THE LAW OF INTEREST: DAWN OF A NEW ERA?

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The high rates of interest and erratic inflation experienced by many countries over the past decade have prompted important reviews of the law of England, Canada and elsewhere. This article has as its focus a new set of proposals for reform of the law relating to parties kept out of their money published by the Law Reform Commission of British Columbia. These proposals go much further than previous ones and amount, in our view, to a revolutionary change. The Commission sets out a scheme which would at long last enable parties to recover sums which reflect the market opportunities of which they have been deprived. An ingenious multiplier system ensures that interest can be compounded in a way which is just as simple to apply as present methods, and has the great advantage of putting into practice the principle of restitutio in integrum.

Les taux d'intérêt élevés et l'inflation irrégulière qui ont affligés de nombreux pays au cours des dix dernières années ont mené à un nouvel examen approfondi des lois en Angleterre, au Canada et ailleurs. Cet article vise le nouvel ensemble de propositions de réforme du droit qu'a publié la Commission de réforme du droit de la Colombie-Britannique et qui a trait aux parties qui n'ont pas reçu l'argent qui leur est dû. Ces propositions vont beaucoup plus loin que les précédentes et représentent, selon les auteurs, un changement révolutionnaire. Le projet présenté par la commission permettrait finalement aux parties d'entrer en possession de sommes qui reflètent les chances offertes par le marché et dont elles ont été privées. Un système de calcul ingénieux permet de composer les intérêts d'une façon tout aussi simple à appliquer que le méthode actuelle et qui a l'avantage de mettre en pratique le principe de restitutio in integrum.

Introduction

The unprecedentedly high rates of inflation and nominal interest rates experienced by many countries in the 1970s triggered widespread review of the methods used in the law of interest for dealing with parties kept out of their money.[1] The losses incurred by a party suffering delay are potentially much greater when price inflation and interest rates are high than when they are low. The Law Reform Commission of British Columbia[2]

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[1] See for example, Law Commission, No. 88, Report on Interest (1978); and the various reports referred to in Law Reform Commission of British Columbia, Working Paper No. 49, The Court Order Interest Act (1985), pp. 6-8.

[2] Hereafter, the "Commission" or the "British Columbia Commission", as the context requires.

was one of the pioneers amongst Commonwealth law reform agencies in this field when it issued its Report on Pre-Judgment Interest in 1973.[3] The Court Order Interest Act, 1979[4] and its predecessor, the Prejudgment Interest Act, 1974,[5] implemented this Report. The Commission has now published another Working Paper[6] which is unusual in that it marks the first time it has examined legislation based upon an earlier report, together with the jurisprudence which has developed under it. Moreover, this Working Paper, in proposing a number of revisions to the Court Order Interest Act, is not merely an exercise in "housekeeping",[7] much as that is an exercise to be welcomed. In this Working Paper may be found a set of bold yet thoroughgoing proposals which would not only revolutionize the treatment of interest by the courts in British Columbia but provide a model which law reformers in other Commonwealth jurisdictions, where reform in this area has been incomplete or untried, ought to contemplate very seriously.

The claim that these proposals are revolutionary derives from the Commission's underlying approach, which entails a switch from simple to compound interest. The Commission recognizes that the issue raised by compounding prejudgment interest is "fundamental".[8] It acknowledges, unanimously, that compounding prejudgment interest is theoretically desirable in that it would more accurately reflect both the behaviour of investors in the marketplace and the cost of delay to successful plaintiffs. It also acknowledges that theory must be weighed against the practical difficulties of calculating compound interest. Most jurisdictions (the only exception cited is Alberta[9]) have concluded that introducing compound interest would present formidable difficulties. Thus, the English Law Commission, in its Report on Interest published in 1978,[10] claimed strong support for the retention of simple rather than compound rates. In that Report, and in the Working Paper which preceded it, little concession was made even to the theoretical desirability of compounding. Simple rates, it was asserted, were "better from the the point of view of certainty, simplicity and consistency".[11] The British Columbia Commission agrees with the conclusion that formidable difficulties have existed. But, in this Working Paper, it has made proposals which suggest that there exists a "considera-

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[3] Law Reform Commission of British Columbia, Report No. 12, Report on Pre-Judgment Interest (1973).

