

Title:

Boyd, Stewart, Interest for the Late Payment of Money, 1 Arb.Int'l 1985, at 153 et seq

**Permission Text:**

This document is included in TransLex by kind permission of Kluwer Law International.

Table of Contents:

Interest for the late payment of money

Content:

Page: 153

Interest for the late payment of money

by [STEWART BOYD*](#)

THE rule that interest is not recoverable as general damages for failure to pay money an time is a relic of the common law that has no place in a modern system of commercial law. Yet it has a tenacious hold on life, and has survived three Acts of Parliament intended to modernise the law an interest, a Law Commission Report which would effectively have abolished it, and two unsuccessful attacks an its survival in the House of Lords. The most recent of these House of Lords cases, *President of India v. La Pintada Compania Navigacion SA (La Pintada)*,¹ has demonstrated the continuing ability of the rule to work injustice in cases falling outside the statutory remedies or any of the established exceptions to the rule.

The facts of *La Pintada* are simple and by no means unusual. The ship *La Pintada* was chartered to the appellant in October 1973. In May 1977 arbitration was commenced to recover substantial sums of freight and demurrage and in January 1981, after previous offers to pay the same amounts had not been accepted, a sum in U S dollars and a sum in Sterling was paid and accepted in satisfaction of the claims. This left nothing to be decided in the arbitration except a claim for interest for late payment of the sums due. On these facts the umpire upheld the claim for interest, which he awarded at a compound rate on the amount of freight and demurrage from the date on which he held they should properly have been paid until the date of his award. But he stated his award in the form of a Special Case for the decision of the court. Staughton J, who heard the Special Case, considered that he was bound by a previous decision of the Court of Appeal, *Tehno - Impex v. Gebr van Weelde Scheepvaartkontor B V*,² to uphold the umpire's decision but certified that a point of law of general importance was involved, so as to invoke the 'leap - frog' procedure under section 12 of the Administration of justice Act 1969. The Special case thus came before the House of Lords as an appeal, in effect, against the decision in the *Tehno - Impex* case.

Both *La Pintada* and *Tehno - Impex* arose at a time when the relevant statutory provision regarding interest was that contained in section 3(1) of the Law

Page: 154

Reform (Miscellaneous Provisions) Act 1934. That subsection provided:

'(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, 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 . . .'

Although the sub - section in terms referred only to 'any court of record'; it was held by the Court of Appeal in *Chandris v. Isbrandtsen-Moller Co Inc*³ that an analogous provision is to be implied into every arbitration agreement in the absence of express agreement to the contrary. But the sub-section contained one important limitation on the power of the court or an arbitrator to award interest, and that was that it could only be included 'in the sum for which judgment ' (or by analogy 'the award') 'is given'. So interest could not be awarded on sums paid before judgment or award.⁴

In the 1970's this gap in the legislation began to be ruthlessly exploited by unscrupulous debtors, who would sometimes wait until the day before the hearing to pay claims to which there was no real defence. In arbitration this ploy was made easier by the absence of any clean and effective procedure analogous to Order 14 proceedings for summary judgment.

The *Tehno-Impex* case was the first attempt to find some way of defeating the ploy. Two arguments were advanced. The first, relying on the old case *In Re Badger*,⁵ was that the rule of common law denying an award of interest as damages was a rule of procedure binding courts but not arbitrators. The second Argument, relying on the power of the Admiralty Courts to award interest on certain types of claim, was that both arbitrators and the courts could award Admiralty interest on any claim which would have fallen within the jurisdiction of the Admiralty Court: this embraced most, if not all, of the usual types of claim in maritime arbitrations, including claims for freight and demurrage. The Court of Appeal rejected the first argument (Denning MR dissenting) but accepted the second (Oliver LJ dissenting).

When the *Tehno-Impex* case came up for re-consideration by the House of Lords in *La Pintada*, the first argument (that arbitrators are not bound by the rule) was argued at some length in the appellants' case, but was abandoned at the hearing - rightly, in their Lordships' opinion. The juridical source of an arbitrator's procedural powers thus remains based on the implication of terms analogous to the statutory procedures of the High Court, with all the limitations, *mutatis mutandis*, which apply to such procedures. The second argument (that interest can be awarded on all Admiralty claims) was rejected. This was perhaps not surprising. Admiralty had never before awarded interest on any claims except those for damages and salvage. The extension of interest

Page: 155

beyond such claims rested on very shaky foundations and gave rise to anomalous distinctions between Admiralty and non-Admiralty claims which could not be supported on any rational basis.

