IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 231 OF 2018

BETWEEN:

JOHN MCDOW

Plaintiff

-AND-

DOLPHIN DISCOVERY (CAYMAN) LIMITED

Defendant

IN CHAMBERS

Appearances:	**Mr Nicholas Dixey of Nelsons for the Plaintiff** **Mr Michael Wingrave of Dentons for the Defendant**
Before:	**Hon Mr Justice Alistair Walters, Actg.**
Heard:	**7 June 2022**
Draft circulated:	**21 June 2022**
Judgment Delivered:	**7 July 2022**

HEADNOTE

Claim for damages for personal injury, application for interim payment pursuant to GCR O. 29, r.9, principles to apply to consideration of interim payment.

JUDGMENT

Summary of background

1. These proceedings relate to a claim brought by the Plaintiff for damages resulting from personal injuries suffered on the Defendant's premises. The writ was issued on 28 November 2018 and alleges that on 25 March 2017 the Plaintiff, who was born on 28 February 1983, was walking along an external walkway besides the exterior wall of the premises adjoining the sea shore when he stopped

and bent down to observe fish in rock pools. As he stood up, he leaned towards the wall to get his balance but before his hand could make contact with the wall an uncut piece of rusty reinforcing bar or rebar jutting out of the wall broke through the right lens of his sunglasses and deeply penetrated into the area of his right eye.

2. The accident caused the Plaintiff to fall to the ground which caused further injuries to his face and bleeding to his nose and right ear.

3. The Plaintiff alleges that he suffered the following injuries:

   3.1 immediate excruciating pain;
   3.2 fracture of the orbital floor to the right eye (blow out);
   3.3 contusion of the right eyelid and periocular area;
   3.4 laceration of the skin of the eyelid and periocular area;
   3.5 diminished sensation to the right lower eyelid;
   3.6 double vision (diplopia) when looking up or down or to the sides;
   3.7 soft tissue injuries to the nose and right ear;
   3.8 numbness to the face;
   3.9 nerve damage to the face; and
   3.10 visible scarring.

4. The Plaintiff was treated at hospital immediately. The treatment included a complex repair of his eyelid sutured in layers and reconstruction of the infra orbital plate.

5. As a result of the accident, the Plaintiff claims to continue to suffer a defect to the medial aspect of the orbital wall of his right eye. He also suffers from diplopia on a lateral gaze and looking upwards and downwards. The Plaintiff has further suffered from severe occipital headaches and cerebrospinal fluid leakage ("CSF leak") from the right eye, in respect of which he has been in the care of a neurosurgeon.

6. The Plaintiff claims that the injuries suffered were caused by the negligence of the Defendant and that he is entitled to general and special damages.

7. In its defence dated 20 December 2018, the Defendant denied liability and alleged contributory negligence.

8. By way of a consent order dated 14 April 2020 the parties agreed negligence as to the Plaintiff at 50% and as to the Defendant at 50% leaving damages to be assessed.

9. By way of a consent order dated 16 of June 2020 various directions were agreed including the reliance on evidence of the jointly instructed expert, Dr Eugene Foley an expert in the field of ophthalmology.

10. On 13 April 2021 the Defendant made a voluntary interim payment to the Plaintiff of USD350,000.

11. By way of summons dated 13 May 2022 the Plaintiff now seeks an order for a further interim payment pursuant to GCR O.29 in the sum of USD480,000 (or such other lesser sum as the court considers just).

Relevant law and procedure

12. GCR O. 29, r.10 and 11 provides as follows:

"*Application for interim payment (O.29, r.10)*

10. (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.

(2) An application under this rule shall be made by summons but may be included in a summons for summary judgment under Order 14 or Order 86.

(3) An application under this rule shall be supported by an affidavit which shall-

(a) verify the amount of the damages, debt or other sum the application relates to and the grounds of the application; and

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application.

