

**THE LAW REFORM COMMISSION
OF HONG KONG**

REPORT ON

**INTEREST ON DEBT AND DAMAGES
(TOPIC 19)**

We, the following members of the Law Reform Commission of Hong Kong, present our report on Interest on Debt and Damages.

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May 1990

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON INTEREST ON DEBT AND DAMAGES

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PART I - AN OVERVIEW : INTEREST ON DEBT AND DAMAGES

Chapter 1

Introduction

Terms of reference

1.1 The Law Reform Commission of Hong Kong was established by the Governor-in-Council in January 1980. The Commission reports upon such matters as the Attorney General or the Chief Justice refers to it.

1.2 On 16 December 1985, the Attorney General and the Chief Justice referred the following topic to the Commission: -

Interest

"To consider the law and practice relating to interest on debt (where interest has not been provided for by the contract) and on damages, and to make recommendations."

Establishment of sub-committee

1.3 At its 40th Meeting on 14 January 1986, the Law Reform Commission set up a sub-committee to look into the matter. The sub-committee was chaired by Mr Graham Cheng, OBE JP, Chairman, Taching Petroleum Co Ltd and Law Reform Commission member. The other members of the sub-committee were: -

Mr Simon S O Ip, JP

Solicitor
Messrs Johnson, Stokes & Master
Former President, The
Law Society of Hong Kong
Law Reform Commission Member

Mr John G Greenwood

Chief Economist
G T Management (Asia) Ltd

The Hon Nellie K M Fong, JP

Accountant
Messrs Arthur Andersen & Co.
Legislative Councillor

Mr Robin F Paton
(Resigned in Feb 87)

Finance Director
A S Watson & Co.

Mr J D Pullen
(Resigned in Nov 88)

Manager, Corporate Banking,
The Hong Kong and Shanghai
Banking Corporation

Summary of work

1.4 The sub-committee held its preliminary meeting on 19th February 1986 and met a total of 38 times. In October 1988, an Interim Report was submitted to the Commission for consideration of the various tentative proposals. The final report of the sub-committee was submitted to the Commission which considered the subject at its 73rd meeting in November 1989.

Methods of working

1.5 Early in its deliberations, the sub-committee considered the method of consultation it would adopt. It decided that on interest on debts consultation would be through a questionnaire, whereas a Working Paper on interest on damages would be prepared and circulated to interested parties. The questionnaire was duly issued to 81 different organisations in Hong Kong, to some of which multiple copies were sent. A total of 111 completed questionnaires were returned. Subsequently, a Working Paper was circulated to interested parties and the amended text of that Paper has become Part 11 of this report.

Further Consultation

1.6 A second round of consultation focussing on a specific issue concerning the choice between simple and compound interest for statutory interest on overdue debts was carried out between April and May 1989. The consultation letter which outlined the arguments for and against simple and compound interest, including calculation examples, was sent to about 300 trade and industrial organisations, the District Boards and about 850 businesses.

Acknowledgments

1.7 We wish to record our appreciation of the assistance given to the Commission by the members of the sub-committee who all gave freely of their time and energy over a period of three years. We would like to place on record our thanks to Mr J Greenwood of G T Management (Asia) Ltd for constructing the multiplier tables, to the Hon Nellie Fong of Messrs Arthur

Andersen & Co for the provision of foreign legal information on interest on debt, and to all the individuals and organisations who sent their views and comments and suggestions for changing the present laws. Throughout this Report we have referred to the English Law Commission's Report on Interest (Law Com. No. 88) Cmnd 7229 1978. Acknowledgment is gratefully made to the Controller of Her Majesty's Stationery Office for permission to reproduce in this Report parts of that Law Commission Report.

Chapter 2

Historical background to interest on debt and damages

Early nineteenth century attitude to interest

2.1 From the earliest times, the taking or awarding of interest was frowned upon as it was, to popular perceptions, closely associated with usury. The religious and popular thinking of those days branded the latter as sinful and immoral. The law could not therefore be seen to support any such transactions.

2.2 When more utilitarian concepts began to dominate social thinking, the legislature took steps to redress the balance between creditor and debtor by empowering the courts to award interest on a discretionary basis. *"In 1833 the Civil Procedure Act, sometimes called 'Lord Tenterden's Act', was passed. It sought to mitigate the harshness of the common law rule by allowing the court a discretion to award interest on debts or damages in certain cases. In particular it provided that interest might be awarded in respect of an unpaid debt where there was a written instrument which stipulated for the payment of the debt upon a certain day or where the creditor had made a written demand for payment and had informed the debtor, in writing, that interest would be claimed¹."*

2.3 The courts criticised this legislation as being unduly narrow². Lord Herschell L.C. held³: -

'I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use.'

Legislative changes made in the 20th century to the law on interest on debts and damages

2.4 In 1934 by section 3(1) of the Law Reform (Miscellaneous Provisions) Act, courts of record were given a general power **when giving**

¹ Para 7 English Law Commission Working Paper No. 66 on Interest.

² The London, Chatham & Dover Railway Co. v The S.E. Railway Co. [1893] AC 429.

³ [1893] AC 429, 437

judgement to award interest on debts and on damages. Interest could be awarded from the date when the debt or damage was due till the date of judgment.

2.5 The powers under this Act were expanded in 1969. Section 22 of the Administration of Justice Act 1969 required that in all cases where damages in excess of £200 for personal injury and death were awarded, an award of interest was to be made in respect of the damages.

The report of the English Law Commission on interest on debt

2.6 The English Law Commission examined the common law rule on interest on debts and the relief provided by the 1934 Act. Having pointed out that that rule is that a contract debt does not carry interest unless the contracting parties have agreed (expressly or impliedly) that it should, the Commission went on⁴:

'30. ... If a debtor defaults and the agreement does not provide for the payment of interest the creditor's remedy is to sue him to judgment and to enforce the judgment by such procedures as the law allows. In the case of a High Court judgment the creditor is entitled to interest on the debt between the date of judgment and date of payment but otherwise the creditor has no right to interest (except of course by contract). This means that the common law allows the ordinary debtor in the ordinary case to take a period of interest-free credit, down to the date of judgment, which the creditor never intended him to have: conversely, until judgment is obtained, the creditor is deprived of the use of his money without any right of redress.

31. The unfairness of the common law has been mitigated in part by the 1934 Act. This Act empowers any court of record to order that interest shall be included in the sum for which judgment is given at such rate as it thinks fit, on the whole or any part of the debt, for the whole or any part of the period between the date when the cause of action arose and the date of judgment. However, the jurisdiction to make a discretionary award of interest may only be exercised in any proceedings tried in any court of record and the 1934 Act provides that interest may be included in the sum for which judgment is given rather than that it may be awarded. Accordingly, where the debtor contests his liability, loses the case and has judgment entered against him for the full debt, it is plain that the 1934 Act empowers the court to order him to pay interest on the debt at an appropriate rate from the date when it fell due down to judgment. It is, however, less plain what power the court has if the debtor does not contest his liability but consents to judgment,

⁴ The English law Commission "Report on Interest" No. 88 Cmnd 7229

or admits liability, or allows judgment to be entered against him in default of appearance or of defence. Here, there is no trial of the proceedings and consequently no jurisdiction in the court to enter judgment for interest under the 1934 Act. It may be possible to obtain an assessment of interest following a default judgment in the High Court but it does not appear that such a procedure is available in the county court which is where over three quarters of all default judgments are obtained. Now that the jurisdiction of the county court in contract cases has been raised from £1,000 to £2,000, the county courts will presumably, be taking a greater share of the debt-collecting litigation than they were before.

32. *Apart from the difficulties raised by the requirement of the 1934 Act that the proceedings in question be tried, there is another problem that we touched on earlier. Since the Act provides that interest may be included in the sum for which judgment is given it seems to follow that if there is no sum for which judgment is given, there can be no order for interest to be paid. A judgment may not be obtained in respect of a debt that has been paid, so the creditor may not apply for interest under the 1934 Act in respect of a debt, however long withheld, that is paid before judgment. Moreover, it seems from the decision in *The Medina Princess* that if the debt or debts are satisfied in part and judgment is entered for the outstanding balance the interest may only be awarded in respect of the balance.*

33. *Finally, there is the case where the debtor tenders⁵ payment of the debt before proceedings are brought. Unless the creditor is entitled to interest by the terms of the contract, the tender the debt is valid even though nothing is tendered in respect of the loss caused to the creditor by the earlier non-payment. If the creditor refuses to accept a valid tender of the money and brings proceedings the debtor may rely on the tender as a complete defence; the creditor has thus no way of obtaining a judgment and, as a consequence, no way of obtaining an award of interest under the 1934 Act.*

34. *It is our conclusion that the 1934 Act only went part of the way towards remedying the unfairness of the common law; there are still substantial loopholes in the law which allow the bad payer to withhold payment to his personal advantage and to the detriment both of the creditor and of those who pay their debts on time. In times of high interest rates the injustice occasioned by this defect in the law is particularly acute and all those who sent us their views on the situation said that it was unsatisfactory and needed to be changed by legislation. We agree."*

⁵ Tender: is an unqualified offer, accompanied by actual production, of the exact amount due in "legal tender".

2.7 The English Law Commission recommended that statutory interest be created on debts calculated on a simple as opposed to a compound basis. Their recommendation has not yet been implemented but Parliament has since taken further steps to investigate the injustice and deficiencies of the common law.

The present legislative provisions on interest on debt and damages

2.8 In 1982, section 15 of the Administration of Justice Act introduced section 35A into the Supreme Court Act 1981⁶. This legislation allows judges to award interest where proceedings have been commenced. This power is no longer restricted to awarding interest only where judgment is given. In Hong Kong section 48 of the Supreme Court Ordinance (Cap 4) and section 49 of the District Court Ordinance (Cap 336)⁷ give judges similar powers.

The remaining problem in the present law on interest on debt

2.9 The only remaining problem therefore is that the common law does not allow interest where a debt is paid late but before proceedings for its recovery have been commenced.

2.10 That situation was considered by the House of Lords in the case of President of India v La Pintada Compania⁸. The facts are immaterial for present purposes. The leading judgment was given by Lord Brandon of Oakbrook. The following are excerpts from his judgment: -

"There are three cases in which the absence of any Common Law remedy for damage or loss caused by the late payment of a debt may arise, cases which I shall in what follows describe for convenience as Case 1, Case 2 and Case 3. Case 1 is where a debt is paid late, but before proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged."⁹

"On 7th April 1978, the Law Commission made its report to the Lord Chancellor.... That report contained recommendations for alterations in the relevant law and a draft Bill which, if they were

⁶ See Annexure 1
⁷ See Annexure 2
⁸ [1985] 1 AC 104
⁹ *ibid* at p. 122

*to be adopted as a whole, would remedy the injustices to unpaid creditors, not only in Case 3 (as had been done earlier by the Law Reform (Miscellaneous Provisions) Act 1934) but also in Cases 1 and 2. No legislative action was taken as a result of the Law Commission's report until the passing by Parliament of the Administration of Justice Act 1982*¹⁰

*"First, whereas section 3 of the Act of 1934 covered only the award of interest in Case 3 (debts not paid before judgment in proceedings for their recovery has been given), the Act of 1982, by the insertion by Section 15(1) and Part 1 of Schedule 1 of a new Section 35A into the Supreme Court Act 1981, covers both Case 3 and Case 2 (late payment of debts after proceedings have been begun but before they have been concluded). In this respect, the new provisions give substantial effect to the recommendations of the Law Commission. Secondly, while the new provisions cover both Case 3 and Case 2, they do not extend so far as to cover Case 1 (late payment of debts before any proceedings for their recovery have been begun). In this respect, the new provisions do not give effect to the recommendations of the Law Commission.*¹¹

"... an ideal system of justice would ensure that a creditor should be able to recover interest both on unpaid debts in Case 1 and also in respect of debts paid late or remaining unpaid in Cases 2 and 3. If the legislature had not intervened twice in this field since the London, Chatham and Dover Railway case, first by the Act of 1934 and more recently by the Act of 1982 ..., I should have thought that a strong, if not an overwhelming, case would have been made out ... in order to do justice to creditors in all 3 Cases 1, 2 and 3 to depart from the decision in the London, Chatham and Dover Railway case... Since the legislature has made the two interventions in this field to which I have referred, and since the scope of the London, Chatham and Dover Railway case have been qualified to a significant extent by Wadsworth v Lydall [1981] 1 WLR 598, I am of the opinion, for 3 main reasons, that the departure sought by the respondents should not now be justified.

My first main reason is that the greater part of the injustice to creditors which resulted from the London, Chatham and Dover Railway case has now been removed, to a large extent by legislative intervention and to a lesser extent by judicial qualification of the scope of the decision itself. My second main reason is that, when Parliament has given effect by legislation to some recommendations of the Law Commission in a particular field, but has taken what appears to be a policy decision not to give effect to a further such recommendation, any decision of

¹⁰ ibid at p. 125

¹¹ ibid at pp. 128 -129

your Lordship's House which would have the result of giving effect, by another route, to the very recommendation which Parliament appears to have taken that policy decision to reject, could well be regarded as an unjustifiable usurpation by your Lordship's House of the functions which belong properly to Parliament, rather than as a judicial exercise in departing from an earlier decision on the ground that it has become obsolete and could still, in a limited class of cases, continue to cause some degree of injustice.

