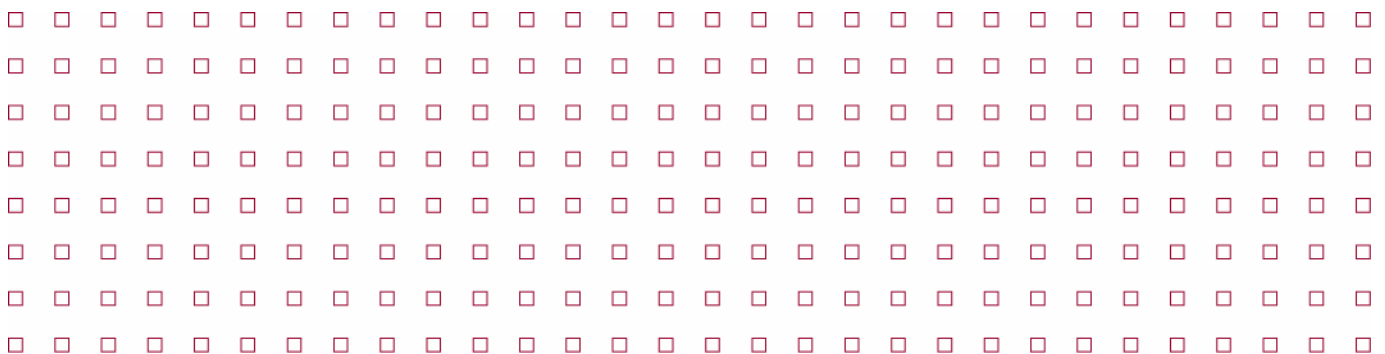




The Government's response to the Law Commission report:

**'Pre-judgment interest on debts
and damages'**

16 September 2008



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GOVERNMENT RESPONSE TO LAW COMMISSION'S REPORT ON PRE-JUDGMENT INTEREST ON DEBTS AND DAMAGES

Introduction

In February 2004, the Law Commission published a report (LC 287) on pre-judgment interest on debts and claims. The report made 25 separate recommendations for change, but the two main recommendations are shown below:

- (1) There should be a **specified rate** set each year at 1% above the Bank of England base rate.
- (2) The courts should have the power to award **compound** (rather than simple) interest in appropriate circumstances.

The Government response to the two main recommendations is set out below.

Setting a rate of interest

The Government agrees that the relevant legislation should be amended to give the Lord Chancellor power to prescribe a pre-judgment interest rate. This would provide greater certainty and rationality for the reasons given in the report. We also agree that it should be possible to set the rate by reference to the Bank of England base rate. This would ensure that the rate remained up-to-date without the need for frequent statutory instruments. (For the same reason, we think there is a case to amend section 17 of the Judgments Act 1838 so that the post-judgment rate can also be set by reference to the Bank rate.)

Compound interest

The Government understands the logic that led the Commission to recommend that it should be possible to award compound interest. We also note the decision of the House of Lords in the case of *Sempra Metals Limited v Her Majesty's Commissioners of Revenue and Customs* (2007) that compound interest is available in common law in appropriate cases as a restitutionary remedy. However, we do not think that the case has been made to introduce compound interest as the norm for the generality of larger cases as recommended in the report. This would be a major step that would require further consultation and a more detailed and quantified impact assessment than the Commission was able to provide. We also think that it would be necessary first to develop a readily accessible web-based programme to make the necessary calculations.

Given the arguments of principle, we think that the Lord Chancellor's order-making power should be cast widely enough to enable rates to be set on a compound basis in future. We think it should be for any such order, not rules of court, to prescribe the scope of compound interest (in terms of case value etc) and to deal with the issue of rests. But the Government has no plans to exercise the power to prescribe compound interest in the foreseeable future. This is because, especially given the recent case law, the issue does not command sufficient priority to justify the necessary work on impact assessment and IT development.

Responses to recommendations

Detailed responses to the 25 recommendations are shown below.

- 1. That section 35A of the Supreme Court Act 1981 and section 69 of the County Court Act 1984 should be amended to allow the Secretary of State for Constitutional Affairs [sc. Lord Chancellor] to set a specified rate.**

Accepted.

- 2. The rate should be set with reference to the Bank of England base rate. It should run from on a fixed date of the year (such as 1 April), and be set with reference to the base rate prevailing on a date in the previous two months (such as 15 February).**

We agree that the Lord Chancellor's power should be broad enough to allow the rate to be set by reference to some other rate. We think it likely to be set by reference to the Bank rate. But a final decision on that (and on whether the rate should be annual or track all changes in the Bank rate) will fall to be made when, following consultation, the Lord Chancellor exercises the new power.

- 3. The [Lord Chancellor] should have power to change the way the rate is set by secondary legislation.**

Accepted.

- 4. The courts should have discretion to depart from the rate where there is good reason to do so.**

Accepted.

- 5. The specified rate should be set at one percentage point over Bank of England base rate.**

Probably – but a final decision is for later (see recommendation 2).