But the importance of *La Pintada* lies not so much in the treatment of the arguments in *Tehno-Impex* as in the wider but unsuccessful attack made by the appellants on the basic common law rule against the award of interest as damages. To understand why the attack failed it is necessary to know something of the history of the rule. Curiously, given its now impregnable position, it was not by any means settled until the decision of the Court of Kings Bench presided over by Lord Tenterden CJ in *Page v. Newman*.⁶ Only three years earlier, in *Arnott v. Redfern*,⁷ it had been possible for Best CJ in the Court of Common Pleas to lay down as a general rule that damages were recoverable as interest wherever the debt had been wrongfully withheld after the Plaintiff had endeavoured to obtain payment of it. Lord Tenterden, however, rejected any such rule on the grounds that -

'It might frequently be made a question at *nisi prius* whether proper means had been used to obtain payment of a debt. That would be productive of great inconvenience.'

(Since trials at *nisi prius* were at that time heard by a judge and jury, it is probable that the inconvenience to which Lord Tenterden was referring was the fact that the issue would have to be the subject of sworn testimony followed by a verdict of the jury. At a time of low interest rates the sums involved would not usually have justified the expense and time involved in such a procedure).

Four years later, Parliament enacted the Civil Procedure Act 1833, of which Lord Tenterden was himself the author, and which enabled juries to award interest 'upon all debts or sums certain'. It was not until 1893, in *London, Chatham and Dover Railway Co v. South Eastern Railway Co*,⁸ in a case which was held to fall outside the Act, that the common law rule against interest as damages was again challenged. But in the leading speech, Lord Herschell LC, while expressing strong sympathy for the claim for interest and remarking that the reason given by Lord Tenterden for the rule against interest seemed unconvincing, nevertheless held that the rule had stood for too long to be overruled, particularly as Lord Tenterden's Act had been passed with obvious reference to it.

The Law Reform (Miscellaneous Provisions) Act 1933 repealed Lord Tenterden's Act and replaced it with a more general discretion to award interest on any claim for debt or damages, limited however to simple interest. It was this enactment which was in force at the time of the arbitration in *La Pintada*. By the time of the hearing in the House of Lords, however, Parliament had intervened yet again, by the Administration of Justice Act

Page: 156

1982, to enable the courts and arbitrators to award interest on debt or damages paid before judgment or award, but with the important limitation that the debt or damages must be the subject of the proceedings or the reference. The effect of this limitation is that the court or arbitrator still has no power to award statutory interest on sums paid before the proceedings or the reference were commenced.

The reason why Parliament imposed this limitation on the powers of the courts and of arbitrators is obscure. The Administration of Justice Act 1982 was preceded by a report in 1978 by the Law Commission,⁹ which stated that the inability of the plaintiff to recover interest on sums paid before proceedings were started was one of its major criticisms of the law. The Law Commission made detailed proposals for remedying this and other criticisms of the existing law, and drafted a detailed bill, which would have replaced the statutory *discretion* to award interest on sums included in a judgment by a statutory *right* to interest, with minor exceptions, on all monetary obligations, including damages. Why Parliament did not adopt this solution has never been publicly explained. The relevant provisions of the Administration of Justice Bill were debated only once, in the House of Lords on 6 April 1982, when an amendment was moved by Lord Stanley of Alderley which would have given effect to the Law Commission's proposals. In speaking against the amendment, which was withdrawn after debate, Lord Hailsham said that 'the matter was processed through various departments and various consultations' and that a number of institutions, including the Confederation of British Industry, the National Chamber of Trade, the Federation of Civil Engineering Contractors, accountancy bodies and most, though not all, of the consumer organisations were very much against the idea. Very much in favour were the National Farmers Union, the Association of British Chambers of Commerce and the Law Society. Unfortunately the Lord Chancellor was unable to give any explanation of the grounds on which the Law Commission's proposals were so firmly opposed, and it is to be regretted that the process of law reform can be thus frustrated without public debate, particularly as the Law Commission had invited and received public comment on its draft proposals, which were published as a working paper before it proceeded to its final report. None of the opponents of the Bill named by the Lord Chancellor (unless the Consumers' Association was among them) appears to have made any comment at that stage.

