



Neutral Citation Number: [2012] EWCA Civ 137

Case No: A2/2011/2192

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM LEEDS COUNTY COURT**  
**District Judge Hill**  
**Claim No 7LS57337**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/02/2012

**Before:**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE HOOPER**  
and  
**LORD JUSTICE McFARLANE**  
**SITTING WITH MASTER GORDON-SAKER AS ASSESSOR**

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**Between :**

<b>ADRIAN SIMCOE</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>JACUZZI UK GROUP PLC</b>	<b><u>Respondent</u></b>

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**John Foy QC and Roger Mallalieu (instructed by Irwin Mitchell LLP) for the Appellant**  
**Mark Friston and Paul Hughes (instructed by Berrymans Lace Mawer) for the Respondent**

Hearing dates: 30 January 2012  
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**Approved Judgment**

## **The Master of the Rolls:**

1. The issue on this appeal concerns the date from which interest should run on an award of costs in favour of a successful claimant, whose legal representatives were retained under a conditional fee agreement (a 'CFA'), in a personal injury claim brought in the County Court.

### *The factual history*

2. The facts are as follows. The claimant, Mr Simcoe, was employed by the defendant, Bradford Jacuzzi UK, for the purpose of assembling shower cubicles. By 2005, he was suffering pain as a result of the repetitive nature of the work involved. In that connection, he instructed Irwin Mitchell Solicitors LLP to act for him in proceedings for damages against the defendant. Irwin Mitchell agreed to act under a conditional fee (often known as 'no win no fee') basis, and in due course the claimant entered into a conditional fee agreement (a 'CFA') on 5 October 2007.
3. The CFA contained a number of definitions. 'Basic charges' were charges assessed by reference to the work done on the case by solicitors at Irwin Mitchell calculated by reference to an hourly rate, which varied between £135 and £250, depending on the experience and qualification of the solicitor concerned. The 'success fee' was 100% of the basic charges, and was payable only if the claimant won the case. The 'insurance' was a policy, whose premium increased as the case progressed, and would indemnify the claimant against liability for Irwin Mitchell's disbursements and the defendant's costs.
4. The effect of the CFA, in summary terms, was as follows. If the claimant won, he would be liable to pay Irwin Mitchell's 'basic charges', 'success fee', and disbursements, and 'the insurance premium'. However, the CFA informed him that he would be able to recover these from the defendant, and, to the extent that any sum was reduced on assessment or by agreement with the defendant, he could normally rely on the reduction as against Irwin Mitchell. If he lost, the claimant would not have to pay Irwin Mitchell, save in respect of disbursements, which, he was told, could be covered by the insurance, which could also protect him against liability for the defendant's costs.
5. Thereafter, Irwin Mitchell issued proceedings for damages on behalf of the claimant against the defendant in the Leeds County Court. On 16 April 2010, the proceedings were compromised by way of a consent order, under which the defendant agreed to pay, and the claimant agreed to accept, £12,750 by way of damages, together with costs to be assessed on the standard basis if they were not agreed. Although detailed assessment proceedings were initiated, the claimant's costs were subsequently agreed in the sum of £74,000 (which included a reduction in the success fee to just over 60%), which was then paid to the claimant's solicitors.
6. The only issue between the parties is whether the defendant is liable to pay interest on the sum of £74,000 from 16 April 2010, as the claimant contends, or whether interest is only payable from the date on which the sum was formally agreed, as the defendant contends. The issue was determined by District Judge Hill in a very brief judgment (perhaps unsurprisingly as neither party appeared before him) on 9 June 2011. He held, in favour of the defendant, that 'interest on costs runs from the date of

assessment of those costs’, basing his decision on the decision of His Honour Judge Stewart QC in a case in the Liverpool County Court, *Gray v Toner* (11 November 2010). His Honour Judge Gosnell gave the claimant permission to appeal, and ordered, pursuant to CPR 52.14, that the appeal should be transferred to the Court of Appeal as it ‘raise[d] an important point of principle’.

7. The issue of principle can be expressed in general terms as follows: where the court orders one party to pay the other party’s costs in a sum to be agreed or determined, does interest run (i) from the date of the order for costs as agreed or assessed, or (ii) from the date on which the sum is agreed between the parties or assessed (or, to use the pre-CPR language, taxed) by the court? Or, in the arcane language of the costs world, does interest run from the *incipitur* date or the *allocatur* date?
8. In determining that issue, we have received helpful written and oral submissions on behalf of each party. We have also had the invaluable benefit of the expertise and advice at the hearing of the appeal and during our deliberations of Master Gordon-Saker.
9. To resolve this issue, it is appropriate to look first at the position in the High Court and the County Court, prior to the introduction of the Civil Procedure Rules (‘CPR’), and then turn to the changes effected in April 1999, when the CPR came into force.

