The bottom line[1]

I have a question for you. What is the current short term interest rate in Argentina? It was 40% p.a. when I left England.

I have a second question for you. What, according to reports this week, was the highest short term interest rate in Argentina in 1990? 1389.88% p.a. [2]

This short talk is about numbers. I hope you will be persuaded that an advantage of an equitable claim is that the claimant may be enabled to obtain an award of interest more favourable than may be made in other types of claim; and that attention from the start to some of the less fashionable aspects of claims - interest and costs - can be very good for the bottom line.

At a pause in an arbitration years ago, in days when numbers were much smaller, a Swiss oil trader showed me a sheet of paper with just three lines written on it. Those lines showed his calculation of the result of some other arbitration in which he and his company had been involved.

The first line showed that his company had won US$24,000 inclusive of costs. The second, that it had cost $17,000 to win that. The third of course showed the $7,000 profit. "As long as that's a plus, I'm happy that I arbitrated", he said. Happily indeed, our day ended with a much bigger profit, but that page from his file showed me the simple client equation. The client equation for a winner can be expressed this way:

x – y = happiness

But that's too simple. We need at least to express it this way:

The client equation

x – y = happiness

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I have often looked at that question mark, which opens up a number of matters:

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[1]Nicholas Davidson Q.C., 4 New Square. For the Chancery Bar Association Shanghai conference May 2018

[2]Argentinian rate from 4 May 2018. According to Rathbones' weekly bulletin of 9 May this was not an unprecedented level for the benchmark interest rate - which Rathbones report has averaged 61.5% since 1979 and hit an all time high of 1389.88% in 1990

Recovered from opponent = *x*

This talk is not much concerned with the risk that the opponent does not pay. If the top line is nil the bottom line can't be better and is usually going to be awful.

Recovered from opponent: *x*

Paid to own lawyers: *y*

It is obvious that controlling that costs line is vital. Unfortunately methods of controlling that, such as fees dependent on outcome, themselves tend to be costly.

In any event, the equation tells us to look at this:

Recovered from opponent: *x*

Paid in costs: *y*

Is *(x-y)* positive or negative?

Here I have changed the wording so as to include not only what one has paid to one's own lawyers, but anything paid to the other side.

All this is obvious. Who has not had the experience of acting for a "winning" client who has won the case but had a negative financial return from it?

This talk is about an area in which English law is tricky, indeed uncertain. It is about the advantage gained by those who think at the start about matters which are dealt with by the Court after it has given its main decision on the claim - points which arise when the Court has to deal with the financial consequences of its main decision.

What is often seen as less obvious is the ability to influence the elements of the equation other than the headline one of winning or losing the substantive case. This talk highlights some aspects of that ability.

One's recovery from the opponent consists, if one wins, of the principal sum and interest to the date of the judgment.

Interest can be a big money item, even if one is not concerned with an Argentinian rate of 40% p.a. The laws of the English-speaking world have struggled with it. As a

result, so have the Courts. I was amazed to discover that as recently as 1989 it was considered necessary to legislate to make it clear that agreements for compound interest are enforceable in New York.[3]

One of the big issues is whether, in cases where there is no express provision for it by agreement between the parties, compound interest can be awarded, the conclusion in litigation frequently being that it cannot.

There are variations on an observation, alleged but not proved to have been made by Einstein, to the effect that compound interest is the most powerful force in the world. One version I like is

> "Compound interest is the eighth wonder of the world. He who understands it, earns it ... he who doesn't ... pays it."

That version does not translate very well into English law. It is generally true that a borrower will have to pay compound interest. It is generally true that a lender or depositor will receive compound interest. The person who stipulates for it in his contract will probably get it. But too often someone seeking a money judgment is denied the benefit of compounding. Equitable claims afford an opportunity for it. Something of which I am convinced is that one should address the question of interest early in a case. It is usually dealt with as a consequential matter after the main judgment has been given, but if one wants a good result, particularly compound interest, one should be careful to identify the basis of the interest claim, consider what evidence is needed to justify it and to support it, and set out the basis of the claim in the statement of case.

What I have just said is thinking about interest before judgment. Of course at the end of the day the equation will take in another element: interest on judgment debt

Interest on the judgment debt may well give rise to similar problems but be the subject of different technicalities, which should be anticipated as far as one can.

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[3]General Obligations Law paragraph 5-527(1)

Much of this talk is about interest. But there is that other element: costs. Obviously two things stand out here. The first is how much your opponent will be required to pay in respect of your costs. That is an enormous subject. As a client all one can do is to ask at the start what rates it is expected that the opponent will be required to pay if one wins, and try to get one's lawyers to agree rates closer to rather than further away from those rates; and try to avoid steps which result in the opponent being spared the costs of a particular step or argument. The second is the risk of having to pay the opponent some costs, either on the way, which is painful, or because the Court or arbitrator thinks ill of some point one has taken.

