The Rate of Return – Where Are We

Adrian Palmer QC,
Guildhall Chambers

June 2012

Damages Act 1996 s.1

(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account **such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor**.

…….

(4) Before making an order under subsection (1) above the Lord Chancellor shall consult the Government Actuary and **the Treasury**; …….

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Wells v Wells [1999] 1AC 345

- Compensation principle paramount.
- Guideline: …. As a general guide, rate of return should be average rate of real return on ILGS over past 3 yrs net of tax (with assumption of 3% future inflation).
- Guideline to apply until the Lord Chancellor specified a new rate under section 1.

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Wells v Wells [1999] 1AC 345 (cont'd)

Two questions arise:

1. Using average of past 3 yrs to assess damages for next 40+ yrs. What is the position if the "past three years" is rather unusal?
2. To what extent is the Lord Chancellor obliged to follow HL when exercising power under s.1?

Lord Chancellor's Statement - 2001

- Close attention to <u>*Wells v Wells*</u>
- Noted variables even within HL formulation
- Also took into account a number of developments and also factors not considered by HL: inflation heading down below 3%; "market for ILGS distorted"; C of P practice/investment advice not to invest exclusively in gilts.

Prescribed 2.5%.

Note: Not precisely following HL.

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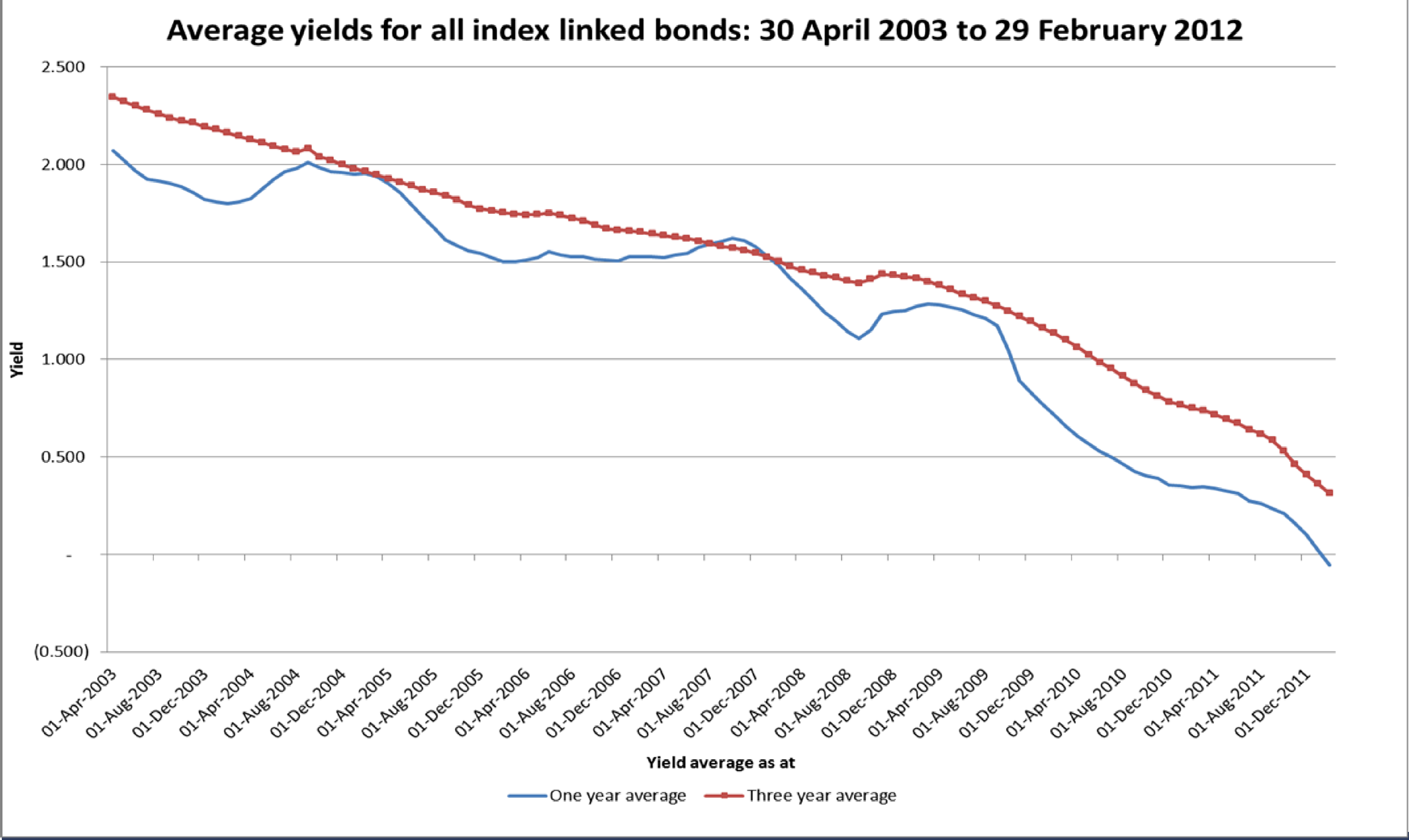
2003 onwards



The judicial review application

Nov 2010: LC announces that he will review.