My third reason is this. Suppose that your Lordships were to depart from the London, Chatham and Dover Railway case in such a way as to give all creditors, whose debts either remain unpaid or were paid late, whether before or after action brought, a cause of action for interest by way of general damages for breach of contract what would be the result? The result, as it seems to me, would be that such cause of action would be available to a creditor not only in Case 1, in respect of which he still has no remedy except where he can prove special damages, but also in Cases 2 and 3, in respect of both of which, since the coming into force of the Act of 1982, he already has a statutory remedy. What is more, the new cause of action so applicable to Cases 2 and 3 would constitute a remedy as of right for a creditor, whereas the statutory remedy would remain discretionary only. There would, accordingly, exist, in relation to Cases 2 and 3, two parallel remedies, one as of right and the other discretionary... It is, in my view, plainly to be inferred from the form of the relevant provisions in the Acts of 1934 and 1982, that Parliament has consistently regarded the award of interest on debts as a remedy to which the creditors should not be entitled as of right but only as a matter of discretion. That being the manifest policy of the legislature, I do not consider that your Lordships should create, in relation to Cases 2 and 3, a rival system of remedies which, because they would be remedies as of right, would be inconsistent with that manifest policy."¹²

2.11 Lord Scarman delivered a concurring judgment and further said *"the sooner there is legislation along the lines proposed by the Law Commission (or some other solution achieving the same end) the better."*¹³

2.12 Lord Roskill also concurred with the judgment of Lord Brandon of Oakbrook but further added *"it would be idle to affect ignorance of the fact that the present state of the law in relation to Case 1 places the small creditor at grave disadvantage vis-a-vis his substantial and influential debtor. The former may fear to offend the latter by instituting legal proceedings either swiftly or indeed at all and it is notorious that some substantial and influential debtors are not slow to take advantage of this tactical strength, especially in time of financial stringency. It has taken two pieces of legislation, one some*

¹² ibid at pp. 129 - 131

¹³ ibid at p. 111

*50 years after 1893 and the other almost another have century later, to remedy the injustice in Cases 2 and 3. I venture to hope that whatever solution be ultimately adopted in Case 1, whether the Law Commission's somewhat complicated solution or something simpler, that solution will be found promptly and the remaining injustice in this branch of the law finally removed."*¹⁴

¹⁴ *ibid* at p. 112

PART II - INTEREST ON DEBT

Chapter 3

The present law and its shortcomings

Legislation in Hong Kong on interest on debt

3.1 Section 48 of the Supreme Court Ordinance 1987 (Cap 4) states

"(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the Court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action¹⁵ arose and -

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment.

(2) In relation to a judgment given for damages for personal injuries or death which exceed \$30,000 subsection (1) shall have effect -

(a) with the substitution of 'shall be included' for 'may be included'; and

(b) with the addition of 'unless the Court is satisfied that there are special reasons to the contrary' after 'given', where it first occurs.

(3) Subject to rules of court, where -

(a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and

¹⁵ Cause of action means the entire set of facts that entitles a person to obtain from the court a remedy against another person.

(b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff interest at such rate as the Court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment [our emphasis].

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs."

3.2 It will be seen that section 48(3) of the Ordinance now empowers the Court to award interest on a debt paid after the commencement of proceedings for its recovery but before judgment is given. The Ordinance does not however go so far as to change the general common law rule laid down in London, Chatham and Dover v South Eastern Railway Co¹⁶ that a creditor in the absence of express or implied agreement has no right to interest on sums paid late **but before legal proceedings are commenced.**

Operation of the present law on interest on debt

3.3 The right to interest and the effect of the present powers of the court to award interest can best be illustrated by an example.

3.4 Debtor D owes Creditor C a sum of \$300,000. D has agreed to make repayment of the sum by 30th June 1986. He fails to do so. C has been pressing D to make payment without success. Finally on 30 June 1987 he instructs solicitors. A letter of demand is sent. D makes payment of the debt on 30 September 1987. Assuming an interest rate of 6 per cent per annum over the period of indebtedness, a sum of over \$18,000 would have been lost by C.

3.5 As there was no agreement to pay interest, C could not claim the interest he had lost. The position might have been different had an action been commenced before payment as section 48(3) of the Supreme Court Ordinance would give the Court power to award interest.

3.6 Equally, if judgment had been entered against D for the debt, the Court would have been able to award interest at such rate and for such period as it thought fit on the whole or part of the sum owed and for the whole or part of the debt.

¹⁶ see 2.

3.7 Some may consider the above situation to be anomalous and unjust.

Present trends in attitudes on interest on debt

3.8 During the last few decades, the social, economic and judicial attitude has been changing towards permitting the recovery of interest. The trend in recent legislation has also been toward allowing interest and being more generous towards the creditor.

3.9 Hong Kong has also gone some way along this path in adopting the new Supreme Court Ordinance. As noted earlier, under this Ordinance, the court may allow interest both where **a judgment is given** and on any sum **paid after commencement of proceedings but before judgment**. Interest will be allowed for any period commencing from the date when the debt fell due to the date of judgment at such rate as the Court thinks fit.

3.10 Most jurisdictions of the United States and many countries in the of European Economic Community have laws which permit interest to be claimed where a debt is paid late but before the commencement of legal proceedings. For example, in France, interest on commercial debts runs from the demand for payment; interest on other debts from the date of service of summons upon the debtor. In the Federal Republic of Germany, interest runs from the date of formal warning. In California, interest runs from the due date of payment.¹⁷

¹⁷ "The Award of Interest for the Late payment of Debts: Orthodoxy Prevail" by F. Wooldridge and Ian R. Insley, 1985 Vol 4 Civil Justice Quarterly 97 at 101.

Chapter 4

Reasons for recommending reform and options for reform

Deficiencies in the present law

4.1 Currently the law in Hong Kong only permits the payment of simple interest in certain limited circumstances in which interest can be claimed. We consider that simple interest does not adequately compensate the creditor and furthermore that the circumstances in which the interest can be claimed under present legislation are too narrow. We have taken the view that a creditor should be fully compensated for the loss of the use of his money where it was improperly withheld from him. As a measure of the cost to the creditor of obtaining funds during the period that he was deprived of their use, we consider that compound interest at the rate that he would have to pay if he were to borrow the money from a bank or other commercial lending institution would be appropriate¹⁸.

Inequities resulting from current legislation

4.2 During the past decade commercial interest rates have risen to levels of 20% or more at various times. One important reason for high rates of interest in recent years has been that inflation has been persistent and at times has been as high as 15% p.a. in Hong Kong. Against this background, creditors who are deprived of interest or who are only entitled to receive simple interest at the low rates permitted by the courts are being unjustly treated. As a corollary, debtors are being unfairly benefited by the implicit bias against creditors in the present law. In order to remove the bias in the present law in favour of debtors and to move our system in the direction of more justice towards creditors, we take the view that interest on debts should be determined in a manner which adequately compensates the creditors for the loss of the use of their money.

Difficulties faced by small traders

4.3 There is also an inherent bias in the present law in favour of the large trader and against the small trader. Studies done in the United Kingdom show that it is the small trader who is most affected by the lack of a legal right to interest. For example, the Bolton Committee of Enquiry on Small Firms reported in 1971 that "powerful customers - large companies, nationalised

¹⁸ Cremer & Others v General Carriers S.A. [1974] 1 W L R 341, 355

industries, even local authorities were deliberately delaying the payment of bills in order to improve their own liquidity". In Hong Kong, also, big businesses have the commercial muscle which allows them to get away with late payment. Smaller businesses supplying large customers do not have the commercial strength to obtain interest payments on overdue debts and are forced to bear the brunt of difficulties arising from late payment of their debts. In fact it is the prompt payer who is the loser and the late payer who is the gainer. The cost of this inherent bias will be passed on to the customers or the shareholders of the smaller companies, and the small company or individual may ultimately be forced to go out of business. We take the view that the law in Hong Kong should be shifted to take as neutral a position as possible as between large and small parties and we feel the only way to achieve this is to devise a statutory scheme which permits small creditors to identify clearly what their entitlement to interest should be under a wide range of circumstances.

Hong Kong's position as a financial centre

4.4 Hong Kong's emergence as a major financial centre in Asia means that there are a large number of financial transactions taking place in Hong Kong which might otherwise occur in other parts of the Asian region. Hong Kong ranks high as a regional base for international financial institutions and as a regional centre for lending and borrowing in Asia. The financial sector itself is a large employer of people and the growth of the financial services sector is important to the long term growth of Hong Kong. It is important in this respect that Hong Kong's law governing the payment of interest where there is no contract is considered to be fair and equitable as between debtor and creditor. In order to ensure that Hong Kong's position as a financial centre is not in any way undermined by outmoded rules on the payment of interest, we consider that it would be desirable to bring Hong Kong's law into line with the most equitable arrangements in practice, even if that would mean Hong Kong pioneering the law in this area.

Growth in the complexity and variety of financial instruments

4.5 In recent years, financial transactions have become increasingly complex and a variety of new instruments has been developed to meet the needs of an increasingly sophisticated investment community. Interest rate swaps, for example, separate the interest and the principal payable on a bond or certificate of deposit, and frequently involve debts and credits in more than one currency. In many cases the terms governing the obligations of issuers and investors holding these new financial instruments are covered by extensive and detailed contracts, but in numerous cases there will be parties involved in subsequent transactions who may not be explicitly covered by the wording of the contract, such as agents, brokers, sub-underwriters, and other intermediaries. There will accordingly be instances where the contract does not explicitly take into account the possibility of default and the consequences to an individual investor or a trader of failure to pay. As a result we feel that it

is necessary to introduce legislation which would provide for the payment of statutory interest in cases where the contract does not protect the parties concerned, but which recognises that interest should be paid at full commercial rates.

The options for reform

4.6 There are basically two options for reform of the law on interest on debts: one would be by widening the scope of the Supreme Court Ordinance (Cap. 4) and the District Court Ordinance (Cap. 336), so as to allow the courts greater discretionary powers; the other would be by providing the creditor with a statutory entitlement to interest in respect of unpaid debts. It would, of course, be possible to provide for both. The English Law Commission made the following observations: -

“(a) A wider discretion

36. Some commentators argued that the loophole in the existing law would be effectively closed simply by giving the courts wider for discretionary powers so that they could make awards of interest even in cases where there had been no trial and no judgment. In favour of this approach it was said that it would allow the courts latitude to award interest (or refuse it) at whatever rate and over whatever period might appear, in the circumstances, to be just.

37. It was pointed out that some people make a deliberate policy of withholding payment as long as possible although they have the means to pay, whereas others fail to pay for no other reason than that they do not have the necessary financial resources. If the courts had a wide discretion they could exercise it leniently in the latter case, on the principle that 'the wind should be tempered to the shorn lamb' but could order the payment of interest at a higher rate or over a longer period in the case of the wilful defaulter. A scheme for making contract debts carry statutory interest at a prescribed rate would, in contrast, make no distinction between the wilful defaulter and the debtor who wanted to pay but was unable to; each would be liable to pay interest at the same rate over the same period which would, it is argued, be unjust. This, in summary, is the case put to us in favour of a wider discretion in the matter of interest as the only necessary reform.

(b) A statutory entitlement

38. As for allowing a creditor a statutory entitlement to interest, rather than the right to apply to the courts for a discretionary award, the strongest points in its favour are that it would be simple to administer, it would be quick and it would be

cheap in terms of legal costs. In cases where the debt was undisputed, as is the position in all but a very small proportion of cases, statutory interest would be recoverable by the same default procedure as the debt itself without a court hearing. The exercise of the court's discretion, on the other hand, would involve a court hearing, the submission of evidence and argument, even in undefended cases, all of which would add to the legal costs which either the creditor or the debtor would have to pay. As for the argument that it would be unfair to treat the rich debtor and the poor debtor in the same way, it is urged that the creditor's loss is the same in either case and that his right to redress should not depend upon the debtor's ability to provide it.

39. *A further point may be made in favour of allowing a creditor a statutory entitlement to interest. It would make for greater certainty. The debtor would know what he had to pay and the creditor would know what he was entitled to receive; there would be less room for dispute than under a system of discretionary awards and there would be a further saving in costs. Interest would be recoverable in many cases without recourse to legal proceedings."*

The option preferred by the English Law Commission

4.7 The English Law Commission reported that

"42. The great majority of those who commented on our working paper said that a wider discretion to award interest was not, by itself, enough: what was needed was a scheme whereby creditors could recover interest on unpaid debts at a prescribed rate. We were told by many that terms as to payment are frequently abused and that the only satisfactory way of checking such abuses and of providing adequate redress for the creditor would be by the introduction of statutory interest on the lines indicated in our working paper. There was no dissent on the main theme of our proposals from those representing the interest of consumers.

43. *We believe that the introduction of statutory interest is appropriate and necessary. The points made in its favour are, we think, sound and it would bring the law of this country into line with the laws of most western countries with which we have close trading links. A step in this direction has already been taken with the enactment of the Uniform Laws on International Sales Act 1967. This Act provides that, in international sales to which the Act applies, the seller is entitled to interest on the contract price, where the buyer delays all payment in breach of contract, at 1 per cent over the official discount rate in the*

country in which the seller carries on business or, if he has no place of business, in the country where he resides.

44. Although we recommend the introduction of statutory interest, we also believe that the courts should have a discretion to award or refuse interest in situations that fall outside such a scheme. Where the defendant has obtained money by fraud or has misapplied or withheld funds entrusted to him in a fiduciary capacity the equitable jurisdiction should be preserved. Moreover a residuary discretion, such as is provided by the 1934 Act, would still be needed to cover situations in which statutory interest would not be recoverable, for example, in relation to claims for damages and in connection with debts to which the scheme would not apply."

The option endorsed by the Law Reform Commission

4.8 We agree with the English Law Commission's recommendation that there should be a statutory entitlement to interest. We also agree with their recommendation as stated in para 44 of their Report regarding the necessity for retaining the court's discretionary power to award interest.

Chapter 5

The proposed scheme for statutory interest on overdue contractual debts

Introduction

5.1 We studied the statutory interest scheme proposed by the English Law Commission, and found it suitable for Hong Kong. However we do not find ourselves in complete agreement with every aspect of the proposed scheme. The scheme in outline as proposed by the English Law Commission is set out below:

'46. No one who commented on our working paper denied that the basis of an award of interest was to compensate the plaintiff for being kept out of his money by the defendant: most endorsed this view expressly and emphatically, as we do. We believe that it should be adopted as the basis of the scheme that we recommend. The other fundamental principle which has guided our thoughts is that contracting parties should not be prevented from agreeing on terms as to credit and as to the payment of interest that are different from those provided by the scheme. We would like the statutory right to interest on unpaid contract debts to take effect as if were a term in the contract except where the parties have agreed that it should not or have provided for contractual interest instead. This would accord with a further element of the scheme we proposed, namely that it should only apply to debts payable under a contract.

47. Our view is that the scheme should provide for the payment of interest at a rate which is, in commercial terms, realistic, and from a date by which, in a commercial setting, persons acting honestly and reasonably would be expected to have paid the debt. This has led us to the conclusion that the right to interest should accrue from the date for payment of the debt where a date for payment has been agreed; otherwise it should accrue from shortly after the receipt by the debtor of a demand for payment. There are, however, some circumstances in which persons acting honestly and reasonably might be expected to withhold payment of the debt; in these circumstances, we believe that the courts should have a discretion to suspend or stop the running of statutory interest. These are the main characteristics of the scheme that we are recommending."

