Of Some Interest: the discretionary power to award interest on damages

INTRODUCTION

Arguments about interest on damages can be a ritual war dance. Claimants reflexively base their calculations on judgement rate of 8%, defendants on Base rate + 1 or 2%. There is a body of authority in support of each approach but the caselaw needs to be read in its proper context.

This note reviews the applicable principles and some of the key authorities.

A: THE GUIDING PRINCIPLES

Interest on damages up to the date of judgment and interest which accrues on a judgment debt are conceptually distinct.

Taking the two in reverse order, interest on a judgment debt accrues at the fixed rate of 8%. This is the effect of section 17 of the Judgments Act 1838, as amended by the Judgment Debts (Rate of Interest) Order 1993. The rate was changed several times between 1971 and 1993. It fluctuated between the original 4% and a high of 15%. Notably, it was in each case within +/- 2% of Base rate when it came into force. It might be thought ripe for further review.

For almost a century after the 1838 Act, the courts could only award pre-judgment interest in limited circumstances. The Law Reform (Miscellaneous Provisions) Act 1934 gave them more comprehensive powers. The current law is to be found in section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984. Each empowers the court to award simple interest on damages between the date on which the cause of action accrued and the date of judgment.

Under these provisions, it is within the discretion of the court whether to award interest, at what rate and for what period. Three things flow from this. First, it means that there can be no certainty as to what the court will do. Secondly, it leaves the parties free to argue about what it should do. Thirdly, it is likely to make it hard to appeal against whatever it does do.

The classical statement of principle was made by Robert Goff J (as he then was) in *BP Exploration v Hunt (No 2)* [1979]1 WLR 783. He explained 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*".

The idea that punishment will play no part in it now needs qualification. The power to award interest at up to 10% above Base is part of the toolkit which the CPR provides to the court to sanction defendants which it thinks have acted unreasonably. The obverse is that the court can decline to award interest or award it at a reduced rate if it disapproves of the claimant's conduct.

Nevertheless, the basic principle remains unchanged. In *Carrasco v Johnson* [2018] EWCA Civ 87, the Court of Appeal distilled the following propositions from the authorities:

a. Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.

b. This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

c. In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

d. In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.

e. Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.

B: THE CASE FOR BASE RATE +

For over half a century the courts have awarded interest at Base + 1% in the appropriate case. This was the rate adopted in *FMC v Fairfield Cold Storage* [1971] 2 Lloyd's and in *BP Exploration* a few years later. By the time that Webster J gave judgment in *Shearson Lehman Hutton v Maclaine Watson* (No 2) [1990] 1 Lloyd's Rep 441, he was able to refer to an established practice of the Commercial Court to award interest at this rate.

In *Baker v Black Sea and Baltic Insurance* [1996] LRLR 353, Otton LJ described it as a presumption which can be displaced if substantially unfair to either party. In cases such as *Jaura v Ahmed* [2002] EWCA Civ 210, it was displaced to reflect what was thought to be the real cost of borrowing to small businessmen. In that case, Base + 3% was adopted instead. In the aftermath of the Credit Crunch, the Commercial Court Guide indicated that Base + 1% should no longer be seen as a presumption. It does not follow that it will never be appropriate.

The Base + approach might have originated in the Commercial Court but has long been followed elsewhere. In *Claymore Services v Nautilus Properties* [2007] BLR 452, the TCC agreed that judgment rate was not appropriate in a commercial dispute. It adopted Base + 2% based on the notional cost of borrowing. It used the same rate in *Persimmon Homes v Hall Aggregates* [2012] EWHC 2429. In *Sycamore Bidco v Breslin* (No 3) [2013] EWHC 174 (Ch), the Chancery Division opted for rates of 2.5% and 3% above Base for different periods. In the more recent case of *MetalNRG v BritENERGY* [2022] EWHC 2531 (Ch), Deputy Insolvency and Companies Court Judge Kyriakides accepted that the claimant was unlikely to be a first-class borrower and settled on 2% above Base.

Nor has this approach been confined to commercial cases. A slightly more generous rate has sometimes been used where the claimants are private individuals. See, for example, *Challinor v Juliet Bellis* [2013] EWHC 347 (Ch) (Base + 3%) and *Attrill v Dresdner Kleinwort* [2013] EWCA Civ 394 (Base + 5%). In *Carrasco*, the Court of Appeal dismissed an appeal against a decision to award a flat rate of 3%, which equated to 2.5% above Base for most of the relevant period.

There is force in the reservations which Warren J expressed in *Reinhard v Ondra* [2015] EWHC 2943 (Ch) about whether it is right to compensate an individual by reference to a notional borrowing rate. In that case, the Claimant urged upon him to award Base + 5% in reliance on *Dresdner Kleinwort*, the defendant to prefer Base + 1% in line with the former presumption. He split the difference and awarded Base +3%. It is apparent from observations which he made in his judgment that he considered *Dresdner Kleinwort* to be an outlier.

The appropriate award might depend on the nature of the claimant's case. Where the whole basis of it is that he would have left his money in the bank in a counterfactual world, it would surely be unjust to reward him with interest in excess of anything a bank might have offered.

Various NPPM Purchasers v 174 Law v Key Manchester [2022] EWHC 4 (Ch) was a claim by individual investors in a failed buyer-funded development against the Seller's solicitor for alleged breach of stakeholder agreements. The defendant in turn made a contribution claim against the Buyers' solicitor, for whom we acted. The action was brought in the Business and Property Courts in Manchester. The Judge indicated that, if he had found for the claimants, he would likely have adopted what he described as *"the usual course of awarding a modest, commercial rate of interest, of between 1% and 2%, representing the historically low rates of interest applicable over the relevant period, to reflect the fact that the claimants had been kept out of their money".* This was *obiter* but shows that the practice is still seen as orthodox, even where the claimants are individuals.

