Neutral Citation Number [2025]CIGC (Civ) 22

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO: G2023-0087

BETWEEN:

PETRONA GORDON

Plaintiff

AND:

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
(As the representative of the Cayman Islands Government)

Defendant

Coram:	**Hon. Justice Marlene I. Carter**
Appearances:	**Mr. Kyle Broadhurst of Broadhurst LLC for the Plaintiff**
	Mrs. Marilyn Brandt, Deputy Solicitor General, for the Defendant
Heard:	**30 October 2024**
Draft circulated:	**10 January 2025**
Plaintiff's further submissions received:	**11 February 2025**
Defendant's further submissions received:	**20 February 2025**
Draft re-circulated:	**11 June 2025**
Judgment Delivered:	**20 June 2025**

Civil Law – Public Service Pension Act (1999 Revision) – Defined Benefits Scheme- Assessment and calculation of pension loss – Discount rate

JUDGMENT

Factual Background

1. The Plaintiff was employed for approximately 28 years by the Cayman Islands Postal Service, from 17 October 1994 until her resignation on 28 February 2023. At the time of her resignation, the Plaintiff held the position of Deputy Postmaster General (Finance).

2. At the commencement of her employment with the Cayman Islands Government (**"CIG"**) in 1994, the Plaintiff was entitled to and received a Contractor's Officers Supplement (**"COS"**). At that time the Plaintiff did not possess Caymanian Status, nor was she employed in a pensionable post. As a result, the Plaintiff was ineligible for pension benefits under the Defined Benefit scheme (**"DB Pension"**) then in place.

3. It was a term of the Plaintiff's contract of employment that if she were to acquire Caymanian status during the period of her employment, she would then be deemed permanent and pensionable, and her appointment would be antedated, with the effect that she would then be considered as enrolled in the DB Pension from 17 October 1994. The DB Pension calculates pension benefits based on the employee's final salary and length of service.

4. In 1999, the *Public Service Pensions Act (1999 Revision)* established a new pension scheme, namely the Defined Contributions Pension Plan. As of 1 January 2000, all newly appointed 'permanent and pensionable' employees were enrolled in the Defined Contributions Plan, which calculates pension benefits based on contributions made to the plan and the returns accrued from those contributions.

5. On 30 October 2002, the Plaintiff was granted Caymanian status. However, she was not enrolled in the DB Pension. It is accepted by the Defendant that this was a breach of the terms of her contract of employment. The main thrust of the Plaintiff's claim instituted on 10 May 2023 was to have her pension entitlements calculated from the start of her employment on 17 October 1994 and for the Plaintiff to be included in the DB Pension.

6. On 6 June 2023, the Plaintiff issued a Summons pursuant to GCR Order 19, Rule 7. On 4 August 2023, the Court made the following orders:

> *"a) Judgment be entered in favour of the Plaintiff.*
>
> *b) The declarations sought by the Plaintiff in the Statement of Claim are granted. It is hereby declared that the Plaintiff is entitled to have her pensionable entitlement antedated to her first employment contract and to be placed into the*

Defined Benefits Plan (as defined in the Statement of Claim) or alternatively to receive the same entitlement and payments from the Defendant as if she were placed in the Defined Benefits Plan. It is further declared that the Plaintiff is entitled to receive from the date of her retirement pension payments in keeping with the foregoing from the Defendant.

c) *It being determined that the Defendant is in breach of its contractual obligations to the Plaintiff, in the absence of the parties reaching agreement as to relief and/or compensation payable to the Plaintiff within 30 days of the date of this order, upon the application of the Plaintiff, the Court will hold an assessment hearing in which it will determine the amount of damages payable to the Plaintiff and/or whether specific performance shall be ordered against the Defendant.*

d) *The Defendant pay the Plaintiff's costs of, and occasioned by, the Summons and of the proceedings on the standard basis, to be taxed if not agreed."*

7. The Plaintiff was not enrolled into the DB Pension. The parties were unable to reach an agreement as to the compensation that was payable to the Plaintiff. The parties have not been able to agree the appropriate discount rate to be adopted by the Court when determining the Plaintiff's loss of pension claim. The only issue for the Court's determination at the hearing was the appropriate discount rate.

8. The parties are agreed that the methodology and formula of the Defendant's expert, Mr. Peter Tomkins, for the calculation of pension once the discount rate is determined, is to be applied in this case.