(4) The summons and a copy of the affidavit in support and any documents exhibited thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the return day.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

Order for interim payment in respect of damages (O.29, r.11)

11. (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied

(a) that the defendant against whom the order is sought (in this paragraph referred to as "the respondent") has admitted liability for the plaintiff's damages; or

(b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or

(c) that if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them, the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely."[1]

13. On behalf of the Defendant, Mr Wingrave referred to the English Court of Appeal case of *Eeles v Cobham Hire Services Ltd)*[2]. *Eeles* sets out useful guidance to judges when examining applications for interim payments:

13.1 the discretionary power to make interim payment orders is not unfettered;

13.2 there must be an attempt by the judge deciding an application for interim payments to estimate the likely capital value of the claim;

13.3 the assessment should be limited to special damages to date, the general damages for pain, suffering and loss of amenity in addition to any capitalized accommodation claim;

13.4 valuation of the claim should be carried out on a conservative basis and the interim payment will be a reasonable proportion of that assessment. However, a conservative proportion could still be a high proportion if the assessment is a conservative one;

13.5 occasionally a judge will be entitled to include in the assessment of the likely final award additional elements of future loss, but that is only when, first there is evidence of real need and, second, that it can confidently be predicted that a trial judge will make a larger capital award that one which covers only the heads set out above (*Brathwaite v Homerton University Hospitals NHS Foundation Trust*[3];

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[1] See *Chin –Welds v Welds* [2006 CILR Note 31].

[2] [2009] PIQR P15.

[3] [2008] EWHC 353 (QB)

13.6 while the court should not always necessarily work on the basis of the defendant's figures concerning assessment of the value of the claim, where there is a wide margin between the parties and the plaintiff's figures are not supported by evidence, the court should base its valuation of the claim, in general terms, upon the defendant's figures; and,

13.7 there is no requirement to consider the use to which the payment sought would be put unless there is a lack of capacity[4] but the court will need to be satisfied that the proposed expenditure is reasonably necessary now as opposed to after trial.

14. As outlined by Mr Dixey on behalf of the Plaintiff, both general and special damages for personal injury may be considered in deciding what is a reasonable proportion of the damages, which, in the opinion of the court, is likely to be recovered by the Plaintiff[5].

15. He reiterated the point that the court is not concerned with the use to which the interim payment will be put. In *Stringman v McArdle*[6] the plaintiff, who was disabled as a result of an accident, applied for an interim payment to finance building work to her home. The lower court refused payment on the grounds that the house conversion was too expensive and this would amount to an excessive proportion of the total awarded for the plaintiff's care. The plaintiff appealed and the appeal was allowed. The court of appeal held an application under GCR O. 29, r. 11 should be granted if the court thinks the amount is just and does not exceed a reasonable proportion of the total likely damages. The court of appeal went on to say that this provision does not imply that applications should be refused on the grounds that the purpose for which the payment sought it extravagant or not in the plaintiff's best interests. Similarly in *Smith v Glennon*[7] the court of appeal held that the plaintiff's use of the money in that case was of no concern to the court.

16. Mr Dixey contends that the important principle is that the payment should not exceed a reasonable proportion of the claim. He says that this principle should not be misinterpreted so as to mean that the interim payment may not be significant or high, rather it is that the court will be mindful of the risk of an interim payment amounting to an overpayment of what is ultimately awarded at a full

[4] It is also the case that the plaintiff does not need to satisfy the court of their need for an interim payment or that they will suffer prejudice if they do not receive one *Baucom v Ebanks (a.M.) and Ebanks (R.)* (Grand Ct.: Schofield, J.), April 22nd 1994.

[5] *Chin-Welds v Welds.*

[6] [1994] 1 WLR 1653.

[7] Unreported, English Court of Appeal, 29 May 1990.

assessment. The court should consider the proposed interim payment against the value of the claim, and not consider the use to which the money is proposed to be put.

17. There is no real disagreement between counsel as to these principles. Mr Wingrave reminded me that the court should be alive to the risk of overpayment and that the court must adopt a cautious and conservative approach to the valuation of the claim.

Evidence from the Plaintiff

18. The Plaintiff swore an affidavit dated 19 May 2022. He also gave evidence briefly during the course of the hearing in response to questions that I posed to Mr Dixey.