5.2 We share the view of the English Law Commission that the basis of an award of interest is to compensate the plaintiff for being kept out of his money by the defendant. Contracting parties should not be prevented from agreeing on terms as to credit and as to the payment of interest that are different from those provided by the scheme.

5.3 We also agree with the English Law Commission that the scheme should provide for the payment of interest at a rate which is, in commercial terms, realistic, and from a date by which, in a commercial setting, persons acting honestly and reasonably would be expected to have paid the debt.

The statutory scheme and the existing rights and remedies

5.4 As for the interrelation of rights under the recommended scheme with existing rights and remedies, there are four aspects that we wish to make clear. These relate to (i) contracting out, (ii) equitable jurisdiction, (iii) existing rights and remedies, and (iv) the permissive nature of the statutory scheme.

(i) Contracting out

5.5 The English Law Commission when considering contracting out said

"49. First, we do not intend our recommendations to prevent contracting parties from agreeing on terms as to interest that are different from those provided by the scheme. Statutory interest is not to override contractual interest but is to fill the gaps where interest has not been provided for at all."

5.6 We have further considered the following views of the English Law Commission as to whether or not contracting out should be permitted.

"95. As we mentioned earlier, we do not intend our scheme for the recovery of statutory interest on unpaid debts to override other contractual arrangements as to interest that the parties may make, but there is a problem on the control of 'contracting out' clauses. It is appropriate to consider this problem now.

96. The point was made by a number of commentators that the bargaining position of the supplier of goods or services is not always stronger than that of the person to whom the goods or services are supplied. A large corporation may, it was argued, be able to insist, when placing an order with a supplier in a small way of business, that the contract should exclude the right to statutory interest or that the rate of interest should be well below the statutory rate. The large corporation could then withhold payment of the account without being liable for interest at the

statutory rate. To redress the balance it was proposed, by some, that contracting out (by which we mean contracting for the payment of no interest or interest at less than the statutory rate) should be forbidden or failing that, it should be subject to a 'reasonableness' test; that is to say, the clause in question should only be binding if it was reasonable for it to have been included in the contract.

97. There are serious practical difficulties with prohibiting or regulating agreements for the payment of interest at rates lower than the statutory rate or for the payment of no interest at all. The cost of borrowing fluctuates from time to time and a rate that the parties may agree on in respect of a loan repayable over several years may at one time be higher than the statutory rate and at another time lower. It would be extremely inconvenient if the creditor could resile from the contract rate and claim the statutory rate instead when interest rates were high, but return to the contract rate when rates were generally low. It may be said, in answer, that the creditor would only be allowed to recover more than the contract rate when it would be fair and reasonable to allow him to do so. However, this raises the question of what would, in the circumstances, be fair and reasonable and would lead to great uncertainty. There is a further point. If the creditor were allowed to challenge an agreed rate of interest as unreasonably low, justice would seem to require that the debtor should be allowed a similar right to challenge an agreed rate as unreasonably high. However, this would mean a major change in the existing law of consumer credit (which lies outside our present terms of reference) whereby interest rates may not be challenged for unreasonableness alone, even by a consumer, but only on the ground that the credit bargain is 'extortionate'.

98. Where the parties stipulate for the payment of interest at an agreed rate, different from the statutory rate, the terms agreed will no doubt favour the party whose bargaining position is stronger. However, this fact does not, by itself, justify intervention, by the courts or by Parliament, any more than the fact that the terms agreed as to price will tend to favour the party whose bargaining position is stronger. For all these reasons we have concluded that there should be no control over rates of interest agreed on by contract save for those controls that are already provided under the existing law.

99. We have concluded that the parties should be free to provide for contractual interest instead of statutory interest, but this leaves open the question whether a debtor should be allowed to contract out of statutory interest where he is not liable to pay contractual interest either. It may be that some purchasers will be able to insist on the exclusion of a right to

statutory interest as one of their trading conditions and that, as a result, the creditor who is in a weak bargaining position vis-a-vis his debtor is likely to be kept out of his money and deprived of a right to statutory interest as well. Nevertheless, we have concluded that an agreement to exclude the right to statutory interest should be no less effective than a provision for the payment of contractual interest, at whatever rate. The creditor should not be entitled to recover statutory interest where the right to it has been excluded by contract. We recommend accordingly.

100. It should be noted that the problems considered in the preceding paragraphs concern the right to statutory interest, and its exclusion. We still have to consider the discretionary award of interest and whether the parties are or should be able, by contract, to oust the courts' jurisdiction to make such awards"

5.7 We agree with the above observations. We recommend that the creditor should not be entitled to recover statutory interest where the right to it has been excluded by contract.

(ii) Equitable jurisdiction to award interest

5.8 The English Law Commission took the view that

"50. ... the equitable jurisdiction to award interest should remain in its existing form. However, this proposition needs to be qualified in one minor respect. It is theoretically possible for a contract debt to be eligible for an equitable award of interest, whether or not a right to interest is provided at law. For example, where money is lent for specified purposes there may be an obligation at law to repay and, at the same time, a duty in equity to account. If the debt were to carry interest at law under our scheme (or indeed by contract) the equitable jurisdiction to require the payment of interest would be subject to, although not necessarily displaced entirely by, the obligation to pay interest at law. Thus, by improving the creditor's chances of recovering interest at law our scheme would, in a sense, reduce the scope of the equitable remedy. We do not regard this as a curtailment of the equitable jurisdiction so much as an improvement in the remedies available at law."

5.9 We agree with the above observations and recommend that the equitable jurisdiction to award interest is not in need of reform.

(iii) Existing rights and remedies

5.10 The English Law Commission had this to say regarding existing rights and remedies under contract: -

"51.... we do not intend that the right to recover statutory interest should affect the scope or exercise of other rights and remedies under the contract. For example, the right of a building contractor to claim statutory interest on sums certified due for building work should not prejudice his other rights upon default in payment. Similarly, the right to statutory interest of a person who has hired out goods should not prejudice such rights as he may have to re-take possession of them for non-payment of the instalments."

5.11 We agree with the English Law Commission and recommend that the right to recover statutory interest should not affect the scope or exercise of other existing rights and remedies under the contract.

(iv) Permissive nature of the statutory scheme

5.12 The English Law Commission explained :

"52.... that the creditor's right to statutory interest in situations falling within the recommended scheme is to be exercisable at his option; we are not suggesting that he should be under a duty to collect it as if it were something like Value Added Tax. The creditor's rights and duties in relation to the recovery of statutory interest should be the same as in relation to contractual interest."

5.13 We recommend that the creditor's right to statutory interest in situations falling within the recommended scheme is to be exercisable at his option.

Debts to which the scheme should apply

5.14 The English Law Commission made the following observations: -

"53. There are many different kinds of contract debt. However, the considerations justifying the introduction of statutory interest seem to apply to all kinds of contract debt in the same way. In our working paper we suggested that no distinction should be drawn between debts incurred in the course of business (commercial debts) and those not so incurred (non-commercial debts). Everyone who sent us comments agreed with us on this point. We canvassed the idea of excluding small debts from the scheme by providing a cut-off point, say £100, below which

debts should not carry statutory interest. The almost universal response was that the exclusion of small debts by means of an arbitrary limit would create anomalies and injustice and was not desirable. The general reaction was that the case for statutory interest on small debts was at least as strong as in relation to large ones; some maintained that it was stronger...

54. Next, we should mention a kind of contract debt that attracted special comment on consultation, namely the sum payable under a contract as agreed damages for breach. The best known example is the so-called 'penalty' clause although, of course, such a clause creates no binding obligation if its effect is to impose a penalty for breach rather than to make a sum payable which is a genuine pre-estimate of the damage likely to be occasioned. If we assume that the clause is binding at all, its effect is to create a debt payable under the contract and it ought, accordingly, to be included within our scheme for statutory interest. The same may be said of another kind of 'penalty' clause, the provision for the payment of demurrage. Provided that the obligation to pay demurrage is binding, it creates a contract debt which ought, in our view, to be included within the scheme. We do not think that special provision for such clauses needs to be made in the Bill as they fall within our general approach to contract debts. We only mention them at this stage because of the concern expressed by some commentators that money due under such the clauses should not be exempted from bearing statutory interest.

55. It is appropriate at this stage to refer to the effect of our scheme where a contract debt has been assigned. The right to be paid a contract debt (and indeed contractual interest) is a chose in action which may be assigned in whole or in part to a third person. Moreover, the right to be paid a debt which has not been assigned forms part of the creditor's estate if he dies and it passes to his trustee if he is made bankrupt. As for statutory interest in respect of a contract debt, we intend that the creditor's right to it under our scheme should pass and should be assignable in the same way and subject to the same incidents as contractual interest."

5.15 We are in agreement with the English Law Commission and we recommended the following: -

- (i) Statutory interest should apply to all kinds of contract debts. No distinction should be drawn between debts incurred in the course of business (commercial debts) and those not so incurred (non-commercial debts). The exclusion of small debts by means of an arbitrary limit is not desirable.

- (ii) Money which is payable as an agreed pre-estimate of damages should come within the scheme.
- (iii) The creditor's right to interest under our scheme should pass and should be assignable in the same way and subject to the same incidents as contractual interest.

The contract debt that is itself Interest

5.16 The basis of an award of interest is to compensate the creditor for being kept out of his money by the debtor. Where a principal debt under a contract has been paid but the accrued interest (contractual, or statutory under the scheme) remains unpaid, the accrued interest itself becomes a debt. The views of those whom we consulted during the first round of consultation were in favour of statutory interest (and interest on interest) but were against compounding. It therefore appeared that views of consultees were confused on this issue. The English Law Commission preferred to keep such debts outside the scheme owing to perceived practical problems of computation. In later paragraphs we discuss the question of compounding and suggest that modern technology has alleviated the problems of calculating compound interest. We are of the view that interest itself should carry statutory interest and so recommend.

Contracts of guarantee

5.17 We can see no reason why statutory interest should not apply to sums paid under a guarantee. This was also the view of those whom we consulted. Under a contract of guarantee the primary liability for the debt is that of the debtor. Should the debtor fail to make payment at all or in time his creditor may look to the guarantor for satisfaction of the debt. The question therefore arises when the guarantor should become liable to statutory interest. We have to consider whether his liability should arise from the date of the primary demand on the debtor, or from the date of demand on the guarantor, or after a grace period from the date of primary demand or demand upon the guarantor.

5.18 One of our commentators noted that in the absence of express provision it does not seem fair that the guarantor should be saddled with a liability which reflects a failure to perform an obligation without himself being given the chance to discharge that obligation. He should therefore be liable to pay interest only if he has been asked to discharge his obligation as guarantor and fails. The fact that a demand has been made of the principal debtor may be unknown to the guarantor. We agree. The guarantor should not be liable for failure to discharge the debt until he receives the demand for payment. So that the guarantor is not caught by surprise he should be allowed a grace period. A period of one month seems most appropriate.

5.19 There was substantial agreement among those whom we have consulted that where a guarantor has paid principal plus interest on behalf of the debtor, interest should accrue on the total sum owed to him and that interest should accrue from the date of the guarantor's payment.

5.20 We therefore recommend the following: -

- (i) Where the parties (i.e. creditor, debtor and guarantor) have agreed interest and terms of its payment, statutory interest should not apply;
- (ii) where interest is agreed between creditor and debtor, but the contract is silent regarding payment of interest by the guarantor then statutory interest should accrue after a grace period; and
- (iii) where the parties (creditor, debtor and guarantor) have not provided for interest, statutory interest should apply after a grace period. We recommend this grace period be one calendar month.

Foreign money liabilities

5.21 We recognise that since Hong Kong is a major international trading and financial centre, there are contracts drawn up and governed by Hong Kong law where the liability will be expressed in foreign currency or currencies.

5.22 We consider that, where such contracts are clearly subject to Hong Kong law, the liability to pay foreign currency should also be subject to statutory interest.

5.23 However, the interest rates payable on a foreign currency are not the same as interest rates payable in Hong Kong dollars. This is because interest rates in different currencies reflect a variety of factors such as local supply and demand for credit, expectations about inflation, as well as expectations about changes in the value of the currency. Consequently it would be manifestly unjust to apply Hong Kong interest rates to other currencies.

5.24 Nevertheless we consider that the fact that a debt has been expressed in foreign currency should not prevent a creditor from claiming statutory interest. Hence we recommend that statutory interest at rates of interest appropriate to the foreign currency in question should be applicable to foreign money liabilities.

5.25 We suggest that interest rates for foreign currencies could be set by reference to Citibank's New York Prime rate for US dollars and for sterling the UK Clearing Banks (e.g. Barclays Bank) base rate.

5.26 This leaves open two questions: which foreign currencies are to be covered and what are the appropriate statutory interest rates for those foreign currencies?

5.27 While recognising that it is impractical for the appropriate government department to construct and publish statutory interest tables for all foreign currencies, we are of the view that it would be fairly easy for the interested parties to compile statutory interest tables based on the same methodology as we will use for the Hong Kong Scheme. We therefore recommend that the statutory interest scheme should cover all foreign currencies.

5.28 There is the remaining question regarding the appropriate margin over the recognised borrowing rate. We have obtained information supplied by branches of major foreign banks in Hong Kong. We observe that, since the Prime/Base Rates of different foreign currencies differ, the percentage to be added on these rates as statutory interest should also differ. We are aware that any percentage so fixed may result in over compensation or under compensation in certain cases, since the percentage a bank may add on the Prime/Base rate mainly depends on the credit rating of the customer. We conclude and recommend that the appropriate government department should determine the appropriate margin for all foreign currencies. We also recommend that statutory interest for all foreign currencies be awarded at compound rates, and at intervals of one month.

Debts excluded from the scheme

Rent

5.29 Rent is part of the return to the landlord for his grant of the tenancy to the tenant. A tenant (or his personal representative if the tenant dies) must continue to pay the rent even if he abandons the premises. When a tenant enters into a fixed term tenancy, he must pay rent for the full fixed term, unless the lease is properly terminated on notice (if such is provided for in the tenancy agreement), or if the landlord waives his right to the rent. Rent may also be apportioned because there is a break in time or because there is a division of the estate in the land (which may arise if there is a division of the reversion by the landlord or of the premises by the tenant).

