

# Taking an Interest in Pre-Judgment Interest: *Mitchell v Al Jaber* [2023] EWHC 1239 (Ch)

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## Introduction

Suppose that the director of a company wrongfully misappropriates money from the company. The company responds by suing the director and, many years later, obtains an award of damages. This award is, however, usually insufficient to fully rectify the defendant's wrongdoing. During the period of time between the misappropriation of the money and the Court ordering the director to pay damages, the company has been denied (and the director has enjoyed) the use of that money. An award of damages alone is therefore insufficient to achieve a just outcome. The solution is an award of pre-judgment interest: an additional payment to be made by the defendant to account for the period of time between the occurrence of the defendant's wrongdoing and the rectification of this wrong by the Court's damages order. There are a number of legal avenues through which pre-judgment interest can be granted, with two of the primary ones being through: (i) the Court's discretionary powers in equity; and (ii) the Court's powers under the Senior Courts Act 1981.

In large-scale commercial cases where judgment is often not handed down until many years after the wrongdoing, the amounts at stake in arguments over pre-judgment interest can be significant. Litigants who fail to take a sufficient degree of interest in arguments over pre-judgment interest do so at their peril. This has been demonstrated by the recent decision of Mrs Justice Joanna Smith DBE ("Smith J") in *Mitchell v Al Jaber* [2023] EWHC 1239 (Ch), where the Claimants sought pre-judgment interest totalling around €38.5 million but were ultimately forced to make do with a significantly lower amount. Smith J's judgment also provides an excellent summary of some of the key principles applicable to claims for pre-judgment interest in equity.

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## Background

Sheikh Mohamed Bin Issa Al Jaber (the “First Respondent”) was the director of MBI International & Partners Inc (the “Company”), a BVI company that was in liquidation. In an apparent attempt to transfer valuable assets away from the Company for his own benefit, in March 2016, the First Respondent caused the Company to transfer shares to JJW Limited (the “Fifth Respondent”), which was a Guernsey company controlled by the First Respondent. The Fifth Respondent held those shares for 15 months before transferring them to a third party. In response, the liquidators of the Company (the “Claimants”) sued the First Respondent and the Fifth Respondent seeking equitable compensation for the lost value of the shares.

Smith J handed down judgment on liability and damages in February 2023. Smith J held that when the First Respondent effected the transfer of the shares to the Fifth Respondent, he was dishonest and was not acting in the best interests of the Company. Likewise, because the Fifth Respondent was controlled by the First Respondent, when it received the shares it did so with knowledge of the First Respondent’s misconduct. The First Respondent and Fifth Respondent were therefore liable as constructive trustees of the shares to account to the Company for the value of these shares. Smith J therefore ordered the First Respondent and Fifth Respondent to pay equitable damages of €67,123,403.36.<sup>1</sup>

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## Determining Pre-Judgment Interest: The Key Issues

At the consequential hearing, the Claimants sought pre-judgment interest of up to 6.5% per annum calculated on a compounding basis from March 2016. Smith J therefore considered the following key issues:

- Should the Court award pre-judgment interest in equity?
- If so:

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<sup>1</sup> The First Respondent and Fifth Respondent (along with the Second Respondent) have obtained permission to appeal Mrs Justice Joanna Smith DBE’s decision on liability. It does not appear, however, that the consequential decision which is the subject of this article has been appealed.

- Should pre-judgment interest be calculated on a compound basis or a simple basis?
- What interest rate should be applied?
- Over what period should the calculation be applied (and should different calculations be applied for different periods)?
- In the alternative, should the Court award pre-judgment interest pursuant to the Senior Courts Act 1981?

### Should the Court Award Pre-Judgment Interest in Equity?

Smith J explained that although a Court has a wide discretion when deciding whether to award pre-judgment interest in equity, this discretion must be exercised in a principled way. To that end, there are “*two principled bases*” on which pre-judgment interest can be awarded in equity against a trustee in default:

- The first basis is in order to compensate the claimant for the loss it suffered (the “Compensatory Basis”).
- The second basis is in order to reverse any profits that the defendant may have made through its wrongdoing (the “Restitutionary Basis”).

As for the Claimants’ arguments on these bases:

- The Claimants’ primary argument was that pre-judgment interest should be awarded on the Compensatory Basis (specifically, by reference to the profits that the Company could have made from the shares if they had not been misappropriated). Smith J rejected this argument. At the time that the shares were misappropriated, the Company was in liquidation and was not actively trading. It was therefore reasonable to assume that the Company would not have put the shares to any profitable use, and the Claimants had not produced admissible evidence to rebut that assumption. It could not therefore be inferred that if the shares had not been misappropriated then the Company would have used the shares to generate returns.
- The Claimants therefore fell back on the Restitutionary Basis. The Respondents argued that pre-judgment interest should not be awarded on this basis either because the Claimants had not produced any evidence that the Respondents had profited from their misuse of the shares. Smith J agreed that no such evidence had been provided, but held that this did not matter. The Respondents’ liability was the result of them having acted dishonestly and in breach of trust. In such circumstances, the

Courts will effectively reverse the onus of proof: rather than leaving it to the claimant to prove that a defendant profited from its wrongdoing, the onus will lie with the defendant to provide “clear evidence” showing that it did not make a profit. The Respondents had not provided any such evidence and were therefore liable to pay pre-judgment interest.

