**Tony Bingham** **You can recover damages for losses caused by breach of contract but probably not for the loss of the use of money awarded in damages. Interest, in other words.That's a bit odd isn't it?**

# Hand over *all* the money

I have to confess that one of the areas of law that I find quite loopy is awarding interest. Having decided (as adjudicator or arbitrator or judge) that X owes Y a lump of cash, what's to be done about also compensating Y for the time X held on to that lump of cash? The truth is that the rules are not soundly based. Not, at least, until the House of Lords got to grips with it in a case called Sempra Metals Limited vs Inland Revenue. This case was explained in a talk given to the Society of Construction Law by Judge Anthony Thornton. The judge calls the case The Sempra Metals Revolution.

Why loopy? Look, English law as a general law provides that you can recover damages for losses caused by a breach of contract or a general wrong caused by the other bloke. But, and this is where I blink, English law does not generally provide for damages for loss of the use of the money represented by the award in damages. So, you can claim for breach of contract and get damages but the bottom line is that claiming for loss of use of the money now awarded is a no-no.

You would call this interest. And, over umpteen years we have wrestled with ideas on how to overcome all this. I well tell you how in a moment; but Sempra has blown the cobwebs away. At the front of the judgment Lord Nicholls says, "To a significant extent the law remains out of step with everyday life in the 21st century. The common law adopted a restrictive rule: unpaid debts do not carry interest, either compound or simple. This was an exception to the ordinary common law principles applicable to recovery of damages for breach of contract." He added: "We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether they borrow money on overdrafts or credit cards or mortgages or shop around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality."

Over all these years the unease felt about the basic rule has been tackled by legislation. A variety of acts gave courts, arbitrators and adjudicators the power to award interest. But these provisions are hedged with ifs and buts. For example, an arbitrator (or court) cannot award interest on money paid late before the action is begun. Yet the delayed

**Jonathan Cope** **We must make sure that lay representativaes in adjudication have adequate knowledge of the law and the process**

# The dangers of DIY

As the recent Mills-McCartney proceedings reminded us, one of the cornerstones of our legal system is that parties have the right to represent themselves in legal proceedings, and long may this continue. This same cornerstone applies to adjudication – and many parties represent themselves successfully.

Rupert Choat made the point a few weeks ago (25 January, page 62) that adjudication has become "too technical" and "too legal". I disagree with Rupert to an extent because, in my view, the guidance of the courts has in the main led to greater certainty in the process. However, I acknowledge that this makes life harder for unrepresented parties.

Unrepresented parties are therefore faced with the question of whether to appoint a representative. Unlike legal proceedings there are no restrictions on whom parties can appoint to represent them, and quite right too – have come across many excellent non-legally qualified representatives who can hold their own against some of the best lawyers.

However, there is a growing problem with some non-legally qualified representatives who simply do not know enough about the law of adjudication. These lay representatives can be even more dangerous than the unrepresented parties because they *think* they know the law. At least with an unrepresented party an adjudicator knows they are likely to lack legal knowledge and can manage the proceedings appropriately. I have come across two cases recently when lay representatives have made basic, yet fatal, errors in presenting their clients' cases.

In the first the referring party's representative forgot to include those magic words in the Notice of Adjudication, "… or such other sum as the adjudicator may decide", and then failed to present a cogent argument to persuade the adjudicator that he could award a sum other than that claimed. In the second, the referring party's representative

payment may have hurt. The Late Payment of Commercial Debts Act 1998 hits a late payer with a penal rate (currently 13.5% per annum) but it doesn't apply in all cases.

None of these acts are swept away. But what the Sempra Metals case has done is brought the "loss of use of money" up to date into the real world. Common law and common sense match right now. It was a test case, nothing, and everything, to do with construction industry payments.

Sempra had paid advance corporation tax. It was too much. That was discovered years later. The tax itself was credited back to Sempra. Then Sempra held its hand out for compensation for loss of use of the money. On the one hand Sempra might have borrowed the money to pay the taxman, or lost the opportunity to invest that money. It even went so far as to claim the benefit that the taxman had enjoyed by having all that money in his coffers. It's called "unjust enrichment".

**What the Sempra Metals case does is bring the 'loss of use of money' smack up to date into the real world. Common law and common sense match right now**

Do you see what is happening here? An ordinary debt paid late on a building contract will attract the penal interest rate under the Late Payment of Commercial Debts Act 1998. But English general law will now ask "Is that enough?" And if compounding interest is appropriate so be it. Then, go much further. This Lords case has recognised what the lawyers call restitutionary rights.

If the other fellow has got, or had, your money when he ought not to have, he has been unjustly enriched at your expense. It is not difficult to show how, and, if that can be compensated by compound interest, that's your claim.

**Tony Bingham is a barrister and arbitrator**

**Bingham's blog can be read at www.building.co.uk/legal**


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**I have come across two cases recently when lay representatives have made basic, yet fatal, errors**

simply did not understand the concept of proving his client's case with the use of evidence.

Unsurprisingly, the referring parties lost in both cases – not because they necessarily had a bad case but because they had bad representation.

Now, some might say that is fair enough and you get what you pay for. However, my concern is that these parties will have lost confidence in adjudication. The parties are unlikely to blame their representatives because they may not understand why they lost. However, I would bet that neither party refers a dispute to adjudication again.

So, what can be done about the problem of representatives who lack essential knowledge of adjudication? The answer is certainly not to put restrictions on who can represent parties in adjudications – most lawyers would acknowledge that it is not financially viable to use them to deal with all disputes. To do so would probably kill off most lower value adjudications.

Could better training be the answer? There is certainly a plethora of adjudication courses on offer from the likes of King's College London, the Chartered Institute of Arbitrators and the College of Estate Management, but lay representatives cannot be forced to attend such schemes.

Likewise, improving the education of clients could be a difficult message to communicate to the smaller contractors and subcontractors that are really affected by this problem.

There is no one simple answer, but I think I might know one thing that would help. I would like to see a collaboration of all the organisations interested in adjudication, not only to discuss issues such as the one I have outlined but others, too. There is no "one voice" in adjudication, and I believe this could be essential to maintain the construction industry's confidence in the process.

The Construction Umbrella Bodies Adjudication Task Group has produced guidance and undertaken a review of the adjudication provisions under the Construction Act, and we have seen nominating bodies form the Collaborative Training Group and hold master classes for the training of adjudicators.

But collaboration needs to go further so it reaches the parties' representatives as well as adjudicators. The involvement of all interested parties in this collaboration should ensure adjudication continues to be the industry's preferred method of resolving disputes.

**Jonathan Cope is a director of technical and legal consultant MCMS**