Interested in Damages?
Unravelling claims for “interest as damages” versus “interest on damages.”

In the recent case of Mortgage Express v Countrywide Surveyors Ltd (2016) the High Court reviewed the current state of the law relevant to claims for (i) interest as damages and (ii) interest on damages, and the circumstances in which each will be awarded in claims against professionals.

Interest as Damages

In Sempra Metals v IRC (2008) the House of Lords, in a landmark case about “interest as damages”, swept away the previous common law restrictions in this area recognising simple interest was an “imperfect way of measuring the time value” of money and held that compound interest could be the proper measure of the Claimant’s loss in both breach of contract and tortious claims, subject to the Claimant properly pleading and proving its actual loss, “…The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money…But an unparticularised and unproved claim simply for ‘damages’ will not suffice…Loss must be proved”.

If the Claimant fails to prove its interest as damages losses, the recovery available to it (subject to the Court’s discretion) will be simple interest under s.35A of the Senior Courts Act 1981.

Interest on Damages

Under s.35A of the Senior Courts Act 1981, the Court has a general discretion to award simple interest for “…all or any part of the period between the date when the cause of action arose and… the date of judgment”.

In lending cases, the s.35A rate commonly used in commercial cases (at least up until the new economic world of very low base rates arrived circa 2008) was LIBOR + 1% to reflect the cost to the Claimant of borrowing the loan monies in dispute from a third party prior to its lending the money on.
As regards the interest rate to be applied after judgment, s.17 of the Judgment Act 1838 currently sets the rate of interest at 8% from the date of judgment up until payment by the Defendant.

The Claim

The Lender, MEX, suffered loss when it advanced a total of £8.2m on 39 separate mortgage loans on the basis of inflated valuation figures. The Court, in an earlier decision, had held the surveyor liable in deceit in respect of those valuations. It was accepted that these were “no transaction” cases and the calculation of loss was agreed, except as regards the issue of interest.

MEX broadly claimed:

- **Interest as damages** on a compound basis to reflect the loss of opportunity to make an alternative loan (representing the amount it would have earned if it had lent the monies to other borrowers).
- In the alternative, MEX claimed simple **interest on damages** under s.35A of the Senior Courts Act 1981 at a rate of LIBOR plus 1% to reflect its own borrowing costs on the £8.2m.

(NB MEX did not claim the unpaid contractual interest owed by the defaulting borrowers for the life of the loans as Swingcastle Ltd v Gibson (1991) prevents this type of claim where it was held that otherwise this would, in effect, make the valuer the guarantor of the mortgage loan).

The difference in MEX’s claim for **interest as damages** and **interest on damages** was in excess of £1.5m.

The Evidence

To succeed in its claim for **interest as damages**, MEX had to prove that, but for the surveyor’s deceit, it would have lent monies profitably to other borrowers. In Swingcastle Ltd v Gibson (1991), the Court said that establishing such evidence was “likely to be a difficult task”.

MEX’s evidence in support of its contention was vague and imprecise and the Court held that MEX did not come within “measurable distance” of showing that it would have made the alternative loans. In fact, the scant evidence available showed that MEX was able to satisfy all of the demand for its mortgages at the relevant time and was, therefore, unaffected (in terms of alternative profitable lending) by the disputed loans. The claim for **interest as damages** failed and the Court awarded MEX s.35A interest plus 0.5% in the alternative.

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How far can these principles be applied?

The principles have wide ranging application. The issues arose here in the context of a surveyor claim, but will apply to claims against other professionals in “no transaction” type cases where the Claimant alleges that they have lost an opportunity to use funds for alternative purposes. Such claims include transaction due diligence claims against solicitors or accountants.

In principle, a Claimant is able to recover interest as damages on “no transaction” cases if they can produce cogent evidence that, had they not invested their money into investment “A” (on the basis of negligent advice) they would have invested into investment “B”. The Claimant will have to get over the usual hurdles of causation and remoteness, and demonstrate at least that (i) investment B was an available investment at the time is entered into investment “A”, (ii) it was eligible to invest in investment “B” and (iii) by virtue of investing in investment “A” it was unable to also invest in investment “B”. The Court will then, as in the present case, assess the evidence and whether interest as damages is appropriate.

Indeed, the principle can be extended to the Claimant seeking lost profit on alternative investment claims – as we frequently see with flawed financial advice claims against IFAs.

Conclusion

We frequently see “kitchen sink” type losses claimed against professionals including loss of alternative investment profits or substantial claims for compound interest. This case is a helpful reminder that in order for the Claimant to succeed on these often speculative claims, the Court will require properly pleaded particulars and clear evidence that an award of interest as damages or of loss of alternative profit is appropriate to compensate the Claimant – this is not an easy gateway for the Claimant to pass through.

In circumstances where the Claimant cannot provide the requisite evidence to succeed on a claim for interest as damages/loss of profit, the Court is still likely to award s.35A simple interest to reflect the Claimant’s own borrowing costs or loss of the opportunity to earn bank interest while it has been out of the money.

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