[4] R.S.B.C. 1979, c.76.

[5] S.B.C. 1974, c.65.

[6] Working Paper, *supra*, footnote 1.

[7] *Ibid.*, p. 323.

[8] *Ibid.*, p. 240.

[9] *Ibid.*, p. 241.

[10] *Op. cit.*, footnote 1.

[11] Law Commission, Working Paper No. 66, Interest (1976), para. 93.

bly simpler method"[12] of calculating, without difficulty, prejudgment compound interest at fluctuating rates. There is little doubt, moreover, that these new proposals are sufficiently well conceived and presented as to enable the assertion of the English Law Commission to be rejected with some confidence.

In what follows, we first review briefly the general issues raised by compounding (and the schemes for implementing compound interest proposed by the British Columbia Commission). We then consider the second issue of particular concern to the Commission: should a contract "about interest" have any effect *post* judgment? Finally, we consider the Commission's treatment of non-pecuniary loss and foreign money liabilities. Although this is to neglect a number of important matters raised by the Working Paper (such as constitutional questions and some of the practice under the Court Order Interest Act), it does enable us to focus more sharply on the most critical and controversial of the many issues involved.

I. *Compounding*

A. *General Interest*

The basic rationale for making an award of interest is simply that the defendant has kept the plaintiff out of his money and should compensate him accordingly.[13] This notion which is, at this abstract level, fully consistent with the principle of *restitutio in integrum* or making the plaintiff whole, has been articulated frequently but implemented effectively only rarely. For the plaintiff can only be described as being restored to the position he would have occupied if the arrangements as to interest do genuinely restore him to a position comparable with the one in which he otherwise would have found himself. The prohibition on the application of interest at compound rather than simple interest, which remains the general rule in many jurisdictions, does, however effectively prevent the achievement of the declared objective, as we have argued on a number of occasions in the past.[14]

A simple example will serve to illustrate the contention. A ship belonging to X is damaged by a collision which is agreed to have resulted from the negligence of Y. The ship is repaired immediately, X paying one million dollars for the repair on December 31, 1981. The matter is brought to trial, with judgment being given on December 31, 1984. Let us sup-

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[12] *Op. cit.*, footnote 1, p. 241.

[13] For a discussion of the appropriate principle, see Working Paper, *supra*, footnote 1, pp. 10-12, 20, 73-84, 97-104, 198-200.

[14] R. Bowles, C. Whelan, Judgment Awards and Simple Interest Rates (1981), 1 Int. Rev. Law & Econ. 111; R. Bowles, Law and the Economy (1982), chapter 11.

pose that banks had, over the same period, been offering a rate of ten per cent *per annum* on deposits, and let us suppose also that it is agreed that an interest rate of ten per cent is an appropriate rate for calculating interest on damages over the period. Had the damage to the ship not been incurred, the *least attractive* option open to a business man (or private investor) would have been to place the one million dollars in the bank as at December 31, 1981. Commercial banking practice is to compound deposits six monthly, and so on June 30, 1982, the bank would have credited the account with interest of $50,000. The deposit of $1,050,000 would have attracted interest at five per cent over the ensuing six months, with the result that a further $52,500 would have been credited to the account on December 31, 1982. By the end of 1984, the account would have grown to a size of $1,340,074 (rounded to the nearest dollar). But if the court were constrained at the end of 1984 to make an award of interest at simple rates only, the plaintiff would have received a sum of $1,300,000 exactly, thus being out of pocket to the tune of $40,074, a shortfall of three per cent.

At higher interest rates, and in cases where the delay between the date of harm and the date of judgment is greater, the degree of "under compensation" becomes more acute. In earlier decades when interest rates were lower, the antipathy of courts and legislatures to compound interest (an approach which Ogus refers to as "a relic from the days when interest was regarded as necessarily usurious"[15]) was less problematic.

