Losing interest

Andrew Hogan highlights how PI lawyers are losing out on interest payments

On 27 May 2019, the County Court (Interest on Judgment Debts)(Amendment) Order 2019 came into force in order to remedy the problem noted by the Court of Appeal in *Simcoe v Jacuzzi UK Plc Group* [2012] EWCA Civ 137: namely that rule 40.8 CPR was arguably ultra vires and ineffective in the County Court. As the Explanatory Memorandum to the Regulations notes: 'The Ministry of Justice publicly committed to clarifying the position following the highlighting by the *Simcoe* case of the mismatch between CPR rule 40.8 and the 1991 Order. The effect of the mismatch has been that the County Court, operating under the provisions of the 1991 Order, cannot backdate interest (from the date of judgment or determination of the amount of the judgment, to an earlier date).

'This can mean that the unsuccessful party benefits from only having to pay interest from the date of judgment (or determination of the amount of judgment) and the successful party incurs a corresponding detriment, compared to the position had the proceedings been in the High Court.'

EXERCISING DISCRETION

Since the regulations came into force, there can be no doubt that both the County Court and the High Court have a co-equal jurisdiction as an exercise of the court's discretion to award prejudgment interest on costs incurred before the making of a costs order. But that then begs the question, in what circumstances should that discretion be exercised in favour of a receiving party in a personal injury case? The court has two relevant powers in the Civil Procedure Rules. Rule 40.8 CPR provides as follows:

'(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless –

'(a) a rule in another Part or a practice direction makes different provision; or

'(b) the court orders otherwise.

'(2) The court may order that interest shall begin to run from a date before the date that judgment is given.'

It will be noted that rule 40.8 CPR deals with interest payable under the Judgments Act 1838: under rule 40.8 CPR, the court can alter the date from which interest runs, but on a simple reading of the wording of the rule, not the percentage amount. As costs judges routinely calculate and award interest on costs (or more accurately allow the parties to do it for them), rule 40.8 CPR is uniformly interpreted as being applicable to judgments given at trial and quantifications of costs on assessment

Rule 44.2 CPR provides as follows:

'(1) The court has discretion as to –

'(a) whether costs are payable by one party to another;

'(b) the amount of those costs; and

'(c) when they are to be paid…

'(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.'

Rule 44.2(6)(g) is more opaque in its construction: noting that it is in rule 44.2 CPR (the making of a costs order) rather than 44.4 CPR (the assessment of costs), there might be thought to be a real issue as to whether it was intended to apply to awards of interest at detailed assessments. However, in the case of *Powell v Herefordshire Health Authority* [2002] EWCA Civ 1786, the predecessor rule was found by the Court of Appeal to apply to awards of interest quantified at detailed assessments. Moreover, it is engrained in law that the interest awarded under 44.2(6)(g) is not Judgment Act interest, but interest which is compensatory in nature.

