



NEW SQUARE

1. This morning (16th February 2012) the Court of Appeal handed down judgment in the case of *Simcoe v Jacuzzi Group UK PLC*. The case is, in effect, the appeal against HHJ Stewart QC's judgment in *Gray v Toner* (Liverpool County Court, 11th November 2010) and provides the answer to the questions which have bedevilled detailed assessments for the last 18 months or so – from what date does interest on costs usually run and does the fact the Claimant was on a CFA provide a reason to not award interest until the costs are assessed.
2. The Claimant was represented by Roger Mallalieu of 4 New Square, who had been responsible for devising the Claimant's arguments in response to the Defendant's challenge, led in the Court of Appeal by John Foy QC (9 Gough Square).
3. The outcome is a resounding victory for the Claimants.
4. The judgment breaks down into two parts. The first is, for now at least, absolutely determinative of the position in County Court cases. The second provides more general guidance applicable to both County Court and High Court cases and essentially restores the status quo as it was believed to be prior to *Gray* and the related case of *Bridle v Ikhlas* (Oxford County Court, 22nd February 2011).
5. The arguments all arise from CPR 40.8 which provides that interest payable on a judgment pursuant to s.17 of the Judgments Act 1838 (High Court) or s.74 County Courts Act 1984 shall begin to run 'from the date that judgment is given' unless the court orders otherwise.
6. There were two key issues. What does 'from the date that judgment is given' mean? In particular, does it mean the same as 'judgment' used to mean prior to the amendment to s.17 which Lord Ackner determined, in the case of costs, meant the date of the costs order, not the date of assessment (the 'incipitur' date, not the 'allocatur' date) – see *Hunt v AM Douglas Roofing Ltd* [1990] 1 AC 398.
7. Secondly, regardless of the meaning of judgment, given that the court now apparently had a discretion under CPR 40.8, did the fact that the Claimant had not paid the costs personally and was therefore not 'out of pocket', and in particular the fact the Claimant was on a CFA or CFA lite provide a reason, or a 'good reason' to 'order otherwise' and not award interest until the assessment was completed?
8. The Court of Appeal, led by the Master of the Rolls, clearly wished to give a clear and swift answer to these questions – the reserved judgment being handed down only a little over 2 weeks after the hearing.



9. The answers are very clear.
10. Firstly, the County Court anomaly. CPR 40.8 (1) at least (and arguably 40.8(2) though the court did not decide this) is ultra vires in the County Court and has no application to County Court proceedings until that problem is resolved. It is of no effect.
11. The reasoning is fully set out in the judgment and is not repeated in detail here. In short, the concurrence of the Treasury was required in order to vary or overrule article 2 of the County Court (interest on Judgment Debts) Order 1991 and does not appear to have been obtained. That was a 'fundamental defect'. Accordingly the 1991 Order still applies and mandates in the County Court that interest on costs runs from the date of the costs order.
12. Until that problem is resolved, there is simply no discretion to order otherwise in the County Court. The incipitur rule applies by force of secondary legislation – the 1991 Order.
13. The problem may be resolved shortly – the Master of the Rolls indicating that the Treasury's concurrence to CPR 40.8 (which has been sitting there, ultra vires in part, for nearly 14 years) may be given with a minimum of formality. There may, however, be interesting issues as to whether that concurrence can have retrospective effect. In the meantime, there is simply no argument to be had in the County Court.
14. However, it is, perhaps, unlikely that such arguments will be necessary in the future in any event. The Claimant in Simcoe was always clear that the ultra vires argument was merely a fall-back position. His primary case was always (i) that the incipitur rule continued to apply as the starting point and (ii) that the fact a Claimant was not personally 'out of pocket' (whether by virtue of a CFA, CFA lite or otherwise) was not a good reason to depart from the incipitur rule. These points are of equal application in the County Court (once the ultra vires point is resolved) and High Court.
15. The Court of Appeal was in complete agreement. Both points were decided in very clear terms. Firstly, the incipitur rule remains the starting date. It is the 'normal rule' that interest on costs runs from the date of the costs order (see paragraphs 36 and 37).
16. Secondly, the fact the Claimant is on a CFA or CFA lite and is not 'out of pocket' is not a good reason to order otherwise (see paragraphs 41 to 46.) Where the case has been 'funded' by someone – be it (in effect) the solicitor or a third party funder there is no reason not to award interest and any suggestion of a windfall is addressed by that interest being payable by the Claimant to the 'funder' (paragraph 48).
17. Lastly, the Court of Appeal gave a warning against the detailed examination of the facts of individual cases when dealing with the question of when interest should run. The court should



take a 'broad view' (paragraph 48). But whether taking a broad view or not, the Claimant's case succeeded.

18. Accordingly, it is only likely to be in cases where there are very substantial sums in issue and reasons other than the fact that the case was not personally 'funded' by the Claimant that arguments in relation to CPR 40.8 should arise.
19. The judgment will be good news for Claimant solicitors. Interest has long provided an additional source of income and has been part of the calculations on which many financial models have been based. In these straightened times and times of great change it would have been sorely missed.
20. It remains to be seen whether the Defendants will seek to petition the Supreme Court. However, the strength of the Master of the Rolls' judgment and the greater reluctance of the Supreme Court to intervene in what they see as matters of procedure which are the domain of the Court of Appeal (and the Master of the Rolls in particular) suggests that that would not be an easy course, even if attempted.