19. In his affidavit the Plaintiff exhibits the report of Dr Foley dated 30 August 2020. As mentioned earlier, Dr Foley is being treated as a joint expert although he is an ophthalmologist and his evidence is therefore limited to the areas of his expertise. Dr Foley summarises the Plaintiff's problems resulting from the accident as follows:

19.1 **Diplopia in all positions of gaze** - there is no position of gaze in which the Plaintiff does not experience diplopia. The Plaintiff experiences headaches and ocular discomfort after about 30 minutes of computer work. The Plaintiff experiences vertical diplopia when driving at night and now no longer drives at night as it is neither legal nor safe for him to do so. The Plaintiff also struggles to drive in the day time.

19.2 **Neck pain** - the Plaintiff was formerly a member of the US Army. In 2005 he was in an accident in an M113-A3 armoured personnel carrier. As a result, he suffered injuries to his neck and spine causing continued weakness, numbness, tingling in his arms and legs, continual neck pain and greatly reduced neck mobility.

19.3 **Numbness on right side of face down to teeth** - the Plaintiff has numbness on the right side of his face down to the teeth and complains of constant tingling and reduced sensation on the right side of his face from lower orbital rim to his upper teeth. This may also cause a physical risk of future damage to his teeth and is causing the Plaintiff to be depressed.

19.4 **Photophobia** - since the accident the plaintiff experiences extreme light sensitivity and floaters.

19.5 **Inability to move neck and to move eye** - the Plaintiff gets severe diplopia when he moves his eyes out of the primary position (looking straight ahead eye). The usual and only compensatory mechanism adopted by patients with this diplopia disability is to move the neck to prevent confusing and dangerous diplopia. The Plaintiff cannot move his neck and therefore neck movement to compensate for lack of functional eye movement is not an option for him.

19.6 **Constant headache** - ever since the accident the Plaintiff has suffered from constant daily headaches with a pain score of as high as 7/10. Working on a computer brings on this headache within 30 minutes.

19.7 **Cosmetic problem** - the Plaintiff's right eye is sunken due to atrophy of the orbital fan content he also has scarring of his right upper and lower eyelids.

19.8 **Balance** – Sometimes the Plaintiff's double vision makes him feel very dizzy and makes him lose his balance. He experiences imbalance constantly when moving around and performing everyday tasks.

19.9 **Accident risk due to diplopia** - Dr Foley states that individuals with constant diplopia and balance problems have a greatly increased risk of future accidents.

19.10 **Family life impact** - as a result of diplopia the Plaintiff cannot play games such as puzzles or video games with his children or help them with their homework.

19.11 **Meningitis risk** - Dr Foley records that in 2019 the Plaintiff was admitted to hospital in the Cayman Islands with a CSF leak. He was treated by Dr Akinwunmi who is a neurosurgeon. Dr Akinwunmi was apparently convinced that the leak was caused by base of skull trauma which occurred at the time of the Plaintiff's eye injury. Apparently this is associated with a significant risk of potentially life-threatening bacterial meningitis with a risk that the CSF leak may occur again.

19.12 **Psychology** - according to Dr Foley of the Plaintiff gets very depressed over the accident and the effects of it on his life and he feels disabled and disfigured.

20. Dr Foley notes that there may be the prospect of orbital floor and orbital wall repair surgery in the future which may slightly reduce the Plaintiff's diplopia but with no guarantee of success. He suggests that future treatment for the CSF leak and/or bacterial meningitis may be necessary.

21. His prognosis for the Plaintiff is "bleak". He says that all of the Plaintiff's symptoms are likely to get worse. He suggests that constant headaches may lead to substance abuse, depression with risk of suicide, loss of employment and relationship loss. He further suggests that employment of any sort is going to become a greater challenge as time passes and he does not think the Plaintiff will be able to pursue gainful employment for a long time into the future. He says that depression is a major problem at present, affecting all aspects of the Plaintiff's life and is likely to get worse over time.

