

CALCULATING CLAIMS OF INTEREST

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INTRODUCTION

1. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, Lord Goff of Chieveley, said at page 684:

“One would expect to find, in any developed system of law, a comprehensive and reasonably simple set of principles by virtue of which the courts have power to award interest... Sadly, however, that is not the position in English law.”

An historical perspective shows the gradual development of the court’s power to award interest and that this development continues.

THE DEVELOPMENT OF THE COURT’S POWER TO AWARD INTEREST

2. The common law power to award interest was stated in *Page v Newman* (1829) 9 B&C 378. Lord Tenterden MR in the Court of Kings Bench referred to:

“the long established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.”

Soon after this statement as to the limited power at common law to award interest, Parliament enacted a limited statutory power to award simple interest on judgment debts or awards of damages (s 28 of Civil Procedure Act 1833, known as Lord Tenterden’s Act). The limitations on this power were strictly applied by the courts.

3. In the exercise of an equitable jurisdiction, the Admiralty Court awarded simple interest as a matter of course on damages: *The Northumbria* (1869) LR 3 A&E 6.
4. In *London, Chatham and Dover Railway Company v South Eastern Railway Company* [1893] AC 429, it was held (reluctantly) by the House of Lords that at common law, in the absence of any agreement (express or implied) or statutory provision for payment of interest, a court had no power to award interest by way of general damages for late payment of a debt. This was because of the decision in *Page v Newman*, the fact it had remained unchallenged for nearly 65 years and the restricted scope of s 28 of Lord Tenterden’s Act that Parliament had passed in response to *Page v Newman*.

5. Under statute, simple interest was recoverable on judgment debts, but only as a matter of discretion. Section 28 of Lord Tenterden's Act was replaced by s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which allowed a court trying any claim for "the recovery of any debt or damages" to order that there be included in the judgment debt interest from the date that the cause of action arose to the date of judgment,. "Any debt" covered liquidated or unliquidated sums recoverable in contract (express or implied) or under statute. However, interest could not be recovered on any debt paid before judgment was obtained or before proceedings were issued. The notes to the White Book stated that interest could only be ordered at trial and not on a default judgment or summary judgment, but in ***Wallersteiner v Moir (No 2) [1975] 1 QB 373***, Lord Denning MR, without deciding the point, thought that this was too narrow a construction of the word "tried".

6. Under the general equitable jurisdiction, the Chancery courts awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance, rescission and taking of an account. Courts of equity had jurisdiction to award simple or compound interest against a trustee or fiduciary accountable for profits made from his position: ***Westdeutsche Landesbank*** at page 701. In cases of fraud, compound interest was and is recoverable in equity where money has been obtained and retained by fraud: "in other words, where the fraudster has in hand a fund which he has, or is deemed to have, made use of for his own benefit": ***Black v Davies [2005] EWCA Civ 531*** at para 87.

7. Compound interest was recoverable by agreement and by custom and practice or trade usage eg a bank's entitlement to compound interest: ***National Bank of Greece SA v Pinios Shipping Co No 1 [1990] 1 AC 637***.

8. Over the last 60 years, the scope for recovering interest has gradually increased.

9. In ***Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297***, in obiter dicta, the Court of Appeal said that interest could be recovered as special damages provided this was a foreseeable loss within the contemplation of the parties when the contract was made. In ***Wadsworth v Lydall [1981] 1 WLR 598***, the Court of Appeal supported the distinction between interest being irrecoverable as general damages, but recoverable as special damages under the second limb of the rule in ***Hadley v Baxendale 9 Exch 341***. This distinction was approved of by the House of Lords in ***President of India v La Pintada Compania Navigacion SA [1985] 1 AC 104*** at p 127C.

10. S 22 of the Administration of Justice Act 1969 introduced by amendment of s 3 of the Law Reform (Miscellaneous Provisions) Act 1934 a mandatory requirement to award interest in personal injury claims above £200 "unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages". This change led to guidelines in ***Jefford v Gee [1970] 2 QB 130*** for

awards of interest in personal injury cases: (1) interest should be awarded on pain, suffering and loss of amenity from the date of service of the writ to judgment and (2) the rate of interest should be the same as that which is payable on money paid into court which is placed on short term investment account. In ***Birkett v Hayes* [1982] 1 WLR 816**, the Court of Appeal introduced the guideline rate of 2% per annum on damages for pain, suffering and loss of amenity. This guideline rate has remained unchanged to promote predictability and to facilitate settlements and inexpensive litigation: ***L (a patient) v Chief Constable of Staffordshire* [2000] PIQR Q349**.