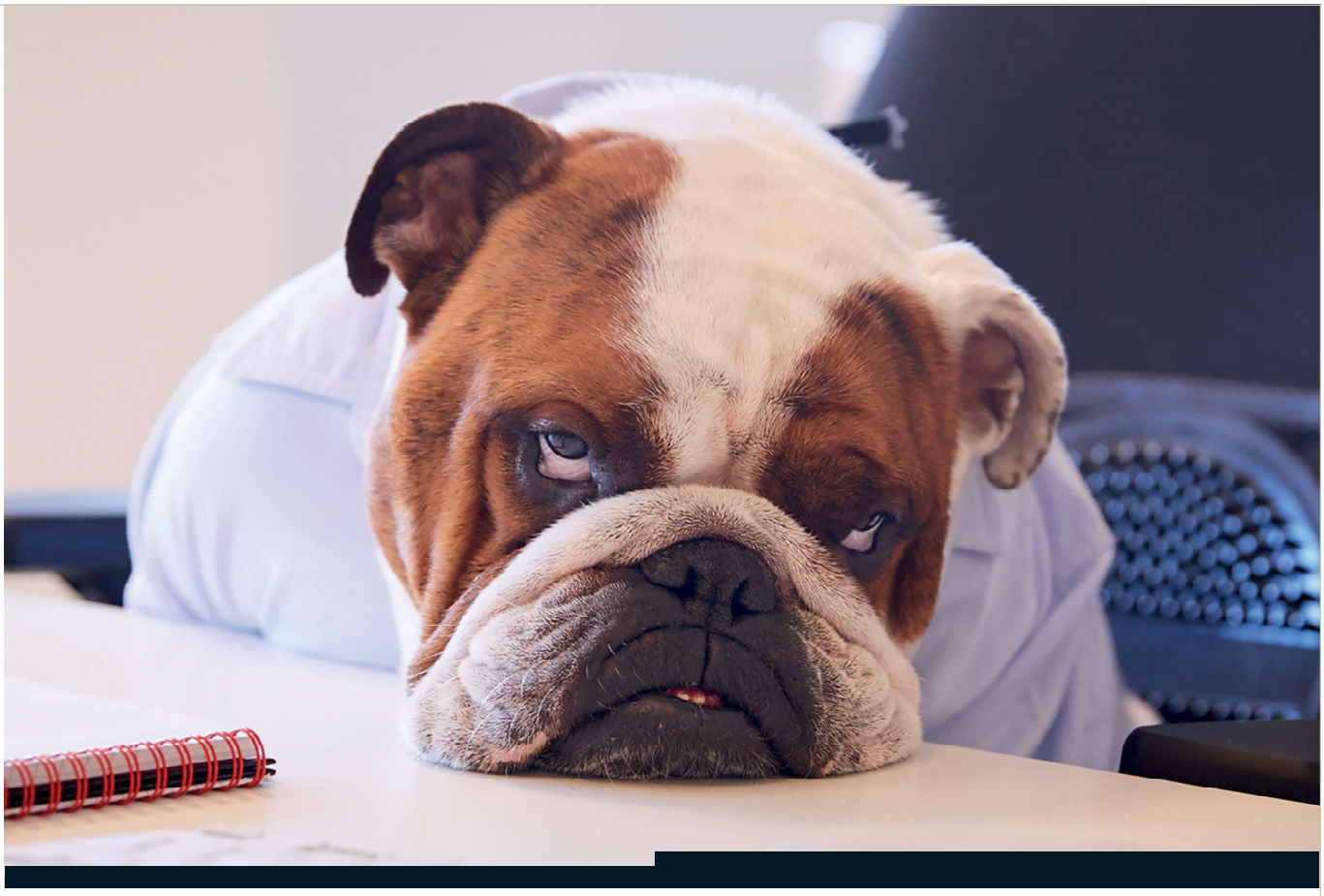
> It is something of a surprise that in not one, but two decisions of Masters in the Senior Courts Costs Office this year, the court has declined to make an award of interest in relation to costs incurred through disbursement funding loans

As noted in *Jones v Secretary of State for the Department of Energy and Climate Change* [2014] EWCA Civ 363: 'The purpose of such an award is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. The relevant principles do not materially differ from those applicable to the award of interest on damages under section 35 A of the Senior Courts Act 1981.

'The discretion conferred by the rule in respect of pre-judgment interest is not fettered by the statutory rate of interest, under the Judgments Act 1838, but is at large. Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving parties. This normally involves an assessment of what is reasonable having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake.

In commercial cases, the rate of interest is usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a 'rule of thumb' by adducing evidence, and the rate charged to a recipient who has actually borrowed money may be relevant but is not determinative. See *F & C Alternative Investments Ltd v Barthelemy (No 3) CA* [2013] 1 WLR at paragraphs 98, 99 and 102 to 105; *Bim Kemi AB v Blackburn Chemicals Ltd* [2003] EWCA Civ 889 at 18 and for example, *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm).'

The court's general approach to allowing interest on costs, where a



party has expended money through borrowing money, is exemplified by *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674, where the court noted: 'Since the payment of solicitors' costs involves the payment of money which could otherwise have been profitably employed, the overwhelming likelihood is that justice requires some recompense to be made in the form of interest.

'If the receiving party has financed the costs from his own money or from money that he has borrowed at interest, the case for his receiving interest on his costs, at least from some date, is likely to be overwhelming.

'The position might be different if the finance had been advanced entirely voluntarily, interest free, from a sympathetic relative or institution, as Akenhead J contemplated in *Fosse Motor Engineers Ltd v Conde Nast and National Magazine Distributors Ltd* [2008] EWHC 2527 QB, or conceivably from a lender which mistakenly failed to call for interest.

'In some cases it may be necessary to examine the underlying financial arrangements.'