Note that there may be interest on costs.

Last year I was struck by a paper on interest in arbitration[4], which indicated that there was much scope for improvement in claimants' claims for interest in arbitration, although my belief is that awards in arbitrations are often more realistic than in litigation. For historical reasons English law has not shown what many believe to be desirable flexibility. There have been numerous cases in our highest court, and in one of them a Judge explained why:

"... legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again."

That is the ground-breaking case of *Sempra Metals Ltd v. Inland Revenue Commissioners* [2007] UKHL 34 [2008] 1 A.C. 561 which had the effect of opening a wider range of cases to the possibility of obtaining compound interest. What we are seeing now is emphasis on the importance of such a claim being raised, if at all, in the statement of case at the outset, quite apart from the importance of actually proving the case for it.

As for the principle in equity, there is the most general of statements, tha:

"Interest ... on an equitable compensation order ... may be awarded on a compound

[4]Professor James Dow. See his section of The Guide to Damages in International Arbitration, 2nd edition

basis."

[Snell][5]

That is not only true of equitable compensation cases. It tends to be true of all cases where there is a financial remedy based on principles of equity, as opposed to the cases of claims based on simple debt or damages, where the law has struggled.

There are indications that the Courts are willing to move to be more ready to make awards that reflect the business realities:

The National Housing Trust v. Y.P. Seaton & Associates Co Ltd [2015] UKPC 43; [2016] B.L.R. 215

That in its way is a classic case, showing how the law needs to adapt to business realities. The actual conclusion was that Jamaica needed a change in its statute law if an arbitrator was to be empowered to do what he had in fact done, which was to award compound interest. That is a typical instance of the unsatisfactory inter-action of judge-made law and statute law which has bedevilled the question of interest for more than 200 years. It is worth noting that Lord Toulson, who took, as a minority of one, the view that the arbitrator had the necessary power, would evidently have been prepared to uphold an award of interest which was almost 9 times the amount of the principal awarded, but we will see in a moment a decision in which the Supreme Court was less happy with the idea of an award of a massive amount of compound interest.[6]

The subject is complicated both by the history of judge-made law and by statute. For arbitrations to which English or Scottish law applies the law should be simplified by

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[5]*Wallersteiner v Moir* [1975] Q.B. 373; *Alenco (Holdings) Ltd v. Bates* [2005] EWHC 1540 [2005] All E.R. (D) 211; *Rama v. Millar* [1996] 1 N.Z.L.R. 257. Equity assumes in such cases that the wrongdoer will have used the money profitably.

[6]Lord Toulson was Chairman of the Law Commission when it made its tremendously important report on interest, LC no. 287. It is a great resort. But its recommendations have not been implemented by Government. The Law Commission website still says, gloomily, that "This project reviews the system for awarding interest before judgment, which leads to widespread confusion and mistakes. Even when the rules are applied correctly, they bear little relationship to commercial reality."

the Arbitration Act 1996, and its Scottish equivalent in 2010 SLIDE.

These confer on arbitrators proceeding under them a simple discretion. To take the English provision, section 49 provides a discretion to make whatever award meets the justice of the case - whether that be compound or simple interest.[7]

There is a widespread view that, regardless of the nature of the claim, arbitrators operating under agreements which give them power to do so are willing to make compound interest awards, and if appropriate with rests at more frequent than yearly intervals.[8]

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[7](1)The parties are free to agree on the powers of the tribunal as regards the award of interest.

(2)Unless otherwise agreed by the parties the following provisions apply.

(3)The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—

(a)on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;

(b)on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4)The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5)References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6)The above provisions do not affect any other power of the tribunal to award interest.

[8]In London Arbitration 10/18, L.M.L.N. of 15 March 2018, the tribunal awarded interest from November 2007 at 6% p.a. compounded with quarterly rests, noting that from about

While mentioning statutes, another one is The Late Payment of Commercial Debts (Interest) Act 1998. This is another statutory intervention, well intentioned but which has in practice been a less powerful weapon for creditors than was intended. It yields to the competitive force of business counterparties who take their custom elsewhere if creditors are so rude as to insist on interest under the Act. But if one is in litigation it is a useful tool: Bank of England base rate + 800 basis points is a formidably high rate at the moment.

The case of the year has no doubt been*Littlewoods Ltd v HMRC* [2017] UKSC 70 [2017] 3 W.L.R. 1401. It is spectacular because of the period – more than 40 years - and the sums involved. It is a notable instance of the five-member Supreme Court committee disagreeing with the four judges who had heard the case at first instance and in the Court of Appeal.