B. *Practical Implementation*

But if higher interest rates have intensified the divergence of interest awards calculated at compound interest rates from those which simple interest rates generate, there has been a second development which makes the switch to compounding a straightforward matter. That development is the advance in computerization which makes the frequent recalculation of interest awards a relatively trivial activity.

The central Commission proposal is a multiplier system,[16] where the role of a multiplier is to enable a dollar at a given date to be turned into a sum at a later date, having made allowance for interest to run at a compound rate in the interim. The scheme entails publication each month of a table which indicates the amount that must be awarded this month to compensate fully a plaintiff deprived of the use of one dollar as from any particular month and year over the previous decade. Thus, if a plaintiff is to recover for a loss of $1,000 incurred in August 1979, judgment to

[15] A.I. Ogus, The Law of Damages (1973), p. 98.

[16] These multipliers for the calculation of interest are quite separate from the multipliers used to calculate the quantum of damages in personal injury and fatal accident cases. They are applied however, in essentially the same way. The Commission's suggested scheme is set out in Chapter XI of the Working Paper.

include interest would amount (as at January 1985 which we take to be the date of judgment) to $2,159, that is the multiplier of 2.159 multiplied by the sum of principal of $1,000.[17]

The interest rate on which the table of multipliers is based is the prime rate of interest charged by the Province's banker less one quarter per cent. The latter adjustment is to take account of the very small distortion which would otherwise result from the practice of compounding monthly rather than twice yearly as would be the practice in the banking transactions to which the prime rate is tailored.

The Commission is at pains to point out that this approach "is not a radical new method of awarding judgment interest. Rather, it is intended simply as an easier method of calculating the *quantum* of judgment interest payable".[18] To the extent that the multiplier is simply a new way of *presenting* the information necessary to calculate interest, the Commission is quite right. For, of course, a similar way of presenting the information could be implemented if simple interest rates were still being used. But the whole point of the exercise is really to switch to compound interest rates, and that is something which could in principle be achieved without any reference to multipliers at all.

Nevertheless, the Commission is surely very sensible to present the new approach in terms of multipliers, since this makes it a great deal more accessible and provides a very solid counter to the objection of the English Law Commission that compound rates lack the merit of simplicity.[19] Whether one would want to agree with the British Columbia Commission that adoption of the multiplier scheme in its final Report should be considered a prerequisite for retaining the proposal for compounding is another matter.[20] For our own part we would strongly endorse both compounding and the multiplier scheme, but would not want to dispense with the former if for some reason the latter were to be rejected.

The virtue of simplicity, a strong feature of the British Columbia scheme, is less evident in the Report on Prejudgment Compensation on Money Awards published in 1982 by the Manitoba Law Reform Commission.[21] This scheme, outlined in the British Columbia Working Paper,[22] entails a two-part procedure for calculating awards. The first step is an adjustment to the principal sum to take care of inflation, whilst the second involves addition of a further three per cent *per annum* of interest to take account of the plaintiff having foregone use of the funds. The figure of

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[17] Working Paper, *supra*, footnote 1, pp. 307-308.

[18] *Ibid.*, p. 306.

[19] *Ibid.*, p. 323.

[20] *Ibid.*, p. 306.

[21] Law Reform Commission of Manitoba, Report No. 47, Report on Prejudgment Compensation on Money Awards: Alternatives to Interest (1982).

three per cent is chosen because it is a good approximation to the longer term difference between nominal interest rates and the rate of inflation. In any particular year, of course, the difference between interest rates and inflation may be positive, zero or negative since interest rates will reflect the market's *expectation* of future inflation rather than hard information about what inflation is at present or what it has been in the past. Further, even if inflation could be predicted with complete accuracy there would still be scope for the real interest rate to fluctuate in response to demand and supply forces in the money markets. A tight monetary policy, for example, will tend to drive real interest rates upwards.

The puzzle, however, is why the Manitoba Commission should want to go to such lengths to distinguish between the award needed to offset inflation and the award needed to ensure a real interest rate *comparable with the long run average figure*. As far as individual plaintiffs are concerned, the opportunities they have foregone are best indicated by the nominal interest rate which has been available over the period for which they have been kept out of their money. A compounding of this nominal rate (as the British Columbia Commission proposes) will more closely restore plaintiffs to the position they would otherwise have occupied, and will do so with application of a much simpler method of calculation. On both grounds therefore these proposals look superior.