11. In ***The Aldora* [1975] 1 QB 748**, Brandon J decided that in a salvage action, interest was recoverable on a salvor's remuneration both under statute and the existing equitable jurisdiction of the Admiralty Court to award interest on damages.
12. The Administration of Justice Act 1982 introduced section 35A into the Supreme Court Act 1981 and an equivalent provision into the County Courts Act 1959, which allowed simple interest on judgments (as before) and debts paid after proceedings had been issued (this was new), but not on debts paid before proceedings had been issued, which the Law Commission in 1978 had recommended should be recoverable. .
13. In the ***President of India*** case, the House of Lords declined to depart from the principles in ***London, Chatham and Dover Railway Company*** and extend the court's power to award interest at common law to debts that had been paid before proceedings were issued. This was because of the recent intervention by Parliament in the AJA 1982 and Parliament's policy decision not to follow the Law Commission's recommendation.
14. ***Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34 [2008] 1 AC 561**
 - concerned companies paying advance corporation tax on dividends before being able to set it off against mainstream corporation tax on its profits. UK based groups could make a group income election to exclude ACT on dividends paid by a subsidiary to a parent company, but this election was not available if the parent company was resident outside the UK.
 - The European Court in ***Metallgesellschaft Ltd v IRC*** and ***Hoechst AG v IRC* [2001] Ch 620** had decided that this was contrary to Article 52, now 43EC, of the EC Treaty. The European Court held that the remedy was a matter for the national court.
 - In order to benefit from the limitation period under s 32(1)(c) of the Limitation Act 1980, the claim was framed in restitution for payment made under a mistake of law.

- The House of Lords held that the court has jurisdiction at common law to award compound interest on a claim for a restitutionary remedy for the use of money paid under a mistake and that interest should be compounded in this case.
- The compound interest was measured at conventional rates calculated by reference to the rates of interest and other terms applicable to borrowing by the Government in the market during the relevant period. This measure was arrived at because the Government could not, as a result of the relationship between the Government and the Bank of England, calculate the interest earned or saved by it.

15. In **Sempra**, Lord Nicholls summarised the common law position as follows:

- A claimant can plead and prove his actual interest losses, including compound interest, caused by late payment of debt, breach of contract or in tort as special damages, subject to remoteness, mitigation of loss etc ie the cost of borrowing or the lost opportunity to invest the money.
- An unparticularised claim for interest as general damages is not allowed.
- The statutory discretion to award simple interest is an additional power that does not displace the common law remedy.

Statutory interest

16. Interest is recoverable under statute by:

- S 35A of the Supreme Court Act 1981 in the High Court (“s 35A”)
- S 69 of the County Courts Act 1984 in the county court (“s 69”)
- S 3 of the Law Reform (Miscellaneous Provisions) Act 1934 for courts of record other than the High Court and the county court, eg the Court of Appeal (Civil Division) when it gives judgment.
- S 57(1)(b) of the Bills of Exchange Act 1882 on dishonoured bills of exchange from presentment if bill is payable on demand and, otherwise, on maturity.
- SS 86 to 92 of the Taxes Management Act 1970 on overdue taxes
- Art 14 of the Solicitors (Non Contentious Business) Remuneration Order 1994 on unpaid solicitors’ bills for non-contentious work, including paid

disbursements and VAT, but the rate cannot exceed the judgment debt rate, ie 8% per annum.

- S 49 of the Arbitration Act 1996, which gives the tribunal power to award simple or compound interest “from such dates, at such rates and with such rests as it considers meets the justice of the case”.
- Late Payment of Commercial Debts (Interest) Act 1998 (“the 1998 Act”).

17. Under ss 35A and 69:

- An award of interest is discretionary (“there may be included”), but an award of interest on a personal injury award above £200 is mandatory “unless the court is satisfied that there are special reasons to the contrary”.
- Interest “may be included in any sum for which judgment is given”, which is any type of judgment ie default judgment, judgment on admissions, summary judgment
- Interest may be awarded “on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment”, but no statutory interest is recoverable where a debt is paid late, but before issue of proceedings.
- Statutory interest is simple, not compound
- Rate of interest is “at such rate as the court thinks fit or as rules of court provide” and may be calculated at different rates for different periods
- Period of interest runs “for all or any part of the period between the date that the cause of action arose” and the date of payment or the date of judgment.
- Statutory interest will not be paid when interest already runs under contract.