### **Should Pre-Judgment Interest Be Calculated on a Compound Basis?**

The Claimants argued that once it has been established that either the Compensatory Basis or Restitutionary Basis applies, it follows that pre-judgment interest should be calculated on a compound basis. Smith J rejected this argument:

- Whether the Compensatory Basis or Restitutionary Basis applies is merely a threshold matter for determining whether a claimant is entitled to pre-judgment interest in equity at all.
- Once the Court has concluded that either of those bases applies, the question of whether the pre-judgment interest should be calculated on a compound basis is a separate matter.
- Nonetheless, and as explained in further detail below, the precise threshold basis on which the Court decides to award pre-judgment interest does have knock-on consequences for how the quantum will be calculated.

In the present case, the Respondents had misapplied the Company’s assets in breach of trust. Smith J held that it was appropriate to order pre-judgment interest calculated on a compound basis in response to this type of misconduct. Smith J also noted that the First Defendant had behaved dishonestly, which was also sufficient in and of itself to justify an award of compound interest.

However, and as foreshadowed above, there was a sting in the tail of Smith J’s reasoning. Smith J had concluded that the Claimants were entitled to equitable pre-judgment interest on the Restitutionary Basis but not the Compensatory Basis. Therefore, Smith J held that the Respondents were only obligated to pay pre-judgment interest on a compound basis during the period in which the Respondents were presumed to have benefitted from the misappropriation of the shares—specifically the period from 8 March 2016 to 23 June 2017 during which the Fifth Respondent held the shares. For the period from 23 June 2017 onwards (*i.e.*, from the date on which the Fifth Respondent transferred the shares to a third party and therefore ceased to derive any benefit from them), pre-judgment interest would merely be calculated on a simple basis.

### What Interest Rate Should Be Applied?

The final issue was the rate of interest to be applied. The Claimants sought a rate of 5% on the basis that this was similar to the rate that had been endorsed by the Courts in some previous cases from the 19<sup>th</sup> century. Smith J rejected this approach, as since the 1970s the Courts have fixed the interest rate for pre-judgment interest by reference to the base rate. The reason for this is that in order for an award of pre-judgment interest to be able to achieve a compensatory or restitutionary objective, it should be calculated using a rate that is consistent with the economic conditions that applied at the relevant time. To that end, interest rates applied by the Courts in the 19<sup>th</sup> century are of little relevance to cases adjudicated in a contemporary economic climate.

Aside from their references to the interest rates applied in previous cases, the Claimants had not provided any evidence or arguments in support of a 5% interest rate. Smith J therefore applied a “*broad brush approach*” and did “*the best I can do on the submissions I have received*” by finding that pre-judgment interest should be calculated at a rate of 1% above the base rate.

### Should the Court Award Pre-Judgment Interest under the Senior Courts Act 1981?

As an alternative to their claim for pre-judgment interest in equity, the Claimants argued that they were entitled to an award of pre-judgment interest calculated on a simple basis at a rate of 5% per annum pursuant to section 35A of the Senior Courts Act 1981. The Claimants argued that this should be calculated on a compensatory basis by reference to what the Company would have done with the shares if they had not been misappropriated. Specifically, the Claimants argued that if the shares had not been misappropriated, then the Company would have sold them and used the proceeds to, among other things, pay off debts (including interest) owed to creditors.

This argument failed at the first hurdle due to procedural errors by the Claimants. At the time of the consequential hearing, the Claimants had not filed any evidence that supported counterfactual in support of the interest claim. Although the Claimants sought to then file evidence after the hearing, they did not have permission to do so. Smith J therefore refused to consider this new evidence, and the Claimants’ claim for pre-judgment interest pursuant to the Senior Courts Act 1981 failed due to lack of evidence.

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## CONCLUSION

To put into perspective the magnitude of the parties' skirmish over pre-judgment interest, the calculation sought by the Claimants would have translated to an award of pre-judgment interest of roughly €38.5 million. The pre-judgment orders made by Smith J would have translated to a significantly smaller amount and an award of pre-judgment interest of less than €8 million. Despite the amounts at stake, the Claimants' written submissions at the consequential hearing consisted of only "*five short paragraphs relying on one authority*" (in response to which Smith J "*reluctantly*" concluded that the parties should provide further written submissions after the hearing). Likewise, and as noted above, many of the Claimants' arguments failed for the simple reason that no evidence had been validly filed in support of them.

*Mitchell v Al Jaber* [2023] EWHC 1239 (Ch) therefore serves not only as a helpful summary of some of the key principles applicable to an application for pre-judgment interest in equity, but also as a salient reminder that a rigorous approach should be taken to arguments over pre-judgment interest.

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Please do not hesitate to contact us with any questions.

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