II. *Substantive Issues*

A. *Post Judgment Interest*

Despite the radical nature of the multiplier scheme proposal, it is the second issue of particular concern to the Commission which divided it most deeply. That issue is whether a contract "about interest" should have any effect *post* judgment? Each of the three Commissioners has a quite distinctive view on the matter, although it is fair to say that none of the views represents a threat to the logic which underpins the scheme as a whole.

The position in British Columbia at present is governed by the Federal Interest Act[23] under which interest is payable on judgments at the rate of five per cent *per annum*. Legislative steps have however been taken to replace this provision, by means of amendments to the Court Order Interest Act.[24] The amendments include replacement of the five per cent rule with interest at the government banker's prime rate, discretion to vary this rate or the period within which it is payable and the stipulation that post-judgment interest be paid at simple rates. In the case law,

[22] Working Paper, *supra*, footnote 1, pp. 39-41.

[23] R.S.C. 1970, c.1-18.

[24] Court Order Interest Amendment Act, S.B.C. 1982, c.47, ss.1-5.

however, a device has been formulated which affords plaintiffs protection against the losses they might otherwise anticipate under the present law[25] when defendants are required to pay interest at only five per cent *per annum* on any delay in making payment to satisfy judgment. A "Larocque" order[26] involves trial judges in specifying a formula that will ensure that the plaintiffs are able, following any delay in receiving payment, to recover a sum which is sufficient to put them in a position comparable with the one the judge regards as appropriate at the date of judgment. This will be "akin to an award of post-judgment interest at compound rates".[27] The very emergence of the *Larocque* order can be seen as a symptom of the tension between the *restitutio in integrum* principle which the courts are following and the legislative restrictions surrounding interest which have traditionally prevented achievement of the prime objective. It is very difficult to imagine the English courts taking the *restitutio* principle as seriously as did the Court of Appeal in British Columbia in *Larocque*.[28] The small advances which have been made in England have resulted mostly from statutory amendment. The Administration of Justice Act, 1982[29] incorporated some of the proposals of the Law Commission[30] for amendment of the Law Reform (Miscellaneous Provisions) Act, 1934.[31] Thus it is now possible in England to pursue a claim for prejudgment interest despite payment in full by the debtor, if an action has been commenced. The British Columbia Commission proposes a similar amendment, which we endorse, to enable the mandatory payment of prejudgment interest on a debt which has been paid in full after the action has commenced.[32] Our only regret here is that the Commission did not see fit to consider the question of interest on debts paid late *before* an action is commenced.[33]

In order to bring the legislation regarding post-judgment interest up to date, the Commission has to confront some difficult questions. Given that a blanket rate of five per cent is so obviously inappropriate how is a better approach to be formulated? The preliminaries are straightforward: the Commission proposes a switch from simple to compound interest and

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[25] And also under the amended rules, since compounding is precluded.

[26] So called because the device was formulated by the British Columbia Court of Appeal in *Larocque* v. *Lutz* (1981), 29 B.C.L.R. 300, at p. 307 *et seq.*, *sub nom. Lutz* v. *Larocque*, [1981] 5 W.W.R. 1, at p. 10 *et seq.* (B.C.C.A.).

[27] Working Paper, *supra*, footnote 1, p. 285.

[28] For a critique of recent English judicial treatment of the law of interest, see R. Bowles, C. Whelan, Interest on Debts (1985), 48 Mod. L. Rev. 229.

[29] 1982, c.53 (U.K.).

[30] Report on Interest, *supra*, footnote 1.

[31] 24 & 25 Geo. 5, c. 41 (U.K.).

[32] See Working Paper, *supra*, footnote 1, pp. 260-264.