22. In his affidavit, the Plaintiff states that before relocating to the Cayman Islands with his wife in 2013 he was working as a vice president of sales for a company called Golden Rule Fasteners ("GRF"), earning a gross salary of USD117,398. In the Cayman Islands the Plaintiff initially worked for A.L. Thompson's and subsequently in 2015, moved to work for Kirkconnell Enterprises Ltd ("Kirks") as a contract sales manager. The Plaintiff's remuneration was a mixture of salary and commission. He suggests that a fair basis upon which to assess his average remuneration is to look at figures for the period 1 January 2019 to December 2019. He says that provides an average monthly remuneration of approximately USD15,000 for that year after including his own pension contributions and deducting health insurance contributions. I will come back to the question of how best to assess his remuneration for the purposes of this application.

23. The Plaintiff says that by November 2020 it was clear that he could not continue with his employment at Kirks and had to resign because of the consequences of the injuries that he had suffered. He also says that if it had not been for his injury he would have hoped to have remained working at Kirks until his retirement although that would have required him (or his wife, who is a vet) to apply successfully for permanent residency. The Plaintiff explains that his term limit (being the maximum term under the Immigration Act 2022 that an individual can remain in the Cayman Islands on work permits before having to leave for a year and then return or apply for permanent residency) was 24 November 2022. By that date he (or his wife) would have had to have applied for permanent residency or they would have left the Cayman Islands for a year. The Plaintiff quite rightly accepts that there was no guarantee that permanent residence would have been granted.

24. After resigning from Kirks, the Plaintiff relocated with his family to Georgia in the Unites States but says that, despite trying, he has struggled to find any paid employment because of his physical limitations.

25. The Plaintiff says that there may be some lighter part-time work that does not require computer screen time or concentration that he could do for a limited period of five years or so until he becomes incapacitated. He says that he was hoping to find work on an employed or self-employed basis running fishing charters or watersports in Georgia. Alternatively, he was hoping he could work as a fisheries technician or fishing guide. His estimate is that he could earn around USD50,000 per year in such an occupation however he has been unable to secure any such work.

26. The Plaintiff also suggests that if it had not been for the injuries suffered in the accident on the Defendant's property, in the event that he had not obtained permanent residency, he would have returned to United States in November 2022 and been able to earn a salary at GRF as a vice president in the sum of approximately USD208,000. In support of this he makes reference to a letter exhibited to his affidavit. The letter is from GRF, dated 21 September 2021 and signed by William McDow who is the Plaintiff's brother. GRF is a family business. The letter confirms that GRF is a nationwide distributor of fasteners and roofing products. The company has been in business since 1991. The Plaintiff was employed at GRF in the late 1990s, leaving for several years whilst he served in the United States Army but returning to GRF once his term was complete. He resigned from his position with GRF to relocate to the Cayman Islands. Employees at GRF who hold comparable positions are apparently currently making a salary of USD208,000 per annum.

27. The letter further confirms that the company would offer the Plaintiff the same position as he held before, subject to the fact that as a result of the injuries that the Plaintiff has suffered to his eye and skull, he is no longer able to spend long periods of time working on computers or spreadsheets and he is also unable to work on a regular schedule. In those circumstances GRF is unable to offer him the same position again.

28. The Plaintiff explained in his affidavit that with the help of his wife he has been able to identify a potential business opportunity to purchase a fishing and birdwatching lodge in Belize (the "Lodge"). With the help of his wife he has prepared a business plan that he has exhibited to this affidavit. The owner of the lodge is apparently prepared to sell the business for USD365,000. Adding to that taxes and closing costs, the cost of purchasing vehicles, an initial payroll and emergency fund, the Plaintiff

says that the total funds needed for that investment are USD476,625. As I mentioned earlier, the Plaintiff gave evidence briefly during the hearing in large part to assist me with questions that I had about this opportunity. He confirmed that if he was able to purchase the Lodge, his intention would be to travel there on a periodic basis to oversee its operations but does not propose to relocate there to live.

29. The Plaintiff indicated that he does not have up-to-date financial records for the business. Based on older records that he has obtained and information about current bookings, he estimates that the Lodge may generate a net profit of USD36,000 per annum.

30. There has been no suggestion that the Plaintiff has been anything other than candid with his evidence and no suggestion that he is doing anything but his best to move on with his life and mitigate his loss.

