

RESOLUTION

The Newsletter of ARBICON ADR Ltd

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Interest pays dividend



We expect to pay interest on money borrowed and to receive it for money loaned. With the current record low interest rates the loss of interest on money paid late may seem relatively unimportant. This is not necessarily so.

The introduction of payment of interest for late payment into English Law has been a slow process. Payment of a sum later than provided by a contract is a breach of that contract and ordinarily damages would flow from that breach. However the position historically was that interest was not payable as general damages for a failure to pay a sum of money¹.

Courts and Arbitrators have been given power by statutory provision² to award interest on the principal sums they awarded, but this does not assist with regard to payments made late but before proceedings for their recovery were commenced.

Of course if there is provision specifically within the contract that interest will be paid for payment outside its agreed terms, then interest can properly be claimed as a term of the contract.

Provisions typically in the JCT forms of contract for reimbursement of "loss and expense" include for the reimbursement of the cost of financing as part of a loss and expense claim³. However, this merely allows for the reimbursement of interest paid or lost up to the time of the contractor's loss and expense application and, in effect, as damages. This does not allow for the recovery of financing costs thereafter, including an inordinate period from certification or late payment of certificate. It is also limited to matters for which loss and expense can be claimed under the provisions of the contract.

In response to a European Union initiative to encourage the prompt payment of commercial debts the Late Payment of Commercial Debts (Interest) Act 1998 was enacted by Parliament. This introduced provision for a remedy for late payment into commercial contracts not as damages, where an actual and direct loss has to be demonstrated, but as a term of that contract.

Although introduced progressively the Act applies to all contracts for the supply of goods or services between parties acting in the course of business entered into from 7th August 2002⁴. All such contracts must provide a substantial remedy for late payment.

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Interest pays dividend cont.

In default, a term is implied into all such contracts which provides that interest (termed "statutory interest") is to be paid at a rate of simple interest 8% above Bank Base Rate⁵, i.e. currently at a rather attractive 8½%, where paid later than provided for by the contract. That rate is set deliberately high in order to protect suppliers and especially to deter late payments⁶. Anything written in the contract that attempts to avoid the Act's provisions is void. Neither will the setting of a far lesser rate of interest avoid statutory interest being payable, unless it represents the "substantial remedy" required by the Act⁷.

A further one-off sum of between £40 and £100, presumably for extra administration can also be claimed⁸.

When does this interest run from? It runs from when the sum should have been paid under the contract, or if that has not been agreed and there are not default provisions such as there exists for the carrying out of construction work⁹, then from 30 days after the making of a demand for payment¹⁰.

Whilst the making of a payment clearly stops interest running it does not prevent, when paid late, interest being claimed retrospectively. In

fact, unless compromised perhaps by a formal final account agreement or the like depending upon its wording, a claim for interest can be made going back 6 years from when the right to make a claim occurred¹¹.

Accordingly, on the one hand, a company needs to protect itself from paying penal amounts of interest to its subcontractors and suppliers by agreeing in writing periods for payments with which it is willing and able to comply.

On the other hand, subcontractors and suppliers can earn a valuable revenue stream in these hard times by examining their client's payment history and claiming interest in accordance with the provisions of the Act.

If we can help you with a claim call Arbicon ADR on 01480 426560 or contact us at advice@arbicon.co.uk – we look forward to hearing from you.

1. *Sempra Metals Ltd v Inland Revenue & Another* – House of Lords (2007) UKHL34 "The general rule of English common law is that the court has no power, in the absence of any agreement, to award interest as compensation for the late payment of a debt or damages: *London Chatham and Dover Railway Co v South Eastern Railway Co* (1893) AC 429."
2. For example s.35A of the Supreme Court Act 1981, s.69 of the County Courts Act 1984, s.49 of the Arbitration Act 1996.
3. *F.G. Minter Ltd v Welsh Health Technical Services Organisation* – Court of Appeal (14th March 1980) – 13BLR1.
4. *The Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No5) Order 2002*.
5. *The Late Payment of Commercial Debts (Rate of Interest) (No3) Order 2002*. The rates at 30th June and 31st December apply during the successive 6 month period. The term Bank Rate is more properly the official dealing rate as set by the Monetary Committee of the Bank of England.
6. Section 6(2) of the *Late Payment of Commercial Debts (Interest) Act 1998*.
7. Section 8(1) of the Act. The JCT Contracts have set the rate at 5% above Base. Although we are unaware of any current judicial authority that clarifies this point, it is possible that this may not be considered a substantial remedy as required by the Act, and accordingly the statutory interest rate could therefore apply in lieu of this contractual provision.
8. *The Late Payment of Commercial Debts Regulations 2002*.
9. As set out in the *Scheme for Construction Contracts (England and Wales) Regulations 1998* pursuant to section 110(3) of the *Housing Grants Construction and Regeneration Act 1996*.
10. Section 4(5) of the *Late Payment of Commercial Debts (Interest) Act 1998*.
11. Section 5 the *Limitation Act 1980*.

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Professional Quantity Surveying Services & Alternative Dispute Resolution Services

Arbicon ADR Limited

**Arbicon is a leading provider of Professional Quantity Surveying,
Cost Management Services and Alternative Dispute Resolution**

Services including the following:

Pre-Contract Services

- Cost planning
- Estimating & tendering (including audits)
- Bills of quantities preparation and production
- Commercial audits and reports
- Budget and cash flow forecasts
- Quantity and procurement checks
- Material scheduling
- Contract procurement
- Drafting of Employer's Requirements

Post-Contract Services

- Preparation of final accounts
- Contractual procedure advice
- Re-measurement
- Cost reconciliation reports
- Sub-contract account management
- Valuations for interim payments
- Variation and day work account valuation and control
- Extension of Time claims
- Loss and Expense claims
- Dispute Resolution, Mediation, Adjudication and Arbitration
- Support in Litigation
- Risk Management and Dispute Prevention
- Expert Witness

Arbicon ADR - Seminars

Contact us if you would be interested in any of our future seminars on Managing Your Risks. Many have benefitted from these informative seminars since we started running them over three years ago. Contact us on advice@arbicon.co.uk or call 01480 426560.



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