

# INTEREST

by

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## Introduction

1. In February 2004 the Law Commission published its report 'Pre-Judgment Interest on Debts and Damages'<sup>1</sup>. At paragraph 1.14 it said:

*'Our review suggests that, by and large, lawyers pay scant regard to interest. Interest payments are often the last issue to be negotiated. It is common for solicitors and barristers to reach for a convenient sum, applying whatever rate they used last time.'*

2. Even if the Law Commission was right about lawyers in 2004, times are tougher in 2008. In that context it might be expected that lawyers will pay, or be expected to pay, or be under pressure to pay, more than "scant regard" to interest.
3. This note<sup>2</sup> accompanies a 20 minute talk which (a) suggests a number of potential opportunities to apply the law on interest to your clients' advantage and (b) identifies issues that are likely to be key in interest disputes in any event. There is no attempt here to provide a basic overall survey of the law on interest: I do however provide a list of some useful sources at the end.
4. Opportunities and issues are considered under four headings:
  - Interest awards in judgments
  - Interest on judgments
  - Interest on costs
  - Interest in arbitrations

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<sup>1</sup> Law Com No 287.

<sup>2</sup> This is a slightly amended version of the note that was distributed to those who attended the Training Day.

## Interest awards in judgments

5. Four topics considered:
  - The exercise of discretion under s. 35A of the Supreme Court Act 1981 ('SCA 1981') and s. 69 of the County Courts Act 1984 ('CCA 1984')
  - Sanctions under CPR Part 36 or for failure to comply with pre-action protocols
  - High rates under The Late Payment of Commercial Debts (Interest) Act 1998
  - Compound interest

### The exercise of discretion under SCA 1981 and CCA 1984

6. Under SCA 1981 and CCA 1984 the court in principle has discretion as to (a) whether to award interest at all, (b) the period of interest and (c) the rate of interest. In practice the rate of interest provides the likely focus of possible argument.
7. It is often said that in practical terms the starting point for the interest rate in most classes of case is the Judgments Act 1838 rate (which has been 8% since 1 April 1993).<sup>3</sup> This is the rate that applies to judgment debts (on which more later). It is undoubtedly often used as a pre-judgment interest rate in the County Courts.
8. However:
  - The overriding principle underlying the court's exercise of its discretion is that the interest awarded should be compensation for being kept out of money: *Wentworth v Wiltshire County Council* [1993] QB 654. A flat rate of 8% does not sit well with that overriding principle.
  - The Court of Appeal has said that (*Reed Executive plc v Reed Business Information Ltd* [2004] 4 All ER 942 at [7]):

*'The judgment rate is purely artificial. I can see no reason for an artificial rate being imposed by the court save in those cases where it must, ie where there has been a judgment for a sum.'*
  - Therefore, away from the context of default judgments, the small claims track and summary judgments, the use of 8% is readily challenged.

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<sup>3</sup> See the evidence at Appendix C of the Law Commission Report referred to above and also Blackstone's Civil Practice 2009 at 62.21

9. The preferred approach has been summarised as follows (*Tate & Lyle Food and Distribution v Greater London Council* [1982] 1 WLR 149 at 154B-F, applied in *Jaura v Ahmed* [2002] EWCA Civ 210 at [20]):

*'I would think it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or particular attribute) could borrow money as a guide to the appropriate interest rate.'*

10. Where the court has taken this approach it has awarded 'base rate + 1%' to large businesses and 'base rate + 3%' to small businesses, though in any given case it is always possible to put in general evidence about borrowing costs for a particular type of party and there is no reason in principle why more than 'base rate + 3%' should not be awarded.
11. Against a background of a base rate that is now at 4.50% and has from August 2006 to November 2008 ranged between 4.50% and 5.75%, the following conclusions can be drawn:
- Often it will be in a claimant's best interest to seek the award of interest at the Judgments Act 1838 rate, though such an approach can be challenged.
  - If a claimant does seek such a rate, the defendant should pause to consider the nature of the claimant and the period over which interest might run before challenging that approach. If borrowing costs for the claimant would be likely to be high, it is possible that the claimant would stand to benefit from an approach based on 'base rate + X%'.
  - With the change of base rate down to 3.00% on 6 November 2008, a defendant should be particularly aware of the possibility of usefully challenging an interest claim based on 8%.
12. Looking further ahead, it is possible that arguments about rates will become less common in the future: on 16 September 2008 the Government responded to the Law Commission Report referred to above, and accepted the proposal that there should be a specified rate that would be used as a reference rate for awards under the SCA 1981 and CCA 1984. How long implementation of this accepted proposal will take is unclear. In any event, the Government also accepted the proposal that the courts should have discretion to use a different rate where there is good reason to do so, so it is possible that the effect of this change will be limited.