The Discount Rate

9. In ***Wilson v Ebanks***[1], Smellie C.J. (as he then was) Chief Justice explained the need for the application of a discount rate[2] as follows:

> *"It is settled principle that some discount should be applied to a multiplicand arrived at by calculation of the full amount of expected income, to reflect the present-day value of a lump sum payment which would otherwise have been earned periodically in the future, and to reflect the life risks other than mortality which could affect the plaintiff's ability to earn - in other words, a reduced multiplier in terms of number of years' purchase to take account of the early payment and those risks. The reason is that the lump sum should represent an advance payment of income to be earned over a number of years in the future and which it must be assumed the plaintiff will invest to yield an income. If no discount is applied to the*

[1] [2011] 1 CILR 447, at paragraph 46.

[2] This explanation related to a claim for future loss of earnings but is nevertheless a useful explanation of the application of a discount rate.

> *full multiplicand sum, the result would likely be overcompensation and injustice to the defendants, who should be required to compensate the plaintiff under this head of pecuniary loss only for the actual loss assessed. "*

10. As simply set out by the Plaintiff's expert, Mr. Bor, the discount rate is relevant because *"by applying the discount rate, the future stream of pension payments due to the Plaintiff is adjusted to reflect their value in today's terms."*

The Plaintiff's position

11. Counsel for the Plaintiff submitted that there were at least two approaches that the Court could adopt in this case. The first of these was to follow the UK and assume the discount rate set there at minus 0.25%. Counsel submitted that:

> *"41. Due to the size of the Cayman Islands and the impact of world economics upon it, there is sense in simply adopting the discount rate set by the UK. It is for this reason that while not binding upon it, this Court will commonly refer and rely upon the Ogden Tables and Judicial Studies Guidelines. While it may be correct that the UK discount rate will change in the near future, this does not in any way diminish the argument for reliance for two reasons. The first is that the UK courts themselves continue to apply the discount rate as established and will continue to do so until it has changed. The second, is that no one can be confident of what the change will be until it occurs."*

12. The second approach was to adopt an objective discount rate to be applied when determining the present-day value of any future loss. Counsel noted that the discount rate applied in previous cases in the Cayman Islands should not be considered, given that the discount rate in the UK had changed significantly since 2017.

13. In this regard he pointed to the following:

> *"44. While there is certainty that a discount rate of 2.5% is much too high. There are also factors that point towards the current UK rate of -0.25% being too low. There are a number of factors which point towards 1% being the correct discount rate. These include the following:*
>
> *a) ILGS are now yielding around 1% per annum.*
>
> *b) The net return on Index Linked Gilts for terms up to 40 years would be about 1%.*
>
> *c) The most recent review of the appropriate discount rate was conducted by the Isle of Man. It was undertaken by a UK Government Actuary (who is currently undertaking the review on behalf of the Lord Chancellor for the UK). In that review, the*

> *analysis recommended the rate of -0.25% to be increased by between 1% (to 0.75%) and 1.25% (to 1%). This led to the increase to 1% which was at the top of the range."*

14. Counsel for the Plaintiff further submitted that the Court should not adopt the discount rate suggested by the Defendant's expert. The principal areas of concern related to the following:

> *"45. The Defendant has sought to argue that a discount rate of 3% should be adopted. That figure put forward by the Plaintiff's expert, Mr. Tompkins, was based upon the rate utilized by the Public Service Pension Plan to forecast its future investment earnings. That figure is not reflective of either the correct legal approach or the factual reality. As confirmed in Helmot the approach of assuming a mixed basket of gilt and equities, which is presumably how the pension plan would invest, was rejected in Wells v. Wells. A far more conservative approach is both necessary and appropriate and it was for this reason in Wells v. Wells the House of Lords confirmed the appropriateness of investments in ILGS. The need for a conservative investment strategy is made apparent when one considers the factual differences between the Plaintiff and the pension plan. The Plaintiff has retired and will need to ensure she has funds available to her to fund her retirement. The pension plan has a far longer investment window and will also have the benefit of ever-increasing funds to invest. It accordingly can make significantly different investments.*
>
> *46. In keeping with the foregoing, it is notable that Mr. Tompkins in his response to Mr. Bor accepted that an individual would have a much shorter timescale for investment as compared to a pension plan. He further accepted that the Plaintiff being retired could be expected to have a low appetite to risk. In his final report, Mr. Tompkins did not challenge the points raised by Mr. Bor which support a 1% discount rate. He did, however, helpfully provide calculations setting out the amount of the award if that discount rate was adopted."*

15. Counsel for the Plaintiff submitted that there was no basis for the +3% discount rate suggested by the Defendant. He argued that the suggestion seems to assume and be derived from a settlement position taken with other persons in disputes with the Public Service Pension Board (**"PSPB"**) and that that approach should not be adopted by this Court. He noted that the last court-assessed discount rate was +2.5% in ***Wilson v Ebanks*** and questioned why this Court should go higher now when the UK approach has been to go lower. Counsel for the Plaintiff offered that this Court cannot ignore the fact that the discount rate has recently been assessed as much lower in other comparable common law jurisdictions. In this regard, he referred to the discount rate for Scotland and Northern Ireland, which was, on 24 September 2024, changed to +.5%. In the Isle of Man, the discount rate is +1%.