Mar 2011: APIL issues application.

May 2011: Answer by Jonathan Djanogly in House of Commons -

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The judicial review application (cont'd)

"The Lord Chancellor is in the process of reviewing the discount rate. In this context he has sought views from HM Treasury and the Government Actuary as required by the Damages Act 1996, and has received representations from the Association of Personal Injury Lawyers and the Association of British Insurers. In the light of the views received he has decided to conduct a wider consultation on the methodology to be used in setting the discount rate. A consultation paper will be published soon, and the review will be completed on as timely a basis as possible."

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The judicial review application (cont'd)

Aug 2011: Holman J dismisses application

Oct 2011: Ogden 7 published

Dec 11: Letter from Treasury Solicitor to APIL –

> "Consideration has been given to what the basis of a discount rate based other than on ILGS might be; and what alternative investment options might be. That has necessitated a number of exchanges internally within MoJ and with HM Treasury and the Government Actuary ('GAD'); and the seeking of information from, for example, the Court of Protection and the Court Funds Office."

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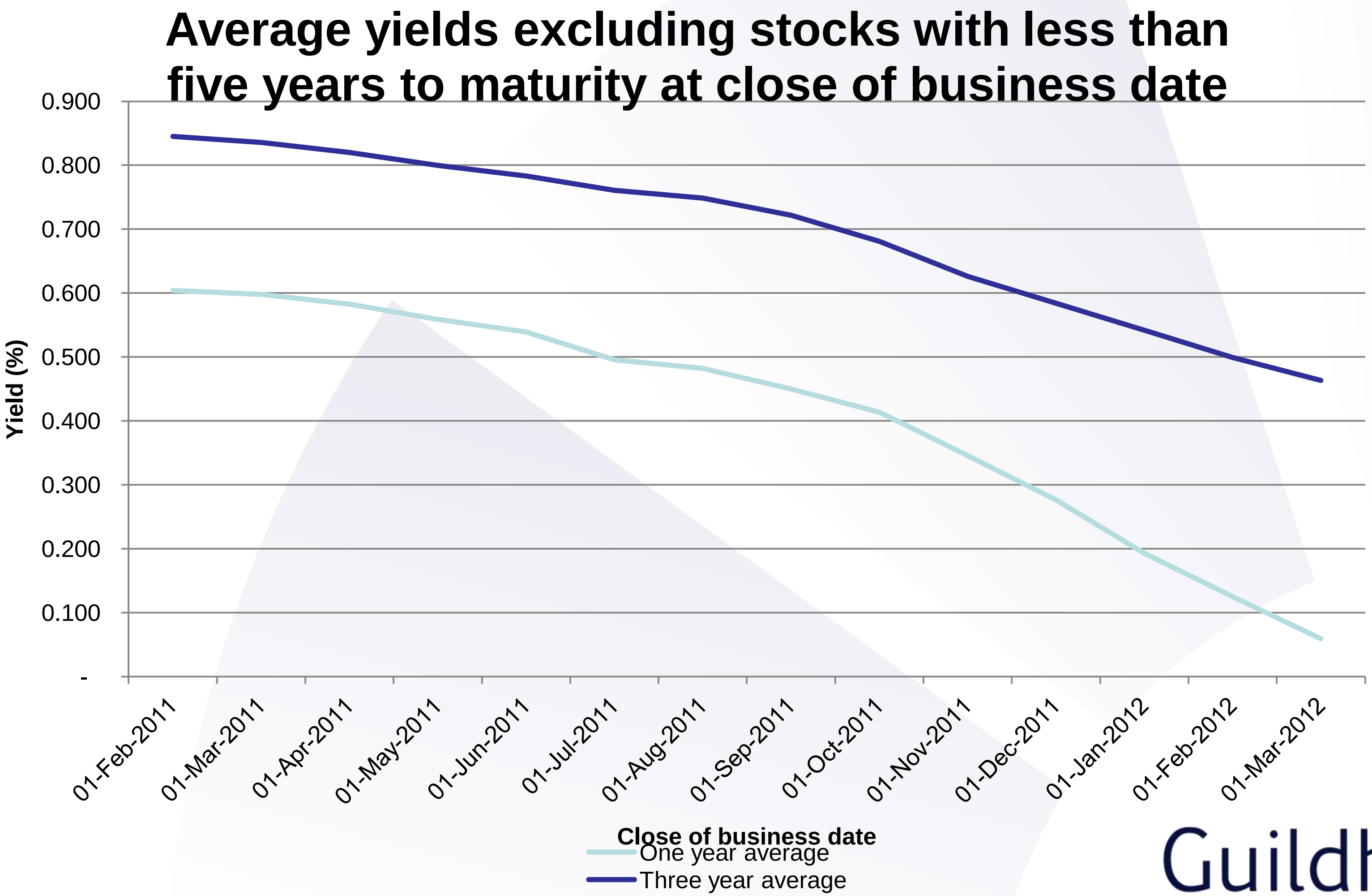
Yields during 2011