C: THE CASE FOR JUDGMENT RATE

There is no obvious reason of principle why judgment rate should apply to pre-judgment interest. Yet there is again a line of authority stretching back decades to support the practice of awarding it.

It is tempting to dismiss the older authorities as outdated, but as recently as seven years ago in *Perry v Raleys* [2017] EWCA Civ 314, the Appellant's Counsel felt able to submit that the preponderance of authority favoured judgment rate in professional negligence claims against solicitors and surveyors. He relied on four cases in support of this.

Pinnock v Wilkins (1990) *The Times* 29 January was a case about a botched personal injury claim. The defendant contended for the Special Account rate which has application in personal injury claims, The claimant pressed for judgment rate. It should be borne in mind that Base rate at the time of the judgment was 15%, identical to judgment rate. The Special Account rate was lower.

The Judge adopted the flawed reasoning, which has resurfaced in a recent case, that judgment rate was appropriate because the claimant would have had judgment earlier but for the defendant's negligence. This presupposes that, not only would judgment have been given for the claimant in a counterfactual world, but also that the defendant would have failed to satisfy it. The Court of Appeal was divided. Ralph Gibson LJ concluded that the Special Account rate was more appropriate and would have allowed the appeal on that point. The majority agreed with the Judge.

Watts v Morrow [1991] 1 WLR 1421, a year later, involved a negligent survey report. Ralph Gibson LJ again gave the first judgment in the Court of Appeal. This time, he was unwilling to interfere with the Judge's award of interest at judgment rate. In a concurring judgment, Bingham LJ (as he then was) expressed the view that there was much to be said for applying a rate which reflected the value of money over time rather than a flat rate. But he held that *Pinnock* precluded any challenge to the exercise by the Judge of his discretion. Sir Stephen Brown P also concurred. By the date of this judgment, Base rate had fallen to 11%. Judgment rate remained at 15%.

In *Credit Lyonnais v Russell Jones & Walker* [2002]2 EGLR 65, the solicitor neglected to advise about a condition precedent for service of a break notice in a lease. Base rate was 4% by the time that the case was heard. The claimant sought interest at judgment rate of 8%. The defendant contended for 6%. Laddie J was dismissive of arguments that 8% was excessive. He observed that judgment rate was *"not intended to be accurate in all circumstances, but provides a normal rate that is likely to do rough justice in most cases".*

In can be seen in each of the three cases that the use of judgment rate led to an outcome broadly in line with the Base + approach, although at the upper end of the scale in the latter two.

Hamilton-Jones v David & Snape [2004] 1 WLR 924 arose from family proceedings. The negligence of the wife's solicitors allowed the husband to whisk the children out of the country. The decision on interest cuts both ways. Neuberger J (as he then was) awarded interest at 2% on general damages and at judgment rate on special damages.

In *Perry v Raleys* itself, Gloster LJ (with whom McFarlane LJ and Sir Stephen Tomlinson agreed) held that judgment rate was appropriate both because it more adequately compensated the claimant for being kept out of his money than the Special Account rate and because the defendant had acted unreasonably in doggedly defending the case. The defendant would go on to be vindicated in the Supreme Court.

By the date of the Court of Appeal's judgment, Base rate had been 5% or under for going on a decade; it had been below 1% for eight years and stood at just 0.25%. Against this backdrop, it would be artificial to maintain that an award of interest at judgment rate did no more than compensate the claimant for being kept out of his money. It would not even be the rough justice spoken of by Laddie J. It would make instructing a negligent professional a sound investment.

The decision is best rationalised as an example of the court using an enhanced interest rate as a sanction against what it considered an unreasonable defendant. There is no reason why judgment rate should invariably be chosen on this basis. It might be any rate up to 10% above Base. At first instance in *Chedington Events v Brake* [2023] EWHC 2804, the Judge accepted the argument that judgment rate was appropriate because the claimant would have obtained judgment earlier if it had not been for the defendants' lies. But as outlined above in connection with *Pinnock*, the reasoning does not withstand scrutiny.

D: THE CASE FOR A RETHINK

It should not be forgotten that Base rate has ticked relentlessly upwards since the low of 0.10% in March 2020. It currently stands at 5.25%. As a snapshot, Base +2% would be in touch with judgment rate; Base + 3% would exceed it. If the trend continues, learning accumulated over the extended period of low interest rates might need to be revisited. The courts might conclude that a fresh approach is called for. This remains to be seen.

E: CONCLUSIONS

It is a matter for the court's discretion whether to award interest, at what rate and for what period. The main aim is to compensate the claimant for being kept out of its money. The courts have historically sought to give effect to this in two ways. The first is by reference to judgment rate, the second by adding a premium to Base rate, or what is described in this note as the Base + approach.

Over time, judgment rate became unmoored from commercial interest rates. In the extended period in which Base rate flatlined at around at 2% or less, it was artificial to say that it did no more than compensate the claimant. Judgment rate might have been easier to justify where an element of sanction was deemed appropriate.

It was long a rebuttable presumption in the Commercial Court that interest would be awarded at Base + 1%. It has been downgraded from a presumption but will still have application in the appropriate case. Base + 2 or 3% will perhaps have wider application. There might be an argument for a higher rate in the exceptional case. The Base + approach has long been adopted outside the Commercial Court and beyond commercial cases. It is likely that it will continue to find favour. It remains to be seen whether the recent return of high interest rates will continue and whether it will prompt a rethink if it does.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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