The Plaintiff's approach to the determination of the appropriate discount rate.

16. Mr. David Bor is the expert relied on by the Plaintiff. Counsel for the Plaintiff very helpfully set out the key findings of Mr. Bor's report as follows in his skeleton submissions**:**

> *"a) By applying the 'discount rate', the future stream of pension payments due to the Plaintiff is adjusted to reflect their value in today's terms. The current discount rate used in the UK of -0.25% should be considered to represent the most objective rate and most objective based approach.*
>
> *b) While it is possible to undertake an exercise to tweak the Ogden Table approach including making the discount rate more specific to the Cayman Islands, the resultant changes would likely be minimal, if any at all, particularly considering the global nature of financial markets including interest rates and inflation, where different territory rates tend to move in line with each other; and*
>
> *c) A discount rate of 1% would be the most suitable to be adopted by the Court, on the basis that:*
>
> *i. The rate of 1% is the result of the most recently reviewed position in line with the current methodology used for setting the discount rate;*
>
> *ii. The general consensus is the expectation for an increase to the rate from -0.25% in the UK;*
>
> *iii. It is difficult to predict what the expected January 2025 review of the Ogden discount rate currently being undertaken by the Lord Chancellor will result in;*
>
> *iv. Current UK Index Linked Gilt (IGLS) returns are in the region of +1% per annum. Market rates have not moved so significantly since July 2023. The Ogden discount rate is currently set based on hypothetical notional asset distribution. Prior to this it was set based on ILGS returns. The use of ILGS could be justified for someone already in retirement such as the Plaintiff, and it is possible that the 2025 review may incorporate this; and*
>
> *v. Producing a more bespoke rate for the Cayman Islands could involve considerable extra cost, delays, disputes and may not result in a significantly different outcome."*

17. Mr Bor was cross-examined by the Deputy Solicitor General. He agreed with Counsel that the primary purpose of the Ogden tables to which he referred in considering the matter at issue, was to assist in assessing the value of personal injury or fatal accident claims. He accepted that a widow's pension benefit may be relevant in calculating pension loss and that the Ogden tables approach may

not allow for that benefit to be fully considered. However, Mr. Bor maintained that his use of the Ogden tables was in an effort to have what could be an accepted and agreed starting point in any consideration of the appropriate discount rate.

18. Mr. Bor explained that he utilised the Isle of Man discount rate of +1% and then considered particular features of the present case including the fact that the Plaintiff had already retired, her present age and also different rates for investments. When he calculated these his conclusions were not far off from the +1% used in the Isle of Man. For this reason, he found it reasonable to stay with the +1% because to do so would be harder to challenge or to fault.

19. Regarding the +3% discount rate suggested by Mr. Tompkins, he noted that it was not appropriate to use the PSPB rate of return since *"the PSPB is a totally different investor. You could not compare the plaintiff to the Pensions Board. They have [an] unlimited time scale over which to invest which she would require to be paid immediately each year. If she invested in equities, there [was] large risk to her."* Mr. Bor went on to note that the PSPB could *"ride out"* variations to rates of return. The Plaintiff, who would need ready returns on her investments, could not do so.

20. Also, the Plaintiff could not be considered to be in the same position because the Plaintiff was to be considered more risk averse.

21. Mr. Bor noted that it was to be borne in mind that the calculation of the appropriate discount rate should ensure that the Plaintiff was *"put in a position as if she was in the defined benefits plan."* When it was suggested that the 1% discount rate would put the Plaintiff in a more advantageous position, he noted that *"It is the position she would have been in with reasonable risk or someone who should not be taking any risk. … The 3% [discount rate] I can't think what she is going to invest in to make up what she would have had."*

22. He opined that it is only equitable types of investments that could put the Plaintiff in such a position, but because of their inherent volatility, the Plaintiff could find herself with considerably less than she would have been entitled to receive had she been enrolled in the DB Pension.

23. He went on to state that the Public Service Pension Plan (**"PSPP"**) rates should not be found applicable for the Plaintiff because she is already retired, another fact that impacts the risk that an individual investor may be willing to take. If an individual is not yet retired, they may take greater risks on investments.

24. He confirmed that based on his analysis, an annuity approach would end up with a discount rate of +0.6 per cent which he has upped to +1% to reflect the particular circumstances of the instant case.

The Defendant's position

25. The Defendant submitted that authorities referred to by the Plaintiff's attorney were concerned with compensation for personal injury or fatal accident claims and were not relevant to the calculation of pension entitlement. Such cases, she submitted, because of their reliance on the Ogden tables for calculating future losses, do not align with the specific nature of pension-related disputes.

