

# NWL Costs Update – February 2022

## Interest on Costs and Loans

### INTEREST ON DISBURSEMENT LOANS

#### **Gill v Barnsley Canister Company & Others** 15.11.2021

##### The Background

This was a noise induced hearing loss claimed which settled in January 2020 for £2,032.40. The Claimants Solicitors subsequently applied for assessment of their costs, and these were allowed (provisional paper assessment) at £8,204.60 including £4,074.60 for disbursements.

##### The Issue

The issue before the court was the Claimant's entitlement to recover disbursement loan interest the Claimant paid to fund her disbursements in the case. The interest was set at a commercial rate of 15.3% and at the time the bill was submitted the claim was £707.08.

##### The Arguments

The Claimant argued the Court had power to order interest on costs pursuant to CPR 44.2(6)(g) which provides that the Court can make an order that a party pay interest on costs from or until a certain date, including a date before the Judgement.

The Claimant relied on the case of **Secretary of State for the Department of Energy and Climate Change & Anor v Jones & Ors [2014] EWCA Civ 363**, in which it was stated by Sharp LJ, at paragraph 17:

*"The purpose of such an award under this provision 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"....."Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable to 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".*

The Claimant also relied upon the case of **Sharp & Ors v Blank & Ors [2020] EWHC Civ 933**, which referred to the decision in Jones and confirmed again the courts power to award interest under 44.2(6)(g).

The Defendant referred to earlier cases including **Hunt v RM Douglas Roofing [1987]** and **Motto v Trafigura [2011]** arguing that interest on a loan was part of the costs of funding the litigation and is not recoverable as costs.

The Judge was also referred to the very similar case of **Godfrey v Automotive Products Limited** in which Regional Costs Judge Baldwin decided that he did have the power to award interest under CPR 44.2(6) but declined to exercise the discretion to do so in the Claimants favour as he was not satisfied that it was what justice required.

##### The Decision

The Regional Costs Judge determined (as RCJ Baldwin had done), that he too had the power to make an award of interest under 44.2(6). The Judge stated:  
*"in order to be able to make that award, I think it would be wrong for this court to simply say, well, an award of*

*interest can be made, therefore this claimant entered into this agreement and incurred interest of 15.3% and that he fell within a class of litigant of modest means without there being some evidence to support that contention”.*

It was not right to assume that the Claimant was of modest means and that it was reasonable for him to have taken out a disbursement loan to fund the litigation. Some evidence would be needed that the Claimant couldn't fund the litigation without the loan, that it was the only loan he could take out and the rate charged was the only rate he could take out in the loan market available. The rate of 15.3% was 'very much on the high side'.

In all the circumstances the Judge felt (as had RCJ Baldwin) that on the evidence presented he was not persuaded to exercise discretion in favour of the Claimant and award interest

### Thoughts

So where do these cases leave us? It seems reasonably clear that the Courts do have power to award interest on disbursement funding loans. It is also clear that both the RCJ in this and the Godfrey case balked at awarding a figure of 15.3% based on assumptions alone.

The decision mentions better evidence about what was available (on the loan market) and whether the Claimant could afford to fund disbursements without a loan – does that mean wealthy claimants can't recover interest if they can afford to fund the disbursements or would they be entitled to claim lost savings interest on what they spent? It seems absent any cogent evidence of why a loan was needed, a brief summary of the Claimants finances and some analysis of funding loans and interest, an award is not going to be made.

## INTEREST ON COSTS (A RECAP)

### **Involnert Management Inc v Apilgrange Limited and Others [2015] EWHC 2834 (Comm)**

This case sets out some guidance on what interest can be recovered on costs.

A helpful summary is set out on page 73 of the SCCO Guide.

Summing up the summary - interest runs from the date of the costs order, the court has discretion to order it to run from a different date and case law suggests it should start from 3 months after the costs order (aligning with the period to commence assessment).

What you can take from this case is -

The Judgment Debt needs to be quantified.

House of Lords (Thomas v Bunn 1991) – interest runs from the date of the assessed damages, not the date of the order for damages to be assessed.

House of Lords (Hunt v Douglas 1990) – interest runs from the date of the costs order.

Six cases were cited in written submissions, covering arguments that the Court should postpone interest to the date of the detailed assessment, that it should be postponed for 6 months, allowing the claimant to prepare the large bill of costs (without imposing an injustice on the paying party), that a 4 month postponement was reasonable if substantial costs are claimed and £400,000 had been ordered as a payment on account, that the level of the interest rate is not a factor which affects the payment date and finally the size of the claim or proportionality can play a part.

It was decided that it may not be reasonable to expect a party liable to pay costs to pay interest until it is known what sums are being claimed. As a benchmark the court decided interest running from 3 months from the order gives some predictability. It should be noted the court has a wide discretion here – see CPR 40.8(1)(b) - interest runs from the date of the order unless the court orders otherwise.

### Thoughts

A payment on account of costs should be requested and ordered on settlement - see CPR 44.2(8). Once a costs order is made without a payment on account being ordered it might have to wait until you have applied for detailed assessment to secure one.

If possible, provide an outline or schedule of the costs to the paying party before the bill is prepared – it will assist with the arguments on when interest should run – on the basis the paying party can't then say it had no idea what the costs liability might be.

Remember interest can be significant. Judgment interest runs at 8% (possibly higher under Part 36) and can be the difference between winning or losing in respect of detailed assessment costs.

In summary always take an interest in interest!