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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**25/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ROBERT HUTCHINSON

Plaintiff

v

SOUTHERN HEALTH & SOCIAL CARE TRUST

Defendant

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Mr S Lannon BL (instructed by John McGrane & Co Solicitors) for the Plaintiff
Mr D Dunlop QC (instructed by the Directorate of Legal Services) for the Defendant

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McFARLAND J

Introduction

[1] This action arose out of the death of the plaintiff's wife during childbirth. The parties reached a provisional settlement on 16 October 2017. Because of the uncertainty concerning the discount rate at the time, the terms of settlement allowed for the determination of a future discount rate, with liberty to apply to the court in certain circumstances. The plaintiff has applied to the court asking that the court determine the discount rate that should apply to the settlement.

Terms of settlement

[2] In 2017 the discount rate applicable in Northern Ireland was 2.5% but in Great Britain (in both jurisdictions) it was minus 0.75%. The discount rate is the assumed rate of return on investment of damages and is used to determine the return to be expected from the investment of a sum awarded as future pecuniary loss which can then be factored into any award of damages by the court. The disparity between the rates was a significant issue giving rise to the need for the provisional settlement.

[3] The figure of 2.5% was regarded by many as totally inadequate to reflect current rates of return. Given the political uncertainty in Northern Ireland at the time with little prospect of a return of a functioning executive and legislature it was not uncommon for parties on reaching a settlement of actions by agreeing written terms that allowed for a 'balancing lump sum payment' once there was a degree of certainty concerning the discount rate.

[4] The agreement between the parties of 16 October 2017 to settle the action was drafted with that in mind. The essential stated elements of the agreement were:

a) It arose from the inability to enact secondary legislation to change the discount rate "to match the rate which was recently been brought into effect in England and Wales and Scotland" (para 3), that rate being minus 0.75%.

b) Should a new Northern Ireland rate be introduced on or before 16 October 2019, then that new rate should apply to the calculation of the balancing lump sum payment. Once the rate had been announced, it would be the applicable rate. Any subsequent changes were to be ignored (para 4).

c) If no change had been enacted before 16 October 2019, then if there was a discount rate for England and Wales and Scotland which is more favourable to the plaintiff then that rate should apply (para 5);

d) If there is not a uniform rate between England and Wales and Scotland on 16 October 2019, then "the court will be asked to hear evidence on the issue and decide the appropriate discount rate at that time and order the appropriate balancing payment" (para 6).

[5] The history of the changing discount rates in the various jurisdictions of the United Kingdom is as follows:

Date	England & Wales	Scotland	Northern Ireland
16 October 2017	Minus 0.75%	Minus 0.75%	2.5%
15 July 2019	Minus 0.25%	Minus 0.75%	2.5%
16 October 2019	Minus 0.25%	Minus 0.75%	2.5%
31 May 2021	Minus 0.25%	Minus 0.75%	Minus 1.75%

[6] Although the Lord Chancellor increased the discount rate in July 2019, when the Scottish Government Actuary conducted a similar exercise in September 2019 no change was recommended. On the 31 May 2021 the Damages (Personal Injury) Order (NI) 2021 came into operation in Northern Ireland applying a rate of minus 1.75%.

[7] The plaintiff by a summons issued on 3 March 2020 has sought the court's decision under para 6 of the settlement agreement in relation to the discount rate as

there was no discount rate applicable in Northern Ireland and no uniform rate in Great Britain on the 16 October 2019.

I*nterpretation of paragraph 6*

[8] The court is required to determine the appropriate rate as at 16 October 2019. The paragraph refers to the calling of evidence, but at the hearing 22 June 2021 no evidence of an actuarial nature was placed before the court. Some accountancy evidence was made available as to the outworking of different discount rates.

[9] The focus of the argument presented by the plaintiff to the court was a suggestion that the court should consider the Northern Ireland rate as at May 2021 namely minus 1.75%, with the defendant's argument directed more to the Great Britain rates in October 2019, namely the English rate of minus 0.25%, or the Scottish rate of minus 0.75%, or a figure in between.

[10] The case turns on the correct interpretation of the meaning of the agreement. This was a contract entered into between the parties to resolve the litigation and therefore the normal rules concerning the interpretation of contracts should apply. These were succinctly set out by Lord Neuberger in *Arnold v Brittan* [2015] UKSC 36 at [12]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd … And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context."

[11] The use of the term 'appropriate' is also used in section 1 (2) of the Damages Act 1996 which provides that although a court shall take into account the prescribed discount rate, there is nothing to prevent a court taking a different rate into account "if any party to the proceedings shows that it is more appropriate in the case in question."