### Interest sanctions

13. **Part 36.** Under CPR 36.14(3)(a), broadly speaking, where a judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 Offer, 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) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the offer expired. For an example where 10% was applied (under the predecessor of CPR 36.14 in the old Part 36: CPR 36.21) see *All in One Design & Build Limited v Motcomb Estates* (2000) 144 SJLB 219.

14. This award of sanction interest is subject to a cap under CPR 36.14(5): 'where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate'. There may be an issue what is meant by the award of interest 'under any other power' in this context.
15. **Pre-action protocols.** Paragraph 2.3(4) of the Practice Direction – Protocols provides:

*'If in the opinion of the court, non-compliance [with the relevant approved protocol] has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the orders the court may make include:*

...

*(4) if the party at fault is a defendant and an order for the payment of damages or some specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10 per cent above base rate (cf. r. 36.21(2)), than the rate at which interest would otherwise have been awarded.'*

#### The Late Payment of Commercial Debts (Interest) Act 1998 ('the 1998 Act')

16. In certain circumstances the 1998 Act provides a means by which a claimant can claim interest on a contractual debt at the high rate of 'base rate + 8%'.
17. The conditions that need to be satisfied are that:
  - the debt arises by virtue of an obligation under a contract for the supply of goods or services (which is not a consumer credit agreement or a contract intended to operate by way of mortgage, pledge, charge or other security); and
  - the purchaser and supplier under the contract are each acting in the course of a business (which for these purposes includes a profession and the activities of any government department or local or public authority).
18. Though the 1998 Act operates by inserting an implied term into the relevant contract, there is also a discretionary element under section 5: interest under the 1998 Act can be remitted in whole or part where the interests of justice require it. Some guidance has now been provided on the exercise of this discretion in *Banham Marshalls Services Unlimited v Lincolnshire County*

*Council* [2007] EWHC 402 at [66] to [73], where the court said that relevant factors included (a) whether the non-payment was casual/feckless, (b) the strength of the defences and (c) whether the claimant was slow to bring proceedings.

19. So in claims for commercial contractual debts:
- claimants should consider whether the 1998 Act applies;
  - if it does, defendants should look to section 5 of the 1998 Act to minimise its impact.

### Compound interest

20. The interest discussed so far has all been simple interest.
21. In cases where there is prospect of interest running over a number of years and the sums involved are large, claimants should consider whether there is a means of arguing for compound interest.
22. **Contractual interest.** In the context of contractual interest this might be achieved through careful construction of the relevant term. In *Whitbread v UCB Corporate Services* [2000] 3 EGLR 60:
- The relevant words were “A capital sum of £160,000 together with interest thereon to date of payment”.
  - At first instance it was found that this wording referred to simple interest, on the basis that “thereon” referred to the capital sum, and compound interest would result in the contractual interest biting on sums other than the capital.
  - This was reversed on appeal: the word “thereon” was neutral since compound interest on a given sum was still a form of interest on that sum, and in the particular commercial context it was clear that compound interest was intended.
23. **Interest as damages.** More generally, there is the possibility of claiming interest as *damages*. The House of Lords has confirmed in *Sempra Metals v IRC* [2008] AC 561<sup>4</sup> that there are no special rules relating to the proof of interest loss. Generally, given the approach taken to interest calculation by lenders or account providers, interest loss will have been incurred on a compound basis. The crucial point to note is that if it is intended to claim for interest loss then the loss must be proved: ‘the common law does not assume that delay in payment of a debt will of itself cause damage’: *Sempra Metals* at [96]. For an illustration of this latter principle in action see *Brandeis v Western Transport Ltd* [1981] QB 864.