5.30 The basic principle of the proposed scheme for statutory interest is to limit its application to contractual debt. We agree with the English Law Commission's observation that there are at least two important considerations sufficient to suggest that arrears of rent should not attract statutory interest in the same way as other unpaid contract debt.

5.31 The first is a theoretical one in that rent may not always be payable under the original tenancy agreement, as the relationship between landlord and tenant may continue to exist even though the tenancy agreement between them has come to an end, for the tenancy may have already been

replaced by a tenancy created by operation of statutory law under the relevant parts of the Landlord and Tenant (Consolidation) Ordinance (Cap 7). The factor common to statutory tenancies is that the obligation on the tenant in possession to pay rent to his landlord does not, in strict legal analyses, arise under the original tenancy agreement which is made without government intervention. Many of the recoverable rents under such protected statutory tenancies (i.e. Part I Pre-War over Premises and Part II Post-War premises) are restrained by restrictions on the statutory rate of rent increase; whilst for other protected statutory tenancies (i.e. Part IV Post-War premises, luxury tenancies and new tenancy agreements), the prevailing market rents are fixed by the Lands Tribunal acting in pursuance to the statutory procedure if a mutual agreement between the parties could not be reached. Thus, the rent so payable is not strictly a contract debt to which the proposed scheme would apply.

5.32 The second consideration is a practical one in that the payment and recovery of rent involves special social policies peculiar to the law of landlord and tenant which differ from those underlying the proposed scheme. The Landlord and Tenant (Consolidation) Ordinance (Cap 7), which is frequently reviewed and amended, controls the amount of rent that the tenant is obliged to pay and it gives security of tenure to the tenant so that the tenant has the right to stay on the premises beyond the expiry date of his original tenancy and despite the knowledge of any notice to quit. The statutory intervention has been particularly extensive in relation to domestic premises. When rent is controlled by the Ordinance, the landlord should notify the increased rent to the Commissioner of Rating and Valuation or else the increased rent will not be legally recoverable by action for non-payment. The landlord may also recover the arrears of rent by distraint (i.e. the seizure, detention and sale of the tenant's goods in order to satisfy the rent arrears), although the Court may give time to the debtor to pay the rent due from him, on such terms as it may think just and reasonable. In addition, the landlord may forfeit from the tenant if the tenant breaks a covenant or condition in their agreement and the breach empowers the landlord to forfeit.

5.33 We are of the view that the theoretical basis of the rent payable is different from a contractual debt and that the payment and recovery of rent involves special social policies peculiar to the law of landlord and tenant, one of the objects of which is to strike a balance between the interests of the landlord and the tenant. We conclude that to include rent in the proposed scheme might well upset that balance. We therefore recommend overdue rents be excluded from the scheme.

Quasi-contract

5.34 The English Law Commission made the following observations regarding quasi-contracts

"66. The most serious obstacle to inclusion is that there are so many variegated categories of quasi-contractual claim, some of

them clear, some not, some arising between contracting parties and some not. Troublesome cases that may or may not be examples of quasi-contract include, for example, (a) where one surety claims a contribution from another surety with whom he has no contract (b) where someone seeks to be paid for services rendered under a contract that turns out to be void (c) where a judgment creditor brings an action to recover a judgment debt. A scheme for making all quasi-contractual obligations carry statutory interest would be extremely complicated and we doubt whether it would be an improvement in the law. There is also a difficulty of principle. Our idea that the right to statutory interest should take effect as if it were a term in the contract is hard to apply to money recoverable independently of the contract, or, indeed, without there being a contract at all. This reinforces our view that the scheme should only be applicable to contract debts."

We share the view of the English Law Commission and recommend that quasi-contractual obligations are excluded because they are difficult to determine and are not strictly contract debts.

Money lending transactions providing for Interest

5.35 Our terms of reference expressly exclude from consideration those situations where interest has been provided for by the contract (see para 1.2 above). Normally, money lending transactions provide for interest and to that extent are outside the scope of our recommendations. In those cases where no provision is made for interest in the money lending contract, our recommendations would apply. We note that the Money Lenders Ordinance, Cap. 163 contains provisions prohibiting excessive interest rates (see Part IV of Cap.163). These provisions would be unaffected by our recommendations.

Indemnity obligations

5.36 We think that it may be instructive for us to refer once more to the English Law Commission and reproduce here their discussion regarding indemnity obligations: -

"68. Indemnity obligations need special consideration. The word 'indemnify' has various shades of meaning. It might, in ordinary speech, be equated with 'reimburse' and be applied where one contracting party agrees to pay the other a certain sum for his services and, in addition, to 'indemnify' him against his out-of-pocket expenses. However, this is not the way the word 'indemnify' is normally used in law. The legal meaning of an obligation to indemnify is an obligation to make good a loss suffered by another. Within this broad definition of an obligation

to indemnify are various sub-categories. There is, for example, the obligation of guarantee: this creates a secondary liability to make good the loss and it only comes into effect upon the default of some other person on whom the primary obligation rests. It is sometimes important to distinguish between an obligation of this kind and an obligation to indemnify which creates a primary liability on the indemnifier to make good the loss. For our purposes, however, the points of difference are not of significance. Another sub-category of the obligation to indemnify is indemnity insurance; this sub-category may be divided still further into marine and non-marine indemnity insurance. The factor common to all these sub-categories is the obligation on one contracting party to indemnify the other against his loss.

69. ... The feature that distinguishes indemnity from non-indemnity insurance is that the obligation of the insurer depends on the insured sustaining a loss; the insurer's duty is to indemnify the insured against that loss to the extent provided by the contract. With non-indemnity insurance (of which life insurance is a good example) the obligation is to pay a sum of money on the happening (or non-happening) of an event, irrespective of whether the event involves the insured in a loss. Of course, it is possible for one insurance policy to contain several obligations some of the indemnity type, some of the non-indemnity type; it is therefore necessary to refer to indemnity obligations rather than indemnity contracts or indemnity policies.

70. In our working paper we suggested that insurance money which was payable under a non-indemnity obligation should carry statutory interest if payment was delayed, whereas insurance money payable under an indemnity obligation should not carry statutory interest: in the latter case there should be no entitlement to statutory interest, only a right to apply for a discretionary award of interest under section 3 of the 1934 Act (as revised). These proposals received general support on consultation and, although two points of difficulty were raised which are considered in the next paragraph, we are confirmed in our provisional view that money payable by insurers under an obligation to indemnify the insured against loss ought not to carry statutory interest.

71. There was a division of opinion about the obligation on insurers to pay money by way of indemnity where the loss has been agreed in advance (the so-called 'valued' policy). It was contended by some that because the sum payable was ascertained by agreement it should carry statutory interest as a debt. The difficulty with this argument is that even where there has been a valuation it does not follow that the sum arrived at in this way is necessarily payable in full. The only effect of the

valuation is fixing the amount of the prime cost; just as if the parties admitted it at the trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. In cases of damage rather than total loss, for instance, the agreed valuation is only one of a number of factors that go to determine what is in fact payable. Accordingly, we think that the so-called 'valued' obligation should be treated in the same way, for the purposes of our recommendations on interest, as the 'non-valued', provided of course that the money is in either case payable under an obligation to indemnify. We should add that we regard so-called 'new for old' insurance in the same way, where insurers agree to indemnify the insured against the loss of 'old' goods (such as house-furnishings) on terms that will enable him to replace them with new ones. It seems to us that although the loss is valued in a particular way for the purposes of this kind of insurance the obligation is one of indemnity. The courts have considerable experience of distinguishing indemnity-insurance from other kinds of insurance, for the purposes, for example, of deciding whether rights of subrogation are available, and we do not think that our recommendation that indemnity and non-indemnity insurance should be treated in different ways, for the purposes of interest on the sum due, should create special difficulties.

72. ...[we] have concluded that, for the purposes of statutory interest, no distinction should be drawn between the various forms that an obligation to indemnify a person against his loss may take. In all cases the obligation on the indemnifier is to pay something in respect of someone else's loss. The indemnifier's position is comparable to that of a person who is liable in damages for tort or breach of contract; he is liable to pay something but until the claim has been presented, and he has investigated it, it is not fair to regard him as withholding payment. The sort of notice of demand and 'days of grace' that we are recommending for the purpose of starting statutory interest running on other contract debts will not always be appropriate to a claim under an obligation to indemnify, particularly where the contract is one of insurance. They will be particularly inappropriate where the obligation is to indemnify against a claim for damages (of which third party insurance and public liability insurance are typical) or to guarantee the payment by some other person of damages in respect of a breach of contract. [we] have decided against recommending that damages should carry statutory interest; interest on damages should be left to the discretion of the court. It would, we believe, be illogical to treat the obligation to indemnify against damages differently from the obligation to pay damages and this inclines us to leave the award of interest on money payable under an

indemnity obligation (insurance or otherwise) to the discretion of the court, at least where the loss is in the form of damages.

73. Even where the obligation is to indemnify another person in respect of loss in the form of non-payment of a debt (as opposed to damages) the indemnifier is not in the same position as the ordinary contract debtor. He needs to be notified of the principal debtor's failure to pay and he needs time to investigate the state of account between the creditor and the principal debtor in order to know the extent of his liability. Some flexibility is needed here because the time that the indemnifier ought reasonably to be allowed, before interest should be recoverable, depends on the size and complexity of the claim. All in all, we are satisfied that an obligation to indemnify a person against his loss (whether by indemnity, indemnity-insurance, guarantee or any other form of indemnity obligation) ought not to carry statutory interest. It should instead be left to the court to decide in its discretion what interest, if any, should be awarded under the 1934 Act (as revised). We recommend accordingly."

5.37 We conclude that the indemnifier is not in the same position as the ordinary debtor since he is liable to pay when the claim has been presented and he needs time to investigate and verify the claim and so it will not be fair to regard him as withholding payment. We therefore recommend that a debt payable under an obligation to indemnify, and all kinds of indemnity insurance, should be excluded from the scheme.

The period over which statutory interest should be payable

5.38 (a) Commencement where a date for payment has been agreed

We recommend that where a date for payment has been agreed whether expressly or impliedly the debt should carry statutory interest from that date. The burden of proof on this issue should be on the creditor.

(b) Commencement where no date for payment has been agreed

Where no date for payment has been agreed, we recommend that statutory interest should not start to run until 28 days after the receipt of a letter of demand.

Form of letters of demand

5.39 We recommend that a valid letter of demand should fulfil the following requirement: -

- a) Be in writing
- b) Should be dated
- c) State the amount of debt and interest due
- d) Set out the currency (if other than HK currency) in which payment should be made
- e) Should identify the creditor and
- f) Contain an address of the creditor;

but only (a) and (c) are mandatory requirements.

Due service of the demand

5.40 We recommend that the letter of demand must be served in the following manner: -

- (a) Where the debtor is a body corporate, apart from service on the company secretary or at the registered office, there should be an option of good service at the place of business, i.e. an address from which the debtor carries on business and at which it would be commercially reasonable to serve the demand, having regard to the previous course of dealing between the parties and any communication between them in connection with the transaction in question.
- (b) Where the debtor is a partnership, service of the demand would be good if delivered at, or posted to, the principal address from which the partnership carries on business, or if served on a partner or person having the control or management of the partnership business. The option of good service at the place of business for business debts, subject to the same conditions as in (a) above, should also be available.
- (c) Where the debtor is an individual, service would be good if effected by delivering the demand to the individual personally or by leaving it at, or posting it to, his last known address. The option of good service at the place of business for business debts, subject to the same conditions as in (a) above should also be available.

Presumption of delivery

5.41 We recommend that the creditor should in all cases have the benefit of the statutory presumption of delivery in the ordinary course of post.

Cessation of statutory interest

5.42 Since a debt may be discharged, or rendered irrecoverable, by circumstances other than payment, we recommend that statutory interest should cease to run from the date when there ceases to be an obligation to pay the debt, otherwise than by reason of the debt having been paid.

Rate of statutory interest

5.43 The question of the appropriate rate of statutory interest for Hong Kong requires further elaboration.

5.44 Various rates of interest exist in the statute books in cases where legislation provides for accrual of interest. Those who were consulted were of the view that these interest rates do not accord with commercial reality. The Best Lending Rate which is set by the Hong Kong Association of Banks was the most favoured rate by those whom we consulted. A sizeable number did not wish to comment on what should be the appropriate rate.

5.45 The basis for an award of statutory interest is to compensate the creditor for having to borrow funds rather than to compensate him for loss of investment income. We take the view that Best Lending Rate + 3%, would be the appropriate rate for statutory interest. We consider this to be the most appropriate rate as this would be the rate normally charged by banks to its borrowers if other credit facilities have not been previously negotiated. We are aware that this may result in overcompensation or under compensation in certain cases as banks may lend at a lower rate to financially sound clients and at a higher rate to those with a poor track record. However, we take the view that Best Lending Rate + 3% is the most widely accepted rate in Hong Kong.

5.46 Others felt that if the creditor is a financial institution he should be compensated for delay in repayment and loss of use of the money which could have been lent out at current lending rates by receiving interest with reference to the Best Lending Rate. But, they agreed, if the creditor is a non-financial institution he would only lose the interest he would have earned by placing his funds on deposit. The latter should receive interest only by reference to a specified deposit rate.

5.47 While recognising that in individual cases a creditor may not have had to resort to taking a loan, we take the view that in keeping with the basis of an award of statutory interest, Best Lending Rate + 3% is the most suitable rate. To take into account the possibility of the Hong Kong Association of Banks rate being disbanded in the future, we recommend the adoption of the Best Lending Rate + 3% or its equivalent as the statutory interest rate. We also recommend that it would be appropriate for the interest on each individual debt to change as the statutory rate changes.

The choice between simple and compound interest

5.48 We spent a great deal of time investigating the arguments for and against recommending compound interest. At one point it was felt that although the proper basis of compensation is that a person deprived of money should be compensated by reference to the cost of borrowing and as a matter of commercial reality funds can only be borrowed at compound rates, yet there could be insurmountable difficulties of implementation which would lead to delay and expense.

5.49 The English Law Commission preferred simple interest as they perceived practical problems of computation. The majority of those whose views were sought in Hong Kong during the first round of consultation also favoured simple interest rather than compound interest although they were in favour of statutory interest (and interest on interest). It therefore appears that the consultees were confused as to the exact meanings of 'simple' and 'compound' interest.