26. The Deputy Solicitor General argued that even if the Court were to refer to the Ogden tables, they should not be applied in a mechanical fashion, *"particularly in complex cases involving pension entitlements where the unique characteristics of pension schemes necessitate a more tailored approach"* an approach which ensures that the specific factors related to pension losses are properly considered.

27. Counsel eschewed the suggestion of rigidly following actuarial tables, thereby relying solely on the framework designed for personal injury claims. Counsel advocated for a *"more tailored approach"*. To this end, counsel suggested that the Court consider that this area of calculation falls within the expertise of an Actuary such as the Defendant's expert, Mr. Peter Tompkins. On the issue of the appropriate discount rate, counsel for the Defendant invited the Court to prefer the alternative approach to the calculation of the discount rate offered by their expert.

28. Counsel suggested that the Ogden tables were used in employment cases because it was cheaper to take that approach than instructing an expert. She reiterated that the further reason why it was unnecessary to have regard to such tables, in this case, lay in the fact that the Court had the benefit of an expert to make relevant adjustments including what the Plaintiff would have had had she been part of the defined benefits scheme, the widow benefit calculated from the Plaintiff's spouse's pension and information regarding the future performance of the PSPP to which the expert, Mr. Tompkins, referred in providing his opinion.

29. Counsel submitted that the approach by the Defendant's expert "*offered a more tailored and appropriate assessment of the Plaintiff's pension entitlements."*

30. Counsel concluded that the Court should be careful in applying principles from personal injury cases to pension entitlement claims, as the considerations in these two areas can be markedly different. She stated: "*Personal injury cases typically focus on compensating for immediate and long-term physical or psychological harm, aiming to address the costs associated with rehabilitation, loss of earnings, and care. Pension entitlement claims, however, involve the complex*

assessment of future financial loss related to the cessation or reduction of pension benefits, which may require a distinct set of criteria."

31. While both types of claims involve the calculation of future losses, pension claims need to consider factors such as fluctuating pension values, potential changes in life expectancy, and the varying nature of pension schemes. Using personal injury frameworks could overlook these unique pension-related factors, leading to an inaccurate or unfair assessment of pension losses.

The Defendant's approach to the calculation of the discount rate

32. After noting the discount rate in the UK and the fact that Cayman Island Courts have adopted rates that apply in England and Wales for those cases where the Ogden tables would apply [typically personal injury cases], Mr. Tompkins stated as follows:

> *"The funding of a pension plan may be based on a more optimistic assumption regarding future investment earnings on the investments held in the plan – or the hypothetical investment holding in the case of an unfunded pension plan. For the PSPP I have been informed that the rate of 6.25% gross has been used in the latest valuation and the same rate has been adopted for the preparation of funding factors when assessing the funding cost of benefits within the plan. This is in conjunction with an inflation assumption of 2%, producing a net discount rate of around 4.25%. This produces a much lower net present value on the pension than use of the Ogden table current rate of -0.25%."*

33. Mr. Tompkins went on to determine that the appropriate discount rate that should be used when calculating the loss to the Plaintiff, in this case, to be +3%. Mr. Tompkins explained his reasoning as follows at paragraph 22 of his report dated 13 October 2023:

> *"I would generally think that a rate of return of 3-4% in excess of price inflation would be a reasonable expectation to make of the compensation allocated to someone for their pension. From this needs to be deducted the investment expenses which they would incur on investment of that money. Compared with the assumption of 6.25% interest and 2% inflation (ie 4.25% net) in the actuarial factors used in the funding of the plan, and the -0.25% as used by the Ogden tables, I suggest an assumption of around 3% net would be suitable in determining a fair level of compensation for a pension loss."*

34. In his response of 18 August 2024, Mr. Tomkins also noted as follows regarding the calculation of the discount rate:

> *"26. In the UK compensation for loss of pension rights is commonly assessed by the financial services regulators in cases where people have been mis-sold pensions – most notably where a financial adviser has advised an investor to*

> *transfer from a defined benefit pension plan into a defined contribution plan which provides different benefits. Where the regulators find such advice to have been bad sales practice, the investor is compensated using an approach set out by those regulators. I have advised the main financial services regulator and those responsible for compensation schemes and the basis of such assessments has been to assume that the investments made produce returns in line with the way in which pension money is typically invested, namely a mix of equity and fixed interest investment. This approach was most recently endorsed by the Financial Conduct Authority (FCA) in guidance for this compensation from 1 April 2023. (PS22/13).*
>
> *27. The FCA's approach to compensation is set out in CP22/15 which specifically supported the approach which I had advised to regulators over the previous 25 years. They stated at 4.37 'If the pre-retirement discount rate is too high, it may require consumers to take too much risk with their investments. This will increase the volatility of returns and expose them to downside risks. Conversely, if it is too low it would not recognise the ability for consumers in a DC environment to make returns on their investments.' On this basis, I believe that assumption of a rate of discount above that from investing fully in index-linked government bonds and below that assumed in the funding of a defined benefit pension plan is an appropriate discount rate to assume."*

35. When cross-examined, Mr. Tompkins stated that his report is based on an acceptance of different risks for an individual investor to that of a PSPP. He also accepted that the PSPP has a mixed portfolio of investments yielding higher rates of return.