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The Yields: Nov 2011

Index-linked Bond	Closing price 22 November 2011	Yield
1.25% index-linked Treasury Gilt 2017	114.81	-1.13%
1.25% index-linked Treasury Gilt 2027	121.20	-0.07%
1.125% index-linked Treasury Gilt 2037	129.47	-0.07%
0.75% index-linked Treasury Gilt 2047	127.63	-0.02%
0.375% index-linked Treasury Gilt 2062	119.55	-0.01%

Source: UK Debt Management Office (www.dmo.gov.uk)

The Yields - 2012

What is current position on ILGS yields?

	3 year	1 year	Month
All			
31 January	0.363	0.180	-0.487
29 February	0.315	-0.055	-0.450
31 March	0.274	-0.126	-0.473
Over 5 years			
31 January	0.540	0.193	-0.326
29 February	0.499	0.125	-0.233
31 March	0.464	0.059	-0.231

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2012: Developments elsewhere

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Simon v Helmot [2012] UKPC 5

- Decision 5 March 2012
- 5 Supreme Court Judges + 1
- "Test-bed" case because (a) no PPO's; and (b) no Ld Chancellor's Statement
- Lady Hale:

  "The only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the defendant's tort, not a penny more but not a penny less."

- Plus *Wells* – the use of ILGS net real yield.

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Simon v Helmot (cont'd)

- Reviewed correctness of trial decision made in Jan 10: looking at evidence as at that date.

- PC affirmed Guernsey CA decision:
1) (Agreed) gross real yield of 1.25%
2) Reduce for tax to 1% in Guernsey (bit more in UK)
3) Reduce for 0.5% higher inflation in Guernsey
4) Result: rate of return 0.5% for Guernsey ("not more than" 1% for UK)

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Simon v Helmot (cont'd)

The Lord Chancellor's dilemma:

- Rates of return have fallen further since 2010.
- Does he embed the concept that C must be given enough money to go out and invest all his money in ILGS and nothing but ILGS on date of judgment.
- Or does he break from *Wells* and claim a wider power? A wider form of investment?

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The sting in ***Helmot***:

- *Wells* directed 3% amage.
- The battle that led
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- We now learn that t approach. To contrary, correctly applied, it endorses that approach. *Simon v Helmot* tells us so: evidence established 2% extra inflation; so rate of return for earnings-related heads of claim = 0.5% - 2% = - 1.5%.

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The sting in *Helmot*:

- *Wells* directed 3% rate of return for all heads of damage.
- The battle that led to *Thompstone*.
- How about lump sum awards?
- We now learn that *Wells* does nothing to stop that approach. To contrary, correctly applied, it endorses that approach. *Simon v Helmot* tells us so: **evidence established 2% extra inflation; so rate of return for earnings-related heads of claim = 0.5% - 2% = - 1.5%.**

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Is Lord Chancellor obliged to follow?

- Damages Act s.1(1):

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....

(3) An order under subsection (1) above may prescribe **different rates of return for different classes of case.**

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Is Lord Chancellor obliged to follow?

- Damages Act s.1(1).
- *Wells v Wells* as developed by *Simon v Helmot* tells us that compensation principle requires such a distinction. Can LC ignore that? Would he be subject to judicial review?

Is Ld Chancellor obliged?

- Damages Act s.1(1):
- *Wells v Wells* as developed by *Simon v Helmot* tells us that compensation principle requires such a distinction.
- Wages inflation is <u>not</u> 2% more than RPI. For y/e Apr 2011: RPI = 5.21%; ASHE 6115 80% = - 1.05% ……. Blip or end of +2% era? To be decided on basis of probability?

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Where we are:

What is the answer?

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