NEUTRAL CITATION NUMBER [2007] EWHC 805 (TCC)
IN THE HIGH COURT OF JUSTICE Case No: HT-04-226 and HT-06-193
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Tuesday, 20th March 2007

Before:

THE HONOURABLE MR JUSTICE JACKSON

CLAYMORE SERVICES LIMITED

Claimant

v

NAUTILUS PROPERTIES LIMITED

Defendant

MS RACHEL ANSELL (instructed by C J Hough LLP) appeared on behalf of Claymore Services Ltd
MR ALEXANDER NISSEN QC (instructed by Pinsent Masons) appeared on behalf of Nautilus Properties Ltd

JUDGMENT
(Approved)

Transcribed from tape by Harry Counsell & Co
Official Court Reporters
Cliffords Inn, Fetter Lane, London, EC4A 1LD
Telephone: 0207 269 0396

MR JUSTICE JACKSON:

1. This judgment is in six parts, namely Part 1 – Introduction; Part 2 – The Facts; Part 3 – The Present Proceedings; Part 4 – The Period During Which Interest Accrues; Part 5 – The Rate of Interest; Part 6 – Conclusion.

Part 1: Introduction

2. This is a claim by a building contractor for payment in respect of building works carried out between late 2001 and late 2002. The principal sum due was agreed shortly before the commencement of the trial. The remaining issues, which have been hard fought, concern interest. The claimant in this action is Claymore Services Limited, to which I shall refer as "Claymore". The defendant in this action is Nautilus Properties Limited, to which I shall refer as "Nautilus".

3. In this judgment I shall refer to the Pre-action Protocol for Construction and Engineering Disputes as "the Protocol". I shall refer to the Judgments Act 1838 as "the Judgments Act". I shall refer to the Housing Grants, Construction and Regeneration Act 1996 as "the 1996 Act". I shall refer to the Late Payment of Commercial Debts (Interest) Act 1998 as "the 1998 Act". I shall refer to the Supreme Court Act 1981 as "the 1981 Act". I shall refer to the official bank rate, set by the Bank of England as "base rate". After these introductory remarks, I must now turn to the facts.

Part 2: The Facts

4. Nautilus is the leasehold owner of the property known as No. 5 Cavendish Square, London W1, which was formerly the Spanish Embassy. I shall refer to this as "the property". In or about late 2000 Nautilus decided to refurbish and convert the property into a number of bars, an eight bedroom hotel, a restaurant and a nightclub.

5. During the course of 2001 Claymore carried out work to the property, under arrangements with Nautilus, which are in dispute. I do not need to go into those arrangements, or their possible contractual basis, because Nautilus has paid Claymore in full for those works. Those works are referred to as the design works, the pre-planning permission works and the preliminary works. It should be noted that the preliminary works continued some way into 2002.

6. Let me now turn to the subsequent works, which are referred to as "the main contract works". On 28th June 2001 Claymore submitted to Nautilus, its tender for carrying out the main contract works in the sum of £3,494,368.00. Claymore submitted revisions to that tender under cover of a letter dated 22nd August 2001.

7. On the 6th December 2001 Nautilus sent a Letter of Intent to Claymore, the relevant part of that Letter of Intent reads as follows:

> "On behalf of Nautilus Properties Limited, I confirm our intention, subject to contract, to enter into an agreement with you for the above works, in accordance with the general terms of your tender and terms and conditions of the JCT Standard Form of Building Contract, with Contractor's Design 1998 Edition. You are hereby authorised to proceed with your preparations for the above works, the commencement of which is subject to the following terms:
>
> 1. You will continue negotiations with our consultant Quantity Surveyors, W T Hills, to ascertain the Contract Sum for the works and any sectional parts thereof.
>
> 2. You will undertake to complete the works within an agreed period, such period to be confirmed and agreed with Nautilus Properties Limited prior to the commencement of the works.
>
> 3. You will accept all of the liabilities in respect of the design and execution of the works, as required by the proposed form of contract.
>
> 4. You will act as Principal Contractor in accordance with the Construction (Design and Management) Regulations 1994, which includes the production of the Construction Phase Health and Safety Plan.
>
> A condition of this Letter of Intent is that you are required to enter into a formal contract within the general terms of the tender documentation as soon as possible. Should the contract not be executed for any reason, you will be

paid your costs resulting from actions taken by you pursuant to the provisions of this letter, during the period from the date of this letter until the earlier date of the date on which you cease work on site, or the date on which you are instructed to cease work on site. Such costs will be computed on a basis related to the terms of your tender. No further claim will be accepted, whether for additional costs, overhead recovery, loss of profit or otherwise, in the event of the formal contract not being executed for any reason."

8. Mr Thorogood, of Claymore, signed a copy of that Letter of Intent and sent it back to Nautilus. Claymore duly proceeded with the main contract works. The parties never executed any formal building contract. Whether any less formal contract was created, either by what was said at the meetings or by correspondence or by conduct, became a matter of controversy, to which I shall return later in this judgment.