- 6. The Civil Procedure Rules Committee (CPRC) should be given power to provide guidance to the courts on how to exercise their discretion on whether to depart from the specified rate.**

Any guidance should be given by practice direction rather than in rules. But it is in any event the practice of the senior judiciary to consult the CPRC before making civil practice directions.

- 7. The CPRC should have power to provide the courts with guidance on when to award compound interest.**

Rejected. The scope of any power to award compound interest should be prescribed in the Lord Chancellor's Order (see main response above) and guidance on any discretionary element would be for a practice direction (see recommendation 6).

- 8. The rules should draw a distinction between awards or settlements of less than £15,000 and those of £15,000 or more. For the former, there should be a rebuttable presumption that interest will be simple; for the latter there should be a rebuttable presumption that it will be compound.**

Rejected. See recommendation 7. Any decision on financial limits or presumptions should be prescribed by Order.

- 9. The rules should exclude compound interest on any debts or damages that have been outstanding for less than a year, unless the claimant can show exceptional reasons why interest should be compounded.**

Rejected. See recommendation 7 & 8.

- 10. Claimants should be entitled to forego interest under the Late Payments of Commercial Debts (Interest) Act and instead claim interest under the courts' general statutory powers.**

Accepted in principle, subject to further consultation in the course of preparing draft legislation.

- 11. Courts of record other than the High Court and County Court which do not have their own interest regime should possess the same powers to award interest as the High Court.**

Accepted in principle, subject to further consultation in the course of preparing draft legislation.

12. The Court Service [now Her Majesty's Court Service (HMCS)] should produce a computer programme to calculate compound interest and make it readily accessible on its website.

Accepted in principle, but there are no plans to take this forward.

13. [HMCS] should publish tables to allow the calculation of compound interest at the specified rate.

Rejected. We think an accessible computer programme is essential, making tables unnecessary.

14. Compound interest should be calculated using monthly rests.

This would be decided, following consultation, if an Order were made prescribing compound interest. Given a suitable IT system, daily rests, which would be more accurate and reflect general commercial practice, could be practicable.

15. The compounding interval should be set by rules of court. All interest under the new statutory regime would then be calculated in accordance with the prescribed interval.

Rejected. We provisionally agree that the interval should be fixed rather than discretionary, but this should be for any future Order following further consultation.

16. The courts should not be allowed to award compound interest for part of the period of the debt, and simple interest for the rest.

We provisionally agree, but this should be for any future Order following further consultation.

17. The 2% "interest rate" applying to non-pecuniary personal injury damages from the date of service of the claim should continue to be simple, rather than compound.

Accepted.

18. Past pecuniary losses should be subject to the general scheme for compound interest outlined in Part V of the report.

We agree past pecuniary damages should be covered by the proposed order-making power. Whether compound interest should apply is a matter for the future, although our provisional view is that it would not be appropriate, in particular given the issues around clinical negligence claims in respect of children discussed in the report.

19. [HMCS] prescribed computer programme should be able to calculate compound interest on losses that occur evenly over time. It should also be able to deal with compound interest on one or more discrete items of expenditure, arising at different dates.

Accepted. Please see recommendation 12.

20. (a) [HMCS] should consult practitioners on whether there is a demand for published tables to cover compound interest at the specified rate on continuing loss arising evenly over time.

(b) [HMCS] should also consider whether there is a demand for simple interest tables to track the specified rate in past years.

(a) Rejected. See recommendation 13. If there is a demand for such tables among practitioners, we believe the market should meet it.

(b) Accepted, assuming an IT solution is not pursued.

21. Civil Procedure Rule 36.21 [now 36.14] should be amended to express the maximum cap as a compound rate of 10% above base. The prohibition on awarding interest on interest should also be removed, so as to allow the courts to award compound interest if this seems appropriate.

Broadly accepted. If compound interest were introduced, it would be appropriate for Part 36 to reflect this. Our provisional view is that the appropriate amendment would be to allow the maximum enhanced rate to be compound in cases where compound interest was available, but otherwise simple.

22. The Rule Committee should consider: 1: amending rule 36.22(b). This would require that offers expressed as exclusive of interest should state the amount or amounts on which interest is offered, the rate or rates offered, the period or periods for which it is offered, and whether it was simple or compound; 2: establishing presumptions to apply to offers expressed as exclusive of interest which state that interest is offered but which do not specify whether it is simple or compound.

Superseded by the changes to Part 36 made in April 2007. All Part 36 offers are now deemed to be inclusive of interest.

23. The specified rate should apply to all judgments or payments made after the commencement date.

Provisionally agreed – but for final decision in due course – see recommendation 2.

24. In most types of case, compound interest should apply to any case where proceedings were issued after the commencement date.

We provisionally agree, but this should be for any future Order following further consultation.

25. The Lord Chancellor should have the power to make special provision for some classes of case, so that they are only subject to compound interest if the cause of action arose after the commencement day.

Accepted.

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