5.50 We therefore decided to carry out a second round of consultation focussing on the choice between simple and compound interest for statutory interest on overdue debts. A consultation letter outlining the arguments for and against simple and compound interest, and including calculation examples, was sent to consultees. A great majority of the consultees favoured compound interest rather than simple interest.

5.51 Our view differs from that of the English Law Commission. We believe that the advance of modern technology in the form of computers has solved the practical problem of calculating compound interest. Compound interest can now be easily calculated by the man in the street. How this is to be done is explained in the following paragraphs.

Multiplier tables for calculating interest

5.52 We have studied the Law Reform Commission of British Columbia's Working Paper Number 49, "The Court Order Interest Act" which provides tables for the easy computation of statutory interest. Based on the same methodology, four tables (A-D) relating to Hong Kong have been prepared (see Annexure 3).

5.53 For all tables we have used the Hong Kong and Shanghai Banking Corporation's Best Lending Rate (commonly known as B.L.R.) plus three percent as the most widely accepted measure of the cost to an individual having to borrow an equivalent sum during the period when a debt owed to him remains unpaid.

The use of the tables

5.54 Table A (Simple Interest Monthly Multipliers) has been produced by calculating simple interest monthly. As an illustration of how Table A, which is for December 1987, would be used, suppose that a debt of HK\$100,000 payable in May 1983 was paid in December 1987. The multiplier shown for May 1983 is 1.5639. Therefore the debt plus statutory interest at prime plus three percent would be HK\$100,000 x 1.5639 or HK\$156,390. Note that the table is not merely applicable to debts which are repaid in a single lump-sum. It can be used to calculate interest due in cases where a portion, or portions, of the original debt are settled during the period.

5.55 Table B (Compound Interest Monthly Multipliers) has been produced by compounding interest monthly using the average interest rate during each month. It is assumed that the average interest rates for each month apply every day throughout the month. For the sake of illustration we shall explore interest due on a debt of the same term as for the previous table, i.e. from May 1983 to December 1987. In this table the relevant multiplier is 1.7522 and accordingly a debt of HK\$100,000 plus statutory interest over this period would amount to HK\$175,220.

5.56 Table C (Adjusted Compound Interest Monthly Multipliers) has been produced following British Columbian practice designed to avoid the undue upward bias implicit in monthly compounding. The adjustment, also following British Columbian practice, consists of reducing by an appropriate amount the monthly compounding factor in order to arrive at a figure which approximates to the normal commercial practice of semi-annual compounding. The interest rate used for compounding is thus Best Lending Rate + 3%, less the adjustment factor. In this case the multiplier shown for May 1983 is 1.7325 and accordingly the debt plus statutory interest on this basis for the principal sum of HK\$100,00 would be HK\$173,250.

5.57 Table D (Hong Kong and Shanghai Banking Corporation's Best Lending Rates - Monthly Averages of Daily Data, Annual Percentage Interest Rates) simply provides the Hong Kong and Shanghai Banking Corporation's Best Lending Rate for each month for reference. The rates shown are monthly averages of daily data, which also form the basis for the computation of Tables A, B and C¹⁹.

Summary

5.58 The following is the comparison of the total sum (principal plus statutory interest) using different methods of computation: -

¹⁹ Source: Hong Kong Monthly Digest of Statistics

Table A	Simple Multipliers	Interest	Monthly	HK\$156,390
Table B	Compound Multipliers	Interest	Monthly	HK\$175,220
Table C	Adjusted Interest Multipliers	Compound	Monthly	HK\$173,250

Rider

5.59 Since debts are not all incurred or repaid at the end of the month, there will inevitably be some inaccuracies if these tables are used without adjustment. As an example, where an individual owed a debt on 1st May 1983 and paid the amount due on 31st December 1987 the tables would understate the amount due. At the other extreme, where an individual owed the same debt on 31st May 1983 and paid the amount due on 1st December 1987 the tables would overstate the amount due. This problem of inaccuracy obviously becomes worse as the length of time over which the debt is owed becomes shorter.

Examples

5.60 To overcome this difficulty, the following examples illustrate how the multiplier tables can be used in conjunction with a simple formula to calculate a more accurate, and therefore fairer, figure for the amount due.

Example 1:

Calculate the amount due on a debt of HK\$100,000 due on 20th May 1983 and paid on 10th December 1987.

(a) Using simple interest:

The multiplier, read off from Table A, is 1.5639. The 20th May to the end of May is 11 days.

The interest rate during May is 15.02% (the figure for May (12.02%) + 3%)

The multiplier for these 11 days is:

$$\frac{\text{Number of days}}{\text{Number of days in a year}^{20}} \times \text{Interest rate expressed as a fraction}$$

²⁰ When calculating the daily interest earned on Hong Kong dollars the commercially accepted practice in Hong Kong is to divide the annual interest rate by 360.

$$\frac{11}{360} \times \frac{15.02}{100} = 0.004589$$

The start of December to the 10th December is 10 days. The interest rate during December is 8.6%. (The figure for December (5.60%) + 3%).

The multiplier for these 10 days is

$$\frac{10}{360} \times \frac{8.6}{100} = 0.002389$$

For the period from the start of June to the start of December the multiplier for June, read off from Table A, is used. This is 1.5514.

$$\begin{aligned} \text{Total multiplier} &= 1.5514 + 0.004589 + 0.002389 \\ &= 1.55838 \end{aligned}$$

Therefore

$$\begin{aligned} \text{Amount due} &= 1.55838 \times 100,000 \\ &= \text{HK\$}155,838 \end{aligned}$$

- (b) Compounding interest monthly and using simple interest for the periods during May 1983 and December 1987:

The multipliers for the periods in May and December are the same as those calculated in Example 1(a).

The multiplier for June, read off from Table B, is 1.7306. Using the results from Example 1(a)

$$\begin{aligned} \text{Total multiplier} &= 1.7306 + 0.004589 + 0.002389 \\ &= 1.73758 \end{aligned}$$

$$\text{Amount due} = \text{HK\$}173,758$$

5.61 When compounding interest monthly simple interest is accrued during each month and this interest is only compounded (i.e. added to the principal amount) at the end of each month. Therefore, the formula used above in Example 1(b) which involved calculating simple interest for parts of the beginning and end month of the period, is legitimate and is consistent with the calculation used to produce Tables B and C.

Flexibility of tables

5.62 Throughout the examples so far it has been assumed that the debt became payable in December 1987 or January 1988 and this meant only one multiplier needed to be read off the tables. The following two examples illustrate how the tables can be used to obtain a multiplier for any period between January 1975 and December 1987.

Example 2

Obtain the multiplier for April 1978 to August 1984.

- (a) For Tables B and C the calculation is Multiplier for April 1978/Multiplier for August 1984.

Hence the multiplier for this period using Table B is :

$$\frac{3.9367}{1.4420} = 2.7300$$

- (b) For Table A the calculation is

$$1 + (\text{Multiplier for April 1978} - \text{Multiplier for August 1984})$$

Hence the multiplier for this period using Table A is:

$$1 + (2.3791 - 1.3678) = 2.0113$$

5.63 Multipliers calculated in this manner can be used in exactly the same way as the multipliers that were used in the previous examples.

5.64 The multipliers can also be used to calculate the outstanding amount owed in cases where portions of a debt have already been paid. The following example illustrates this.

Example 3

Assume a debt of HK\$100,000 is due in May 1983. HK\$30,000 is repaid in July 1984 and a further HK\$40,000 is repaid in September 1985. What is the outstanding debt owed in December 1987?

Reading from Table B:

Multiplier for May 1983 is 1.7522

Multiplier for July 1984 is 1.4653

Multiplier for September 1985 is 1.2482

The outstanding debt owed in December 1987 is given by

$$(100,000 \times 1.7522) - (30,000 \times 1.4653) - (40,000 \times 1.2482) = \text{HK\$81,333}$$

N.B. This method can only be used with multipliers from Tables B and C.

Conclusion

5.65 The tables are relatively easy to construct and could be provided every month. As illustrated above the accuracy of the monthly tables can be enhanced by reference to some fairly simple formulae. These examples suggest that tables for statutory interest could be introduced to Hong Kong and applied, without difficulty, both by the Judiciary and by individual debtors and creditors.

Compound interest recommended

5.66 We are convinced that the object of the scheme should endeavour to provide full restitution. We consider that compound interest should be used under the scheme because it is consistent with commercial practice and, with the use of the multiplier tables, it can be almost as easy to calculate as simple interest. We are therefore recommend that statutory interest be awarded at compound rate. We are fully aware that the recommendation is a departure from existing laws of other jurisdictions. We feel that the time is ripe for Hong Kong to make such a change so that the fragmented state of the law on interest can be rationalised in a new piece of legislation.

5.67 We think the most appropriate period for compounding is considered to be a period of one month. The one month period is chosen as it is the practice to all major banks in Hong Kong to compound interest at monthly intervals. The rest of the financial community tends to follow the practice of banks. To facilitate full restitution a creditor should be allowed to follow the general practice. We therefore recommend that statutory compound interest be awarded at intervals of one month.

5.68 In order to facilitate computation of statutory compound interest, we also recommend that the appropriate government department should publish Table B at monthly intervals.

5.69 We appreciate that part payment of a debt in the middle of a month would cause further complications on compound interest calculations. We therefore recommend that no compound interest should be capable of being claimed in respect of any debt overdue for a period of less than a month.

Publication of the statutory rate of interest

5.70 We also considered the best method of publishing statutory interest. We concluded that Orders published under subsidiary legislation

appear to be the best method. We propose that primary legislation should create a right to interest and subsidiary legislation would govern the rate. This device is useful where the interest rate changes rapidly. Such a system operates in relation to interest on judgment debts. The rate of interest is set by the Chief Justice and published periodically. We recommend that the Chief Justice should set the rate of interest by Orders under subsidiary legislation and that the appropriate department of the Government should publish the statutory rate of interest. The rate should be published monthly.

A judicial power to suspend the running of statutory interest

5.71 The issue of whether the court should have a discretion, on the application of the debtor, to remit statutory interest (or, as the case may be, to order repayment) where the creditor has broken the terms of the agreement and such an order would be reasonable in all the circumstances has been considered by the Commission. The views of those we consulted were equally divided on the issue. Some argued that to include such a discretion would mean diluting the statutory entitlement. On the other hand it was pointed out that a power of suspension may avoid injustice in certain cases. Some of the grounds suggested for suspension were as follows:

- (a) Where the creditor has acted unconscionably and/or the debtor would suffer hardship.
- (b) In cases of particular hardship or where some public interest is involved.
- (c) Where the creditor has wilfully or vexatiously withheld information which has prevented payment.
- (d) When it is not abundantly clear that the debtor is liable to pay the debt.
- (e) When the court thinks fit.
- (f) When a court is satisfied that the creditor did not suffer unduly from late receipt.
- (g) Where a debtor cannot meet payment for some time.
- (h) Where in the circumstances it is not equitable to award interest.

5.72 The judiciary suggested that the courts should have power to suspend statutory interest. They suggested that if that has the effect of diluting the entitlement to interest or of producing inconsistency this could be remedied by a provision requiring the debtor to show hardship before the power to suspend could be exercised.

5.73 We take the view that while courts should have power to suspend statutory interest from running in appropriate cases this power should not be so wide that the courts would become burdened with numerous hearings. It would defeat the purpose of the legislation. To give power to the court to suspend statutory interest from running on 'just and equitable' grounds is considered too wide. It is difficult to find the proper yardstick to allow a plea of poverty. It would result in different judges reaching different decisions depending on the circumstances of the debtor. We recommend that, while personal reasons for late payment or non-payment of a debt should not be a ground for suspension of statutory interest, where payment is withheld due to genuine doubts or dispute as to the terms of the agreement or the amount of the principal the courts should be able to intervene.

The commission's other recommendations

5.74 We observe that the currency of certain contracts may extend over a long period of time. In order to avoid the possibility of changing the character of transaction carried out on the basis of the existing law, we recommend that the scheme should only apply to debts payable under contracts entered into after these recommendations are given the force of law.

5.75 We note that the existing general law on interest binds the Crown under the Crown Proceeding Ordinance (Cap 300). We recommend that the scheme should bind the Crown so that the Crown can take advantage of or be burdened by the scheme.

5.76 We understand that there is other legislation which provides for interest on debts under certain specific circumstances (e.g. interest on debt on bankruptcy under s. 71(1) of the Bankruptcy Ordinance (Cap 6)). We therefore recommend that the scheme should be without prejudice to other statutory enactments.

5.77 We also consider that the following aspects of the existing law should remain unchanged.

- (i) the matrimonial jurisdiction to award interest and
- (ii) the law governing the recovery of interest upon the dishonour of a bill of exchange.

PART III - INTEREST ON DAMAGES

Chapter 6

The present law

Introduction

6.1 The established legal system of Hong Kong is such that there is unavoidably some lapse of time between a plaintiff incurring his loss and the date when he obtains judgment for damages. During this period, he is deprived of the use of money to which he is entitled. The question arises as to whether interest should be awarded on damages in order to compensate him for that loss of use.

6.2 In tort cases (e.g. negligence) interest may not be recovered at common law, either as part of the damages or as additional compensation for delay in payment.

6.3 In 1833, the Civil Procedure Act, which sought to mitigate the harshness of the common law rule by allowing the court a discretion to award interest on debts, was also applied to damages in certain cases.

6.4 Earlier in this Report (Para 2.3) it was noted that in 1893, the narrowness of these provisions was criticised by the House of Lords in London, Chatham and Dover Railway Co. v S.E. Railway²¹ and finally in 1934, the legislature, by section 3(1) of the Law Reform (Miscellaneous Provisions) Act of that year, enacted a general provision allowing the court to award in its discretion interest upon damages in all cases, where judgment was given in proceedings tried in court.

6.5 Section 3(1) was subsequently amended by the Administration of Justice Act 1969 which provided that in every case of personal injury or wrongful death where the damages exceed £200, an award of interest shall be made unless there are special reasons for refusing it.

6.6 The jurisdiction created by the 1934 Act does not empower the court, in proceedings for debt or damages, to award interest where the proceedings themselves are not tried or to award interest in respect of sums paid prior to judgment. This situation was criticised by the Law Commission in their Report on Interest.