9. Claymore completed its work and handed over the property to Nautilus on 10th November 2002. It is in issue between the parties whether there were defects in the building and whether its condition on that date constituted "practical completion" as that term is generally understood. Be that as it may, it appears from Nautilus's evidence, and I accept, that the building opened for business on 28th November 2002.

10. Following the handover of the building, Mr Kevin Castle, who was Claymore's quantity surveyor, set about preparing the final account. In doing so he followed the general format which had been suggested by Mr Andrew Hill, who was Nautilus's Quantity Surveyor. The third draft final account, prepared by Mr Castle, showed a total value of work of £4,304,928.00. Mr Castle handed a copy of the third draft final account to Mr Hill at a meeting on 16th January 2003.

11. Mr Hill took the view that the third draft final account contained insufficient information and detail. After analysing that document he formed the opinion that the value of the final account would turn out to be somewhere between £3.9 million and £4.25 million. On this basis, by letter and report dated 4th April 2003, Mr Hill advised Nautilus that Nautilus could safely make an interim payment to Claymore of £144,790.00. This payment would be in

addition to interim payments previously certified, amounting to £3,499,710.00, as set out in certificate 11, dated 27th November 2002.

12. Nautilus did not pay Claymore the sum recommended by Mr Hill. Indeed, Nautilus made no payment to Claymore beyond the sums previously certified. Instead Nautilus told Mr Hill to take no further action and effectively terminated his retainer.

13. Claymore, in the meantime, set about preparing a more detailed final account. For this purpose Claymore instructed Mr Patrick Heatley, another quantity surveyor, who worked on the new final account with some assistance from Mr Castle.

14. Mr Heatley required more detailed records setting out what work had been done on site, and by whom. Accordingly, at Mr Heatley's request, Mr Thorogood of Claymore, collated the necessary information and prepared a set of labour allocation sheets. He passed these to Mr Heatley.

15. In March 2004 Mr Heatley produced Claymore's final account. This is a magnum opus, which fills seven ring files. At the front of the first file is a schedule entitled "Scott Schedule", which draws together the various sums said to be due.

16. Claymore submitted the final account to Nautilus, but Nautilus made no substantive response.

17. On the 18th May 2004 Claymore commenced adjudication proceedings in order to recover the outstanding sums as set out in the final account. These sums totalled £908,296.00. Nautilus defended the adjudication on a variety of ground. Nautilus also challenged the Adjudicator's jurisdiction on the grounds that there was no contract between the parties.

18. The Adjudicator promulgated his decision on the 25th June 2004. He accepted Nautilus's contention that there was no contract between the parties. At paragraph 2.22 of his decision, the Adjudicator said this;

> "Accordingly, the claimants submission that a contract between the parties was created by its signed acknowledgement of receipt of the Letter of Intent is plainly wrong, both in fact and in law. There is no offer. There is no acceptance and therefore there is no agreement. Furthermore there was not an intention to enter into legal relations, as evidenced by the use of the words "subject to contract". The Letter of Intent is incomplete and uncertain as to terms to evidence an agreement. It was simply an authorisation to proceed with the preparation for the works. It was not an instruction to proceed with any works. These are the words used in the document, which should be given their plain English meaning to determine the intention of the parties."

19. At paragraph 2.43 the Adjudicator stated:

> "Based upon the evidence and argument put before me by the parties, I am persuaded by the respondent's contention that the words "subject to contract" in the respondent's Letter of Intent, read as non-binding upon the parties. No contract could come into existence until such time as the parties executed the formal agreement referred to in the letter, viz. the JCT Standard Form of Building Contract with Contractor's Design 1998 Edition. It is common ground that no such agreement was executed by the parties. There is therefore, no contracted writing as required by s. 107 of the Act."

20. The Adjudicator's reference in paragraph 2.43 to Section 107 of the Act was a reference to Section 107 of the 1996 Act.

21. Somewhat surprisingly, the Adjudicator then went on to hold that he nevertheless had jurisdiction. The Adjudicator found that the sum of £574,455.00 was due to Claymore. He awarded interest on that sum at 4% above base rate as from 20th March 2004. The Adjudicator dismissed Nautilus's counterclaim for defects.

22. On the 6th September 2004 Claymore commenced proceedings in the Technology and Construction Court in order to enforce the Adjudicator's decision. These proceedings were doomed to failure because it was clear, on the face of the decision that the Adjudicator did not have jurisdiction. Judge Toulmin CMG QC convened a case management conference, at which he

indicated Claymore's difficulties. On the 17th November 2004 Claymore discontinued its proceedings to enforce the Adjudicator's decision.

23. A counterclaim in those proceedings survived, but that is not relevant for present purposes.

24. On the 21st December 2005 Claymore's solicitors sent a letter of claim to Nautilus's solicitors, pursuant to the Protocol. The claim advanced in that letter was for £1,529,662.00 plus VAT. Eight ring files accompanied that letter. The first of seven ring files comprised the final account of March 2004. The eighth file comprised Claymore's revised claim for additional preliminaries. Nautilus's solicitors sent a response letter, dated 31st March 2006 rejecting Claymore's claim and asserting a counterclaim for defects.