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<sup>4</sup> A case primarily concerned with restitutionary claims for interest, though the speeches contain lengthy discussion of the general law of interest.

24. **Equitable jurisdiction.** There is a well-established equitable jurisdiction for the award of compound interest in cases of breach of fiduciary duty. *Sempra Metals* may have affected the scope of the equitable jurisdiction but that issue goes beyond what can be covered in this note.
25. **Compound coded as simple.** Even in the case of an interest award under SCA 1981 or CCA 1984 it can be argued that the choice of interest rate should be influenced by the fact that the statutory interest is calculated on a simple basis only.

### Interest on judgments

26. If the judgment is for a contract debt, and the contract expressly provides for the contract rate to apply post-judgment, then it will do so. There is a division of opinion as to whether that contractual interest can be included within the judgment, or whether it would be for the creditor to bring a second claim to recover the contractual post-judgment interest.
27. Under s. 17 of the Judgments Act 1838 (as amended) and CPR 40.8 a High Court judgment carries interest at 8% from the date on which the judgment is given, unless a rule or practice direction provides otherwise or the court orders otherwise.
28. Under s. 74 of the County Courts Act 1984 an order may be made that county court judgments carry interest at such rate and for such periods as rules may prescribe. The relevant rules are in the County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184) ('the 1991 Order').<sup>5</sup> Under the 1991 Order, interest will generally run on county court judgments at 8% from the date at which judgment is given. The crucial exceptions (there are others) are that interest does not run on:
  - a judgment of less than £5,000 to which the 1998 Act does not apply;
  - a judgment given in proceedings to recover money due under an agreement regulated by the Consumer Credit Act 1994; or
  - a judgment including a possession order for a landlord or mortgagee in relation to a dwelling house.
29. It should be emphasised that the interest runs from the date that the judgment is given, not the date on which it is entered or the date by which the amount awarded is ordered to be paid.
30. County court judgment creditors should note that the judgment debt ceases to carry interest from the moment at which enforcement proceedings are brought (unless those proceedings fail to produce any payment): the 1991 Order Art.4.

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<sup>5</sup> I pass over the issue of how the 1991 Order sits together with CPR 40.8.

## Interest on costs

31. The basics re interest on costs are as follows:

- The key point is that an order for costs is part of the judgment. This means that the judgment debt law set out above applies and interest at 8% runs on costs from the date of the order, not from the date at which costs are assessed.
- Where costs are deemed to have been ordered under CPR 44.12(1) – in particular where a claim has been struck out for non-payment of fees, a Part 36 Offer has been accepted, or a claimant discontinues – judgment debt interest will run from the date of the event giving rise to the entitlement: CPR 44.12(2).
- Where a Part 36 Offer is not accepted there are also potential ramifications for interest on costs:
  - Where a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer, the court will, unless it considers it unjust to do so, and broadly speaking, order that the defendant is entitled to interest on those costs to which he is entitled from the date on which the offer expired: CPR 36.14(2).
  - Where a claimant obtains a judgment at least as advantageous as the proposals contained in a claimant's Part 36 offer, the court will, unless it considers it unjust to do so, and broadly speaking, order that the claimant have his costs assessed on the indemnity basis from the date on which the offer expired and interest on those costs at a rate not exceeding 10% above base rate: CPR 36.14(3).

32. In addition to the above, however, significant potential (usually for those awarded costs) is provided by CPR 44.3(6)(g), which provides that:

*'(6) The orders which the court may make under this rule include an order that a party must pay-*

*...*

*(g) interest on costs from or until a certain date, including a date before judgment.'*

33. The courts have interpreted this rule as providing a standalone rule for awarding interest at an appropriate rate on costs incurred (and paid) pre-judgment, rather than as providing the ability to shift the date from which judgment interest runs. There are not yet settled guidelines as to how the court goes about exercising its discretion as to interest on costs under CPR 44.3(6)(g). The cases show a range of approaches:

- In *Amoco (UK) Exploration Co v British American Offshore Ltd (No 2)* [2002] BLR 135, QBD (Comm Ct), Langley J said at [9]-[10]:

