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Harrington Scott Ltd v. Coupe Bradbury Solicitors Ltd [2022] EWHC 2275 (Ch)

Nicholas Davidson KC

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Harrington Scott Ltd v. Coupe Bradbury Solicitors Ltd
[2022] EWHC 2275 (Ch)
- provoking thoughts on, and of, interest

The judgment discusses whether the Judgments Act rate of interest may be selected for pre-judgment interest awards under s.35A of the Senior Courts Act (or section 69 of the County Courts Act 1984), a selection which Nicholas Davidson K.C. suggests would usually be illogical and inappropriate.

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Perry v Raleys [2019] UKSC 5 [2020] A.C. 352 (a claim against solicitors) had a bumpy journey to the Supreme Court.

The trial Judge found for Raleys, and therefore did not have to deal with interest. The Court of Appeal reversed some findings of fact, and allowed the appeal [2017] EWCA Civ 314 [2017] P.N.L.R. no. 27 (p.641). That Court therefore did have to make an original decision about interest (i.e. was not reviewing a decision on the point of a Court below). The Supreme Court allowed the appeal from the Court of Appeal, and therefore did not have to deal with interest (and made no mention of it other than of the fact that an award of interest had been made: paragraph 7; there is no reference in the argument to interest).

The Court of Appeal's decision on interest was a discretionary one under s.69 of the County Courts Act 1984 (equivalent to s.35A of the Senior Courts Act 1981). The decision was distinctive: this was an original decision to award interest at a flat 8% p.a. simple, chosen for pre-interest judgment by referring to the rate for post-judgment interest, specified under s.17 of the Judgments Act 1832.

In the late 20th century the Court of Appeal had upheld a decision where a Court of first instance had made such an award: *Pinnock v Wilkins & Sons* (1990) (The Times 29 January 1990; [1990] 1 WLUK 651), a case which very much rewards study. The context was a solicitor's negligence in allowing a claim to become time-barred. The main argument for the successful claimant was that the judgment rate was the correct choice because the defendant, by his breach of duty, had deprived the claimant of the judgment which he would have had if his personal injury claim gone to judgment, and the claimant's receipt of (substantial) damages had been delayed for six years by the solicitor's error.

The Court of Appeal decision in *Perry v. Raleys* has just been mentioned by the High Court in *Harrington Scott Ltd v. Coupe Bradbury Solicitors Ltd* [2022] EWHC 2275 (Ch). Harrington Scott's entire claim was struck out, principally on the basis that the way in which the claim had been conducted was an abuse of process (paragraphs 236, 237, 277).

A section in the 283-paragraph judgment addressed an unusual, peripheral, application to strike out a claim for interest: the claimant had pleaded that, for an identified pre-judgment period, interest should be awarded at 8% p.a., and the defendants' motivation for attacking this was that the claim for that was allegedly made in terrorem as part of attempts to pressurise the defendants to settle. The Judge decided that he would not have struck out that particular claim if that issue had been free-standing. This section of the judgment (section 12(b), paragraphs 190-198) is thought-provoking.

Interest awards are always important to the parties, because they affect the “bottom line”. Occasionally they can be of critical importance, because the question whether a party has or has not done better than a Part 36 offer may turn on the interest award, vastly magnifying the financial impact of the decision on interest.

However much one may sympathise with any judicial regret at having to devote much time to “consequential matters”, it is dangerous and potentially seriously unfair to litigants if a Judge denies the parties adequate time for a point on interest to be presented and argued properly and determined with sufficient thought. Judges can be astute to use their powers under CPR 32.1 as to what evidence is required: much information is readily and cheaply available. Parties should be sensible, co-operative, and proportionate in addressing such issues, but Judges should recognise that the decision on an interest point is not one which should be treated more lightly than a decision on the substantive case.

The Judge's decision in *Harrington Scott Ltd v. Coupe Bradbury Ltd* that the claim to interest at 8% p.a. should not, when considered free-standing, be struck out was, on the authorities, correct. The Judge considered *Pinnock v. Wilkins and Sons*, and two later decisions discussing it. What he did not have to do was to consider what rate would actually be awarded if the claimant obtained a judgment.

The use of the Judgments Act rate for pre-judgment interest is divorced from the reality of interest rates charged or received, and the reason why judgments attract that rate is not normally present for pre-judgment interest. The key point, I suggest is, that if a claimant asks for that rate pre-judgment the claimant should be asked what is the justification for it, and will be hard put to provide justification. Thus (1) anyone who wants to argue for a discretionary award of pre-judgment interest at the Judgments Act rate should pause to think “What will I say if the Judge asks me why that rate is relevant?”; (2) any Judge faced with such a request should ask precisely that question; and (3) it is normally very difficult to see any persuasive answer to that question. (In *Head v Culver Heating Co Ltd* [2021] EWHC 1235 [2021] P.I.Q.R. P17 (page 397) (a personal injury case) Johnson J. saw no persuasive answer to it, and I suggest that the cases in which there is a persuasive answer will be rare.)

I acknowledge that my suggestion is contrary to an important sentence in the judgment of Nicholls L.J., for the majority, in *Pinnock v. Wilkins & Sons*: “There is nothing abnormal or special about [the Judgments Act] rate which requires special factors to justify its use.”, but, 32 years on from that judgment, the history of movements in interest rates and the fact that the Judgments Act rate has only changed once in the whole of that period show that contemporary conditions are different from those which existed in 1990, a point not referred to in *Perry v. Raleys*; and the complexities of the Part 36 régime (as opposed to the payment into Court option existing in 1990) have added a new dimension to the making of awards.