25. It was clear from the correspondence that the dispute between the parties was not susceptible to amicable resolution. Accordingly Claymore commenced the present proceedings.

Part 3: The Present Proceedings

26. By a claim form issued in the Technology and Construction Court on the 15th July 2006, Claymore claimed against Nautilus £1,324,505.00 as payment for work done at the property. Claymore accepted that there had been no contract between the parties for the main contract works. Accordingly Claymore advanced its claim on a quantum merit basis.

27. In paragraph 50 of its Particulars of Claim Claymore formulated its claim for interest in the following manner:

> "Further, Claymore is entitled to and claims interest pursuant to Section 35A of the Supreme Court Act 1981 on such terms as are found to be due to it, at such rate for such period as the court thinks fit."

28. Together with the claim form and Particulars of Claim, Claymore also served a Scott Schedule in essentially the same form as the earlier Scott Schedule. This

Scott Schedule cross-referred to the eight ring files previously relied upon by Claymore in its letter of claim under the Protocol. It should be noted, however, that claims for interest were removed from the Scott Schedule, since interest was dealt with separately in paragraph 50 of the Particulars of Claim.

29. In due course Nautilus served a Defence and Counterclaim. In its Defence Nautilus asserted that there had been a contract between the parties. Such contract was either made orally on or about 18th March 2002 or, alternatively, was based upon the Letter of Intent. In its counterclaim Nautilus claimed substantial damages for defects.

30. One irony of the present litigation is that each party has reversed its position on the contract issue. Claymore, which asserted in the adjudication that there was a contract, now says the opposite. Nautilus, which asserted in the adjudication that there was no contract, now asserts the opposite. I shall refer to this change of position by both parties as "the volte-face".

31. The litigation duly proceeded. Expert reports and witness statements were exchanged. The matter was listed for trial in March 2007. Shortly before trial the main issues in the litigation were settled on terms that Nautilus would pay £750,000 to Claymore. This payment was agreed to be in full and final settlement of all claims and counterclaims except for claimant's claim for interest pursuant to Section 35A of the 1981 Act.

32. The question of interest remained unresolved. Accordingly that falls for determination by the court. The trial of the one remaining question in this action took place on Wednesday 15th March. Ms Rachel Ansell represents Claymore. Mr Alexander Nissen Q.C. represents Nautilus. The trial bundle comprises sixteen ring files. The argument lasted all day and concluded at 5.00pm. In the course of their submissions, counsel ranged across the whole terrain of the trial bundle. Over the following two days, they lodged written submissions on outstanding issues. Claymore also lodged a supplemental bundle of documents, two days after the end of the trial. I shall only consider those documents in the supplemental bundle, to which no objection is taken.

33. In giving my decision on the question of interest, I shall first identify the relevant period and then determine the appropriate rate.

Part 4: The Period During Which Interest Accrues

34. Ms Ansell submits that interest should start to accrue on 11th November 2002. She points out that Claymore's claim is not based on any contract but rather is for restitutionary relief. The cause of action accrued when Nautilus received the benefit of the relevant goods and services. Demand for payment is not an element of the cause of action. In the alternative, submits Ms Ansell, interest should run from June 2004, when Claymore had produced its final account and Nautilus had had time to consider it (See paragraphs 44 to 47 of her skeleton argument).

35. Mr Nissen accepts that a demand is not necessary to complete the cause of action. He submits, however, that the present restitutionary claim is a claim for unjust enrichment. Nautilus' enrichment did not become unjust until Nautilus knew what had to be paid and refused to pay it.

36. Mr Nissen's primary contention is that the sum due to Claymore did not become apparent until December 2006, when serious discussions took place between the experts instructed in the present litigation. In the alternative, Mr Nissen submits that interest should run from 2nd June 2004; that date is three months after the issue of Claymore's final account. In support of his secondary submission Mr Nissen points out that Claymore's pleaded case is based upon its final account of March 2004, so that interest can hardly run from any earlier date. Furthermore, it is the convention of the construction industry that the balance due to a contractor is not paid until after the contractor has furnished his final account, and there has been an opportunity to consider it.

37. I have reviewed the evidence in the trial bundle, although without the benefit of hearing any witnesses cross-examined. It is clear to me that the claim, which has been settled, is a claim for *quantum meruit*. As the editors of

Emden's Construction Law point out, in paragraph 845 of the current edition, a *quantum meruit* claim may be based either on an implied contract, or on restitution.

38. The present case is of the latter type. The parties intended to enter into a contract, but never actually did so. Accordingly, this case falls into the second of the four categories of restitutionary *quantum meruit* discussed in paragraph 845 of Emden.