31. Mr Wingrave accepts that a plaintiff should not be kept out of the damages to which they may be entitled and accepts that a further interim payment may be appropriate but argues that the sum sought by the Plaintiff in the present application is too large when compared against the variables that may affect an award of damages in this case.

The parties' position in relation to damages

Damages for pain and suffering and loss of amenity ("PSLA")

32. The Plaintiff approaches the question of damages for PSLA in relation to the eye injury by reference to the *Judicial College guidelines for the assessment of general damages in personal injury cases 16th edition* (the "JC Guidelines"). The Plaintiff refers to chapter 5 (A) of the relevant JC guidelines in relation to complete loss of sight in one eye and suggests that the Plaintiff's injury falls between:

32.1 Some risk of sympathetic ophthalima. The upper end of the bracket is appropriate where there is scarring in the region of the eye which is not sufficiently serious to merit a separate award. GBP49,270 to GBP 54,830; and,

32.2 Cases of serious but incomplete loss of vision in one eye without significant risk of loss or reduction of vision in the remaining eye, or where there is constant double vision a case of constant blurred vision and sensitivity to light in both eyes requiring constant wearing dark glasses would be at the top of the bracket. GBP23,680 to GBP39,340.

33. The Plaintiff suggests that the appropriate award in this case would be between the top award as set out in paragraph 32.2 and the bottom of the award as set out in paragraph 32.1; namely, GBP44,305.

34. In relation to the skull trauma and consequent CSF leak the Plaintiff refers to chapter 3 (A) (d) of the JC Guidelines which covers less severe brain injuries. In these cases the injured person will have made a good recovery and will be able to take part in normal social life and return to work. There may not have been a restoration of all normal functions and there may still be persisting problems such as poor concentration and memory or disinhibition of mood, which may interfere with lifestyle, leisure activities, and future work prospects. At the top of this bracket there may be a small risk of epilepsy. The level of award within this bracket will be affected by the extent and severity of the initial injury, the extent of any continuing and possibly permanent disability, the extent of any personality change and depression. The brackets for the award are GBP15,320 to GBP43,060. The Plaintiff suggests that his injury falls into the upper part of this bracket with an estimate of GBP40,000.

35. The Plaintiff accepts that it is not appropriate to simply add the two awards together where the effects of the injuries on amenity tend overlap[8] but that when taking into account matters such as the psychological injury and the cosmetic impact of the Plaintiff's injuries (which is also claimed affect his marital relations) an appropriate award for PSLA would be not less than GBP65,000. The GBP:USD exchange rate to be applied to an award would be that applying is at the date of judgment[9]. The Plaintiff has used the rate applicable as at 20 May 2022 which he says equates to USD80,958.69 or KYD67,195.71 (at x0.83).

36. The Defendant's position is that the Plaintiff's estimate of an award for PSLA is excessive and makes insufficient allowance for overlapping injuries/symptoms. The Defendant also makes the point that the expert medical evidence so far has been solely from Dr Foley who is an ophthalmologist, not a neurosurgeon. On that basis the Defendant questions the extent to which any CSF leak was a result of the accident in question. The Defendant also notes that the Plaintiff required right facial reconstruction surgery in 2009 and suffered spinal injuries in 2005 and there has been no expert comment on whether or not those spinal injuries or the injuries necessitating facial reconstruction might be behind some or all of the Plaintiff's neurological complaints.

[8] *Sadler v Filipiak* [2011] EWCA Civ 1728.
[9] *Woods Furniture v Gary James* (Unreported CICA 1 of 200) 30 July 2020.

37. Without prejudice to the position that it may adopt a trial, for the purposes of this application, the Defendant says that the proper total award for PLSA is not higher than USD60,241 or KYD50,000.

Past loss of earnings

38. The position of the Plaintiff in relation to past loss of earnings is that but for the accident he would have been able to work at Kirk's until his term limit of 24 November 2022. The Plaintiff has been unable to find alternative employment since returning to the United States and therefore says that his past loss of earnings should be calculated based on the period between 16 April 2021 (the date his employment with Kirk's came to an end) and 24 November 2022 (84 weeks). As mentioned earlier, the Plaintiff's approach to calculating loss of earnings starts with identifying an amount per month that is reflective of his average monthly remuneration whilst employed by Kirk's. The figure he identified was USD15,063.69 which equates to a weekly figure of USD3,376.23 and a total loss for the 84 week period of USD292,003.83.

