12

King's Bench Walk

Accommodation claims: a look under the eaves in the post Swift landscape

Speakers:

William Audland Q.C.

audland@12kbw.co.uk

Gemma Scott

scott@12kbw.co.uk

Swift v Carpenter

- The Court of Appeal picked a discounting rate of 5%.

- In longer life-expectancy cases, C will recover most of the capital costs.
    - C recovers over 50% of the capital costs after 14.5 years.

- The door was left open for 'short' life expectancy cases
    - 'The position will be different in short life expectancy cases … these may require a different approach' (Underhill LJ)

- But the Court of Appeal did not descend into detail in respect of issues that may arise in other cases.

Issues

- Short life expectancy cases
- Rental costs
- Multiple properties
- Delayed purchase
- Interim payments

Short life expectancy cases

- What are these?
  - Not clear quite how short.
  - The judgment accepts some "robbing Peter to pay Paul".
- By way of example, the percentage of the additional capital cost recovered under *Swift* would be:
  - 5 years: 21.65%
  - 10 years: 38.61%
  - 15 years: 51.90%

Short life expectancy cases

- What can be robbed?

  - Presumably general damages.
  - But the amounts awarded in respect of PSLA will often not be sufficient to cover the reversionary interest in short-life expectancy cases.
  - What about other heads of loss?
  - In shorter life expectancy cases, there will be little scope elsewhere

- If that is not sufficient to cover the shortfall what is the correct approach?

Short life expectancy cases

- Award full capital costs?

- Award full capital costs less PSLA?

Reducing the shortfall

- As C recovers adaptation costs in full (subject to increases in the value of the property), then purchasing a smaller (cheaper) property and spending more on adaptations can increase the recoverable loss where the adaptations do not increase the value of the property to that of the alternative larger properties. For example:

  - 30-year life expectancy, £500k purchase, £300k adaptations: £684k recovery

  - 30-year life expectancy, £300k purchase, £500k adaptations: £884k recovery (less additional betterment)

Reducing the shortfall

- In respect of increase in value: as this is only a 'notional' increase which cannot be realised then as a matter of principle the 'reversionary' valuation should be applied to that element of the claim so C only funds part of that increase. For example:

    - Adaptation costs increase the equity in the property by £30,000

    - C has 30-year life expectancy (so reversionary interest would be 23.14%)

    - C only gives credit for £30,000 x 23.14% = £6,942

Short life expectancy cases

- Rental

  - In a minority of cases, Cs may accept renting for life.
  - Lump sum award
  - PPO

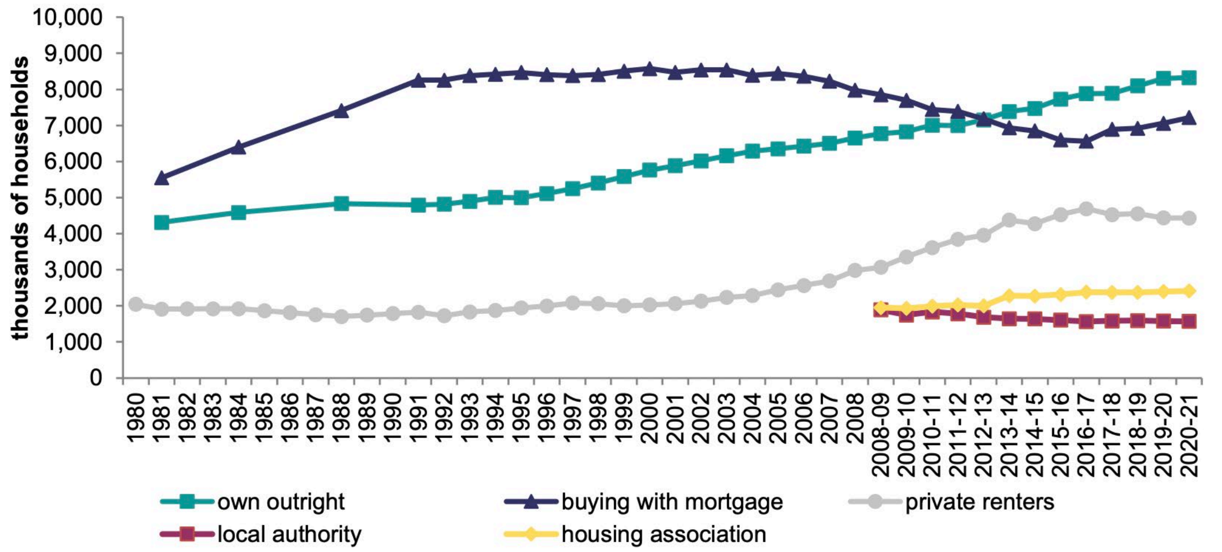
- If a property is bought with an interim payment:

  - If the only suitable property had more land than C reasonably requires, could C sell that off to cover the shortfall?