18. Ss 35A and 69 differ in that:

- S 35A(5) states that rules of court may provide for a rate of interest by reference to the rate specified in s 17 of the Judgments Act 1838 as that

section has effect from time to time or by reference to a rate for which any other enactment provides. There is no such provision in s 69.

- S 69(8) provides that in determining whether the amount of any debt or damages exceeds that prescribed by or under any enactment, no account shall be taken of any interest payable by virtue of s 69 except where express provision to the contrary is made by or under that or any other enactment.

19. The general purpose of the 1998 Act is to provide for a high rate of interest to run on commercial debts which are not paid on time: ***Ruttle Plant Hire Ltd v Secretary of State for Environment, Food & Rural Affairs [2009] EWCA Civ 97.***

- It applies to a contract for the supply of goods and services, where each party is acting in the course of business
- It creates an implied term that a qualifying debt carries simple interest.
- The interest rate is 8% over the official dealing rate, but this may be remitted in whole or in part in the interests of justice because of the supplier's conduct.
- The parties cannot oust or vary the right to statutory interest, unless the contract contains a "substantial remedy" for late payment of the debt and, if it does, statutory interest does not run unless the parties agree.

THE COURT'S DISCRETION AS TO RATE AND PERIOD

20. In ***B.P. Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783***, Robert Goff J

- at page 845G expressed the "fundamental principle is that interest is not awarded as a punishment, but simply because the plaintiff has been deprived of the use of the money which was due to him"
- at page 846C stated that "interest will generally run from the date of accrual of the cause of action in respect of money then due or loss which then accrues; and in respect of loss which accrues at a date between accrual of the cause of action and judgment, from such date."

- at page 846E stated that “the power to award interest is discretionary, and there is certainly no rule that interest will invariably run from the date of loss. It is no part of my task to attempt to define the circumstances in which the court will depart from the fundamental principle; indeed, since the discretion to award interest is unfettered, it would be improper to do so.”
- at page 847D stated that “the mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will generally not preclude such an award”.

21. He identified three groups of cases where the court may depart from the fundamental principle:

- Position of the defendant ie lack of knowledge of claimant’s claim, in which case interest may run from date of claim.
- Conduct of the claimant ie unreasonable delay in prosecuting the claim, which may lull a defendant into a false sense of security
- Unjust in all the circumstances ie more just to award interest from a later date.

22. In ***Birkett v Hayes [1982] 1 WLR 816***, Watkins LJ said at page 825E:

“Far too often there is unjustifiable delay in bringing an action to trial. It is, in my view, wrong that interest should run during a time which can properly be called unjustifiable delay after the date of the writ. During that time the plaintiff will have been kept out of the sum awarded to him by his own fault. The fact that the defendants have had the use of the sum during that time is no good reason for excusing that fault and allowing interest to run during that time.”

23. In ***Derby Resources AG v Blue Corinth Marine Co Ltd (No 2) (The “Athenian Harmony”)*** [1998] 2 Lloyd’s Rep 425, Colman J said at page 427:

“In cases where delay and the degree of fault are so substantial that the predominant cause of the plaintiff being out of his money can be seen to be his own failure to prosecute the claim, rather than the defendant’s maintenance of his defence, it is not difficult to see that the

policy should be that a successful plaintiff should not be compensated for the loss of use of the money. However, in order for it to be said that the plaintiff's fault has displaced the defendant's fault as the predominant cause of the plaintiff being kept out of his money, the delay in question would have to be very substantial and not merely relatively short periods of weeks or months during which in commercial litigation lulls in activity inevitably occur and the plaintiff's fault would have to be very substantial, as where an action has inexcusably been allowed to go to sleep for years."

24. In ***Claymore Services Ltd v Nautilus Properties Ltd [2007] BLR 452*** Jackson J in the TCC derived three propositions from a review of authorities:

- Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest.
- In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable when, after making due allowances for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.
- When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay.

25. He held that:

- Interest in a building case for a quantum meruit in restitution where there was no contract between the owner and the builder should run the date when the sum due was ascertainable, even if in theory the cause of action arose earlier.
- The sum due was ascertainable when the builder had delivered his final account and the owner had had a reasonable opportunity to assess it, which on the facts of the case was three months.

- The interest rate under s 17 of the Judgments Act 1838 (set at 8% per annum since April 1993) is not an appropriate rate in a commercial dispute, but is fixed for the benefit of unpaid judgment creditors.
- Interest should be paid at 2% above base rate being the minimum rate that the claimant would have to have paid to borrow the same amount as the debt.