Not unexpectedly, the existence of the Administration of Justice Act 1982 had a decisive impact on the result of *La Pintada*. Lord Brandon, who made the leading speech, gave three reasons for refusing to depart from the House's previous decision in the *London, Chatham and Dover Railway* case, each of which referred to the existence of the new legislation. In summary, they were as follows:

Page: 157

1. The major part of the injustice to creditors which resulted from the rule against awarding interest as damages has now to a large extent been removed by the Act and to a lesser extent by judicial decision. (The reference to judicial decision will be explained in a moment).
2. Where Parliament has taken what appears to be a policy decision not to give effect to a Law Commission proposal, the courts ought not to arrive by another route at a result which Parliament has rejected.
3. To create a common law *right* to interest running parallel to the statutory remedy, which is discretionary only, would run counter to the policy of the legislature as manifested in the Acts of 1934 and 1982.

So, not for the first time in this field, limited Parliamentary intervention has inhibited more radical reform by the courts.

What then is a creditor to do when, after the date for payment but before proceedings are begun, his debtor tenders the amount owing without any additional sum for interest? It seems that there are two courses of action open to him: First, he may claim interest as *special* damages. Secondly, he may reject the tender and bring proceedings for the principal sum due: once he has started proceedings he can recover interest under the Act of 1982.

The first of these two possibilities is explicitly referred to in the speech of Lord Brandon, and arises out of the decision of the Court of Appeal in *Wadsworth v. Lydall*¹⁰ that the *London, Chatham and Dover Railway* case did not extend to claims for special, as distinct from general, damages. Lord Brandon, with whom all four Law Lords agreed, expressly stated that *Wadsworth v. Lydall* was correctly decided, and indeed this is part of the ratio decidendi of *La Pintada*, since the existence of a possible claim for special damages is referred to by Lord Brandon as one of his reasons for concluding that the common law rule against general damages should not be abandoned.

Unfortunately, the precise scope of the decision in *Wadsworth v. Lydall* is by no means certain. Lord Brandon's explanation of the decision is that the distinction drawn in it between general and special damages 'is the difference between damages recoverable under the first part of the rule in *Hadley v. Baxendale*, 9 Exch. 341 (general damages) and damages recoverable under the second part of that rule (special damages)'. It will be recalled that the first part of the rule encompasses such damages 'as may fairly and reasonably be considered either as arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it': whereas the second part of the rule comes into play only 'if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties'. But this presents a problem.

Page: 158

Does *Wadsworth v. Lydall* permit damages to be recovered only when they would fall within the second part of the rule *but not the first*? Or does it permit damages to be recovered when they are pleaded and proved under the second part of the rule even if they could, but for the decision in the *London, Chatham and Dover Railway* case, have been recovered under the first part of the rule? If the former position is correct, the extraordinary result would follow that such loss of interest as would obviously flow from late payment would not be recoverable, whereas less obvious losses, if arising from special circumstances communicated to the debtor, *would* be recoverable. But if the latter position is correct, *Wadsworth v. Lydall* would appear to decide that the *London, Chatham and Dover Railway* case turned only on the point that the loss of interest had not been pleaded and proved. If this is the combined effect of the two decisions then it seems there is little left in practice of the common law rule. And if that is so, one would have thought that Lord Brandon's reasons for declining to abandon the common law rule would have led him to conclude that *Wadsworth v. Lydall* was wrongly decided. Moreover, the need to plead and prove a claim for interest would appear to involve the very inconvenience which led Lord Tenterden to adopt the common law rule in *Arnott v. Redfern*.

Fortunately, however, the logic of Lord Brandon's approach seems to have been well tempered with pragmatism, and it is submitted that his approval of *Wadsworth v. Lydall* will enable the plaintiff to recover interest in all cases where he takes the precaution of pleading that the loss of interest was foreseeable and adducing the necessary evidence to make good the pleading. The rule in the *London, Chatham and Dover Railway* case ought perhaps now to be expressed merely as a rule that 'interest is generally presumed not to be within the contemplation of the parties'. The presumption will no doubt generally be rebutted without difficulty in the case of commercial transactions.