39. The Plaintiff goes on to argue that if he had remained in the Cayman Islands until his term limit expired he would have then left the Cayman Islands and started work on 1 December 2022 as a vice president with GRF on a salary of USD 208,000. With a notional trial date of 28 February 2023 the Plaintiff says the lost earnings would be USD51,199.99 with an estimated loss, giving credit for state and federal taxes, of approximately USD40,000. Combining the claimed loss of earnings to the term limit (USD292,003.83) with the additional claimed loss of earnings from then until the notional trial date (USD40,000) the alleged loss amounts to approximately USD330,000.

40. The Defendant argues that the Plaintiff has not approached the question of the calculation of loss of earnings clearly and has cherry picked the best months from his overall earnings. The Defendant says that the Plaintiff appears to have received USD111,543.15 during the period 1 January 2019 to December 2019 or USD9,295.26 per month. An alternative analysis suggested by the Defendant is to take an average of the Plaintiff's overall earnings between 1 May 2015 and 1 February 2021 which results in a monthly figure of USD7,604.28. Much of the difference in figures appears to result from fluctuations in the commission that the Plaintiff earned. The Defendant suggests that past loss of earnings to the notional trial date would amount to a high of USD195,200.45 or low of USD159,789.88 depending on the approach adopted to its calculation.

41. The Defendant questions the evidence put forward by the Plaintiff in relation to the offer of employment from GRF and what salaries would be for comparable positions with other employers, for which there is no evidence.

42. The Plaintiff seeks to recover lost employer pension contributions from Kirk's which would have been paid during the 84 week period referred to above. The Plaintiff estimates those at USD753.18 per month (being 5% of USD15,063.69) giving a total of USD63,267.49 or KYD52,512.02. During the course of the hearing there was discussion as to whether or not employers in the US contributes to the personal pension plans of employees but neither counsel was sure as to the correct position in that regard.

43. Adopting the position of the Plaintiff in relation to employer pension contributions the Defendant says that the Plaintiff stands to be awarded 5% of USD195,200.46 (USD9,760.02) or 5% of USD159,789.88 (USD7,989.49).

Future loss of earnings

44. This head of loss is the largest identified by the Plaintiff and the report from Dr Foley underpins the Plaintiff's assessment of his likely damages. For the purposes of this application the Plaintiff assumes that he would have remained in the employment of Kirk's in the Cayman Islands until his term limit on 24 November 2022. Thereafter, he says that he would have returned to the United States, and, but for the accident, could have expected to have obtained employment as a vice president with GRF on a gross salary of USD208,000 (net USD156,000). Based on the report from Dr Foley the Plaintiff suggests identifying a multiplicand and for the first five-year period of loss from the notional trial date of 28 February 2023 calculated based on the difference between the net salary from GRF (USD156,000) and what the Plaintiff says is the current best case scenario income of USD50,000 in some alternative employment. This leaves a figure of USD106,000 as the Plaintiff's notional loss of earnings for that initial five year period. Thereafter, the Plaintiff's position is that, consistent with the report of Dr Foley, he is likely to have to take early retirement and will therefore suffer loss of at least USD156,000 per year for 20 years between the age of 45 until normal retirement age of 65, subject to the application of the appropriate Ogden Tables. Having said that, is also submitted on behalf of the Plaintiff that, at trial, the court may consider that the Plaintiff will have some capacity to continue to work after the notional five year period and may be able to generate some income. The notional figure of USD27,500 is mentioned in that regard leading to an annual loss of USD128,500.

45. The Defendant does not dispute that the Plaintiff would likely have worked until usual retirement age and the Defendant also accepts that the Plaintiff's ability to earn has been affected and that the effects of his injuries on that ability may deepen as time passes.