[33] See Bowles, Whelan, *loc. cit.*, footnote 28.

that the power of the British Columbia courts to make *Larocque* orders be preserved. It proposes also that the court should not have a discretion to vary the statutory rate of post-judgment interest. But the hard question, over which the Commission is divided, is "whether, and to what extent, an agreement about interest should override the terms of the *Court Order Interest Act* respecting post-judgment interest".[34] The three possibilities canvassed by the Commission are basically as follows:

(1) Retain the *status quo*, enabling the plaintiff to recover post-judgment interest at the statutory rates;
(2) Award post-judgment interest only in the event of the absence of any agreement between the parties as to interest;
(3) Give the court discretion to apply contractual or statutory rates.

The argument in favour of (1) is that judgment marks the conclusion of the obligations of the parties under the cause of action. The court's name stands behind the judgment, and the rights of the plaintiff flow from the court order. Further, the plaintiff has available at this stage a wide variety of enforcement procedures and should be prepared to be restricted to the statutory rate of interest in return for this security. This solution would not permit contracting out, so that no contractual provisions respecting interest would survive the judgment.

The argument in favour of (2) is that arrangements made by the parties about interest are made knowingly and should continue to apply to post-judgment interest unless they are unenforceable for other reasons. To the extent that the Commission is prepared to argue in favour of recognition of any arrangements regarding prejudgment interest, it should be consistent and allow such arrangements to survive judgment.

Compromise position (3) sees merits in both sets of arguments, and comes down in favour of stating a general rule along with a discretion in the courts to depart from it. The discretion could operate in favour of either of the two previous approaches.

All three positions have something to recommend them. Our own preference would be for (1) on the grounds that it is the most certain and eliminates any temptation for the defendant to delay making payment. The notion that the occasion of judgment marks the conclusion of contractual obligations seems persuasive in this context. We should make clear, however, that our preference for (1) would be contingent on the other recommendations of the Commission being adopted. If interest were not to be compounded, for example, we would no longer support a statutory approach to post-judgment interest since this would entail "undercompensation" of the plaintiff and give the defendant an incentive (as exists under the present five per cent rule) to delay making payment.

[34] Working Paper, *supra*, footnote 1, p. 292 *et seq*.

B. *Non-pecuniary Loss*

Our discussion thus far has been concerned with the general case in which a loss is measured by reference to the date when it occurs, with interest being awarded to compensate the plaintiff for the delay between the date the harm was suffered or the date of judgment and the date of recovery in respect of the loss. Damages for non-pecuniary loss however are calculated in "trial date dollars", that is to say by reference to prices and values when the case is being decided rather than those ruling at the time when the harm is suffered. The current position in British Columbia is very similar to the one which pertained in England following *Jefford* v. *Gee*[35] until the Court of Appeal decision *in Cookson* v. *Knowles*.[36] In *Jefford* v. *Gee* the Court of Appeal had set down the guideline that interest should be payable for non-pecuniary loss from the date of service of the writ. But this was overturned in *Cookson* where it was recognized that to allow the plaintiff to recover interest on the award at market interest rates was to make allowance twice over for inflation, once in the sum of principal calculated in trial date dollars and again in the interest element which contained an inflation component. The Court of Appeal held that *no* interest was therefore to be awarded. This judgment was in turn overruled by the House of Lords in *Pickett* v. *British Rail Engineering Ltd.*[37] in which it was recognized that a refusal to make any award of interest was to prevent the plaintiff from recovering compensation for *loss of use* of the funds, despite being compensated for *loss of value* resulting from price inflation. The Court of Appeal in *Birkett* v. *Hayes*[38] subsequently set down a guideline figure of two per cent. This received approval in the House of Lords in *Wright* v. *British Railways Board*,[39] when it was noted that the figure of two per cent was not immutable, but to be based on expert evidence regarding the real rate of return on investments in England.

The British Columbia Commission makes proposals in its Working Paper which would have the effect of leap frogging the stages in the evolution of English law as between *Jefford* v. *Gee* and *Wright* v. *British Railways Board*.[40] There can be little doubt that the current position in British Columbia involves undesirable duplication of the effects of inflation on awards. The Commission's proposal that a real rate of return of three and one half per cent *per annum* compounded monthly[41] be allowed

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[35] [1970] 2 Q.B. 130, [1970] 1 All E.R. 1202 (C.A.); see Working Paper, *supra*, footnote 1, pp. 200-203 for the British Columbia law.