Rental costs

- *Swift* does not address whether credit should be given for rental costs against the replacement purchase.
- It would be surprising if such credit were not required as this represents the main housing costs for many people.

Figure 1.2: Trends in tenure (thousands of households), 1980 to 2020-21



Rental

- English Housing Survey 2020-2021:
  - In 2020-21, the private-rented sector accounted for 19% of households (4.4m) in England.
  - The social-rented sector accounted for 17% (4m).
  - Renting is more prevalent in London than in the rest of England. 27% of households lived in the private rented sector in 2020-21 (compared to 17% of households in the rest of England). 22% of London households were social renters (compared to 16% in the rest of England).

Rental

- Private rental trends across different age groups:

  - In 2019-20, 42% of those aged 25-34 were in private-renting households.

  - In 2019-20, the proportion of 34-45 year olds in the private rental sector was 27%.

  - In 2019-20, 10% of those aged 55-64 were living in the private rented sector.

Source: English Housing Surveys 2019-2020 and 2020-2021

Rental

- Many long-term renters have support with rent from Housing Benefit/Universal Credit.
  - In 2020-21, 60% (2.4m households) of social renters and 26% (1.1m households) of private renters received Housing Benefit.
- If that benefit will be lost (HB won't be received if C purchases property, UC could be much more complex) consider claiming/reducing the rental 'set-off' for the loss of that benefit.

Source: English Housing Survey 2020-2021

Multiple properties

- C may require more than one ‘replacement’ property and (with longer life expectancies) may have purchased more than one ‘but for’ property.

- Some Schedules attempt to pro-rate the reversionary interest in the differing additional capital over the period, e.g.:

  - £500k property for 15 years, £300k property for 15 years required.
  - ‘But for’ property would have been £100k for 10 years, £150k for 10 years, £100k for 10 years.
  - Attempt to value reversionary interest in: £400k for 10 years, £350k for 5 years, £150k for 5 years, £100k for 10 years by pro-rating.

Multiple properties

- Judgment in *Swift* supports taking the highest capital need for the replacement property.
- Against that C should give credit for capital he would have to fund in any event.
    - There may be some argument about whether this is the highest value 'but for' property or the end of life 'but for' property.
    - One could use a weighted average.
- Then carry out a straightforward *Swift* calculation for additional capital identified.

Delayed purchase

- What if C, with a 30-year life expectancy, will not purchase alternative accommodation (say costing an additional £500k at present day values) for 15 years?

- This illustrates the disconnect between the PI discount rate (-0.25%) and the reversionary interest discounting rate (5%) with results varying depending upon approach:

    - A capital cost of £500k in 15 years' time would be valued at £519,150 at present day values.

Delayed purchase

- When do you value the reversionary interest?

  - If valued at the present date, then it would reduce damages by £115,690 (30-year reversion).

  - If valued at purchase date, then reversionary interest is worth £249,720 (15-year reversion at that date: £519k x 0.4810) and could arguably be 'discounted' to present day value (£259,284).

Delayed purchase

- If the *Swift* approach is a true valuation of the 'reversion' at current-day values then the first figure should be right: the value of the reversion in 30 years time will not be affected by the date the property was first purchased.

- If, however, it is a measurement of a real market then in 15 years time when the purchase occurs the reversion will be worth £249,720 and the reduction should reflect that fact.

- There is no clear correct answer.

Interim payments

- *Swift* clearly improves the prospects of obtaining an interim payment to purchase accommodation because a substantial element of the property cost can now be brought into account at the *Eeles* stage 1 assessment

- Even where C falls short at *Eeles* stage 1, the stage 2 process remains an option, particularly where C is in unsuitable accommodation.

  - *See PAL v Davison & Ors.*