The second possibility which has already been mentioned for enabling the creditor to recover interest on sums tendered before proceedings have started is to reject the tender as inadequate and to bring proceedings at once for the principal sum due, in which interest would then be recoverable under the Act of 1982. The debtor will be unable to make good a plea of tender before action, so as to throw the costs of the proceedings on the creditor, because tender of the sum due after the time for payment does not support a plea of tender: *Dixon v. Clark*.¹¹ (It is in any case unclear how a plea of tender should be made in an arbitration. In an action it must be accompanied by payment of the sum due together with an amount sufficient to cover the defendant's liability for interest under statute: Order 22, rule 1(8). Presumably a plea of tender in an arbitration should be accompanied by an irrevocable payment into an account from which payments may only be made pursuant to the arbitrator's award).

There are, however, two matters to bear in mind before rejecting a tender as a means of recovering interest. The first is that if the solvency of the debtor or

Page: 159

the ability to enforce an award against him is in doubt, 'a bird in the hand is worth two in the bush'. The second is that under many, if not all, forms of arbitration agreement an arbitrator may not have jurisdiction over a claim which is admitted.¹² The creditor may therefore have to bring his claim by action, which will only be possible in the case of a foreign debtor if he can be served within the jurisdiction or under Order 11. Nevertheless, rejecting a tender may still be useful in some cases, particularly if there is any doubt whether interest can be claimed under the principle of *Wadsworth v. Lydall*.

Finally, the question of compound interest should be mentioned. It was expressly prohibited by the Act of 1934 and is likewise excluded by the Act of 1982. It is not recoverable in Admiralty, although it may be awarded in an equitable claim to recover trust property. There seems no reason in principle, however, why it should not be recovered under the principle of *Wadsworth v. Lydall* so long as it is properly pleaded and proved. Most finance nowadays is based on compound rather than simple interest, and this has been reflected in the readiness of commercial arbitrators, before the decision in *La Pintada*, to award compound interest. (It may be observed that, although the Law Commission rejected a proposal for compound interest on the grounds that the cost of calculating it would be out of proportion to the sums involved, the reasons given at paragraph 85 of its Report suggest that the method of calculating compound interest may have been misunderstood.)

La Pintada has drawn attention to a serious gap in the Administration of Justice Act 1982, in that delay in payment of a money obligation cannot be compensated by an award of interest under the Act if payment is made before proceedings are started. Lord Scarman and Lord Roskill each spoke of the need for early legislation to fill the gap. It is to be hoped that their words will be heeded and that when the subject is next debated it will be debated in public and not merely 'processed through various departments and various consultations'.

The implications of *La Pintada* for international arbitration are not easy to assess. It will clearly govern any reference in which both the *lex causae* and *lex curiae* are the law of England. But where either of these laws is not English law, the question will probably have to be considered whether the claim for interest involves a matter of substance or procedure. From the point of view of the English rules of private international law this raises problems of considerable difficulty, which are unfortunately beyond the scope of this note. In Order to indicate the nature of the difficulties it is perhaps sufficient to state that although the statutory powers of courts and arbitrators to award interest have always been expressed in terms of discretionary remedies which have the appearance of being essentially procedural in character, modern opinion tends towards the view that the right to interest, whether on debt or damages, is

Page: 160

governed by the *lex causae*: *Miliangos o. George Frank Textiles (No. 2)*,¹³ *Helmsing Schiffahrts GmbH v. Malta Drydocks Corpn.*¹⁴ But the decisions in these two cases reveal a difference of opinion as to whether questions concerning the *rate* of interest are to be regarded as procedural or substantive. The possibility, raised by the decision in *La Pintada*, that interest may now be recoverable as special damages as well as by statute, make it likely that the courts will soon be called upon to re-examine the principles of private international law in England as they relate to claims for interest.

*Q.C. London.

¹[1985] A.C. 104.

²[1981] Q.B.648.

³[1951] K.B. 240.

⁴The Medina Princess [1962] 2 Lloyds Rep. 17.

⁵(1819) B. & Ald. 691.

⁶(1829) B. & C.378.

⁷(1826) 3 Bing. 353.

⁸[1893] A.C. 429.

⁹Law Com. No. 88 (Cmnd. 729).

¹⁰[1981] W.L.R.598.

¹¹(1848) 5C.B.365.

¹²Mustill and Boyd, Commercial Arbitration, pp. 95-97.

¹³[1972] Q.B.489.

¹⁴[1977] 2 Lloyds Rep. 444.

Referring Principles:

VII.7 - Right to charge compound interest