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FINANCING LOSSES AND INTEREST - SIMPLE PLEASURES OR COMPOUNDING THE MISERY?

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SUMMARY

It has long been a mystery to economists, accountants and business people why lawyers have regard to simple interest in commercial cases, in circumstances where companies generally do not (and cannot) borrow money on a simple interest basis. Despite compound interest having been awarded and endorsed in *Sempra Metals* more than 15 years ago, it is still common for claimants to claim, and for UK courts to award, interest on a simple basis.

The Competition Appeal Tribunal's landmark judgment in *Royal Mail v DAF Trucks* provides a ringing endorsement of the principles laid down in *Sempra Metals* and provides insight as to what a claimant is required to prove to successfully claim compound interest.

BACKGROUND

In July 2016, the European Commission issued a settlement decision finding that five major truck manufacturers participated in an EEA-wide cartel involving collusion on the prices of medium and heavy trucks, and the timing and passing on of costs associated with emissions technologies. Royal Mail and BT (among others) brought follow-on damages claims against DAF, claiming that they were overcharged for Trucks that they purchased during the cartel period.

Royal Mail also claimed compensation for its historic losses by way of compound interest based on its weighted average cost of capital ('WACC') or, alternatively, compound interest based on its cost of debt and forgone return on short-term investments.

THE CAT'S JUDGMENT

The Tribunal ultimately rejected the use of the WACC as the appropriate measure for Royal Mail's financing losses but favoured Royal Mail's alternative interest measure and awarded Royal Mail interest on a compound basis.

In considering the dispute between Royal Mail and DAF as to whether interest should be simple or compound, the Tribunal considered comments made by Male J in *Equitas,* including that "it is impossible to borrow commercially on simple interest terms" and remarked that, in light of those comments, "it is perhaps surprising that compound interest is not ordered more often and the law still seems to be wedded to simple interest".

The Tribunal confirmed that it had:

> "no difficulty in favouring a compound interest calculation over simple interest. This accords with economic reality and there is no legal bar to compounding the appropriate interest rate that we find to be applicable. This is what happens in the real world and it therefore corresponds to Royal Mail's actual losses. If it is appropriate to charge interest on a financial transaction, then it is self-evidently appropriate to apply interest also on any interest that has accrued between one period and another."

In support of its claim, Royal Mail had provided disclosure of documentary evidence (including statutory accounts, loan agreements and treasury documents) and had adduced factual witness evidence from its Group CFO, as well as evidence from an expert economist.

The Tribunal rejected DAF's demands for more detailed evidence about exactly how Royal Mail would have used additional financing in the absence of the overcharge, stating that such evidence would in any event be hypothetical. Based on the evidence before it from Royal Mail's factual witnesses and expert, the Tribunal was happy that it was able to "draw "broad axe" inferences" as to what Royal Mail would have done with the money in the absence of the overcharge – that being Royal Mail paying down its debt during certain periods, and making short term investments during other periods.

WHAT DOES THIS MEAN FOR OTHER CASES?

It seems clear from the Tribunal's endorsement of *Sempra* and *Equitas* that it will not be necessary for a claimant to specifically prove **exactly** how it would have used the additional money in the absence of the overcharge, as such evidence would by definition be hypothetical. Rather, a claimant needs to provide sufficient evidence which allows the court to draw inferences as to the appropriate measure of the claimant's loss. Where a claimant is able to provide evidence to allow for such inferences to be drawn, the courts will not be at all reluctant to favour an award of compound interest over simple interest.

The value of the compound interest award to Royal Mail was sizeable and exceeded the value of the primary overcharge damages. This will often be the case for high value claims concerning historic losses. However, one thing to bear in mind is that there may still be cases in which claimants are actually better advised to pursue simple interest only. As compound interest must be properly pleaded and proven, the claim value (and consequently the value of the compound interest

aspect of the claim) will need to be sufficient so as to justify the additional disclosure, factual and expert evidence that is required in order to make that claim good.

For those claims that justify that cost and effort, however, the judgment in *Royal Mail v DAF Trucks* provides a strong basis for compound interest awards going forwards.

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MEET THE TEAM

Andrew Leitch

London

andrew.leitch@bclplaw.com
+44 (0) 20 3400 4023

India Fahy

London

india.fahy@bclplaw.com
+44 (0) 20 3400 2250