[36] [1977] Q.B. 913, [1977] 2 All E.R. 820 (C.A.).

[37] [1980] A.C. 136, [1979] 1 All E.R. 774 (H.L.).

[38] [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (C.A.).

[39] [1983] 2 A.C. 773, [1983] 2 All E.R. 698 (H.L.).

[40] Working Paper, *supra*, footnote 1, p. 213.

[41] *Ibid.*, p. 321.

over the period from the date the cause of action arose would, if anything, take the law of British Columbia "ahead" of English law. For the position in England is that a real rate of interest of two per cent (simple interest) is applied even though it is conceded that four per cent would be a more accurate reflection of market opportunities.[42] This halving of the rate is designed to take account of non-pecuniary loss being something which is accumulating over the period between the date of the cause of action and the date of trial, but this it must be said seems rather arbitrary, and such provision is absent from the British Columbia Commission's scheme. At the low rates of interest involved, it does not make a great deal of difference whether compounding is used rather than simple interest unless very long delays are common, but the Commission's proposal to compound monthly is clearly most appropriate from a technical viewpoint.

One puzzle is why the Commission includes an argument which purports to indicate that the method it proposes for calculating non-economic loss does still include some degree of duplication of the effects of inflation. It makes the following assertion:[43]

> The award of even nominal interest [by which it refers to the real rate of three and one-half per cent] on the past component of the award is calculated on trial date dollars and therefore the effect is to award some prejudgment interest on the inflationary component of an award, even though at the date interest starts to run the inflation had not occurred.

With respect, we would argue that this is a red herring. In order to illustrate why, in effect, it makes no difference whether inflation is taken into account before rather than after interest *when interest is being compounded*, consider the following example. X suffers non-pecuniary loss at the beginning of 1981 at which time the consumer price index stood at 100. Inflation runs at ten per cent *per annum* through January 1985, at which point the court hears the case. An award is made of $12,100 implying that in accident date dollars the harm amounted to the equivalent of $10,000. The court is going to award interest at three and one-half per cent compounded monthly. Table B of the Working Paper indicates that the relevant multiplier is 1.150, implying that the total award will be $12,100 x 1.150 or $13,915 when using three and one-half per cent monthly compounding. Now, compare the alternative method of calculation, which the Commission suggests it would like to use were it not so complex. This entails taking the sum of principal expressed in accident date dollars, applying three and one-half per cent monthly compound interest and converting the resulting sum into trial date dollars. This would

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[42] It might be noted that the Government Actuary's Department in England has had reason to comment recently in its Working Paper on Personal Injury and Fatal Accidents Cases that the real interest rates set by the market, "currently in the bracket 2½%-3½%", can be inferred from the market price of Index-Linked Government Stock; see (1984), 134 New Law Jo. 454.

[43] Working Paper, *supra*, footnote 1, p. 211.

yield $10,000 x 1.150 x 1.21, or $13,915. That the two methods will always yield identical results derives from the fact that the product of the price index and the real interest multiplier is in each case being applied. They are applied in a different order, but that does not affect the result. The Commission's scheme is thus rather better than it thinks!

It is worth comparing in passing the award which a court in England would make in similar circumstances. Applying a two per cent simple real interest rate on a principal sum of £12,100 (at trial date pounds) would yield a total award of £13,068. The interest component would thus represent only £968 on the English approach compared with £1815 on the Commission's scheme. In British Columbia at present the position is as set out by the Court of Appeal in *McArthur* v. *Barton*,[44] namely that interest would be awarded on non-pecuniary loss at the same rate as on other heads of loss. We do not have the necessary information to make an informed assessment of what the comparable interest figure for our example would be, but it would certainly amount to a great deal more than (quite likely more than double) what the Commission's scheme would generate and *a fortiori* more than the English courts would award.

