Cayman Insurance Litigation Q1 2017 Review

Welcome to the Q1 2017 Stuarts Insurance Litigation Review. In this edition, we address the impact of anticipated changes to the Discount Rate in the Cayman Islands. Stuarts acts for a number of leading Cayman Islands Insurance Companies and specifically advises and acts for Insurers in defending large loss personal injury claims. We hope you will find the review of interest.

The Changing Tide - the New Rate of Return and the Effect on Claims for Future Loss

Calculating Future Loss - a Short Recap

Stuarts' Q1 review of 2016, "Calculating Future Loss – A snap shot", discussed the approach taken by the Cayman Islands Courts as to the method of calculating future loss in personal injury cases. Therein it was confirmed that annual loss (the multiplicand) must be multiplied by the number of years over which the loss is anticipated to be incurred (the multiplier).

It is generally accepted that the multiplier for any particular loss will be calculated with reference to the *Ogden Tables*. These are actuarial tables which represent statistical research in the UK which give the number of years over which the loss is calculated.

In *Archer v. UBS (Cayman Islands) Limited* [2009 CILR 531] the Grand Court of the Cayman Islands endorsed the use of the tables generally. Quin J held that *"... in the absence of actuarial tables specific to the Cayman Islands, the court would rely on the Ogden Tables to determine the appropriate multiplier to calculate future lost earnings"*.

What is the "Discount Rate"?

This term has been used historically to describe the adjustment that is to be applied to multipliers so as to reflect the expected return on investment of the lump sum award. Up until recently, the rate of return on investment in the UK was set by the Lord Chancellor (pursuant to section 1 of the Damages Act 1996) at 2.5%. In essence this meant that the relevant multiplier selected for a particular Plaintiff was discounted by 2.5%, that being the rate of return expected on the deposited/invested money and therefore that accrual of interest expected over the total period of loss was offset by reducing the relevant multiplier by 2.5%, hence the use of the word "discount".

Whilst the Damages Act does not, of course, apply to the Cayman Islands and the discount rate for return on investment remains open to judicial discretion, it has been adopted generally as 2.5%. This was challenged in *Chin (as personal representatives of the estate of Chin) v Yates [2014]* 2 CILR 196, however the Court of Appeal declined to apply the alternative rate of return which had been put forward by the Plaintiff/Respondent's expert accountant[1]. Affirming the decision of the Grand Court, that the appropriate rate of return was 2.5%, Newman JA stated that "*the invitation to this court to embark on a review of an area of such complexity without detailed evidence has to be rejected. I have reservations about the lasting utility of the exercise. As in England, it may be something which can be given attention at government level*".

1 The Privy Counsel in the case of Simon v. Helmot [2012] UKPC 5 on appeal from the Court of Appeal of Guernsey, considered the issues arising from the unreliability of taking a rate of return from Index Linked Government Securities ("ILGS") and is authority for the proposition that expert evidence on the point can be adduced when it is being contended that 2.5% is not a fair rate of return.

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The Call for Change

There had been calls for change to the discount rate since the recession, owing to the effect on interest rates generally. It was said that the effect of the 2.5% discount rate was to penalise Plaintiffs as they would not, in practice, realise such a return on their investment in the current and continuing economic climate. The discount rate had not been altered in the UK since 2001, until on 27 February 2017 the Lord Chancellor announced a reduction in the discount rate from 2.5% to minus 0.75%.

The Minus 0.75% Adjustment - a Change in the Opposite Direction

The new, negative "discount rate" now more appropriately termed "the adjustment rate" is said to reflect the economic climate whereby the rise in inflation exceeds the rate of investment. By applying the minus 0.75% adjustment, the selected multipliers in the Ogden Tables now provide for an increase to the projected period of loss, so as to reflect and account for the economic reality of low interest rates coupled with a higher rate of inflation and the effect that this has on a lump sum.

The Knock on Effect - What this Means for Insurers

This will have a significant impact on personal injury claims involving claims for future loss.

For example, a 40 year old male who claims a loss of earnings of CI$50,000 per year and is said to continue for 25 years (until retirement age of 65), applying the discount rate of 2.5%, would generate a total award of CI$904,500. However, applying the new minus 0.75% rate, the award would now be a much higher, CI$1,327,000. This generates a difference of CI$422,500.

As stated, whilst the Damages Act 1996 of the UK does not apply in the Cayman Islands and the adjustment rate (in this jurisdiction) is a matter of judicial discretion, it is certainly foreseeable that the Cayman Courts will follow suit, based on their approach historically in following the principles and approach of the UK courts when dealing with personal injury litigation and the legislative framework generally.

It is unsurprising that the insurance industry in the UK has expressed their dissatisfaction strongly. They claim that this method of calculating future loss generally is out of date. The knock on effect, conceivably, is that the increased cost of claims to insurers will be felt by policyholders, who will see an increase in their premiums as a result. It is reasonable to assume that this reaction and consequential effect will equally apply here in the Cayman Islands.

However, it is anticipated that this 'new' rate may not be around for long. The UK Chancellor is likely to respond to the Insurance industry's outcries, by increasing the adjustment rate to potentially 1% or thereabouts. This is a midway point between the old 2.5% rate and the new -0.75.

Conclusion

Therefore, Insurers can expect to see an increase in the value of future loss claims being adjudicated upon from now on. The new adjustment rate now applies in the UK, having been implemented on 20 March 2017. Insurers should carefully review the reserves they hold for existing claims in this context and account for the impact that this change will have on those claims as well as new claims moving forward. This equally applies even if the rate is revised again. Whilst not as much, a 1% rate, for example, will still mean that claims for future loss will increase as compared to if calculated using the old 2.5% rate.

Whilst we envisage that the Cayman Islands' Courts are likely to apply the new adjustment rate, or a revised adjustment rate, we do not know for certain. This is a windfall for Plaintiffs but a real knockback for Insurers. With reference to the current -0.75%, it could be said that the pendulum has swung too far in the opposite direction, hence the anticipation that the existing rate is likely to change again. Whatever rate the UK Chancellor implements in the long term, it is probably only a matter of time before we are given some insight into how the Cayman Islands' Courts will interpret this change and whether it will be applied to personal injury litigation here in the Cayman Islands.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact Richard Annette at Stuarts Humphries.

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