Over the thirty-odd years 1973 to 2004 Littlewoods overpaid VAT under a mistake of law.

HMRC repaid Littlewoods £205m in respect of that VAT. HMRC also paid simple interest amounting to £268m. The case concerned Littlewoods' argument that what should have been paid was compound interest which, they said, would increase the interest payment by £1.25bn. Thus the principal was £205m; the interest was either to be £1,518m or £268m. Perhaps Einstein was right.

The critical decisions were, firstly, whether s.78 of the Value Added Tax Act 1994 as amended provided an exhaustive statement of the availability of interest, which was simple interest; secondly, if so, whether an award on that basis was consistent with the EU principle of effectiveness of remedy to be provided where a member State had obtained payments of tax inconsistently with EU law. HMRC won on both points. The Supreme Court considered that simple interest provided reasonable redress for the taxpayer having been out of its money. I doubt that this decision is going to impact on cases outside the specific field of claims for monies overpaid in respect of

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2009 London maritime arbitrators had generally awarded interest at 4.5 or 5 per cent compounded annually.

tax; Courts will continue to take the business view that when commercial organisations are out of money for a time they suffer measurable loss which can be measured in business terms, but the case will have done nothing to encourage Courts to be more sympathetic to claims based on compound interest.

Another very substantial case is *Kazakhstan Kagazy PLC v Zhunus* [2018] EWHC 369 (Comm). This is a very heavy case on foreign exchange points, and on related matters of interest. In relation to claims where there was not a contractual interest provision the Judge firstly applied a general commercial approach[9], noting that no claim for interest as special damages had been set out in the statements of case and evidently regarding that as a decisive, or near-decisive, factor.[10]

Secondly, submissions about interest made late in the day by the claimants' lawyers were not supported by evidence about borrowing rates; the Judge considered that they had needed to support the submissions with evidence, and operated on the basis that if claimants needed to put in some evidence about interest and did not do so they could not expect the Court to act on mere assertion.

Thirdly, in dealing with post-judgment interest on a foreign currency claim, which, to refer to yet another Act, falls under section 44A of the Administration of Justice Act 1970 (as amended), the Judge decided two things. As a matter of interpretation he considered that that section did not permit compound interest. As a matter of discretion he saw no reason to award for the post-judgment period a rate different from that which he had chosen for the pre-judgment period. That is a point to beware of. The general rate under the Judgments Act 1838 for cases not involving foreign currency is 8% p.a. At current prevailing interest rates that incentivises judgment debtors to pay. The Judge does not appear to have created a similar incentive for the foreign currency claim which he had decided.

Another case this year of which to beware is *Carrasco v Johnson* [2018] EWCA Civ 87. This is an influential case whose influence may not be benign. If acting for a claimant one may want to consider whether one can outflank it.

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[9]Paragraph 42

[10]Paragraphs 41 and 42

The Court of Appeal upheld an award to an individual at what it called a blended rate, somewhere between what the individual would have needed to pay if she had borrowed and what she would have got if she had placed money in deposit. Although there is the conundrum that some claimants have net cash and some net debt, the evidence in the particular case was that the claimant actually had to borrow because she was out of pocket. I am someone who finds this decision surprising. It is another case which would lead me to be careful to plead my case as to interest. But the considerable care of the claimant's counsel did not bring the claimant success on the point.

The niceties of thought and what they can do for your client are however illustrated by *Certain Underwriters at Lloyd's v Syrian Arab Republic* [2018] EWHC 385 (Comm).

This case is about enforcement in England of a judgment of the District of Columbia for US$51,574,997.89 plus post-judgment interest. Post-judgment interest was, on the evidence, running at 0.18% compounded annually and to the date of the start of the enforcement proceedings in England this amounted to US$310,715.68. The English Court, which acted under s.35A of the Senior Courts Act 1981, did two things. First, taking a cautious view, and unimpressed by the analogy with the Foreign Judgments (Reciprocal Enforcement) Act 1933 (section 2(6)), the award of interest here was on the principal sum only and not on the $310,715.68 of interest. Second, the Judge was persuaded not to apply the rate of 0.18%, or any similar rate, but to award interest at US Prime Rate, which on the evidence was 4.5%. This, of course, was simple interest, but in headline terms the rate was 23 times higher than the rate which the judgment was carrying in the United States. Well done the claimants for seeing a path to a very much higher rate of interest: $6,396.87 per day as opposed to $254.34 per day.