26. The current, historically low base rate at 0.5% makes the 8% rate under s 17 of the Judgments Act 1838 even more uncommercial. **Claymore** was decided on 20.3.07 when the Bank of England base rate was 5.25%. Therefore, 8% per annum was 2.75% above base rate. Now 8% is 7.5% above base rate. This should provide very strong ammunition for those acting for a judgment debtor to ask for a much lower rate when assessing interest to judgment date. From judgment date, the 8% rate is fixed by statutory instrument.

THE CPR

27. CPR rule 16.4(1)(b) and (2) require the claimant to state in the particulars of claim (or counterclaim) that he is seeking interest and to state whether he is claiming it under

- a contract
- an enactment and if so which or
- some other basis and if so which

If the claim is for a specified amount of money, the claimant must state:

- the percentage rate at which interest is claimed
- the date from which it is claimed
- the date to which it is calculated, not later than the date of issue of the claim form
- total amount of interest claimed to the date of calculation

- the daily rate of interest at which interest accrues after the date of calculation

28. In ***Greer v Alstons Engineering Sales and Services Ltd [2003] UKPC 46***, it was said at paragraph 15:

“The same practice prevails in Trinidad and Tobago as in England: neither a claim for interest nor the facts and matters relied on in support of such a claim need be pleaded.”

This seems to mean that any deficiency in pleading interest, as per the CPR, does not prevent a court from awarding interest.

29. Under rule 36.14, where judgment obtained against a defendant is at least as advantageous to the claimant as proposals contained in an offer made by a claimant, the court will, unless it considers it unjust to do so, order that the claimant is entitled to interest on the whole or part of any sum of money (excluding interest) at a rate not exceeding 10% above base rate set by the Bank of England for some or all of the period starting with the last date for accepting the offer. The court cannot award interest under 36.14 and interest on any other basis that exceeds 10% above base rate.

30. Under rule 44.3(6)(g), the court may order a party to pay interest on costs from or until a certain date, including a date before judgment. Under rule 36.14, enhanced interest at a rate not exceeding 10% above base rate may be awarded on the claimant’s costs.

31. Paragraphs 4.6(4) and (5) of the Practice Direction – Pre Action Conduct give the court power to impose sanctions, where there has, in the opinion of the court, been non-compliance with the PD:

- depriving a claimant of interest on all or part of the sum recovered and/or to award interest at a lower rate than would otherwise have been awarded and
- awarding interest against a defendant up to 10% above base rate.

In ***Biguzzi v Rank Leisure plc [1999] 1 WLR 1926***, Lord Woolf MR referred to the then equivalent sanctions, with other sanctions, as producing a more just result than striking out a claim or a defence for procedural default.

CALCULATING INTEREST AT COURT

32. Don't forget your calculator! The base rates for the last 10 years and the special account rates since 1st January 1980 are set out in note 7.0.17 of the 2009 White Book.

33. It is a good idea to come to court ready with calculations based on:

- any contractual rate;
- 8% per annum, if you are acting for a claimant;
- 1 to 4 % above base rate.

34. Interest is compounded by adding unpaid interest to the principal sum periodically (rests) and charging interest on both principal and interest. The rests can be annual, half yearly, quarterly etc. .

CONCLUSION

35. In the light of ***Sempra***, the common law has now changed. In ***F J Chalke Ltd v The Commissioners of Her Majesty's Revenue & Customs [2009] EWHC 952 (Ch)***, Henderson J said at paragraph 71:

“It is now clear, following ***Sempra***, that a claim for interest may be maintained even after the principal sum has been repaid, whether the interest is claimed as damages for late payment of the principal sum by way of restitution for loss of use of the money.”

36. Historically, the Court leant against awarding compound interest and limited compound interest to restricted cases in equity and to cases where it was a matter of practice and custom. The situation has changed. In ***Man Nutzfahrzeuge AG v Freightliner Ltd [2005] EWHC 2347 (Comm)***, Moore-Bick LJ said at para 321:

“There has been an increasing willingness to recognise that an award of simple interest does not fully compensate the injured party for the loss caused by being kept out of his money, nor does it adequately reflect the benefit to the wrongdoer of having had the use of it. As a result it has become routine for arbitrators to award compound interest in the exercise of their powers under s 49(3) of the Arbitration Act 1996.”

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