39. I agree with both counsel that in a case of this kind, demand for payment is not an element of the cause of action. The date upon which the builders' cause of action accrues in a restitutionary *quantum meruit* claim is not entirely clear. For understandable reasons, there has not been a full citation of the authorities which bear upon this question. Even if, in theory, the cause of action accrues on the date upon which the building is handed over, nevertheless I am quite satisfied that interest should not run from that date. Interest should only run from the date when the sum due is ascertainable. In this regard, most of the relevant information resides with the contractor. In my view, interest should start to run when the contractor has furnished his final account and the building owner has had a reasonable opportunity to assess the final account. This approach accords with the general practice of the construction industry. It is also consistent with the reasoning of Robert Goff J in *BP Exploration Co. (Libya) Limited v Hunt (No.2)* [1979] 1 WLR 783 at 846 F to H.

40. Let me now turn to the facts of the present case. Once Claymore's third draft final account had been analysed it became clear that an additional sum of at least £145,000.00 was payable in addition to previous interim payments. (See Mr Hill's report of 4th April 2003.)

41. It was not clear in April 2003 what further monies beyond £145,000 would be due. As can be seen from the contemporaneous documents, much relevant information and detail was missing. The precise amount due to Claymore could not be quantified until Claymore served its full final account in March 2004.

42. I acknowledge that the claim for additional preliminaries in that final account was subsequently recast. Nevertheless that circumstance did not prevent a realistic appraisal from being carried out in the period following 2nd March 2004. A reasonable time for such appraisal would be three months.

43. Let me now draw the threads together. For the reasons set out above, Nautilus ought to have paid £145,000.00 to Claymore on 16th April 2003; Nautilus ought to have paid the balance of £605,000.00 on 2nd June 2004.

44. In the exercise of my discretion under Section 35A of the 1991 Act, I hold that interest on the agreed settlement figure of £750,000.00 should accrue as follows: Interest on £145,000.00 should start to run on 16th April 2003. Interest on the balance of £605,000.00 should start to run on 2nd June 2004.

45. The next issue to consider is the effect of Claymore's delay in commencing the present action. Mr Nissen submits that in a case where there was no construction contract, it was inappropriate to adjudicate at all. Alternatively, the present litigation should have proceeded in tandem with the adjudication. He further submits that the adjudication enforcement action was misconceived and a waste of time. In his skeleton argument Mr Nissen contended that the present action should have started on 2nd June 2004. In oral argument he accepted that time should be allowed for the Protocol process. He argued for a start date of October 2004.

46. Ms Ansell submits that there was no unreasonable delay on Claymore's part. It was reasonable for Claymore to refer its claim to adjudication. Having obtained a favourable adjudication award, it was reasonable for Claymore to bring enforcement proceedings. After the failure of those proceedings, Claymore needed time to obtain legal costs insurance. Thereafter Claymore went through the Protocol process before commencing the present action on 15th July 2006.

47. There has also been debate between counsel about the legal consequences of any pre-action delay, which may be established. In particular, counsel have debated whether interest should continue to run during the period of delay and, if so, at what rate.

48. In relation to this issue I must begin by reviewing the authorities which have been cited. In *BP Exploration and Co (Libya) Limited v Hunt (No. 2)* [1979] 1WLR 783, Robert Goff J awarded £5,666,399.00 to plaintiffs pursuant to section 1(3) of the Law Reform (Frustrated Contracts) Act 1943, following the frustration of a contract between the parties as a result of action by the Libyan Government. At page 846 Robert Goff J referred to the principle that interest is awarded from the date of loss until the date of judgment. He noted that the power to award interest was discretionary and that in certain categories of case interest was not awarded for the full period. At page 846H - 847 he said:

> "The second group of cases concerns the conduct of the plaintiff. If, for example, the plaintiff has been guilty of unreasonable delay in prosecuting his claim, the court may decline to award interest for the full period from the date of loss. This may be to encourage plaintiffs to prosecute their claims with diligence and also because such conduct may lull a Defendant into a false sense of security, leading him to think that the claim will not be pursued against him."

49. In *Birkett v Hayes* [1982] 1WLR 816 the Court of Appeal gave general guidance on the assessment of interest in personal injury cases. Eveleigh L J said this at 824B:

> "In awarding interest the judge is exercising a discretion. In the great majority of cases the plaintiff could have proceeded with greater dispatch; and yet it may well be wrong to deprive him of interest particularly as the defendant will have had the use of the money. I therefore think that we should approach this matter on the basis that the court should arrive at a final figure which will be fair, generally speaking, to both parties."

50. At 825E - F Watkins L J said this:

> "Usually this period will run from the date of the writ to the date of trial, but the court, may in its discretion, abridge this period when it thinks it is just to so do. Far too often there is unjustifiable delay in bringing an action to trial. It is, in my view, wrong that interest should run during a time which can

properly be called an unjustifiable delay after the date of the writ. During that time the plaintiff will have been kept out of the sum awarded to him by his own fault. The fact that the defendants have had their use of the sum during that time is no good reason for excusing that fault and allowing interest to run during that time."