The Court of Appeal judgment in *Perry v. Raleys* considered why the Judgments Act rate might be relevant in a case, and why it was in fact selected. The judgment was unanimous, and two of the three members of the Court had been leading Judges in the Commercial Court, necessarily very experienced in interest matters.

The rates mentioned were (1) the Judgments Act rate (2) the Special Account rate (cf. The Court Funds Rules 2011). These were the rates mentioned in counsel’s submissions. (Among rates not mentioned were (3) base rate (4) the rate under the Late Payment of Commercial Debts (Interest) Act 1988).

The argument may have shaped the judgment: it appears possible that the decision was taken on the basis of a binary choice between the rival submissions.

The decision shows two elements.

The first is the opinion [paragraph 63] that if Mr Perry were only to be awarded simple interest thereafter at the special account rate - 6% until 31 January 2009, 3% from February to May 2009, 1.5% in June 2009 and 0.5% from 1 July 2009 until judgment – he would not be adequately compensated for the lack of the use of that money in the intervening period not least because of the erosion of the value of the fund due to inflation. (This factor was mentioned by the majority in *Pinnock v. Wilkins & Sons*, where the point was being made that the interest on money actually in the Court Funds special account is compounded twice a year, whereas under the Senior Courts and County Courts provisions what is awarded is simple interest.)

While no figures are given for inflation over that period, if one thinks in terms of compensation it is consistent with a compensatory approach to try to arrive at an interest award which is designed to ensure that the judgment sum, inclusive of interest, is sufficient to give the claimant an amount which (1) is at least equivalent to the “real” (i.e. inflation-adjusted) value of the sum which the claimant should have received at an earlier date and adds

(2) an appropriate amount to reflect the delay in receipt (C*ompare Pickett v. British Rail Engineering Ltd* [1980] A.C. 136.). One can see what the Court had in mind as an objective. The method of achieving that objective is not spelt out, probably because of the Court's second reason, which to this reader comes across as having dominated the decision and caused an award at 8% p.a. despite the fact that in the 8 years preceding the award Bank of England base rate had never exceeded 1% p.a.

That second reason is a withering criticism of Raleys' conduct of the proceedings [paragraph 68]. The fact that the criticism may seem entirely displaced by the reasoning and decision of the Supreme Court should not blind one to the Court of Appeal's point that if the defence of a case is conducted in a way which should be seriously criticised the Court may select a higher rate of interest than it otherwise might.

I suggest, however, that using interest to punish a defendant is not really desirable: indemnity costs are an important tool for such cases; further, Part 36 is quite a toolbox: see *Gosden v. Halliwell Landau* [2021] EWHC 159 (Comm) [2021] P.N.L.R. no. 14 (p.397) at paragraphs 53, 56, 57. One may add that it would be particularly hard if using interest as a penalty triggered a second penalty by affecting Part 36 consequences. Further, having consistency and predictability of interest awards is a boon to litigants and Judges dealing with "consequential matters" alike, tending to minimise the occasions of dispute.

There is much to be said about the Judgments Act rate, but I refer to only three matters.

First, the Judgments Act rate is rarely altered. Indeed, it was most recently altered 29 years ago - by The Judgment Debts (Rate of Interest) Order 1993, in force from 1 April 1993. According to Official Bank Rate History, on 1 April 1993 Bank of England Base Rate was 5.88% (that table only uses two decimal places, and rounds up from the actual 5.875), since when, by my addition, that rate has, to the date on which I am writing, changed some 69 times, the lowest rate being 0.1). The Judgment Debts rate is usually substantially higher than deposit rates. For a long time it has been substantially higher than secured personal borrowing rates. (The extraordinary rates now charged by banks for unsecured overdrafts (often well over 30% p.a.) are, however, far higher than the Judgment Debts rate.)

Awarding a flat rate which has not been altered in 29 years is, one might say, unlikely to reflect very well the situations of the parties, or insurers, who have had to run their affairs while rates have changed 69 times during those 29 years, during which base rate has peaked at 7.25 and troughed at 0.1.

Second, situations where the rate is prescribed by statute (as under the Judgments Act and the Late Payment of Commercial Debts (Interest) Act) are legally distinct from situations where the rate is left to the discretion of the Court. This suggests that seeking guidance from such rates is only likely to be helpful when there is a worthwhile analogy with the situation addressed by the statute.

Third, situations pre- and post-judgment are different in principle.

Post-judgment, there is no doubt about whether a judgment debt which is not the subject of a stay ought to be paid. A debtor who or which does not pay is a pest, and may cause damage to the creditor. An established debtor has simply no excuse for non-payment. The rate needs to be set at a level which incentivises the debtor to pay promptly and which, as far as possible, protects the creditor, to whom a delaying debtor is doing an established wrong. (*Head v Culver Heating Co Ltd* at paragraphs 80 and 86.)

Pre-judgment in a claim for damages, it is not established that the defendant is doing wrong by not paying. The defendant, who is not yet an established debtor, and will only become one when judgment is given, may or may not be behaving badly. The Court can, in the light of the judgment, assess what interest it is fair to both parties that the debtor ought to pay. This may vary according to the facts of the case. Awards by reference to (fluctuating) rates reflect economic reality, and the Courts know that the choice of margin above the selected reference rate is conveniently flexible. Choosing the Judgments Act rate does not reflect economic reality and is inflexible.

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