin over that of Mr. Gorham was the distinction to be drawn between the investment goals of the hypothetical prudent investor, when compared with the investment goals of the hypothetical prudent plaintiff. In paragraph 100 of his judgment, the Chief Justice set out the explicit legal policy imperatives which require the courts assessing the appropriate level of lump sum award to:

> "(a) assume that the least possible risk will be taken when the lump sum is invested by the prudent claimant with a view to achieving the goal of full compensation;
> (b) ignore the commercial realities of how lump sums may actually be invested;
> (c) utilize tools for the calculation of the discount rate which are sufficiently simple to be conveniently deployed both in the context of assessing damages in and out of court without the need for the expense of expert evidence save in exceptional cases"

17. The Chief Justice then carried on to comment that the mixed portfolio with the safe fund model proposed by Mr. Gorham might well be fit for a variety of investment purposes, including (as Mr. Daykin had conceded) for the actual

investment of lump sum awards received by personal injuries claimants with future loss. However, the Chief Justice made it clear that in his view Mr. Gorham's approach did not provide "a clear or convincing basis for this Court declining to utilise what remains the only recognised English common law approach to determining the discount rate on damages for future loss in personal injuries cases."

18. This is essentially the nub of the Chief Justice's judgment. He continued to consider the applicable discount rates in the three cases before him, both in respect of heads of damage likely to be affected by price inflation, and those likely to be affected by real earnings increases. It is not necessary to review his application of the appropriate discount rates.

**Overview**

19. I have set out the relevant parts of the Chief Justice's judgment in considerable detail, and made comment where appropriate, because it contains all the applicable principles needed to arrive at discount rates which do indeed reflect the appropriate application of the common law to Bermuda. I now turn to the grounds of appeal.

**Grounds of Appeal – The First Ground**

20. The Appellants started from the position that in *Helmot*, the Privy Council's conclusion was a decision based on a factual finding, rather than a legal conclusion. It was then contended that the Chief Justice had failed either to accept the adjustment presented by the Respondents' actuary, or to accept the evidence of the Appellants' actuary, that the true safe rate of return should be assessed in the manner suggested, and in failing to take either course had set a discount rate on the basis of a return which was accepted by both actuaries as being inaccurate. In fact, the Chief Justice did accept the evidence of Mr. Daykin that ILGS should be used as a starting point, and then adjusted appropriately. For the Appellants, Mr. Hogarth QC submitted that the Chief Justice should have rejected Mr. Daykin's approach, and found that the current rate of return on

ILGS is affected by bias, and is not therefor an appropriate starting point for calculating the discount rate.

21. I do not find anything objectionable to the approach taken by the Chief Justice on the basis of the evidence before him, and in particular in his acceptance of the evidence of Mr. Daykin. To my mind, the key remains the difference between the two actuaries in terms of Mr. Daykin's acceptance of the objective of a risk-free investment, and Mr. Gorham's contention that the appropriate discount rate was to be found through the means of an investment involving risk. In my view, the Chief Justice was right to follow the guidance given in both *Wells* and *Helmot* and correct to accept Mr. Daykin's evidence, which on a fair reading of the judgment he clearly did.

**The Second Ground of Appeal**

22. The argument under this ground turned on the positions of the respective actuaries in relation to the possibility of plaintiffs being over-compensated, and particularly the submission that Mr. Daykin's evidence led to the position that between 90 and 95% of claimants would be over-compensated. Elsewhere, the Appellants submitted that Mr. Daykin's approach would lead to 40 to 45% of claimants being over-compensated, presumably on the basis that this was to be compared with the 50% which it was contended was the consequence of accepting Mr. Gorham's evidence.

23. It is important to look at the particular evidence of Mr. Daykin which the Appellants contend led to such a result, namely paragraph 6.1 of his supplementary report of 8 April 2015, and it is no doubt helpful to set out this paragraph in its entirety, as follows:

> "An important aspect of Mr. Gorham's report is to seek to demonstrate sufficiency of compensation based on a much higher discount rate than would be indicated by the real risk-free rate of return taken from US TIPS. It should be noted, however, that Mr. Gorham is regarding sufficiency as demonstrated where there is, according to his model, about a 50% chance of the claimant

> receiving the payments needed to match expenses and losses, or in other words a 50% chance of there <u>not</u> being sufficient assets. In my view this is nowhere near meeting the principle of full compensation which has been argued over many years by the Courts. Given a simulation of many scenarios, I would expect demonstration that the payments were sufficient for the claimant in at least 90-95% of cases in order to come close to providing "full compensation."