Once more then we find that the Commission's scheme comes closer to what we would regard as the correct approach than does the present law of either British Columbia or England. Again, the publication of a set of multipliers each month will make the calculation of interest a very straightforward matter for the courts — much simpler than it is at present in fact because all the difficult parts of the arithmetic, such as discovering the relevant figures to apply, will be available ''off the peg'' from the registrar's office.

C. *Foreign Money Liabilities*

At the same time as high interest rates have been prompting review of arrangements for interest, the unprecedented volatility of exchange rates prompted by the floating of many of the leading currencies in the 1970s following the collapse of the Bretton Woods agreement has led to widespread review of the treatment of foreign money liabilities.[45] In its earlier report on this area, the British Columbia Commission had concluded that courts should be permitted to make orders expressed in terms of a foreign currency.[46] This approach was considered by the Commission

[44] (1982), 37 B.C.L.R. 10 (B.C.C.A).

[45] See, for example, the Law Commission, Working Paper No. 80, Private International Law: Foreign Money Liabilities (1981), for comments on which see R. Bowles, C. Whelan (1982), 45 Mod. L. Rev. 434; Law Commission, Report No. 124, Private International Law: Foreign Money Liabilities (1983).

[46] Law Reform Commission of British Columbia, Report No. 65, Report on Foreign Money Liabilities (1983). For comments on the Working Paper which preceded this Report see R. Bowles, C. Whelan (1982), 60 Can. Bar Rev. 805.

to be superior to the existing legislation restricting courts to making awards in Canadian dollars.[47] In order to prevent inconsistency and uncertainty, the Commission proposed also that when making awards of interest in cases where judgment was expressed in a foreign currency, the courts should "have regard to the foreign interest rates which prevail with respect to that currency".[48] These recommendations on foreign money liabilities have not as yet been implemented.

As far as the question of interest is concerned the position of the Commission remains as set out in its Report on Foreign Money Liabilities, namely to preserve the discretion of the court to make an award of interest at rates prevailing in that currency.[49] The reservations we have as to the wisdom of a switch to recognising foreign currencies need not be explored here.[50] Suffice to say that we would endorse the Commission's position that appropriate foreign interest rates should be applied if and when judgment is given in a currency other than the Canadian dollar. Although this represents an exception to the general rule proposed by the Commission that courts should not have a general discretion to fix a rate of prejudgment interest,[51] it is consistent with the principles underlying its proposed reform of the law of foreign money liabilities. If such interest rates are to be compounded, as surely they would under the Commission's recommendations, then so much the better.

Conclusions

This Working Paper on the Court Order Interest Act is, in our view, an important document. It represents a thorough and sophisticated effort to resolve the tension between the principle of restoring plaintiffs to the position they would have occupied and the crippling legislative constraints to which courts have been subject in seeking this end. In its Working Paper on Foreign Money Liabilities, the English Law Commission describes as a "truism" that "the award of interest on a debt or on damages is made because the plaintiff could, had he himself had the money, have invested it and earned interest on it".[52] And yet, the courts both in English and Canada, as elsewhere, have been unable, because of the prohibition on awarding compound interest, to make such awards. This tension remains in England following the Law Commission's Report on Interest which proposes that "it is better to get away from compounding altogether and to recommend a simple rate".[53]

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[47] Working Paper, *supra*, footnote 1, at p. 17.

[48] *Ibid.*, p. 18.

[49] *Ibid.*, p. 244.

[50] See Bowles, Whelan, *loc. cit.*, footnotes 45, 46.

[51] Working Paper, *supra*, footnote 1, p. 95.

[52] Law Commission, Working Paper, *op. cit.*, footnote 45, p. 129.

[53] *Op. cit.*, footnote 1, para. 85; see also para. 156.

The method of resolution proposed by the Law Reform Commission of British Columbia has the twin merits of conceptual appeal and procedural simplicity. Such a scheme would banish from the legislation the persistent but outmoded view of interest as usurious or distasteful and replace it with an approach to interest that recognizes commercial reality and allows plaintiffs to recover sums for interest which adequately reflect the losses they have suffered whilst kept out of their money.