*‘The jurisdiction to award interest on costs before judgment derives from and originated with CPR 44.3(6)(g). There is almost no authority on how it should be exercised. I have been referred to the decision of Ferris J in Sir Elton John and others v Price Waterhouse and others (Unreported 12 July 2001) at paragraphs 36 to 41. Ferris J at paragraph 40 considered that the fact that the costs involved are large did not carry very great weight. In that case the relevant sum seems to have been about £3m.*

*‘For my part I think it may well be appropriate, at least in substantial proceedings involving commercial interests of significant importance both in balance sheet and reputational terms, that the court should award interest on costs under the rule where substantial sums have inevitably been expended perhaps a year or more before an award of costs is made and interest begins to run on it under the general rule [ie under CPR 40.8]. In this case I have seen a schedule of BAO’s costs which totals in excess of £16m (exclusive of VAT). I have no difficulty in accepting that costs of such an order have had to be financed and paid over a substantial period of time. Moreover ... I would consider it appropriate in principle to award interest upon such costs from payment to judgment...’*

*[The judge then refused to award interest on costs because of the late application and because the party was pursuing compensation for “loss of invested capital” by a separate court action.]*

- In *Amec Process and Energy Ltd v Stork Engineers and Contractors BB (No 3)* [2002] All ER(D) 48 (Apr) QBD (TCC) the judge agreed with the principle outlined in *Amoco* and went on:

*‘The fairest way of awarding costs is to adopt a broad brush and award interest on the whole of the costs but for half of the period of the litigation, namely for 2 years of the 4-year period from November 1997 to November 2001 [the month of judgment]. From the date of judgment, statutory interest will run under the Judgments Act. Thus, interest will be awarded at a composite rate of 6% on the totality of the award of costs, including the interim payment sum of £3m, for 24 months culminating on 22 November 2001. Thereafter, judgment rate interest will run on the sum of costs until payment of that component part of the costs.’*

- In *Bim Kemi AB v Blackburn Chemicals Limited* [2003] EWCA Civ 889 at para 18(c) it was said that:

*‘It is clear from CPR 44.3(6)(g) that the rules intended that the court should have power to award interest on costs... In any event in principle there seems no reason why the court should not do so where a party has had to put up money paying its solicitors and been out of the use of that money in the meanwhile. It furthermore seems to use that Mr Wilson is right that there is no reason why Blackburn should not have interest at the judgment rate as from 30 January 2002, that being the date of the order of the trial judge. That must be so in our*

*view because if the judge had made the order which we now hold the should have made in Blackburn's favour, interest would have been payable at the judgment rate from the date of that order down to the date of payment – see Hunt v R M Douglas (Roofing) [1990] 1 AC 398. That leaves the question of interest on costs incurred prior to that date. It seems to us that once again, 1% over base rate is the appropriate rate of interest, that interest to run from the date of each invoice.'*

- In *Douglas v Hello* [2004] EWHC 63 (Ch) at [24] the judge said that:

*'In Bim, it was ordered that the award of interest should run as from the date or dates of solicitors' invoices but, in principle, it seems to me that the more appropriate dates, when one is seeking to measure the extent to which a party has been out of pocket, would be the dates on which invoices were actually paid. As to when such interest should stop, it seems to me that the appropriate time would be when interest on costs is replaced by judgment interest. In my judgment, it is right, in the light of Bim and of the rule, to award the Claimants interest on assessed costs but that the computation will need to reflect both that of each sum found to be within assessed costs on the standard basis only 75% will be payable and that interest is not to run on any sum unless and until it had been paid. The rate is to be base rate from time to time plus 1 ½ %. If the parties cannot agree a computation the issue will need to be restored to me.'*

- In *Lloyd v Svenby* [2006] EWHC 576 (QB) the judge said:

*'I see no reason why I should not follow the guidance of the Court of Appeal in Bim Kemi AB v Blackburn Chemical [2003] EWCA Civ 889 at [18(c)]. Mr Lloyd must pay interest at 1 per cent over base rate from the date of payment by Mr Svenby of each of his solicitors' bills on 80 per cent of the amount so paid'.*