36. He acknowledged that there are varying approaches to investing in pension funds. In this case, because the Plaintiff is faced with a short time frame for investment, and an inability to make further contributions to the pension fund, he agreed that the difference in approaches to investments would be influenced by that time frame.

37. Mr. Tomkins agreed that there is a difference in the approach regarding investments, to pre-retirement and to post-retirement. Post retirement, more annuity pricing is involved, and in the circumstances of this case the methodology should be based on an annuity-based calculation.

Court's considerations

38. It is well established that when calculating a damages award which includes a future loss component, a discount should be applied to account for the fact that the Plaintiff will have the benefit of a lump sum.

39. In the case of ***Wells v. Wells***[3], the House of Lords decided that the discount rate to be applied to compensation should be based on the yields on Index-Linked Government Stock (**"ILGS"**). This was based upon the likelihood that a claimant would adopt a risk-averse approach to the investment of their award so that it would be exhausted at the end of the period for which they were being compensated and not before. The rate applied by the court at that time was 3%.

40. The UK discount rate at the date of trial was minus 0.25%.

41. The parties in this matter agree, that there is no legislation which binds the Courts in the Cayman Islands (unlike in the UK) to adopt any specific discount rate.[4]

42. Instead, the question of the discount rate to be applied is to be determined in accordance with the common law. This is reflected in ***Wilson v Ebanks***[5] a case determined after ***Wells v. Wells*** but prior to the Lord Chancellor setting the discount rate. In that case, Smellie C.J., after acknowledging that the rate in ***Wells v. Wells*** was +3%, accepted a rate of +2.5% as being appropriate for the case before him. That the Court is free to determine the issue has been confirmed in subsequent cases in this jurisdiction.[6]

43. This was the approach taken in ***Simon v Helmot***[7] a Privy Council decision considering the laws of Guernsey. The Court held that Guernsey was not restricted by the provisions of the Damages Act, and as such, the question was to be determined in accordance with the common law. In that 2012 decision, the Privy Council upheld the Court of Appeal of Guernsey's decision rejecting the +2.5% rate and instead adopting a rate of minus 1.5% for earnings-related losses.

44. It was acknowledged and confirmed in ***Helmot*** that any rate set by the Court is not set in stone. Lord Clarke, at paragraph 86 of his judgment, stated that *"although uniformity of approach is plainly desirable and frequent changes are equally undesirable, I agree with Sumpton JA that, if there were convincing evidence to support substantially different figures, the relevant percentages in the future would indeed be different."*

45. The question of the discount rate to be applied is not fixed by a prior decision of the Court.

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[3] [1999] 1 AC 345
[4] There is no equivalent to the Damages Act in the Cayman Islands.
[5] [2011] 1 CILR 447
[6] See ***Yates v Chin***, Unreported, G180 of 2010 and John McDow v Dolphin Discovery (Cayman) Ltd Unreported, G231 of 2018 per Walters J. (Actg.)
[7] [2012] UKPC 5

46. On the facts of this case, there is very little difference between the Plaintiff and the Defendant. The Defendant accepts that an appropriate discount rate is the rate that would put the Plaintiff in the same position she should have been had she been enrolled into DB Pension at the time that she acquired Caymanian status.

47. The Defendant suggests a discount rate of +3%, an approach arrived at by the Defendant's expert with regard to the PSPP rate of return on investments. The Defendant maintains that this rate is more tailored to the Plaintiff because it takes into account or is set against a benchmark that is the actual fund into which she should have been put at the relevant time. It has been suggested that this rate has been offered to other persons in a similar position and it has been accepted.

48. The Defendant's submission that the Plaintiff's expert's suggested rate of 1% should not be accepted is based primarily on the fact that the Plaintiff's expert used the Ogden tables as its benchmark. The submission is that the Ogden tables are not suited to the pension calculation required. It was further argued that the discount rate suggested by the Plaintiff was not tailored to the Plaintiff's individual position as it did not take into account her Widow's Pension entitlement should it become due and it was not one that was aligned with the PSPP rate of return.