*The law in the High Court before the CPR*

10. Sections 17 and 18 of the Judgments Act 1838 (‘the 1838 Act’) provided as follows:
  - ‘17. ... every judgment debt shall carry interest at the rate of 4 pounds per centum per annum from the time of entering up the judgment ... until the same shall be satisfied ... .
  18. ... all decrees and orders of Courts of Equity and all rules of Courts of common law ... whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments ... And the persons to whom such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act ... .’
11. In *Hunt v AM Douglas (Roofing) Ltd* [1990] 1 AC 398, Lord Ackner, with whom the other Law Lords agreed, concluded that, as had been held in a number of nineteenth century cases (including *Boswell v Coaks* (1887) 57 LJ Ch 101 and *Pyman v Burt, Boulton* [1884] WN 100), the effect of these two sections was that interest on costs ran from the date the order for costs was made, and not the date on which the costs were subsequently assessed or agreed. Lord Ackner also said at [1990] 1 AC 398, 415F-416B that, while ‘a satisfactory result cannot be achieved in every case’, he considered that ‘the balance of justice favours the *incipitur* rule’ for reasons which he then explained.
12. Those reasons (renumbered and abbreviated) were as follows:

- i) '[T]he unsuccessful party ... has caused the costs ... to be incurred, [and, as] interest is not awarded on costs incurred and paid by the successful party, why should he suffer the added loss of interest on costs incurred and paid after judgment'?
- ii) 'Since ... payments of costs are likely nowadays to be made to lawyers prior to taxation, ... the *allocatur* rule would generally ... do greater injustice than ... the *incipitur* rule,.
- iii) '[T]he *incipitur* rule provides a ... stimulus for payments to be made on account ... prior to taxation, for costs to be more readily agreed, and for taxation to be expedited';
- iv) Barristers, solicitors and expert witnesses should not be expected to finance their clients' litigation until ... the [taxation is completed]';
- v) Where the interest is payable on disbursements and costs in respect of a period during which they have not been paid, there can be 'an express agreement between the solicitor and his client that any [such] interest ... on the costs [shall] belong to the solicitor, and ... on disbursements [shall] be held by him for ... the ... persons to whom they are ultimately paid.'

13. Two years later, in *Thomas v Bunn* [1991] 1 AC 362, the House of Lords had to consider whether interest on damages in a personal injury claim, following a split trial, ran from the date of judgment on liability, or the later judgment (or agreement) on quantum. In deciding on the latter date, Lord Ackner (with whom the other Law Lords agreed) accepted that 'it is an anomaly that an order for payment of costs is construed for the purposes of section 17 as a judgment debt', but he then said that 'the courts have accepted since its enactment that section 17 does apply to such an order, and for the reasons set out in *Hunt* [1990] 1 AC 398, the balance of justice favours continuing so to treat such an order' – [1991] 1 AC 362, 380E.

#### *The law in the County Court before the CPR*

14. The position in the County Court was governed by section 74(1) of the County Courts Act 1984 ('the 1984 Act'), which, so far as relevant, provided:

'The Lord Chancellor may by order made with the concurrence of the Treasury provide that any sums to which this subsection applies shall carry interest at such rate and between such times as may be prescribed by the order.'

And it is clear from subsection (2) that 'the sums' to which this provision refers include sums payable by way of costs pursuant to a court order. Section 74(6) provides that the power is to be exercised by a statutory instrument.

15. In 1991, the Lord Chancellor made the County Court (Interest on Judgments Debts) Order 1991 (SI 1991/1184, 'the 1991 Order'). The 1991 Order was promulgated with the concurrence of the Treasury, as is stated at the beginning of the Order, and as is evidenced by the signatures of two of the Lords Commissioners of the Treasury at the end of the Order, after the signature of the Lord Chancellor.

16. It is necessary to refer to three of the articles of the 1991 Order:

‘1(2) ... “relevant judgment” means a judgment or order of a County Court for the payment of a sum of money of not less than £5000, and, in relation to a judgment debt, means the judgment or order which gives rise to the judgment debt. ...’

2(1) Subject to the following provisions of this Order, every judgment debt under a relevant judgment shall, to the extent that it remains unsatisfied, carry interest under this Order from the date on which the relevant judgment was given.

2(2) In the case of a judgment or order for the payment of a judgment debt, other than costs, the amount of which has to be determined at a later date, the judgment debt shall carry interest from that later date.’