- In *Seventh Earl of Malmesbury v Strutt & Parker* [2008] EWHC 616 (QB), a professional negligence claim against a firm advising in connection with leasing of land to Birmingham International Airport, the judge made an order that interest should run on the costs to be assessed at 2.5% over base rate from the midway point of the actual cost expenditure.
- All of the above cases involved orders made in substantive judgments. *Powell v Herefordshire Health Authority* [2002] EWCA Civ 1786 was a rather different case. In this case judgment was entered by consent for damages to be assessed with costs in June 1994. Not until June 2001 was the issue of quantum resolved. At the costs hearing in July 2002 the master considered as a preliminary issue the date from which interest on the costs should run and regarded himself as having to choose between June 1994 and June 2001. It was found by the Court of Appeal that the *costs judge* had discretion under CPR 44.3(6)(g) to look at the dates when the costs had been incurred, and come to a conclusion which fitted the justice of the circumstances of the particular case.

## Arbitrations

34. Arbitrators have power to award interest under s. 49 of the Arbitration Act 1996, which provides:

*'(1) The parties are free to agree on the powers of the tribunal as regards the award of interest*

*(2) Unless otherwise agreed by the parties the following provisions apply.*

*(3) The tribunal may award simple or compound interest from such dates, at such rates and which such rests as it considers meets the justice of the case*

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*(a) On the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;*

*(b) On the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.*

*(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any awards as to costs).*

*(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.*

*(6) The above provisions do not affect any other power of the tribunal to award interest.'*

35. Three comments:

- In contradistinction to the power of the Court under SCA 1981 or CCA 1984, arbitrators have statutory power to award compound interest.
- In contradistinction to interest on Court judgments, interest does not run on arbitral awards as a matter of course. If the claimant wants it, it has to ask for it (and even then it might not get it): *Walker v Rome* [1999] 2 All ER (Comm) 961.
- It is a hot topic<sup>6</sup> whether arbitrators have power under this section to award interest on determinations of open market rents under rent review clauses, and if they do, whether they ought to exercise such power.
  - The arbitrator will have such power only if the rent payable under a lease following a determination on a rent review is properly described as “an amount payable in consequence of a declaratory award”. It can be argued that it is not properly so described since the arbitrator merely declares the open market rent for the purposes of the rent review clause, and does not make any declaration of payability as such.

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<sup>6</sup> See the article by Jonathan Karas QC ‘Interest: an alternative argument?’ in the Wilberforce Chambers publication *Hot Topics in Property Law: A Surveyor’s Guide*, on which the points made here are based.

- Even if the arbitrator does have such power under the 1996 Act, there is a strong argument that the discretion should not be exercised in relation to leases entered into prior to the 1996 Act, when the parties could not have contemplated that the arbitrator would have such power in the absence of agreement.

## **Conclusion and useful sources**

36. This note has explored a number of issues relevant to arguments on interest.
37. The note has not attempted to provide a survey of relevant law. Here is a list of useful sources:
  - CPR and White Book 2008:
    - General commentary on interest at 7.0.9 to 7.0.24
    - CPR 12.6 and commentary: interest in default judgments
    - CPR 36.14 and commentary: interest impacts of Part 36 offers
    - CPR 40.8 and commentary: interest on judgments
    - CPR 44.3 and commentary at 44.3.14: interest on costs
    - CPR 44.12 and commentary: deemed cost orders
    - CPR 47.8 & 47.14 and commentary: interest sanctions on the receiving party in the context of detailed assessment proceedings
    - C1-002: Practice Direction – Protocols para 2.3
  - *Blackstone's Civil Practice 2009* Chapter 62
  - *O'Hare & Browne on Civil Litigation* 13<sup>th</sup> Ed 2007 Chapter 3
  - *Cook on Costs 2008* Chapter 18
  - 'Pre-Judgment Interest on Debts and Damages' (Law Com No 287)
  - Government response to Law Commission Report, 16 September 2008<sup>7</sup>
  - *Hot Topics in Property Law: A Surveyor's Guide*, Wilberforce Chambers 2008

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<sup>7</sup> Available at <http://www.justice.gov.uk/publications/pre-judgment-interest.htm>