49. The Plaintiff's expert has pitched the rate against that used in the Ogden tables. He has calculated the rate based on a similar jurisdiction, which has, in the not-so-distant past, had a full investigation and assessment of the discount rate applicable. It is a jurisdiction similar in size and standard of living to the Cayman Islands. The Plaintiff's expert preferred this rate because, in his opinion, aligning the discount rate to the PSPP would present a false finding of the appropriate discount rate. This opinion was rooted in various factors relevant to the Plaintiff.

50. This latter position was arrived at for a number of reasons:

    i) The age of the Plaintiff.

    ii) The fact that a person in the Plaintiff's position would be more risk-averse in determining what investments to make with the pension funds.

    iii) The fact that the appropriate rate is being considered when the Plaintiff is already retired and even more risk averse.

    iv) The fact that the PSPP would make investments which were more high risk than those considered by the Plaintiff in order to recoup greater returns.

51. I find that the fact that the PSPP is the fund into which the Plaintiff should have been enrolled at the time that she acquired Caymanian status is not a sufficient or sole determinative factor necessitating the use of the current rate of return on that fund in the calculation of the appropriate discount rate in this case.

52. It is accepted that the PSPP had the advantage of time which had a direct effect on the nature of the investment with which the PSPP would normally engage. This, to this Court's mind, is a highly relevant factor in distinguishing the PSPP's rate from that against which the applicable discount rate, in this case, should be calculated as the experts both agree that the Plaintiff would not have a similar advantage as she would need to be able to recoup some return in the shorter term. As Mr. Bor expressed in his evidence, the PSPP, with the luxury of time, could ride out any "*ebb and flow"* in the investment markets, a luxury that would not be available to the Plaintiff.

53. The discount rate used in UK at present at the date of trial was minus 0.25%. The discount rate suggested by the Defendant is +3%. The difference accruing to the Plaintiff between the +1% suggested by the Plaintiff and the +3% suggested by the Defendant is vast. I am not persuaded by the Defence expert's explanation why the rate suggested is so high. Given the discount rate adopted by the Isle of Man at +1%, this suggested rate appears to be out of kilter with the progression or trend of these rates. The Court has been provided with information that in Scotland and Northern Ireland the discount rate is now set at +0.5%. The courts in the Cayman Islands have not slavishly followed the discount rate in the UK or these other common law jurisdictions as they are no bound by them. However, it cannot be argued that the discount rates in these jurisdictions do not provide some relevant context in any consideration by a court faced with this issue.

54. To this Court's mind, the fact that the Ogden tables are usually used for the calculation of future loss for personal injury does not disqualify its use in the present case. I am not persuaded that the Ogden tables should only be used or are only utilised when it is cheaper than instructing an expert to assist with the calculation of pension benefits, as the Deputy Solicitor General seemed to suggest in her submissions to this Court.

55. There is no dispute that the Ogden tables have been found to be useful in the calculation of pension entitlements.[8] The Plaintiff's expert use of these tables may be regarded as being a more neutral place from which to form an opinion as to the appropriate discount rate. He suggests that it could

[8] The Plaintiff referred the Court to a document produced by the Tribunal's Judiciary entitled, *"Employment Tribunals – Principles for compensating Pension Loss"* in this regard.

be as low as .6% based on his calculations. However, he has pegged it at 1%, more in line with that of the Isle of Man.

56. I have considered the submissions of counsel and the evidence of the experts. In ***John McDow v Dolphin Discovery (Cayman) Ltd***, Walters J. (Actg.) expressed the view that applying the then prevailing discount rate of 2.5% was a conservative choice.[9] This court has had expert evidence to assist in coming to its opinion of the appropriate discount rate. The prevailing rates in the jurisdictions considered by the experts are relevant and have been considered here. In all circumstances, I initially found that a discount rate of +1.25% was appropriate. In my draft judgment, I held that this is the discount rate that would best result in a pension calculation which would put the Plaintiff in the position in which she should have been had she been enrolled in the DB Pension on 30 October 2022.

Further submissions

57. The draft judgment was circulated on 10 January 2025. Shortly prior to its circulation, on 2 December 2024, the Lord Chancellor determined that the discount rate in the UK would increase from minus .25% to +.05%. That change was to take effect as of 11 January 2025. Given this material change, Counsel for the Plaintiff sought the Court's leave to advance further submissions.

58. Paragraph 1. 1.2 of Practice Direction 1 of 2004 notes as follows:

> *"1.2 To enable the attorneys of the parties to submit any written suggestions to the judge about typing errors, wrong references of fact or citation of authority or other minor corrections of that kind in good time, so that, if the judge thinks fit, the judgment can be corrected before it is finally handed down in open Court or Chambers."*

59. The Court's attention was also drawn to the judgment of the CA in ***Smith v Smith***[10] which states that a court may *"until an order has been drawn up, entered and perfected,"* withdraw or modify its judgment even when the court had delivered reasons for it.