*The CPR and changes made with effect from April 1999*

17. The CPR represent the principal means by which Lord Woolf’s reforms to civil justice were introduced. They were contained in regulations, the Civil Procedure Rules 1998 (SI 1998/3132 L17), which were laid before Parliament by the Civil Procedure Rule Committee in conjunction with the Lord Chancellor, pursuant to sections 1 and 2 of the Civil Procedure Act 1997 (‘the 1997 Act’). With certain irrelevant exceptions, the CPR replaced the Rules of the Supreme Court in the High Court, and the County Court Rules in the County Court, with effect from 26 April 1999.

18. With effect from the same day, section 17 of the 1838 Act (‘section 17’) was amended by article 3 of the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940, ‘the 1998 Order’) so that it read:

‘(1) Every judgment debt shall carry interest at the rate of 8 pounds per centum per annum from such time as shall be prescribed by rules of court;

(2) Rules of Court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).’

19. So far as the CPR themselves are concerned, the centrally relevant provision for present purposes is CPR 40.8, which provides:

‘(1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless-

(a) a rule in another Part or a practice direction makes different provision; or

(b) the court orders otherwise.

(2) The court may order that interest shall begin to run from a date before the date that judgment is given.’

*The issues*

20. The appellant claimant contends that the District Judge was wrong to hold that interest on the agreed costs in this case should run from the date the costs were agreed (i.e. from the *allocatur* date) as opposed to from the date of the order for costs (i.e. from the *incipitur* date), for two alternative reasons. The first reason is that the amendment purportedly made in April 1999 by CPR 40.8(1) was ineffective so far as the County Court is concerned, so that the 1991 Order still applies, and it mandates that interest is to be paid from the *incipitur* date. The second reason is that, if CPR 40.8 does apply, while it does give the court a discretion, the normal rule is that interest is payable from the *incipitur* date, and there is no reason to depart from that rule in the present case.
21. These two arguments each raise two issues. The first argument raises the issues (a) whether CPR 40.8(1) has effectively replaced or amended the 1991 Order in the County Court, and (b) if not, whether the 1991 Order effectively mandates the payment of interest on costs from the *incipitur* date. The second argument raises the issues (c) whether CPR 40.8(1) contains a general rule that interest on costs runs from the *incipitur* date, and (d) if so, whether there is any good reason to depart from that general rule in the present case. I shall consider those four arguments in turn.
22. The first of these issues is to my mind the most difficult, and in many ways the most far-reaching, of the four issues raised on this appeal, and in the light of the conclusions I have reached on the other three issues, it need not be answered in order to dispose of this appeal. However, it seems to me that, as the validity of CPR 40.8(1) in the County Court has now been raised, it should be disposed of. If the rule is effective, then the sooner that is made clear the better. If the rule is ineffective, then the sooner that is put right the better.

*Is CPR 40.8 effective in the County Court?*

23. Although there is no reference to the 1991 Order in the CPR generally, or in CPR 40.8 in particular, it must be right to construe CPR 40.8, if it is otherwise valid and effective in the County Court, as impliedly repealing and replacing the 1991 Order, at least in so far as that order applied to cases to which CPR 40.8 would now apply. However, the claimant contends that CPR 40.8 is concerned with the court’s powers to make orders with regard to interest on sums which the court awards, which brings it within the ambit of section 74(1) of the 1984 Act, and CPR 40.8, or at least CPR 40.8(1), is therefore invalid, because the CPR were made without the concurrence of the Treasury.
24. The defendant contends the 1997 Act represented a wholly new source of authority for making rules for the County Court, including rules with regard to the payment of interest on sums of money awarded by the court, including costs. I cannot accept that. Section 1 of the 1997 Act states that the CPR should govern the ‘practice and procedure’ in the English civil courts. This does not suggest that they were intended to empower those courts to have the substantive power to award interest, especially as such a power was already bestowed on them by the 1838 and 1984 Acts, which were

not apparently repealed by the 1997 Act. Even more significantly, section 17 was actually amended as part of the introduction of the Woolf reforms, which shows that the court's power to award interest was regarded as having a separate source from the 1997 Act. My view is supported by CPR 40.8(1) itself, which states in terms that the powers which it confers derive not from the 1997 Act, but from the 1838 Act in the High Court and from the 1984 Act in the County Court.