51. In *Metal Box Co Limited v Currys Limited* [1988] 1 WLR 175 the plaintiffs claimed damages for the loss of their goods in a warehouse fire. The fire occurred on 1st March 1977. The first two plaintiffs issue their writs in 1981. The third plaintiff issued its writ in 1984. The action came to trial in 1986. McNeill J held that there had been unjustifiable delay in commencing proceedings and he reduced the period over which interest was allowed. In respect of the first two plaintiffs the period of interest was reduced by some two years; in respect of the third plaintiff the reduction was more substantial. At pages 1841 to 1842 McNeill J said this:

"As Mr Twigg observed, the test of unjustifiable delay has been applied on a number of cases, see, for example, *Allen v Sir Alfred McAlpine & Sons Limited* [1968] 2 QB 229 *per* Diplock L J at pp 256B, 257D, *Birkett v Hayes* [1982] 1WLR 816 and *Wright v British Railways Board* [1983] 2 AC 773. Mr Twigg argued that this was, in his words, "an ordinary fire case" and should have been heard within the four years of the fire. He invited the court to say that that was the maximum for which interest, if any, should be awarded. Whether a hearing where speeches and evidence occupy some 10 days is an ordinary case, I am not prepared to say. In *La Pintada Compagnia Navigacion SA v President of India* [1983] 1 Lloyds Rep 37, Storton J had expressed the view that reprehensible delay should be dealt with by a reduction in the rate of interest rather than by a reduction of the period for which it was paid. With respect to that view, I do not consider this is a case in which such a course would be appropriate.

So far as the matter of the Metal Box and Massey Ferguson claims are concerned, I am of the opinion that from an early stage it must have been clear to the Loss Adjustors that the defendant's insurers were not going to go down without a fight. I do not regard the failure formally to deny liability as sufficient justification to delay the commencement of proceedings. On the other side, as I find in my judgment, the defendant's servants on the ground never from the outset disputed the cause of the fire was the stacking of the cartons too close to the lamps, and it was never challenged that one of them said that they may have done so. The total period from the fire to the Judgment is, put broadly, nine years and two months; from Writ to Judgment, four years and seven months. For the reasons that I have given, I consider that the appropriate period for which interest should be awarded in those two cases, is seven years."

52. In the *Athenian Harmony (No. 2)* [1998] 2 Lloyd's Law Reports 425, the claimant was guilty of substantial delay in the conduct of its action for damage to cargo. Colman J dealt with this delay by reducing the rate of interest for the entire period by almost one third. At page 427 Colman J set out the relevant principles as follows:

> "If interest is withheld the defendant receives a windfall. He has free use of funds which, if he had performed his obligation to pay, would not have been in his hands, since the English Courts have no jurisdiction to order compound interest, the defendant will enjoy the further benefit of relatively inexpensive use of funds, even if finally ordered to pay interest for the entire period from the cause of action arising until Judgment. Whereas, in a case such as *Birkett v Hayes*, where the claim cannot be quantified for a long period after the cause of action has arisen, and the proceedings commenced, it is not difficult to see unfairness to the defendant in requiring interest to be paid on the whole of the sum not then quantifiable, it is much harder to detect any unfairness to a defendant left with substantial funds in his hands, and knowing perfectly well the amount of the claim during the whole of the material time, from the initial presentation of the claim. If there is no material previous to the defendant by reason of the delay, it is difficult to see why the interests of justice should normally require that when he knows that amount claimed, he should have an even larger benefit bestowed on him than he would derive from his unjustifiably refusing to pay the claim. Having regard however to the way in which Lord Justice Lawton (with whose judgment Lord Justice Eveleigh agreed, as did implicitly Lord Denning M R) expressed the principle, it would appear that justification for depriving the successful plaintiff of interest must be that he has caused his loss of use of the money by his own fault rather than that it would be unfair or unjust to the defendant that he should have to pay interest during the delay.
>
> This countervailing consideration would be consistent with the compensatory function of the interest jurisdiction.
>
> In cases where the delay and the degree of fault are so substantial that the predominant cause of the plaintiff being out of his money can be seen to be his own failure to prosecute the claim, rather than the defendant's maintenance of his defence, it is not difficult to see the policy should be that a successful plaintiff should not be compensated for loss of use of the money. However, in order for it to be said that the plaintiff's fault has displaced the defendant's fault as the predominant cause of the plaintiff being kept out of his money, the delay in question would have to be very substantial and not merely relatively short periods of weeks or months, during which, in commercial litigation, lulls in activity inevitably occur and the plaintiff's fault would have to be very substantial as where an action has inexcusably been allowed to go to sleep for years."

53. In *Kuwait Airways Corporation v Kuwait Insurance Company SAK* (Commercial Court transcript 19 April 2000) Langley J ordered insurers to

make an interim payment to the insured in respect of losses caused when Iraq invaded Kuwait. The judge then dealt with the question of interest in a detailed judgment. At pages 25 and 26 of the transcript the judge said this:

"(5) Where a claimant assured has been guilty of excessive delay, whether in making the original claim or in pursuing it, then the starting point (or on occasion the rate of interest) may be adjusted adversely to him. The rationale for such an approach has sometimes been expressed as a form of sanction for delay but can, I think, equally and more consistently with principle, be expressed in terms that in such a case it is wrong to view the claimant as kept out of or deprived of the use of money, payment of which he has delayed in seeking. A more striking illustration will be circumstances in which a claimant consciously, and for his own reasons, chose not to pursue a claim immediately and notified the potential defendant to that effect. To a limited extent that is said to have been the position of KAC in this case. It is not, I think, sensible to regard a party who positively chooses not to make a claim when first available to him, as one who is deprived of, or kept out of his money."