In commercial cases, the English Courts generally have regard to what it is supposed would have been the interest charged to a claimant with the general characteristics of the actual claimant to borrow money at short term rates for the period that it was denied its money by the opponent. *Jaura v. Ahmed* [2002] EWCA Civ 210 [2002] All ER (D) 289 appeared to many to mark an important step forward, because of the Court's explicit recognition that small businesses are often less well placed than large

to obtain favourable financial terms. The Court did not have as much evidence as it might have liked, but considered that the small business man should be awarded considerably more than a substantial corporation would have been, a rate 200 basis points higher. I was rather concerned by *Kitcatt v MMS UK Holdings Ltd* [2017] EWHC 786 (Comm) and was encouraged when the internet suggested that it was the subject of an appeal. My information from counsel in the case is that the interest decision is not in fact under appeal. My concern is this. The claimants were successful business people, and the Judge was concerned to find a rate appropriate to them, which would be less than that applicable to less well off people but more than that applicable so soundly financed corporations. The Judge said that it would be disproportionate to allow evidence to be served on the issue. That, I suggest, gives inadequate consideration to the importance of the subject. The claimants asked for 300 basis points more than the Judge decided to award. I calculate that the money difference that the higher award would have made would have been about £234,000. The conclusion which I have drawn from that, and another case in which I was myself involved, is that attempts to get in evidence at the so-called consequentials stage face an extra hazard of judicial reluctance. If one thinks the point matters, the modern position seems to be that one should invest in the evidence a little earlier, indeed possibly raising the matter for directions at CMC or PTR stage so that the opponent is deprived of the shield of saying “it comes too late, I am prejudiced, it is disproportionate”.

Note also that the Courts are not keen on evidence about the actual interest position of the claimant: they are interested in interest rates applicable to corporations or people with characteristics similar to those of the claimant. While one can see that there can be differences - for example, a corporation cannot realistically ask for a higher interest rate on the basis that banks thought that it was badly managed - getting the right evidence involves more than just referring to the rates actually paid by, or paid to, the particular claimant.

I said that in commercial cases, the English Courts generally have regard to what it is supposed would have been the interest charged to a claimant with the general characteristics of the actual claimant to borrow money at short term rates for the period that it was denied its money by the opponent. Can one do better than that?

What about enhancing the rate of interest?

An English experiment has been to give claimants in litigation the opportunity to gain extra interest by offering to accept a defined sum to settle the claim. To be effective this has to be done in a particular way, the procedure being known as Part 36.

If the defendant does not accept the offer, and there is then a trial, the claimants get extra benefits if they get a better result at trial than they offered to accept. One of the most important is enhanced interest up to 10% above base rate. And that is on offer on judgment and costs

In *OMV Petrom SA v Glencore International AG*[11] such an award was made. Glencore had to pay over $40m damages, and OMV had offered to accept less. Glencore, which had behaved particularly badly, was ordered to pay interest at 10% over base rate for the period after the offer date; and the same rate was applied to interest on costs. As I read the decision, this was 750 basis points more than would otherwise have been payable: and on $40million, that is a difference of $3 million p.a.

A less extreme case is *Triple Point Technology Inc v. PTT Public Company Ltd*[12] in which the loser's conduct, in contrast to that of Glencore, was perfectly normal. Pre-offer interest was at US Prime. The Judge settled on US Prime + 4 (400 basis points) as the enhanced rate. This ran from the date of the offer (21 June 2016) until the post-judgment hearing on costs and interest (4 October 2017), so the winner, who had a judgment for rather over $4million, gained more than $200,000 from the interest enhancement on the judgment, with more to come on the interest on costs. Note also that there is a curious bonus, on a sliding scale with a £75,000 maximum, to parties who use this rule successfully, so the winner got another £75,000: even before the extra interest on costs, the winner had gained more than $300,000.

This is a procedural rule for litigation, not arbitration. There have evidently been cases in which arbitrators have concluded that parties have behaved in a way

[11][2017] EWCA Civ 195 [2017] 1 W.L.R. 3465. This is the leading case on the interpretation and application of the current rule, but the facts were extreme.

[12][2018] EWHC 45 (TCC) [2018] 1 Costs l.O. 111

apparently adopting the Part 36 procedure to their arbitration. Without agreement or specifically applicable rules I cannot see how arbitrators can have power first to determine what interest should be paid and then to redetermine it in the light of information provided as to whether the winner had achieved a better result than it had offered to accept. My guess is that it is most unlikely that a situation will ever arise in which enhanced interest is actually awarded in arbitration, let alone that the bonus sum is awarded.

The points I make are simply these:

1) on big money claims, very big money is available from the Court by interest enhancement on the claim and the costs;

2) on all claims, the enhancement, if obtained, is intrinsically worthwhile and goes some way to compensate for the pain of litigating, and for the fact that one never recovers as much in respect of costs as one has actually spent;

3) as a matter of practical experience, claimants seem rather reluctant to use the procedure at the time when it offers the greatest potential gain, which is in the very early stage of claiming.

My core message from this talk is short: be interested in interest from the start of the claim; and beware of the costs.