

Cerno

Distinguish; determine; resolve.

Date 28 September 2012

Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this issue the main subject under consideration is the entitlement to interest on late payments.

Do I get interest with that?

Late payment is, unfortunately, a regularity in many fields of life and particularly so in construction projects. Some contracts contain provisions for compensating the innocent party by the award of interest; other contracts do not have such provisions or the party drafting the contract otherwise strikes out the provision prior to awarding the contract. Whilst some jurisdictions have countered this by establishing legislative provisions giving rights to either simple or compound interest, this is not always the case. If you are paid late but there is no statutory remedy and no contractual provision are you entitled to interest in the debt?

Under English law the situation changed dramatically in 2007, following the case of *Sempra Metals Limited (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and another* [2007] UKHL 34. So substantial was the change brought about by this House of Lords decision that now, despite the absence of contractual and/or statutory provisions claims for interest will be allowable in most cases, with compound interest being the measure of damages in many cases!

Even where there is no contractual provision to the payment of interest and no statutory legislation enacted, interest is allowable on late payments!

Questions about interest usually arise where the claim is presented as ancillary to a claim for a principal sum (for which a court or tribunal is asked to give judgment). Less usual are cases where interest is sought on a principal sum which has been paid before judgment.

Since the case of *London, Chatham and Dover Railway Co. v South Eastern Railway Co.* [1893] AC429, the position under English law had been that in the absence of an agreement between contracting parties the courts had no power to award interest for the late payment of a debt or damages. At the time that decision did not sit comfortably with, for example, the statement of Lord Westbury in the case of *Carmichael v Caledonian Railway Co.* (1870) 8M (HL) 119,131, which identified a principle that remains to this day in Scots law; that interest can be demanded "by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid."

In 1952, in the case of *Trans Trust SPRL v Danubian Trading Co. Ltd.* [1952] 2 QB 297, it was recognized that loss due to late payment might be recoverable if it constituted special damage within the contemplation of the parties, under the second limb of the test in *Hadley v Baxendale* (1859) 9 Ex 341; but it was sometime before this modification of the common law position was approved; in the case of *President of India v La Pintada Compania Navigacion SA* [1985] AC 104.

Statute law, in the form of section 35A(1) of the Supreme Court Act 1981, created a right to payment of simple interest on a sum for which judgment is given for recovery of a debt or damages or where a sum of that kind is paid before judgment. Further entitlement to interest on late payment was created when the Late Payment of Commercial Debts (Interest) Act 1998 was enacted. Otherwise claimants and judges had to look to the law of equity.

In equity interest was available in all cases which lay within equity's exclusive jurisdiction and was also available in the exercise of equity's jurisdiction in aid of rights enforceable at common law. But the right to compound interest was limited and the courts expressed clearly the intention not to go beyond awarding simple interest in cases where statute law provided for that remedy.

Sempra Metals was a case concerning the award of interest. It was before the House of Lords on appeal from the Court of Appeal case [2005] EWCA Civ. 389.

The facts of *Sempra Metals* will be of limited interest to most readers. In brief it concerned a claim in restitution on the basis that common law required payment of a sum representing the value of money held over a period of time. The claim was for compound interest. Under English law companies had to pay part of their mainstream corporation tax early. This premature payment of corporation tax had been held by the European Court of Justice to be contrary to what was then article 52 (now article 43) of the EC Treaty and it was upheld that Community law required a remedy in English domestic law to enable those who had paid early to recover a sum equal to the interest which would have been generated by the advance payments, from the date of the early payment to the date on which the mainstream corporation tax became payable.

Sempra Metals is of benefit to many. Compound interest is now the measure of damages across the board ...

The wider effect of *Sempra Metals* is of benefit to many as practically all modern contracts contain a promise by one party to pay a sum of money, by ascertainable dates. In his judgment, Lord Nichols equated two forms of action with his reference to "claims at common law for ... interest losses as damages for breach of a contract to pay a debt and ... claims for payment of a debt with interest." ([2008] AC561 para. 96.) In the simplest of terms, compound interest is now the measure of damages across the board where a claimant can prove loss of compound interest; compound interest is not solely a remedy in equity. If it was within the parties' contemplation that a breach of the contractual obligations to pay would cause the innocent party to borrow onerously or to lose out on lending attractively, a claim for compound interest should succeed. This entitlement is likely to be subject to the general rules of damages but is unlikely to be troubled by arguments over the remoteness of the loss or mitigation.

CIArb News

*News for members of
the Chartered Institute
of Arbitrators in Trinidad
& Tobago*

The Trinidad & Tobago branch of the Chartered Institute of Arbitrators (CIArb) is a branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CIArb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

1-4 October 2012: New York: FIDIC Americas Contract Users' Conference.

22-23 & 26-27 November 2012: Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to jccfidic2@gmail.com.

Contact Information

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