What Mr. Daykin was saying is essentially that Mr. Gorham's theory of sufficiency demonstrated that, using his model, there is approximately a 50% chance of a claimant receiving a fund sufficient to meet expenses and losses, with the other side of the coin being that 50% of claimants would not have sufficient assets to do so. Consequently, Mr. Daykin concluded that these figures come nowhere near meeting the principle of full compensation which has been accepted over many years by the courts. What Mr. Daykin said in relation to the 90 to 95% figures was not that these represented over-compensation on the basis of the Chief Justice's ruling, but that if one were to test a model proposed in place of the *Wells* mechanism (as advocated by Mr. Gorham), then there would have to be a demonstration that the payments were sufficient for the claimants in at least 90 to 95% of cases in order to come close to providing full compensation.

24. Again, the real point is Mr. Gorham's departure from the risk-free rate of return, which is the touchstone to be derived from *Wells* and *Helmot*.

**The Third Ground of Appeal**

25. This applies now only in respect of the claimant Warren, and is essentially founded on the premise that the Chief Justice regarded the relationship between the US and Bermudian economies as being an issue to be determined on the balance of probabilities. Instead, it was submitted that the correct approach was to regard the issue as a series of chances, and then decide on a percentage basis. I find this an impossible argument to accept, given the lack of countervailing evidence to that put forward by Dr. Llewellyn. The short answer is that the Chief Justice had evidence before him as to the appropriate comparison to be made between the Bermudian and US economies, and he was entitled to accept it.

Specifically, the Chief Justice considered the issues on which Dr. Llewellyn had been cross-examined, such as the high levels of public debt in Bermuda, and the fact that a number of international companies had left the Island. He nevertheless found Dr. Llewellyn's evidence to be persuasive in the absence of any contrary expert evidence. No criticism can properly be made of that conclusion on his part.

**The Fourth Ground of Appeal**

26. The criticism made in this ground is that in assessing the rate of discount, the Chief Justice used figures which were not properly consistent with each other. Specifically, it is said that he used the spot rate for assessing the real rate on return of money invested by taking the current rate of return on ILGS and TIPS, but then used figures for future loss of earnings which were an estimate of the extent to which wages would rise over an extended period. The ground contends that the Chief Justice should either have used the present rate of return and the present rate of wage increases, or an estimate for the future rates of both.

27. As the skeleton arguments for the Respondents set out, the process was explained by Mr. Daykin at paragraphs 2.9 and 2.10 of his 19 February 2015 report. As he concluded in the second of those paragraphs:

> "The real yield is the discount rate net of the impact of price inflation. Applying a multiplier calculated on a real yield, based on ILGS, is equivalent to assuming cash-flows going up in line with prices and discounting at a nominal rate based on fixed interest gilts. The real yield available in the market incorporates the market's assessment of the impact of future inflation on nominal yields which would be available on fixed interest government bonds."

So Mr. Daykin's suggested investment in ILGS produces a real yield based on the market, which incorporated the market's assessment of the impact of future inflation.

28. The bottom line in relation to this and the previous grounds of appeal is that the Chief Justice preferred the evidence of Mr. Daykin to that of Mr. Gorham, as he was entitled to do. And he did so on the basis that an investment in ILGS or TIPS was in conformity with the principles laid down in the cases of *Wells* and *Helmot,* where the target was to calculate the lump sum required based on a safe investment for the long term. As Lord Hope indicated in *Helmot*, in practical terms, an investment in ILGS is risk-free. And as Lord Lloyd opined in *Wells,* it does not follow that a prudent investment for the ordinary investor is a prudent investment for the claimants in cases such as the ones before us. Indeed, as previously noted, the Chief Justice's judgment referred to the fact that Mr. Daykin had conceded that the mixed portfolio with the safe fund model proposed by Mr. Gorham might very well be appropriate for a variety of investments purposes. The fact remains that it does not accord with the common law approach for determining the discount rate on damages for future loss in personal injuries cases.

29. I am acutely conscious of the fact that there were many issues of detail raised in argument which have not been addressed in this judgment. But at the end of the day, this is a relatively simple case, at least at the appellate level. Was the Chief Justice entitled to reach the conclusions that he did on the evidence of Mr. Daykin and Dr. Llewellyn? In my judgment the answer is unequivocally yes, and there is no question in my mind of his having misunderstood that evidence, or of it being either confusing or contrary to authority. On the contrary, the Chief Justice's analysis of the issues, and their application to the cases before him cannot be faulted.

**Conclusion**

30. It follows that I would dismiss the appeals in respect of the above cases.

**Costs**

31. I would expect costs to follow the event, and would make an order that the Respondents should have their costs of the appeal, on a nisi basis, failing an application for costs to be made within 21 days of this judgment.

*Signed*

__________________________________

Bell, JA

I agree *Signed*

__________________________________

Baker, P

I agree *Signed*

__________________________________

Riihiluoma, JA (Acting)