6.7 In 1982, a new section 35A was inserted into the Supreme Court Act 1981 (see Annexure 1) by the Administration of Justice Act 1982 which

²¹ [1893] AC 429

provides for interest to be included in any judgment for debt or damages whether or not the proceedings have been tried as required by section 3 of the Act of 1934. Section 35A provides for interest to be included in the judgment, not only in respect of the debt or damages for which judgment is given but also in respect of any sum paid before the judgment.

Awards of interest on damages in England

6.8 It was stated by Lord Denning M. R. in Harbutt's Plasticine Ltd. v Wayne Tank and Pump Co²² that the basis of an award of interest is that "*the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly*". In Jefford v Gee²³ the Court of Appeal held that this statement of principle also applied to the award of interest on damages in tort.

6.9 We follow the course adopted by the Law Commission in its Report on Interest (1978) and consider this area of the law under three broad headings: -

- (a) Personal injury litigation and awards of interest.
- (b) Awards of interest in Admiralty.
- (c) Awards of interest on damages generally.

Personal injury litigation and awards of interest in England

6.10 In Jefford v Gee, the Court of Appeal set out the principles to be applied when awarding interest on damages for personal injuries or death. The Court of Appeal laid down the main guidelines as follows:-

- (1) special damages (that is to say, loss of earnings and out-of-pocket expenses to the date of trial) should carry interest at one-half the appropriate rate as from the date of the accident. The selection of the half-rate basis is designed to provide a rough and ready but fair method of averaging out compensation for losses of earnings and out-of-pocket expenses which range over a period and comprise an aggregate of smaller, and often trifling, individual sums;
- (2) general damages for pain and suffering and loss of amenities (non-pecuniary loss) should carry interest at the appropriate rate from the date of service of the writ to the date of trial; and
- (3) damages awarded to a dependent under the Fatal Accidents Acts, where the accident results in death, should carry interest

²² [1970] 1 QB 447
²³ [1970] 2 QB 130

at the appropriate rate from the date of the service of the writ to the date of trial.

6.11 In Jefford v Gee²⁴ the Court of Appeal also decided that the appropriate rate of interest is that payable on short-term investment where money is in the court i.e. where a defendant makes a payment into court in respect of a claim.

6.12 The Court of Appeal regarded general damages for pain, suffering and loss of amenities as indivisible. In Jefford v Gee Lord Denning said, *"it is not possible to split those misfortunes into two parts; those occurring before the trial and those after it. The court always awards compensation for them in one lump sum which is, by its nature, indivisible. Interest should be awarded on this lump sum as from the time when the defendant ought to have paid it, but did not, for it is only from that time that the plaintiff can be said to have been kept out of the money.*

6.13 The special damage in fatal accident cases was regarded as being "Inflicted once and for all at the time of the accident"²⁵ and, accordingly, pre-judgment interest was payable on the whole award.

6.14 In a number of subsequent cases, these guidelines were reconsidered. In Cookson v Knowles²⁶, the Court of Appeal held that in fatal accident cases, the impact of inflation necessitated that damages be apportioned into past and future components, thereby departing from the Jefford v Gee guidelines. On further appeal, the House of Lords agreed that damages in fatal accident cases should be apportioned into pre-trial loss and future loss and that interest is payable on the pre-trial loss at half the short-term current rates while no interest should be awarded on the future loss. However, the speeches in Cookson were silent on the question of the divisibility of damages awarded for non-pecuniary loss.

6.15 In the Court of Appeal, Lord Denning made an observation that no interest should be allowed on pain, suffering and loss of amenities. In Pickett v British Rail Engineering²⁷, the House of Lords placed back awards of interest on non-pecuniary loss. The argument that since the sum awarded by the court takes into account inflation, the plaintiff stands to gain by delay in bringing his case to trial was held to be a fallacy by Lord Scarman as interest is given not for the loss of purchasing power of money but for the loss suffered in being kept out of the money to which one is entitled. Secondly, legislation had made it mandatory that the court award interest on damages unless there were special reasons for not doing so. Inflation was not a special reason for it affected everyone alike. The House of Lords, however, did not deal with the question of rate of interest on non-pecuniary loss.

²⁴ [1970] 2 QB 130 at p. 147

²⁵ Jefford v Gee [1970] 2 QB 130, at p. 148

²⁶ [1979] AC 556

²⁷ [1980] AC 136

6.16 The Jefford v Gee guideline in relation to the rate of interest on general damages was subsequently altered by the Court of Appeal itself in Birkett v Hayes²⁸. Lord Denning M. R. pointed out that the opinion expressed in Cookson that no interest should be awarded on non-pecuniary loss had attracted considerable support. The reasoning for the support in the Report of the Royal Commission in 1978 (Pearson Commission) was cited. *"A more important justification, however, lies in the conventional nature of non-pecuniary damages. We do not think that it would be appropriate to subject essentially arbitrary figures to detailed calculations. If an attempt were to be made, allowance would have to be made for inflation in selecting the appropriate interest rate. It would also, strictly speaking, be necessary to apply interest at the half rate only to that part of the damages relating to non-pecuniary loss before trial, assessed on the scale current at the date of injury. This would all be highly artificial"*. In the result, the Court of Appeal fixed the appropriate rate of interest at 2%, having regard to the current incidence of inflation. This approach was approved by the House of Lords in Wright v British Railways Boards²⁹ who concurred with Lord Diplock's speech. Lord Diplock noted that the guideline of 2% laid down by the Court of Appeal was not immutable. It was based on expert evidence concerning the real rate of return on investments and reflected the actual value of loss of use, and hence ought to be applied in the absence of evidence to the contrary.

Awards of interest in Admiralty in England

6,17 Contrary to the common law rule that there was no right to interest when damages were withheld, the Admiralty law allowed a person with a claim for damages arising out of a collision to recover interest on the damages, so as to compensate him for the period over which the money payable to him was wrongfully withheld. The period over which it will be calculated depends on the nature of the loss. It has been held, for example, that on the sinking of an unladen vessel, the plaintiff is entitled to interest from the date of sinking; on the damaging of a vessel, from the date of paying for the repairs; and on death or personal injuries at sea, from the date of the registrar's report to the date of judgment. Where Admiralty interest is claimed and the defendant makes a payment into court, he must include provision for interest in his payment. However, the supposed entitlement to interest in Admiralty cases only applies where a claim for damage to property is made in respect of a collision involving a vessel and in a few other cases, such as salvage actions.

Awards of interest on damages generally in England

6.18 Section 35A(1) of the Supreme Court Act 1981 gives to the Court general power to award interest on damages in its discretion. Section 35A(2) provides that in the case of personal injuries or death, the Court must exercise

²⁸ [1982] 1 WLR 816
²⁹ [1983] 2 AC 773

that discretion unless there are special reasons to the contrary. In all other cases, the award of interest is at the discretion of the Court.

Awards of interest on damages in Hong Kong

6.19 Again we consider this area of the law under three broad headings: -

- (a) Personal Injury Litigation and Awards of Interest
- (b) Awards of Interest in Admiralty
- (c) Awards of Interest on Damages Generally

Personal injury litigation and awards of interest in Hong Kong

6.20 In Hong Kong, the plaintiff's right to interest on damages awarded for personal injury and death is found in Section 48(1) of the Supreme Court Ordinance Cap. 4 and section 49(4) of the District Court Ordinance Cap. 336 (see Annexure 2). These provisions are directly modelled on section 22 of the English Administration of Justice Act 1969 which is now replaced by section 35A of the Supreme Court Act 1981. These provisions came into effect on 15 April 1977. Before that, interest was awarded in some cases with the consent of the parties, but refused in other cases. Although section 48(1) requires the court to award interest on damages in personal injury and death where judgment is given for a sum exceeding \$30,000, matters such as the type or kind of damages on which interest should be awarded, the period for which it should be awarded and the rate of interest to be awarded are left to the discretion of the court.

6.21 The basic principles as set out in Jefford v Gee have been followed in Hong Kong, although some confusion was caused by the decision of the Court of Appeal in Cookson v Knowles. Some judges in Hong Kong followed Cookson v Knowles and did not award interest on the general damages for pain, suffering and loss of amenities while other judges either refused to follow or ignored the new guideline and awarded interest. In personal injury cases not resulting in death, the position has been clarified by the House of Lords in Pickett v British Rail Engineering Ltd. which was followed by the Hong Kong Court of Appeal in LEUNG Chat-nui v CHAU King-wai and another³⁰ where it was held that interest should be given on any sum ordered to be paid as general damages unless there are special reasons to the contrary.

6.22 As regards the appropriate rate of interest, Mr Justice Cons in LEE Koon-keung v NG Chi-yat and another³¹ made the following comment -

³⁰ [1979] HKLR 73
³¹ [1975] HKLR 153

“The English Court of Appeal felt that the rate of interest should be the same as that awarded after judgment. But in England, that rate was unrealistic and the Court was forced to look elsewhere. In Hong Kong, the post judgment rate is fixed by section 20B of the Supreme Court Ordinance at 8%. That is a realistic rate and I am happy to adopt it.”

6.23 The court, however, did not continue to accept the rate on judgment debts as the appropriate rate. In LAM Mei-lan v LEUNG Yuk & another³², Mr Commissioner LEE said -

“There is nothing in our Rules which sets an upper limit for interest rate beyond which the court has no jurisdiction to award for general damages in a running down action. Indeed section 48(4) of the Supreme Court Ordinance, which enjoins the court to award interest on damages in respect of personal injuries, provides that such rate should be what the court considers appropriate”

6.24 The court in LAM Mei-lan v LEUNG Yuk & another went on to consider deposit rates offered by leading finance companies, savings account rates and Government charges on purchase prices of land paid in instalments before adopting 10% per annum as the appropriate rate of interest.

6.25 In 1983, in TSANG Hoy-fuk v Kong & Halvorsen Marine & Engineering Co. Ltd.³³, the appropriate rate of interest was decided on the basis of the average of the banks' best lending rates during the period over which the loss or injury occurred.

6.26 In NG Chai-man v LEUNG Ngan³⁴, the Hong Kong Court of Appeal held that Wright v British Railways Boards had the same practical effect as if it were as strictly binding as the legislative provisions requiring interest to be awarded, and further held that the principles on which the rates of interest are assessed are the same in England and Hong Kong and the new guideline should be that the rate of interest in personal injury actions on damages for non-economic loss should be 2%.

Awards of interest in admiralty in Hong Kong

6.27 The position in Hong Kong is the same as that in England as described in paragraph 6.17.

³² [1979] HKLR 600

³³ [1983] HKLR 164

³⁴ [1983] HKLR 303

Awards of interest on damages generally in Hong Kong

6.28 Apart from personal injury or death cases where the damages exceed \$30,000, section 48(1) of the Supreme Court Ordinance provides that awards of interest on claims for debt and damages are in the court's discretion.

6.29 As to the rate of interest, it was held in Fargo Shipping Co. S.A. v Hwa Haur Trading (Hong Kong) Co.³⁵, that where interest is payable on monies awarded in a foreign currency, the rate of interest is that prevailing in that currency in Hong Kong. The case of The Oceantramp³⁶ was cited in Mr Justice Cons' judgment -

In this jurisdiction, there is a decision of the Full court which lays down simply that where damages have been claimed, and are therefore repayable, in Hong Kong, the court is bound to have regard to the commercial rates of interest prevailing in Hong Kong: The Oceantramp. That was an award of damages in tort, not in contract or by way of debt. Yet I do not see why that should make any difference. The English Court of Appeal made no distinction when it discussed the proper rate to be awarded generally: Jefford v Gee, and indeed no one in the present case has suggested that there ought to be. I consider myself bound by that decision. It was, of course, made before a judgment could be given in other than Hong Kong dollars. Now that this can be done it seems to me that the natural development of the principle must be to require the court, in those cases where it has been done, to have regard to the commercial rates which prevail here in relation to the particular foreign currency involved."

³⁵ HCA No. 1959 of 1978
³⁶ [1970] HKLR 52

Chapter 7

The commission's response to views received on consultation

Introduction

7.1 In response to our sub-committee's Working Paper on Interest on Damages many replies and comments were received. In this chapter the main points raised by commentators are dealt with and our views on them are set out.

Special damages

7.2 The Bar Association, while agreeing with the views expressed in the Working Paper, took exception to the appropriate rate on special damages being Hong Kong Best Lending Rate + 3%. Their view was that this was a commercial rate which should not be applied in personal injury cases. Their reasoning was based on the belief that a plaintiff in a personal injury action is unlikely to have borrowed money for expenditure on special damages.

7.3 We considered the argument that the commercial rate should not apply in personal injury cases. While the necessity to guard against over-compensation was accepted, the assumption that savings may be readily accessible in liquid form, thus alleviating the necessity to borrow, was questioned. Savings are usually invested or placed on fixed deposit. The possibility of borrowing to meet expenses arising out of injuries was also real. On the other hand, one could not advocate different rates for different plaintiffs. We concluded that the discretion of the judge in relation to the question of damages as a whole would take care of such problems. Moreover it should be stressed that our recommendation that interest rate should be BLR + 3% is only a guideline.

Exceptional cases

7.4 Several cases decided since Jefford v Gee have dealt with the question of interest on special damages where the courts have been able to break away from the half-rate rule. In these cases it was pointed out that where the plaintiff wishes to say that there are special circumstances which exclude the application of the Jefford v Gee principle, "he should say so when claiming interest and set out the facts so as to enable the courts to adjudge whether there were special circumstances". In the light of these cases it is now possible to seek an award of a full rate of interest on special damages.

This position has been reached by the evolution of case law. Our view is that it is unnecessary to legislate further.

The period over which interest should accrue

7.5 A number of those who responded to the Working Paper suggested that interest on special damages should be awarded from the date of service of the writ to the date of award of damages instead of merely to the date of trial.

7.6 The legislation currently empowers the court to award interest up to the date of judgment. In the guidelines on interest and often in judgments reference is made to interest up to the date of trial. Sometimes interest on special damages is said to be awarded up to the date of trial, while sometimes it is said to be awarded up to the date of judgment. The terms appear to be used interchangeably. Such looseness of terminology is confusing. The present day importance of interest warrants greater care in references to the period over which interest is awarded.

General damages

The rate: the period over which interest should accrue

7.7 We were also asked to consider awarding the full rate of interest on conventional awards such as loss of expectation of life. It was also suggested that interest should be payable from the time of the accident to trial, not merely from the date of service of the writ to trial.