46. The Defendant focuses on two particular issues that it says makes the approach to future loss of earnings particularly difficult. The first is what the Defendant says is simply a lack of evidence as to what job opportunities might have been available to the Plaintiff if he had reached his term limit and then returned to the United States and what the Plaintiff's level of remuneration might have been. The Defendant says that the GRF letter is insufficient evidence in this regard. The Defendant also questions the lack of evidence to back up the attempts that the Plaintiff says that he has made to secure employment and the precise reasons for the Plaintiff's lack of success. The Defendant says that the court cannot be satisfied that proper attempts to mitigate loss have been made or that the Plaintiff's approach is to be unable to earn into the future reliable as a matter of law or evidence.

47. The second issue is in relation to the Plaintiff's plan to purchase and run the Lodge. The Defendant accepts that the Plaintiff is under no obligation to demonstrate to the court why he wishes to have the interim payment that he seeks (other than that it is reasonably necessary). But the Defendant says that the Lodge raises a different issue. That is, the extent to which purchasing the Lodge might generate sufficient income to extinguish the Plaintiff's future loss of earnings claim in its entirety. The Defendant says that what is missing is any form of profit or income analysis that would enable the court to be able to assess with any certainty, the effect of the purchase of the Lodge on the Plaintiff's ability to earn an income and, in turn his future loss of earnings claim. The point is put fairly starkly by the Defendant when it submits that if the purchase price and initial running costs of the Lodge might extinguish the future loss of earnings claim, they would stand to be assessed at USD480,000.

48. A further factor raised by the Plaintiff is the discount rate applied by the court to an award of damages for future loss. This issue was considered by the court of appeal in *Chin v Yates*[10]. In that case the court declined the opportunity to review whether the rate of 2.5% which had been set in England by the Damages Act 1996 was a fair rate to continue to apply in the Cayman Islands. Ultimately, the court felt that the issue was one for legislative review. The Plaintiff says that at the time of the *Chin* case, the rate in England had been set at 2.5% for 14 years and makes the point that for the last 3 years, the rate in England has been set at -0.25%. The Plaintiff further contends that it is inconsistent

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[10] [2014] (2) CILR 196.

on one hand to apply in the Cayman Islands resources such as the Ogden Tables and the JC Guidelines which are updated based on actuarial data from the English economy and on the other hand continue to apply a 2.5% discount rate. His position is that in the absence of any actuarial evidence to the contrary, the current discount rate in England should apply in the Cayman Islands, just as updated quantum cases from England are also relied on (albeit with the Cayman Islands 10% uplift[11]).

49. The Plaintiff illustrates the effect of the discount rate as follows:

49.1 With reference to the 8th edition of the Ogden Tables and using Table 9, from age 40 and a discount rate of -0.25% there is a multiplier of 24.97. When that is applied to the multiplicands identified by the Plaintiff, the loss is USD2,724,726.30.

Ages	Period (years)	% split	Table 9 (multiplier of 24.97)	Discounted multipliers (Table C) (x0.88)	Net Annual Earnings (USD)	Loss (USD)
40-45	5	20	4.994	4.39472	106,000	465,840.32
46-65	20	80	19.976	17.57888	128,000	2,258,886.00
TOTALS	25	100	24.97	21.9736		2,724,726.30

49.2 Following the same approach but using a discount rate of 2.5% provides for a multiplier of 18.14 at table 9 and generates a loss figure of USD1,979,436.20.

Ages	Period (years)	% split	Table 9 (multiplier of 18.14)	Discounted multipliers (Table C) (x0.88)	Earnings (USD)	Loss (USD)
40-45	5	20	3.628	3.19264	106,000	338,419.84
46-65	20	80	14.512	12.77056	128,000	1,641,016.40
TOTALS	25	100	18.14	15.9632		1,979,436.20

[11] *Archer v UBS (Cayman Islands) Ltd* [2009 CILR 531].

50. On behalf of the Plaintiff it is also noted that although the Ogden Tables suggest different multipliers and advocated adjustments to be made to accommodate differentials other than mortality (such as unemployment, illness and accidents) the research upon which that is based analyses socio-economic conditions in the UK which are different from those in the Cayman Islands[12].

51. The Defendant says that if the discount rate is to be reviewed it will have to be at trial with the benefit of actuarial evidence, directions for which (amongst other things) were given at this hearing. Until then, and for the purposes of the current application, the rate of 2.5% should be applied.