60. Neither the judgment nor a final order having been finalized in this case, the court determined that it would allow counsel to advance further submissions on ***this discrete issue*** of the change of the discount rate in the United Kingdom to +0.5% given this issue's prominence at the hearing and

[9] Walters J. appeared to be constrained to adopt that approach as he recognised that he did not have expert evidence before him to enable him to opine on what the correct discount rate would/could ultimately be.
[10] [2004-5] CILR 225)

again noting that the change came into effect after judgment was reserved and after a draft was circulated.

61. In its supplement submissions the Defendant acknowledged the Lord Chancellor's decision to revise the discount rate to +0.5% in the United Kingdom (the Chancellor's Review"). The Deputy Solicitor General maintained the Defendant's previous submission that this decision is not binding on the courts of the Cayman Islands which must determine the appropriate rate based on legal principles, evidence, and economic conditions. Counsel for the Defendant submits that the Plaintiff's reliance on the Chancellor's Review and the accompanying expert panel report was fundamentally flawed for the following reasons:

> *"(i) These materials do not hold direct applicability within the unique legal and economic framework of the Cayman Islands. It was submitted that unlike England and Wales where the discount rate is periodically reviewed within a predetermined legislative framework, the Cayman Islands courts assessed discount rates on a case-by-case basis ensuring that the outcome is tailored to the specific economic conditions and financial realities of the jurisdiction;*
>
> *(ii) The economic conditions, investment opportunities, taxation situation and statutory obligations in the Cayman Islands differ significantly from those in the UK;*
>
> *(iii) The Cayman Islands do not operate within the same statutory framework that prescribes specific methodologies for calculating investment returns and associated risk. As a consequence, the assumptions underlying the expert panel analysis do not accurately reflect the realities of local investment options."*

62. The Deputy Solicitor General stated that the Court's analysis of the appropriate discount rate should remain guided by local principles which reflect the financial conditions and compensatory principles specific to the Cayman Islands. Counsel stated that the discount rate suggested by this Court in its draft judgment should be maintained.

63. Counsel for the Plaintiff submits that the Chancellor's Review does provide an important comparison for the Court's consideration as to what the appropriate discount rate should be in the Cayman Islands. In this regard, Counsel noted that in the cases cited to the Court at trial, the discount rate in the UK has been noted as a point of reference.

64. Counsel referred to the differences in approach between that adopted by the Lord Chancellor and that required by the common law. These differences included the following:

> *"(1) In accordance with the Damages Law 1996 the Lord Chancellor is required to consider a mixed investment portfolio in contrast to the position at common law which requires the consideration of a very conservative investment in the ILGS;*
>
> *(2) The Lord Chancellor considered and relied upon the expert panel report which in turn took into account investments different from the ILGS and claimants with different investment timelines to the Plaintiff in this case*
>
> *(3) The net impact of the additional considerations regarding a number of hypothetical claimants with different time frames for investment was that the Lord Chancellor considered a higher rate of return than what is described by the common law."*

65. Counsel noted that despite being able to take into account those additional factors which cumulatively result in a higher rate of return, the discount rate was still set at +0.5%. He noted, in particular, the basis for that decision, being that it was only at that rate that the odds were in favour of all claimants being able to receive full compensation that was greater than 50%.

66. Counsel urged the Court to consider that despite starting with a rate of return ranging from 2.9% to 3.8%, the Lord Chancellor set the discount rate at +0.5%. He argued that if the court, applying the common law, was to base its determination of the discount rate upon a claimant investing in a risk-free or very low-risk investment, the ILGS, and then make adjustments to that figure to take into account reasonable adjustment factors such as inflation and expenses relating to the investment, the current rate of return of the ILGS is approximately 1% per annum and it is that rate of return which should be the starting point.

67. Counsel submitted that it must be of significance that England and Wales, Scotland and Northern Ireland have all recently set their discount rate at +0.5%. He submitted further that *"there is no adjustment which would warrant a higher discount rate than that set in the UK."* He noted that:

> *"While an investor in Cayman does benefit from no income tax, this must be weighed against the fact that an investor from Cayman in order to invest in the ILGS would be required to place their investment in a foreign market where they may be susceptible to tax. Further, and in any event, Cayman has a higher cost of living which likely offsets any savings which might occur. There is further no basis to assume that any other costs faced by a Cayman plaintiff would be less than their UK counterpart. Certainly, the cost of investment would not be less and there is no reason to believe that Cayman is not subject to the same or similar inflationary factors. In this regard, it is noted that on the only occasion when this Honourable Court considered the discount rate to be applied when making an award, it*

accepted that it was appropriate for the discount rate to be set at 2.5% which was .5% lower than the rate in the UK at that time.