7.8 We are of the view that clear principles have been set out in the case law regarding non economic loss in personal injury cases. We do not think that there is a need for legislative provision.

7.9 It is suggested that interest should not be awarded on non-pecuniary awards. Instead these awards should be fixed from time to time taking into account inflation.

7.10 We note that parties are always free to agree that, if inflation has been taken into account in an award for non-pecuniary damages, interest should not be awarded. We do not feel that there is a need for further legislative provision.

7.11 We cannot agree with the suggestion that the formula for interest on pain, suffering and loss of amenities should be the same as for special damages.

The necessity for notice of claim on interest on personal damages

7.12 It was also suggested to us that safeguards should be introduced to ensure that an adequate period of notice to charge interest is given, that the rate of interest is given, that the rate of interest charged is reasonable and that the defendant is granted the right to contest the charge where appropriate.

7.13 We feel that legislation to reflect those aims is unnecessary as the question of whether or not a claim for interest is reasonable is a matter for the court's discretion. A defendant will always have the right to contest the charge.

7.14 We cannot agree that the courts should take into account the defendant's ability to pay interest and that he should be absolved of his liability if he is unable (rather than unwilling) to pay.

Chapter 8

Recommendations on interest on damages

In general: no need for reform

8.1 Having carefully examined the present law and the approach of other jurisdictions on interest on damages, we conclude that the law and practice relating to interest on damages in Hong Kong is not in general need of reform.

Rate of interest on special damages

8.2 We considered the question of the rate of interest on special damages in personal injury cases and devised a formula for fixing the rate of interest based on the assumption that, if the plaintiff was out-of-pocket, he would have to borrow money, and should be compensated. We are of the view that the appropriate rate should be the cost of borrowing for a personal borrower. According to the Hong Kong and Shanghai Banking Corporation the cost of such borrowing would be in the region of 3% over the Best Lending Rate on an unsecured basis (i.e. without any collateral). Based on that, we recommend that the formula for fixing the rate of interest should be half the sum of 3% over the Best Lending Rate at the time of the award i.e. $(BLR + 3\%) \div 2$.

8.3 In arriving at this rate, we made reference to a decision of Mr Justice Liu in LO Wai-fong v HO Lai-chi³⁷ where the interest rate on special damages was fixed at 6.5%. That case was decided in January 1986 when the Best Lending Rate was about 7%. It would therefore appear that in that case interest on special damages was calculated at more than half the cost of borrowing. Nevertheless since the purpose of awarding interest on special damages is to compensate the plaintiff for the cost of borrowing funds, we feel that the appropriate rate should be the rate that the person would have had to pay to borrow money.

8.4 Hong Kong's closest equivalent to the short term investment rate, which was stated to be the appropriate rate by Lord Denning M. R. in Jefford v Gee, is perhaps the Hong Kong Association of Banks' call deposit rate which is a very low rate of interest. An award of interest at that rate may result in the plaintiff being under-compensated.

³⁷ HCA No. 1971 of 1985

Rate of interest on general damage

8.5 As to what should be the appropriate rate of interest on general damages for pain, suffering and loss of amenities, we accept the view expressed by the Court of Appeal in Birkett v Hayes, and recommend that interest should be awarded at the low rate of 2% from the service of the writ to the date of trial since the award already takes into account inflation. Furthermore, the exact judgment sum is unknown at the date of service of the writ and *"to award interest on this sum as though it were a debt is to call on a defendant to pay interest on a figure that was never demanded and which at the date of the writ is usually sheer guesswork"*³⁸.

8.6 In Wright v British Railways Boards Lord Diplock explained the rationale behind the choice of the interest rate of 2% on general damages for pain, suffering and loss of amenities. Since the level of damages was fully adjusted to take account of inflation, the plaintiff would be over compensated if he received the full commercial interest rate from the date of his loss. The current high rates of interest are composed in large part of an allowance for inflation, and if inflation is already taken into account by an adjustment in the principal amount of the award the plaintiff ought to receive only, in addition, interest at a rate reduced to exclude consideration of inflation. *"In effect, he may be regarded as having held an inflation-proof investment between the date of service of the writ and the date of trial; and the rate of interest accepted by investors in index-linked (i.e. inflation-proof) government securities should provide a broad indication of what is the appropriate rate of interest to be awarded him"*³⁹.

8.7 Lord Diplock then went on to consider the expert evidence given in Birkett v Hayes in respect of the rate of return these securities produced. *"On index-linked securities the rate of return on retirement bonds after being held for five years was 0.8 per cent per annum free of tax; on the save-as-you-earn investment, it was 1.3 per cent per annum also free of tax; and on the 15-year and 25-year index-linked treasury stock issued in 1981, it was 2 per cent. In effect, subscribers to this stock obtained that 2 per cent free of tax since initially, at any rate, it was only available to gross funds - pension funds, life funds and the like, not liable to income tax; but medium and long-term index-linked issues at 2 per cent or 2½ per cent have latterly been made available to private individuals who, if liable to income tax, obtain a net return of 2 per cent to 2½ per cent less tax, and even now are traded at around about par. The expert's examination of the rate of return obtained upon a range of investments that were not inflation-proof but in which the risk element, apart from inflation, was small led him to the conclusion that no better return than 2 per cent in excess of inflation could be expected during that period of recession and inflation as the real reward for foregoing the use of money. The success of the index-linked issue of long-dated treasury stock carrying 2 per cent interest came after his original report in which he had expressed that conclusion and provided powerful confirmation of it. Although 4 per cent to 5*

³⁸ Birkett v Hayes [1982] 1 WLR 816, 824

³⁹ Wright v British Railways Boards [1983] 2 AC 773, at p. 782

*per cent may again become an appropriate rate to allow for foregoing the use of money if currency becomes stable again, when inflation is rampant and recession has increased the risk of investment in equities, anxiety to preserve the real value of money that is not immediately needed but is saved for future use makes investors willing to accept a much lower 'real' rate of interest; and I see no ground for rejecting, for the time being, the 2 per cent rate adopted by the Court of Appeal in Birkett v Haves as the rate to be used for calculating the conventional "interest" on an award for damages for non-economic loss that the statute requires the Court to include in the sum for which judgment is given*⁴⁰.

8.8 We note that the Pearson Commission in its report agreed with the Law Commission's conclusion and with the Court of Appeal's observation in Cookson v Knowles that no interest should be awarded on non-pecuniary loss primarily because of the conventional nature of such award. The Law Reform Commission of British Columbia, in its Working Paper No. 49 on the Court Order Interest Act 1985, criticised the reasoning of the Pearson Commission. In Chapter VI.4, the Working Paper states "*Nor does the conventional nature of the award militate against prejudgment interest. After all, the plaintiff has been kept out of the conventional sum and the defendant has had the use of the money. This reasoning confuses the process of calculating the quantum of the award with calculating compensation for delay in its payment*".

8.9 It is now the practice in a number of states in Australia to apportion the award for pain, suffering and loss of amenities into past and future components and to award interest on the past component. In Hong Kong, Mr Justice Leonard in LEUNG Chi-ming v SO Ki-yim⁴¹ and CHAN Yi-keung v CHU Jau-choy⁴² divided the award for pain, suffering and loss of amenities into two parts and only awarded interest on the amount he assessed for the pre-trial pain, suffering and loss of amenities. We, however, feel that such division is difficult and should not be adopted. We therefore recommend that there should be no division of the award of pain, suffering and loss of amenities.

Awards of interest in admiralty

8.10 We consider that it is not necessary to give detailed consideration to the law in this area as the English Rules of Admiralty are held in high regard by most countries.

⁴⁰ Wright v British Railways Boards [1983] 2 AC 773, 783, 784

⁴¹ HCA No. 433 of 1976

⁴² HCA No. 2887 of 1977

Awards of interest on damages generally

8.11 We agree with the English Law Commission that interest on damages should be left to the court's discretion.

Chapter 9

Summary of conclusions and recommendations

(1) Interest on debt

Statutory entitlement and residuary discretion

9.1 There should be a statutory entitlement to interest. However, the residuary discretion of the court to award interest should be retained (paras. 4.8 and 5.9).

Contractual provision for interest

9.2 The creditor should not be entitled to recover statutory interest where the right to statutory interest has been excluded by contract (para. 5.7), or where interest is expressly provided for by contract (paras 1.2 and 5.35).

Preservation of existing rights

9.3 The scheme would not affect the scope or exercise of other rights and remedies under the contract (para. 5.11).

Permissive nature of the statutory scheme

9.4 The creditor's right under the scheme is to be exercised at his options. (para. 5.13).

Scope of the scheme

9.5 The scheme should apply to all kinds of debts without any distinction (para. 5.15(i)).

Genuine pre-estimate of damages

9.6 A sum payable which is an agreed pre-estimate of the damages should fall within the scheme (para. 5.15(ii)).

Creditors' right assignable

9.7 The creditor's right to statutory interest should be assignable like any contractual interest (para. 5.15(iii)).

Contract debt that is itself interest

9.8 Where a principal debt under a contract has been paid but the accrued interest remains unpaid, the accrued interest itself becomes a debt. Interest itself should carry statutory interest (para. 5.16).

Contract of guarantee

9.9 Statutory interest should not apply when the parties (creditor, debtor and guarantor) have agreed interest and the terms of its payment (para 5.20(i)). If interest is only agreed between the creditor and the debtor but the contract is silent regarding the payment of interest by the guarantor, then statutory interest should accrue after a grace period (para 5.20(ii)). Where the parties (creditor, debtor and guarantor) have not provided for interest, statutory interest should apply after a grace period which should be one calendar month (para 5.20(iii)).

Foreign money liabilities

9.10 Debts payable in foreign currencies but subject to Hong Kong law are included in the scheme (para. 5.22). The statutory interest rate should be appropriate to the foreign currency in question (para. 5.24). The statutory interest scheme should cover all foreign currencies (para 5.27). The appropriate government department should determine the appropriate margin over the recognised base lending rates; and the statutory interest should be awarded at compound rates and at intervals of one month (para. 5.28).

Exclusion: rent

9.11 Overdue rents should be excluded from the scheme because many of them, jurisprudentially speaking, are not strict contractual debts at all and their recovery involves special social policies peculiar to the law of landlord and tenant (para. 5.33).

Exclusion: quasi-contractual debt

9.12 Quasi-contractual obligations should be excluded because they are difficult to determine and are not strictly contract debts (para. 5.34).

Exclusion: indemnity obligations

9.13 Indemnity obligations should be excluded from the scheme because the indemnifier is not in the same position as the ordinary debtor since he is liable to pay when the claim has been presented and he needs time to investigate and verify the claim and so it would not be fair to regard him as withholding payment (para. 5.37).

Commencement of statutory interest

9.14 (a) Where date for payment has been agreed, the debt should carry statutory interest from that date. The burden of proof should fall on the creditor (para. 5.38(a)).

(b) Where no date for payment has been agreed, statutory interest should not start to run until 28 days after the receipt of a letter of demand (para. 5.38(b)).

Form of letters of demand

9.15 A valid letter of the demand should:

- (a) be in writing,
- (b) be dated,
- (c) state the amount of debt and interest due,
- (d) set out the currency (if other than HK currency) in which payment should be made,
- (e) identify the creditor, and
- (f) contain an address of the creditor.

Only (a) and (c) should be mandatory requirements (para. 5.39).

Due service of the demand

9.16 (a) Where the debtor is a body corporate, apart from service on the company secretary or at the registered office, there should be an option of good service at the place of business, i.e. an address from which the debtor carries on business and at which it would be commercially reasonable to serve the demand, having regard to the previous course of dealing between the parties and any communication between them in connection with the transaction in question.

(b) Where the debtor is a partnership, service of the demand would be good if delivered at, or posted to, the principal address from which the partnership carries on business, or if served on a partner or person having the control or management of the partnership business. The option of good service at the place of business for business debts, subject to the same conditions as in 9.16(a) above, should also be available.

(c) Where the debtor is an individual, service would be good if effected by delivering the demand to the individual personally or by leaving it at, or posting it to, his last known address. The option of good service at the place of business for business debts, subject to the same conditions as in 9.16(a) above, should also be available (para. 5.40).

Presumption of delivery

9.17 The creditor should in all cases have the benefit of the statutory presumption of delivery in the ordinary course of post (para. 5.41).

Cessation of statutory interest

9.18 Since a debt may be discharged, or rendered irrecoverable, by circumstances other than payment, statutory interest should cease to run from the date when there ceases to be an obligation to pay the debt, otherwise than by reason of the debt having been paid (para. 5.42).

Rate of statutory interest

9.19 The basis for an award of statutory interest is to compensate the creditor for having to borrow money rather than for losing investment income. The rate of statutory interest for HK currency debt should therefore be the Best Lending Rate + 3% or its equivalent (para. 5.47).

Fluctuations in the statutory rate

9.20 The rate of statutory interest carried by a debt should fluctuate as the statutory rate itself fluctuated, and it follows that it would be appropriate for the interest on each individual debt to change as the statutory rate changes (para. 5.47).

At compound rates

9.21 Statutory interest should be awarded at compound rates (para. 5.66) and at intervals of one month (para. 5.67).

Publication of the multiplier table B

9.22 The use of multiplier Table B is recommended and it should be published by government at monthly intervals (para. 5.68).

Debt overdue period of less than a month

9.23 No compound interest should be capable of being claimed for any debt overdue for a period of less than a month (para. 5.69).

Publication of the statutory rate of interest

9.24 The rate of interest should be set by the Chief Justice as Orders under subsidiary legislation, and should be published by government at monthly intervals (para. 5.70).

A judicial power to suspend the running of statutory interest

9.25 While personal reasons for late payment or non-payment of a debt should not be a ground for suspension of statutory interest, where payment is withheld due to genuine doubts or dispute as to the terms of the agreement or the amount of the principal the courts should be able to intervene (para. 5.73).

Retrospectivity

9.26 The scheme should only apply to debts payable under contracts entered into after these recommendations are given the force of law (para. 5.74).

Debts involving Government

9.27 The scheme should bind the Crown so that the Crown can take advantage of or be burdened by the scheme (para. 5.75).

Effect on other statutory provisions on interest

9.28 The scheme should be without prejudice to other statutory enactments (para. 5.76).

Other recommendations

9.29 The following aspects of the existing law should remain unchanged: -

- (a) the matrimonial jurisdiction to award interest and
- (b) the law governing the recovery of interest upon the dishonour of a bill of exchange (para. 5.77).