54. In *Quorum AS v Shramm* (2001) 19 Construction Law Journal 224, the claimant claimed successfully against its insurers for fire damage to a picture. The defendant insurers contended that interest should be reduced by reason of the claimant's delay in prosecuting the claim. In dealing with this issue, Thomas J referred to the judgment of Robert Goff J in *BP Exploration* and the judgment of Colman J in *Athenian Harmony*. At paragraph 16 the judge said this:

"In the absence of any explanation for the period of delay in bringing proceedings, I consider that there was unreasonable delay. This was also the predominant cause of the claimants being kept out of their money. There seems to be no reason why the claimants could not have issued proceedings in September 1995; the delay until September 1997 is wholly inexplicable. I do, however, have to bear in mind that during that period interest rates were high and therefore underwriters derived a substantial benefit. That is a significant factor - see the judgment of Waller L J in *Adcock v Co-operative Insurance Society* [2000] LIRLR 657 and 662. In the circumstances therefore, it seems to me that it would not be right to deprive the claimants of the whole of the interest during the two year period from September 1st 1995 to September 1st 1997. I will therefore award the claimants interest only at half the rate that would otherwise have been payable during that period."

55. From this review of the authority, I derive three propositions:

(1) Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest.

(2) In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable for present purposes when, after making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.

(3) When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay.

56. Let me now apply those principles to the present case. Although in hindsight it can be seen that there was no construction contract in writing, within the meaning of Section 107 of the 1996 Act, this question was not a straightforward one. Indeed, both parties have changed their position (albeit in opposite directions) on the question of whether there was a contract. I do not consider that Claymore acted unreasonably in proceeding to adjudication. Nor do I regard it as unreasonable that Claymore refrained from litigation whilst they were engaged in adjudication. It should be remembered that the majority of all cases referred to adjudication are resolved by the parties with the benefit of the Adjudicator's decision.

57. Once the Adjudicator's decision was received, Claymore needed time to consider it. After that consideration however, Claymore's next step was, in my view, an unreasonable one. Claymore and its lawyers ought to have

appreciated that the Adjudicator's decision was unenforceable having regard to his finding that there was no relevant contract between the parties.

58. The period of delay which occurred between the date of the Adjudicator's decision (25th June 2004) and the date of Claymore's letter of claim under the Protocol (21st December 2005) was excessive. There is no evidence before the court to establish that the process of obtaining legal costs insurances caused any significant delay. Bearing in mind the legal principles set out above, I consider that Claymore was guilty of one year's unreasonable delay, namely between 21st December 2004 and 21st December 2005. I do not consider that any of Claymore's delays after 21st December 2005 should be characterised as unreasonable.

59. The next question to consider is what adjustment should be made to the recoverable interest, in order to reflect the 12 months unreasonable delay. In this regard I bear in mind that during the relevant period Nautilus had the benefit of £750,000.00, which ought to have been paid to Claymore. Furthermore, Nautilus must have known that sooner or later Claymore would get its tackle in order and would commence litigation. In all the circumstances I conclude that the interest payable to Claymore should be reduced by 50% during the period 21st December 2004 to 21st December 2005.

60. Let me finally draw together my conclusions on this aspect of the case. In relation to £145,000.00 Nautilus must pay interest from 16th April 2003 until 8th March 2007 (the date when Nautilus paid the settlement sum to Claymore). In relation to £605,000.00 Nautilus must pay interest to Claymore from 2nd June 2004 until 8th March 2007. I will deal with the rate of interest in part 5 of the judgment. It should be noted, however, that by reason of Claymore's unreasonable delay that rate will be halved during the 12 month period 21st December 2004 to 21st December 2005.

Part 5: The Rate of Interest

61. Mr Nissen, for Nautilus, contends that the court should award a commercial rate of interest, namely 1% over base rate. Ms Ansell, for Claymore, submits

that interest should be awarded at the rate specified in section 17 of the Judgments Act, namely 8%. In the alternative, Ms Ansell submits that if the court adopts a commercial rate that should be 3% or 4% over base rate, not 1% above base rate.

62. At this stage I should mention a point which has arisen on the pleadings. Mr Nissen submits that Ms Ansell's alternative case is not open to her on the pleadings. I reject that submission. First, paragraph 50 of Claymore's original Particulars of Claim is wide enough to embrace the claim for interest at 3% or 4% over base rate. Secondly, Claymore's Particulars of Claim in respect of interest is wide enough to permit such a claim to be advanced. Thirdly, if Mr Nissen succeeds on his argument that the court should award base rate plus an additional percentage, it must be open to Claymore to make submissions about what that additional percentage should be.