SCCO DECISIONS

Given the above, it is something of a surprise that in not one, but two decisions of Masters in the Senior Courts Costs Office this year, the court has declined to make an award of interest in relation to costs incurred through disbursement funding loans assumed by claimants in personal injury claims, where they have been charged and had to pay interest.

In the first of these cases, *Nosworthy v Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust* (Master Brown 30 April 2020), the claimant and receiving party sought a sum of £235 in interest, due to taking out a funding loan to pay for an expert report at 15%. In practical terms, there would have seemed to have been no impediment to allowing interest from the date of the inception of the loan at, perhaps, 4% above base rate – as adopted in the *Jones* case. Although the rate charged to the claimant was 15%, it has long been the case that interest awards under this rule are made on the basis of a class of litigant, rather than the particular litigant, and with the interests of the paying party in mind. But the court refused to do so, the Master ruling:

'19. I am not satisfied that the Court in *Jones* intended to set a general rule that an award of interest on costs should be made in respect of the period before judgment.

'That such an award should be made in that case had been conceded

Continued on page 8

Continued from page 7

before Swift J at first instance. The only issue before the Court of Appeal was the narrow one set out above.

'It is clear, moreover that not only did Dingemans take the view that such an award was not the general rule in ordinary litigation, he also took the view that it was undesirable that there should be such a general rule.

'At the risk of stating the obvious, in large commercial claims, or multi party actions, it is much more likely to be proportionate for the court to undertake the sort of enquiry into interest which is anticipated by this claim. In a case such as this one, self evidently it is not.'

In the later case *Marbrow v Sharpes Garden Services Limited* (Master Gordon-Saker 10 July 2020), a claim for interest incurred of £2,484 as either an item of costs or through the device of an award of pre-costs order interest:

'33. *Jones* was a rather different case to the present: a group action in which the disbursements came to a total in excess of £787,500.

'The present case is a straightforward personal injury claim. No evidence of the claimant's means has been produced, but for present purposes, I am happy to accept, on my reading of the papers, that it is unlikely that the claimant would have had the means to fund disbursements other than by a loan.

'That is almost certainly the case for the vast majority of claimants in personal injury actions. Yet the incipitur rule remains the default position and parliament did not choose, when enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2013, to make specific provision for the funding of disbursements; whether by enabling the recovery of funding costs or by creating a default entitlement to pre-judgment interest.

'34. In my view, justice does not require a departure from the general rule in this case, and the claimant should be entitled only to interest from the date of the costs order. The higher rate of interest under the Judgment Act should go some way to compensating the claimant for the interest that he is liable to pay for funding the disbursements.'

Given that these cases inevitably involve injured claimants who will usually be of modest means, and who probably need the money more than the average party in a commercial case, the reasoning in both these judgments might be said to be demonstrably flawed.

In the first case, the difficulties of calculating an award of interest on the facts of that case, were nonexistent. The date when the liability was assumed, and the amount of the interest liability, could readily have been used to support an award of interest – albeit at one potentially far less than 15%.

In the second case, the Master was clearly correct that an interest charge is not an item of costs, but it is the refusal to award prejudgment interest that is flawed: again, the reliance on the incipitur rule as a factor predicating not awarding pre-judgment interest, misses the point that in any other case where prejudgment interest is awarded, the incipitur rule will necessarily apply too. Rather than there having to be a reason why such interest should be awarded, the correct test is whether the loan liability having been established, there were reasons not to make an award of pre-judgment interest.

INTEREST PAYMENTS

Solicitors who undertake PI work are missing out, by standing the costs of disbursements without charging their clients interest on them which should be capable of being recovered – at least in part – from paying parties

SUMS AT STAKE

I have long thought that solicitors who undertake personal injury work are missing out, by standing the costs of disbursements without charging their clients interest on them which should be capable of being recovered – at least in part – from paying parties.

It may also be the case that if solicitors are charging clients success fees, in part because of the delay in payment, or because of the arrangements about paying disbursements, that these too may ground an award of pre-judgment interest.

But the two cases considered above stand out as being the sort of first instance decision that demonstrates conventional wisdom, but that should be challenged robustly in an appellate court.

The amounts in any individual case may be small, but this is a systemic point that could result in large sums in aggregate moving from compensators to victims.

Andrew Hogan practices from Kings Chambers in Manchester Leeds and Birmingham. His blog can be found at www.costsbarrister.co.uk