(2) Interest on damages

Special damages

9.30 We recommend that the formula for fixing the rate of interest in respect of special damages in personal injury cases should be half the sum of 3% over the Best Lending Rate at the time of the award i.e. $(BLR + 3\%) \div 2$ (para. 8.2).

General damages

9.31 We recommend that the rate of interest in respect of general damages in personal injury cases should be awarded at the low rate of 2% from the service of the writ to the date of trial as the award already takes into account inflation and the exact judgment sum is unknown at the date of service of the writ (para. 8.5).

9.32 We recommend there should be no division of the award of pain, suffering and loss of amenities and interest should be awarded on the whole award (para. 8.9).

Awards of interest in admiralty cases

9.33 We have concluded that no changes are needed in the existing law relating to awards of interest in Admiralty cases (para. 8.10).

Awards of interest on damages generally

9.34 We have concluded that there should be no general entitlement to interest on damages but that the award of interest on damages should be left to the court's discretion (para. 8.11).

Section 35A of Supreme Court Act 1981

35A Power of High Court to award interest on debts and damages

(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and -

- (a) in the case of any sum paid before judgment, the date of the payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment

(2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect -

- (a) with the substitution of "shall be included" for "may be included"; and
- (b) with the addition of "unless the court is satisfied that there are special reasons to the contrary" after "given", where first occurring.

(3) Subject to rules of court, where-

- (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and
- (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Without prejudice to the generality of section 84, rules of court may provide for a rate of interest by reference to the rate specified in section

17 of the Judgments Act 1838 as that section has effect from time to time or by reference to a rate for which any other enactment provides.

(6) Interest under this section may be calculated at different rates in respect of different periods.

(7) In this section "plaintiff" means the person seeking the debt or damages and "defendant" means the person from whom the plaintiff seeks the debt or damages and "personal injuries" includes any disease and any impairment of a person's physical or mental condition.

(8) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

Section 48 Supreme Court Ordinance (Cap. 4)

48. (1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the Court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and -

Interest on claims for debt and damages. 1981 c. 54 s 35A

- (a) in the case of any sum paid before judgment, the date of the payment; and
- (b) in the case of the sum for which judgment is given, the date of the judgment.

(2) In relation to a judgment given for damages for personal injuries or death which exceed \$30,000 subsection (1) shall have effect -

- (a) with the substitution of "shall be included" for "may be included"; and
- (b) with the addition of "unless the Court is satisfied that there are special reasons to the contrary" after "given", where it first occurs.

(3) Subject to rules of court, where -

- (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and
- (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff interest at such rate as the Court thinks fit or as

rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section, for a period during which, for whatever reason, interest on the debt already runs.

(5) Interest under this section may be calculated at different rates in respect of different periods.

(Cap. 336)

(6) For the avoidance of doubt it is declared that in determining, for the purposes of any enactment contained in Part IV of the District Court Ordinance, whether an amount exceeds, or is less than, a sum specified in that Part, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power.

(7) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

(8) In this section -

"defendant" means the person from whom the plaintiff seeks the debt or damages;

"personal injuries" includes any disease and any impairment of a person's physical or mental condition; and

"plaintiff" means the person seeking the debt or damages.

(Replaced, 52 of 1987, s. 37)

Section 49 District Court Ordinance (Cap. 336)

49. (1) Subject to subsection (2), the Court may, in any proceedings brought in the Court for the recovery of any debt or damages, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

interest on claims for debt and damages. 1981 c.54 s. 35A

(2) Nothing in subsection (1) shall -

(a) authorize the giving of interest upon interest,

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise., or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

(3) The powers conferred by subsection (1) may be exercised -

(a) whether or not interest is expressly claimed;

(b) at any time after judgment is entered in any case in which it appears that the failure to apply for or to award interest was through inadvertence; and

(c) in the case of a judgment entered by default or by order of the Registrar, by the Registrar.

(22 of 1962, s. 19A, incorporated. Added, 6 of 1970, Schedule)

(4) Where in any such proceedings as are mentioned in subsection (1) judgment is given for a sum which (apart from interest on damages) exceeds \$3,000 and represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then (without prejudice to the

1969 c. 55. s. 22.

exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) (the Court shall exercise that power so as to include in that sum interest on those damages or on such part of them as the Court considers appropriate, unless the Court is satisfied that there are special reasons why no interest should be given in respect of those damages. *(Added, 100 of 1970, s. 2)*)

(5) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1). *(Added, 100 of 1970, s. 2)*

(6) For the avoidance of doubt it is hereby declared that in determining for the purposes of any enactment contained in Part IV, whether an amount exceeds, or is less than, a sum specified in that Part, no account shall be taken of any power exercisable by virtue of this section or of any order made in the exercise of such a power. *(Added, 100 of 1970, s. 2)*

(7) In this section -

"personal injuries" includes any disease and any impairment of a person's physical or mental condition. *(Added, 100 of 1970, s.2)*

TABLE A

SIMPLE INTEREST MONTHLY MULTIPLIERS

	<u>JAN</u>	<u>FEB</u>	<u>MAR</u>	<u>APR</u>	<u>MAY</u>	<u>JUN</u>	<u>JUL</u>	<u>AUG</u>	<u>SEP</u>	<u>OCT</u>	<u>NOV</u>	<u>DEC</u>
1975	2.6693	2.6593	2.6497	2.6417	2.6338	2.6259	2.6180	2.6101	2.6022	2.5942	2.5863	2.5784
1976	2.5705	2.5626	2.5547	2.5467	2.5388	2.5309	2.5230	2.5151	2.5076	2.5001	2.4926	2.4851
1977	2.4776	2.4704	2.4633	2.4566	2.4501	2.4436	2.4372	2.4307	2.4243	2.4178	2.4114	2.4049
1978	2.3984	2.3920	2.3855	2.3791	2.3726	2.3655	2.3584	2.3512	2.3437	2.3362	2.3286	2.3191
1979	2.3093	2.2989	2.2882	2.2768	2.2644	2.2511	2.2377	2.2244	2.2106	2.1960	2.1815	2.1669
1980	2.1523	2.1377	2.1231	2.1077	2.0919	2.0763	2.0631	2.0508	2.0400	2.0289	2.0166	2.0025
1981	1.9860	1.9693	1.9527	1.9360	1.9193	1.9027	1.8860	1.8690	1.8515	1.8340	1.8152	1.7971
1982	1.7811	1.7653	1.7494	1.7336	1.7178	1.7020	1.6870	1.6721	1.6583	1.6458	1.6333	1.6209
1983	1.6092	1.5980	1.5867	1.5755	1.5639	1.5514	1.5377	1.5248	1.5127	1.4994	1.4837	1.4699
1984	1.4561	1.4427	1.4312	1.4210	1.4095	1.3972	1.3839	1.3678	1.3529	1.3388	1.3255	1.3131
1985	1.3011	1.2897	1.2789	1.2681	1.2578	1.2479	1.2384	1.2301	1.2226	1.2143	1.2059	1.1976
1986	1.1893	1.1809	1.1726	1.1643	1.1551	1.1462	1.1375	1.1287	1.1204	1.1125	1.1046	1.0967
1987	1.0887	1.0815	1.0748	1.0674	1.0595	1.0516	1.0432	1.0344	1.0257	1.0169	1.0079	1.0000

Statutory Interest Multiplier Tables

Annexure 3

TABLE B

COMPOUND INTEREST MONTHLY MULTIPLIERS

	<u>JAN</u>	<u>FEB</u>	<u>MAR</u>	<u>APR</u>	<u>MAY</u>	<u>JUN</u>	<u>JUL</u>	<u>AUG</u>	<u>SEP</u>	<u>OCT</u>	<u>NOV</u>	<u>DEC</u>
1975	5.2568	5.2047	5.1550	5.1144	5.0743	5.0344	4.9949	4.9556	4.9167	4.8781	4.8398	4.8018
1976	4.7640	4.7266	4.6895	4.6527	4.6161	4.5799	4.5439	4.5082	4.4745	4.4412	4.4082	4.3753
1977	4.3428	4.3118	4.2815	4.2529	4.2256	4.1985	4.1715	4.1448	4.1182	4.0917	4.0655	4.0394
1978	4.0135	3.9877	3.9621	3.9367	3.9114	3.8839	3.8566	3.8287	3.8002	3.7719	3.7436	3.7085
1979	3.6726	3.6348	3.5962	3.5557	3.5121	3.4658	3.4202	3.3752	3.3294	3.2815	3.2344	3.1879
1980	3.1420	3.0969	3.0524	3.0060	2.9591	2.9137	2.8759	2.8410	2.8105	2.7796	2.7459	2.7076
1981	2.6638	2.6201	2.5772	2.5349	2.4934	2.4525	2.4123	2.3720	2.3312	2.2911	2.2488	2.2088
1982	2.1740	2.1401	2.1068	2.0739	2.0416	2.0098	1.9801	1.9512	1.9246	1.9009	1.8774	1.8543
1983	1.8330	1.8126	1.7924	1.7725	1.7522	1.7306	1.7071	1.6854	1.6653	1.6434	1.6180	1.5960
1984	1.5743	1.5534	1.5358	1.5202	1.5030	1.4847	1.4653	1.4420	1.4209	1.4011	1.3827	1.3658
1985	1.3496	1.3344	1.3201	1.3060	1.2927	1.2801	1.2680	1.2575	1.2482	1.2379	1.2277	1.2175
1986	1.2074	1.1975	1.1876	1.1778	1.1671	1.1568	1.1467	1.1368	1.1274	1.1185	1.1098	1.1010
1987	1.0924	1.0846	1.0774	1.0694	1.0611	1.0527	1.0439	1.0349	1.0259	1.0170	1.0079	1.0000

TABLE C

ADJUSTED COMPOUND INTEREST MONTHLY MULTIPLIERS

	<u>JAN</u>	<u>FEB</u>	<u>MAR</u>	<u>APR</u>	<u>MAY</u>	<u>JUN</u>	<u>JUL</u>	<u>AUG</u>	<u>SEP</u>	<u>OCT</u>	<u>NOV</u>	<u>DEC</u>
1975	5.0914	5.0421	4.9950	4.9567	4.9188	4.8811	4.8438	4.8067	4.7700	4.7335	4.6973	4.6613
1976	4.6257	4.5903	4.5552	4.5203	4.4858	4.4515	4.4174	4.3836	4.3518	4.3203	4.2890	4.2579
1977	4.2271	4.1979	4.1692	4.1422	4.1165	4.0909	4.0655	4.0402	4.0151	3.9902	3.9654	3.9408
1978	3.9163	3.8920	3.8678	3.8438	3.8199	3.7938	3.7679	3.7415	3.7144	3.6875	3.6605	3.6270
1979	3.5926	3.5563	3.5193	3.4804	3.4384	3.3938	3.3499	3.3065	3.2622	3.2160	3.1704	3.1255
1980	3.0812	3.0375	2.9945	2.9496	2.9042	2.8602	2.8237	2.7900	2.7606	2.7308	2.6983	2.6612
1981	2.6187	2.5763	2.5345	2.4935	2.4531	2.4134	2.3743	2.3352	2.2955	2.2565	2.2152	2.1763
1982	2.1424	2.1095	2.0770	2.0451	2.0136	1.9827	1.9538	1.9256	1.8998	1.8767	1.8539	1.8315
1983	1.8108	1.7911	1.7715	1.7521	1.7325	1.7114	1.6885	1.6674	1.6479	1.6265	1.6017	1.5802
1984	1.5591	1.5387	1.5216	1.5065	1.4897	1.4719	1.4530	1.4302	1.4095	1.3901	1.3722	1.3556
1985	1.3399	1.3251	1.3111	1.2974	1.2844	1.2722	1.2605	1.2503	1.2412	1.2312	1.2213	1.2115
1986	1.2017	1.1920	1.1824	1.1729	1.1625	1.1525	1.1427	1.1330	1.1239	1.1153	1.1068	1.0983
1987	1.0899	1.0823	1.0754	1.0676	1.0595	1.0514	1.0428	1.0340	1.0253	1.0166	1.0077	1.0000

TABLE D

HSBC's BEST LENDING RATES-MONTHLY AVERAGES OF DAILY
DATA, ANNUAL PERCENTAGE INTEREST RATES

	<u>JAN</u>	<u>FEB</u>	<u>MAR</u>	<u>APR</u>	<u>MAY</u>	<u>JUN</u>	<u>JUL</u>	<u>AUG</u>	<u>SEP</u>	<u>OCT</u>	<u>NOV</u>	<u>DEC</u>
1975	9.00	8.57	6.52	6.50	6.50	6.50	6.50	6.50	6.50	6.50	6.50	6.50
1976	6.50	6.50	6.50	6.50	6.50	6.50	6.50	6.03	6.00	6.00	6.00	6.00
1977	5.61	5.50	5.08	4.75	4.75	4.75	4.75	4.75	4.75	4.75	4.75	4.75
1978	4.75	4.75	4.75	4.75	5.50	5.50	5.74	6.00	6.00	6.08	8.35	8.75
1979	9.48	9.86	10.69	11.90	13.00	13.00	13.00	13.53	14.50	14.50	14.50	14.50
1980	14.50	14.50	15.52	16.00	15.71	12.78	11.74	10.00	10.37	11.71	13.97	16.74
1981	17.00	17.00	17.00	17.00	17.00	17.00	17.36	18.00	18.00	19.61	18.73	16.19
1982	16.00	16.00	16.00	16.00	15.97	15.00	14.81	13.55	12.00	12.00	11.93	10.97
1983	10.50	10.50	10.50	10.87	12.02	13.50	12.44	11.50	13.00	15.84	13.55	13.50
1984	13.15	10.75	9.32	10.73	11.81	12.88	16.37	14.84	14.00	12.90	11.92	11.37
1985	10.65	10.00	10.00	9.35	8.81	8.38	7.03	6.00	6.97	7.00	7.00	7.00
1986	7.00	7.00	7.00	8.00	7.68	7.50	7.50	6.98	6.50	6.50	6.50	6.50
1987	5.68	5.00	5.97	6.40	6.50	7.13	7.50	7.50	7.50	7.82	6.48	5.60