63. Let me now turn to Ms Ansell's primary submission that interest should be awarded at the rate specified in the Judgments Act. In support of this submission Ms Ansell began by placing reliance, indeed considerable emphasis, on the *volte face*. She submitted that if there was a contract, as alleged by Nautilus in its pleadings, then Claymore would get a higher rate of interest than 8%. Claymore would get either 5% over base rate, pursuant to Clause 30 of the JCT contract or alternatively 8% over base rate, pursuant to the 1998 Act.

64. I am unpersuaded by the argument that the *volte face* has any relevance to the rate of interest. I quite accept that I must exercise my discretion in respect of interest, having regard to all relevant circumstances. However, the fact that both Claymore and Nautilus have, from time to time, changed their respective positions on the contract issue, does not seem to me to be a relevant consideration.

65. Ms Ansell had cited two cases in which the court awarded interest at Judgment Act rates. These are *Pinnock v Wilkins & Sons* Times Law Reports 29th January 1990 and *Watts v Morrow* [1991] 1 WLR 1421. In *Pinnock* the

plaintiff suffered injuries in a road traffic accident. He recovered damages against solicitors for mishandling his personal injuries litigation. The trial judge awarded interest at the Judgments Act rate on the basis that but for the solicitors' negligence, Mr Pinnock would have obtained a judgment carrying interest at that rate. The Court of Appeal upheld that award.

66. In *Watts v Morrow* the plaintiffs recovered damages against a surveyor for a negligent survey report, on the basis of which the plaintiffs had purchased a house. The Court of Appeal declined to interfere with the judge's award of interest at the Judgments Act rate. The question of interest was only briefly discussed and the rationale of the Court of Appeal's decision appears to be that they should not interfere with the judge's exercise of discretion: see Ralph Gibson L J at pages 1443 to 1444 and Bingham L J at page 1446. It should be noted that Bingham L J had certain reservations about the use of the Judgments Act rate in that case.

67. It is significant that neither of those two cases was a commercial case. In the first case there were special reasons why the Judgments Act rate was appropriate. In the second case at least one member of the Court of Appeal had reservations about using the Judgments Act rate, but the Court of Appeal was unwilling to interfere with the trial judge's exercise of discretion.

68. In my view neither of those cases suggests that it is appropriate to use the Judgments Act rate in a commercial case such as the present. The Judgments Act rate does not reflect the loss to the claimant from being kept out of its money. The rate stipulated in section 17 of the Judgments Act can only be changed by Parliament, through the mechanism of a Statutory Instrument. That is not a speedy process. Indeed, the Judgments Act rate has only been changed once in the last 20 years. During that period there have been substantial changes in the rate of inflation and in the cost of borrowing. The Judgments Act rate is fixed for the benefit of unpaid judgment creditors. It is not normally an appropriate rate of interest to award in the context of a dispute between two businesses.

69. For all of the above reasons I reject Ms Ansell's contention that interest should be awarded in the present case at the Judgments Act rate.

70. I turn now to Mr Nissen's submission that interest should be awarded at 1% over base rate. Let me start by reviewing the authorities cited on this issue. In *Tate and Lyle Food and Distribution Limited v Greater London Council* [1982] 1 WLR 149, the plaintiffs recovered damages for the defendants' failure to remove silt, which inhibited access to certain moorings on the river Thames. Forbes J awarded interest on those damages at 1% over base rate. In relation to the rate of interest Forbes J said this at pages 154 to 155:

> "I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve *restitutio in integrum*. One looks, therefore, not at the profit which the defendant wrongly made out of the money he withheld - this would indeed involve a scrutiny of the defendant's financial position - but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow at a very high rate, or on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind, mean that you exclude entirely, all the attributes of the plaintiff, other than that he is a plaintiff. There is evidence here that large public companies, of the size and prestige of these plaintiffs could expect to borrow at 1 per cent. over the minimum lending rate, while for smaller and less prestigious concerns, the rate might be as high as 3 per cent. over the minimum lending rate. I think it would always be right to look at the rate at which plaintiffs, with the general attributes of the actual plaintiff in the case (though not, of course, with any special particular attribute), could borrow money as a guide to the appropriate interest rate. If commercial rates are appropriate I would take 1 per cent. over the minimum lending rate as the proper figure for interest in this case…. But in commercial cases it seems to me that the rate at which a commercial borrower can borrow money would be the safest guide. I should add, perhaps, that the proper question is: At what rate could the plaintiff borrow the required sum and not what return could the plaintiff have expected if he had had invested it."

71. In *BP Exploration Co (Libya) Limited v Hunt (No 2)* [1979] 1WLR 783 Robert Goff J awarded interest at 1% over base rate because he could see no good reason for departing from the usual rule: see page 849D.