[12] The approach to this section was dealt with by the English Court of Appeal in *Warriner v Warriner* [2002] EWCA Civ 81. Dyson LJ at [33] stated:

> "We are told that this is the first time that this court has had to consider the Act, and that guidance is needed as to the meaning of "more appropriate in the case in question" in section 1(2). The phrase "more appropriate", if

> considered in isolation, is open-textured. It prompts the question: by what criteria is the court to judge whether a different rate of return is more appropriate in the case in question? But the phrase must be interpreted in its proper context, which is that the Lord Chancellor has prescribed a rate pursuant to section 1(1) and has given very detailed reasons explaining what factors he took into account in arriving at the rate that he has prescribed. I would hold that in deciding whether a different rate is more appropriate in the case in question, the court must have regard to those reasons. If the case in question falls into a category that the Lord Chancellor did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return and (b) are shown from an examination of the Lord Chancellor's reasons not to have been taken into account, then a different rate of return may be 'more appropriate.'"

and Latham LJ added at [43]:

> "It is against that policy background, therefore, that the words in section 1(2) fall to be construed. The phrase "more appropriate", as explained by Dyson LJ, has to be read in conjunction with the reasons given by the Lord Chancellor for choosing the particular rate of return that he has. It follows that it is difficult to see how a case falling squarely within the category of case envisaged by the Lord Chancellor, in which he has given a reasoned justification for the prescribed rate, could be said to be one in relation to which that prescribed rate is inappropriate in the absence of special features."

[13] Although the word 'appropriate' is used in both the contract and the legislation, I consider that different considerations apply to each. The legislation places a burden on a party to prove that there is a more appropriate rate than the one designated by the Lord Chancellor. A court could choose any rate it considers to be appropriate bearing in mind the overall purpose of the discount rate and the requirement to assess a level of an award which achieves a just result of the issue. But it must do so taking into account the fact that the Lord Chancellor had already prescribed a rate and that in the absence of evidence suggesting that the Lord Chancellor had fallen into error, that rate should apply.

[14] The contract is different. It does not place a burden on any party. In the preceding paragraphs it specifically refers to the discount rates in the three jurisdictions of the country. The clause becomes activated after two years if the Northern Ireland rate is unchanged and there is a disparity between the two Great

Britain rates. I consider that the intention of the parties was to restrict the discretion to choosing what the court considers to be an appropriate rate from one of the three rates that were applicable in the United Kingdom. The contract does not state, and I cannot infer, that the court would have an absolutely free rein to choose any other rate it considered appropriate, either by carrying out an actuarial exercise or some sort of mathematical exercise attempting to achieve an average between two, or three, rates.

The appropriate discount rate

[15] As to which rate is appropriate there is a clear inference to be drawn from the contract that the current rate of 2.5% would not achieve a fair result for the plaintiff and achieve the object of a fair award for damages for future expenditure. The fair result is achieved, adopting the words of Lord Hope in *Wells v Wells* [1008] 3 All ER 481 at 508 e, by adopting a rate of return:

> "which can reasonably be expected on that sum if invested in such a way as to enable the plaintiff to meet the whole amount of the loss during the entire period which has been assumed for it by the expenditure of income together with capital"

[16] There is a clear statement in the contract that a discount rate should be applied which was more favourable to the plaintiff than the existing rate of 2.5%:

> "If for some reason the discount rate has not been altered in Northern Ireland within two years of the date of approval in this case [16 October 2017] and a discount rate which is more favourable to the plaintiff is at that time applied in England and Wales and Scotland, then a balancing payment shall be made to the plaintiff using a discount rate then applicable in England and Wales and Scotland." (para 5).

[17] The contract, however, did not state that in the event of a disparity in the Great Britain rates, the lower, being the one more favourable to the plaintiff, should apply.

[18] The plaintiff's attempts to accrue a more substantial benefit by using the May 2021 discount rate of minus 1.75% cannot have been the intention of the parties as the relevant date is the 16 October 2019 and a rate set based on evidence considered by the Department of Justice at least a year after the relevant date. The argument presented by the plaintiff is opportunist in nature hoping to benefit from a windfall never contemplated, or provided for, by the agreement.

[19] My interpretation of the purpose of para 6 was to allow the plaintiff to achieve the benefit of a more realistic discount rate, with an emphasis on what is more favourable to him at the time. In that context the English rate could not be considered as being appropriate. Mr Dunlop QC has provided brief press releases issued by both the Lord Chancellor and Scottish Government Actuary. The latter focuses on the actuarial exercise that had been carried out. The Lord Chancellor included an element of policy, namely an expressed view that under the current rate of minus 0.75% claimants were being substantially over-compensated increasing financial pressure on public services that have large personal injury liabilities, particularly the NHS. Such concerns are valid at a political and policy level, but have limited, if any, influence on an actuarial exercise designed to compensate someone for a loss that has been suffered. Should policy factors of this nature be relevant to a discount rate I consider that primary legislation may be required.

[20] In all the circumstances I consider that the Scottish rate of minus 0.75 should be the appropriate rate.

[21] One final point raised by the plaintiff is that I should apply the equitable doctrine of "equity looks on as done what ought to be done". I am not convinced that this has any relevance to this case. It seems to have been offered up in oral argument as a suggestion that the court exercising its equitable jurisdiction should remedy a situation where the Minister of Justice, if appointed, ought to have done something. This falls foul of the most basic application of the maxim which is that equity will only require that which ought to be done if it can be done (see Equity: Doctrines and Remedies 4th edition (2002) at 3.210 and Vos J in *HR Trustees v Wembley plc* [2011] EWHC 2974 [53]–[67]).

Conclusion

[22] I therefore direct that the applicable discount rate shall be minus 0.75%. I will leave it to the parties to agree the balancing lump sum payment based on this discount rate.

[23] I will hear the parties in respect of the costs of this application.