68. Counsel argued that given that the ILGS was set at 1%, a discount arrived at in a manner similar to that in ***Wells v Wells*** would place the appropriate discount rate well below the +0.5% figure, it would align with the Court's decision in ***Wilson v Ebanks*** and would take account of the present cost of investment.

Court's further considerations.

69. I thank counsel for their helpful further submissions. In setting out his reasons for his conclusion that the discount rate should be set at a single rate of +0.5%, the Lord Chancellor noted that his decision was aimed at satisfying the following principles: *"...as far as achievable: claimants should receive at least sufficient compensation; a high risk of significant under-compensation should be avoided; significant over-compensation should be limited; and that it is appropriate to prioritize the mitigation of significant under-compensation to the injured party.*"

70. The change in the assessment of the appropriate rate on this review, away from an assessment of the investment decisions, returns and expenses of a single "*representative claimant*" to an assessment of several core claimant types from within a range of modelled claimants, resulted in a consideration of the impacts that different rates would have across a broad range of claimants. The core claimant types were identified in the Chancellor's Review by "*their investment terms of 20, 40 or 60 years, [to] appropriately reflect a comprehensive range of the key characteristics of real-life claimants, including the size and term of their damages award, their investment strategy, and other taxable income.*

71. The approach taken by the expert panel which carried out the review and made recommendations to the Lord Chancellor was complimented for its adherence to the legislation, the Damages Act 1996, and the required assumptions therein. These assumptions were: "*that these portfolios* [of the three appropriate core claimant types] *are suitably diverse and indicative of claimants having been properly advised, and that the assumed approached is indicative of more than a very low level of risk but less risk than would ordinarily be accepted by a prudent properly advised individual investor.*"

72. This approach is significantly different to that which is indicated in the instant case. Counsel for the Plaintiff at the hearing invited the court to consider the Plaintiff's individual case. The factors

that this Court noted as being of particular significance to the Plaintiff on this application are set out at paragraph 50 above.

73. While the discount rate in the UK is something that this court has taken into account in its determination of this issue, the change in that rate must not overshadow the assessment of the individual Plaintiff in this case, and upon whose particular characteristics the expert reports considered by this Court were based. The change in the approach to the calculation of the new rate, away from an assessment of the investment decisions, returns and expenses of a single "*representative claimant*" to an overall assessment of several core claimant types from within a range of modelled claimants, is another relevant factor that influences this court's final conclusion on this issue. This change in methodology is significant and a factor that further lends against slavishly following new UK discount rate.

74. The plaintiff's expert determined that a discount rate of +1% is the appropriate rate based on the factual circumstances in this case. This was a rate that was arrived at using the Ogden tables methodology. It appears to this Court that the expert was well cognizant of the UK discount rate and its applicability to the circumstances in this case and its impact on his final expressed opinion. The Plaintiff's expert suggested that any exercise to tweak the Ogden Table approach to make a discount rate more specific to the Cayman Islands would involve considerable work and include potential challenges due to different experts having different opinions. In any event, the resultant changes could be minimal, if any at all, particularly considering the global nature of financial markets, including interest rates and inflation, where different territory rates tend to move in line with each other.

75. The expert considered that the Isle of Man rate of +1% would be more suitable in the factual circumstances of this case. The expert took into account the UK discount rate and noted that the general consensus was the expectation for an increase to the rate from minus 0.25%. The fact that that discount rate increased to +0.5% is therefore within the range of factors that influenced his final opinion.

76. The expert considered how the discount rate had been traditionally determined in the UK and whether it was appropriate for courts in the Cayman Islands. He noted, at the time his report was submitted, that it is possible that the expected January 2025 review of the Ogden approach could suggest more fundamental changes to the methodology making it even more difficult to predict exactly where the suggested discount rates will be set. It appears that this is what in fact occurred.

77. Mr. Bor concluded that a discount rate of +1% could be the most suitable in the circumstances of this case. In coming to that conclusion, he was well cognizant of the expectation of an increase to the rate from minus 0.25%. He was well cognizant that he could not predict exactly what the increase would be although he expected an increase.

78. This Court initially found the appropriate discount rate in this case should be +1.25%. Taking into account the further information available to this Court and the foregoing, I find that the Court should depart from that initial finding but only to the extent that the discount rate of +1% proposed by the expert is even more in line with changes in other jurisdictions and is more appropriate, and I so find.

79. Costs to the Plaintiff to be taxed if not agreed.

Carter J.

Hon. Justice Marlene I. Carter
Judge of the Grand Court