52. Overall, in relation to this head of loss, Counsel for the Defendant has made reference to the case of *Blamire v South Cumbria Health Authority*[13], a case in which there were a number of "imponderables" and uncertainty related to the plaintiff's loss of earnings claim which meant that the conventional multiplier/multiplicand approach was inappropriate. In such circumstances, a judge can approach the calculation of compensation for loss of earnings on a wide or global basis and assess the current value of future financial loss.

Future medical treatment and expenses

53. The Plaintiff estimates USD25,000 or KYD20,750 in respect of some future medical treatment. He also estimates future medical expenses of US$24,242. For the purposes of this application, the Defendant is content to agree those figures.

Summary of damages

54. I can say at the outset, that it is not for me on this application to review the applicable discount rate. I think that from the court of appeal decision in *Chin v Yates* and its reluctance to review something which it regarded as within Parliament's purview, it is unlikely that at the trial of this case the rate is going to be adjusted downwards. On that basis, I have taken a conservative approach and used the figure for future loss of earnings calculated by the Plaintiff applying the 2.5% discount rate.

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[12] *Bodden v Solomon* [2008 CILR 385].

[13] [1993] PIQR Q1.

Head	Plaintiff assessment (USD)	Defendant assessment (USD)
PSLA	80,958	60,241
Past loss of earnings (to notional trial date)	330,000	195,200
Past loss of earnings (to term limit of 24 November 2022)	63,267	
Future loss of earnings	1,979,436 (the Plaintiff's lower figure)	480,000 (if the Lodge extinguishes the future loss claim)
Future medical treatment	25,000	25,000
Future medical expenses	43,819	43,819
Special damages	11,609	11,609
Interest on special damages and general damages (approx.)	41,500	41,500
Total	2,575,589	857,369
Less 50% apportionment on liability	1,287,794	428,684
Less interim payment USD350,000	937,794	78,684
Outstanding damages	937,794	78,684
Less interim payment current sought USD480,000	457,794	
Outstanding damages	457,794	
% of estimated claim paid out by way of interim payments (approx.)	65%	

55. As mentioned above, I have approached the question of future loss of earnings using the more conservative, but in my view most likely, discount rate of 2.5%. Having said that, I am very conscious of the guidance from *Eeles* and, in particular, the caution that must be adopted when considering future loss of earnings. Excluding future loss of earnings from any assessment of damages at this stage would effectively preclude any further interim payment.

56. I am of the view that there may well be an award of damages for future loss of earnings and it may be sizeable. On that basis, I think that it is reasonable to consider that head of loss for the purposes of the current application.

57. I am however, also aware of the variables that are at play in this case. They include:

57.1 the lack of any medical evidence other than that from Dr Foley. In the context of the claim as a whole, the parties are not substantially apart on general damages but it is possible that additional expert medical evidence might have a significant impact on the Plaintiff's future loss of earnings claim;

57.2 the lack of any meaningful evidence about the Plaintiff's earning capacity apart from the letter from GRF which the Defendant is clearly entitled to test at trial; and,

57.3 the lack of any current or cogent evidence about the likely impact the Lodge may have on the Plaintiff's ability to earn or receive an income.

58. These are imponderables of the kind considered in *Blamire.* But even after reviewing the respective positions of the parties and adopting a global approach, I am in some difficulty in assessing the present value of the Plaintiff's future loss. To order the interim payment as currently sought would result in the payment to the Plaintiff of approximately 65% of the claim calculated on his figures. The Defendant's case puts the claim at a far lower value, but still subject to the variables identified above.

59. I am satisfied that the Plaintiff has a reasonable need for an interim payment to assist with legal and medical costs. However, based on the above, and in order to avoid the risk of the Plaintiff receiving

an overpayment, in my view, it would be imprudent to order a payment of more than US$150,000 at this stage.

60. Following the hearing and the circulation of this judgment in draft the parties agreed between them that costs should be in the cause.

Hon Mr Justice Alistair Walters
Acting Judge of the Grand Court

GRAND COURT
CAYMAN ISLANDS