72. In *Shearson Lehman Hutton Inc v MacClaine Watson & Co. Ltd.* [1990] 3 All ER 723 the plaintiffs recovered damages for the defendant's failure to purchase tin in accordance with their obligations under forward contracts. Webster J awarded interest at 1% over base rate. At page 733 he said this:

> "Although the decision of Forbes J in the *Tate and Lyle* case was neither referred to in the judgment nor cited in the *Polish Steam Ship Co.* case I do not conclude that the cases which refer to the practice in the Commercial and Admiralty courts have the effect of precluding evidence as to the rate of which persons with the general attributes of the plaintiff could have borrowed the money. In the *FMC (Meat) Ltd* case and the *Polish Steam Ship Co* case no evidence had been adduced on this question. In the *BP Exploration* case no evidence had been adduced in relation to the sterling part of the award; but evidence was adduced and admitted by Robert Goff J on the dollar element.
>
> I conclude therefore, that the practice of the Commercial Court amounts to no more than a presumption which can be displaced if its application would be substantially unfair to one party or the other. I do not treat Donaldson J's short dictum 'If they can draw money at less… the best of luck to them' as inconsistent with this conclusion.
>
> But if the presumption is to be displaced the burden must clearly lie on the party who seeks to displace it."

73. In *Kuwait Airways Corporation v Kuwait Insurance Company SAK* (Commercial court transcript 9th April 2000) Langley J reviewed *Tate and Lyle* and a line of later authorities. He noted that in *Re Duckwari* [1999] 2 WLR 1059, Nourse L J doubted the relevance of the size or prestige of the claimant. Langley J considered that the court should award interest at 1% over base rate, save in exceptional circumstances.

74. In *Metal Box Co Limited v Currys Limited* [1988] 1 WLR 175, the facts of which I have already outlined, McNeill J awarded interest at 1% over base rate.

75. Mr Nissen urges the point on me that I should follow that line of decisions and award 1% in this case. He submits that there is no evidence before the court to justify departing from the norm and awarding a higher rate.

76. Ms Ansell advances two main lines of argument in response. First, she submits that Claymore is a company of modest resources, quite unlike Tate and Lyle, BP, Kuwait Airways or Metal Box. Clearly, in order to borrow money, Claymore would be required to pay much more than 1% over base rate.

77. Secondly, Ms Ansell points out that if the parties had entered into a contract along the lines contemplated, a higher rate of interest would have been due in respect of late payments. That would have been either 5% over base rate, pursuant to clause 30 of the JCT contract, or 8% over base rate, pursuant to the 1998 Act. Ms Ansell submits that in a quantum merit case the court does take into account the general terms upon which the parties had proposed to contract. In support of this submission she relied upon the decision of the House of Lords in *Way v Latilla* [1937] 3 All ER 759 at 764 and 766, and also two more recent decisions in the Technology and Construction Court in which *Way v Latilla* has been briefly noted.

78. Ms Ansell also endeavoured to rely upon an alleged oral agreement between the parties that Nautilus would pay interest at 4% over base rate. I disregard entirely this last point. The alleged oral agreement is not admitted and the relevant witnesses have not been cross-examined.

79. The following matters have, however, been established on the evidence. Claymore is a small business within the meaning of the 1998 Act. If Claymore or a company such as Claymore, had sought to borrow £750,000.00 over the period since June 2004, Claymore would have had to pay interest at more than 1% over base rate. The evidence before the court does not establish precisely what interest Claymore, or a similar company, would have had to pay. I am satisfied however that it would not be less than 2% over base rate.

80. The House of Lords' reasoning in *Way v Latilla* must also be considered. In the present case the parties were proposing to enter into a contract, under which late payments would attract interest at substantially more than base rate. In the event they never entered into a contract at all. Clearly the proposed contractual rates should not be treated as binding on this court. Nevertheless, in view of the reasoning of the House of Lords in *Way v Latilla* at pages 764 and 766, I do regard those proposed rates as being of some small relevance. I should emphasise, however, that in my view the relevance is slight rather than substantial.

81. Having regard to all the evidence before the court and the circumstances of this case, I have come to the conclusion, in the exercise of my discretion, that it is proper in this case to award interest at 2% over base rate.

82. Let me now draw the threads together. For the reasons set out above, I reject Ms Ansell's submission that the Judgments Act rate should be applied. I accept Mr Nissen's submission that the court should award a commercial rate, comprising the base rate plus an additional percentage. That additional percentage should not be 1%, as Mr Nissen contends, nor should it be 3% or 4% as Ms Ansell contends. Having regard to the nature of the claimant company and all the circumstances of this case, the proper addition to base rate is 2%.

Part 6: Conclusion

83. For the reasons set out in parts 4 and 5 above, Nautilus must pay interest at 2% over base rate on the sum of £145,000.00 from 16th April 2003 until 8th March 2007. Nautilus must pay interest at 2% over base rate on the sum of £605,000.00 from 2nd June 2004 until 8th March 2007. In each case, however, the rate of interest shall be reduced by one half during the 12 month period 21st December 2004 to 21st December 2005.

84. I request that solicitors and counsel do the arithmetic in order to calculate the precise amount of interest for which this court is giving judgment and then do draw up the Order accordingly.

85. I have been asked to consider, in the course of this judgment, the question of appeal, on the basis that whichever party loses may wish to take this case further. In the event, both parties have had a measure of success but neither has won an outright victory. In my view neither party has a realistic prospect of doing better in the Court of Appeal. I therefore refuse both parties permission to appeal.

(End of Judgment)