25. The defendant rightly does not challenge the contention that CPR 40.8(1) ought to have been concurred in by the Treasury if it was to comply with the strict requirements of section 74(1) of the 1984 Act. The effect of CPR 40.8 is contained in an 'order', and its function is to 'prescribe' a rule as to the 'times' 'between' which 'interest' should be paid on a 'sum' which is within the scope of section 74(1).
26. The defendant does, however, challenge the submission that the Treasury did not concur in the making of the CPR. At least on the basis of the arguments we have received, I do not think that that challenge can be maintained. There is nothing to suggest that the Treasury was consulted about the CPR, let alone that it agreed to them. The contrast in this connection between the regulations making the CPR, which have no reference to the Treasury at all, and the 1991 Order, with its reference to the Treasury and the Treasury Commissioner signatories, could not be more marked. It is true that section 2(6) of the 1997 Act requires the Civil Procedure Rule Committee to 'consult such persons as they consider appropriate before making or amending the [CPR]'. However, it is unrealistic to think that the Treasury was consulted about CPR 40.8, and, even if it had been, there is nothing to show that it concurred. The defendant relies on the fact that solicitors working for the Treasury Solicitor had involvement in formulating the Lord Woolf's 'Final Report', but that report is not the CPR, involvement is not concurrence, and the Treasury Solicitor is not the Treasury,
27. The final, and to my mind most difficult, issue on this first point is whether the absence of the Treasury's concurrence in the making of CPR 40.8(1) renders it ineffective in the County Court, at least so far as interest on sums after judgment is concerned. As a matter of principle, it seems to me that, if Parliament has stated in a statute that regulations made under that statute have to be made by one Government department with the concurrence of a second Government department, any regulations made by the one department, without the concurrence of the other would be *ultra vires*. That is simply because such regulations will have been made in such a way as fails to comply, in a significant and fundamental way, with how Parliament has stipulated they should be made. If, for instance, the first department had issued regulations after the second department had been consulted and had refused to agree them, it would seem quite wrong for the court to flout Parliament's intention, plainly expressed on the face of the empowering statute, by giving effect to such regulations.
28. The nearest authority which I could find on the point is *R v Secretary of State for Social Services ex p Association of Metropolitan Authorities* [1986] 1 WLR 1, where the statute required the Government department making the regulations concerned first to consult with certain local authorities. Although there had been no valid consultations, Webster J held at [1986] 1 WLR 1, 14-15 that the Court could, in its discretion, refuse to revoke the regulations as they had been acted on and assumed to be valid for a significant period. On the assumption that that case was rightly decided, I am nonetheless of the view that we should hold that CPR 40.8 is of no effect in the County Court, owing to the absence of any concurrence by the Treasury.

29. The defect in not obtaining the concurrence of the Treasury appears to me to be fundamental in a way in the failure to consult in *Metropolitan Authorities* [1986] 1 WLR 1 was not. Obtaining concurrence requires getting the positive agreement of the concurrer whereas consultation is satisfied even if there is positive disagreement from all the consultees. Further, unlike the failure to consult in *Metropolitan Authorities* [1986] 1 WLR 1, the failure to obtain concurrence goes to the very making of the regulations concerned. I also have difficulty with the notion that a judge can be required to exercise a power purportedly given to him under regulations which he is satisfied were made without any involvement of a party whose concurrence has been stipulated by Parliament as necessary in the making of the regulations. In *Metropolitan Authorities* [1986] 1 WLR 1, Webster J faced no such problem.
30. In addition, the conclusion that CPR 40.8(1) is ineffective in the County Court does not mean that the provisions of the rule, let alone those of the CPR as a whole, are of no effect: CPR 40.8(1) has always been valid in the High Court, and CPR 40.8(2) is (albeit only arguably) valid in the County Court as well as the High Court. By contrast, in *Metropolitan Authorities* [1986] 1 WLR 1, the court was being invited to hold that the whole regulation was invalid. Further, the Regulations in *Metropolitan Authorities* [1986] 1 WLR 1 concerned an issue, housing benefit payments, which involved a general policy issue, in relation to which the Government and others will have based plans and made financial arrangements. CPR 40.8 is a measure to be applied on a case by case basis, and it is fanciful to think that anyone has made plans on the basis that it applied in the County Court, although I accept that some cases will have been decided or settled on the assumption that it did. However, as explained below, it appears to me that the position under the 1991 Order is the same as the *prima facie* position, or the general rule, under CPR 40.8(1). So I would expect that there have been very few cases where the County Court has made an order purportedly under CPR 40.8(1) which would have been different from that which it would have made under the 1991 Order. It is only fair to acknowledge that *Gray v Toner* (11 November 2010) appears to have been such a case.
31. If the Treasury is, in fact, content with CPR 40.8, I consider that this could simply be formally recorded, and the rule will then be valid. It does not seem to me that the terms of section 74(1) of the 1984 Act would invalidate regulations which are concurred in by the Treasury after they are made. The fact that the concurrence is expressed subsequent to promulgation is a purely procedural point, which in no way impacts on the substantive requirements of the section. The question whether the concurrence can be expressed retrospectively, so as to render CPR 40.8 valid with effect from April 1999 is not a point on which we were addressed or on which we need rule.

*The meaning of article 2(2) of the 1991 Order*

32. The claimant's case is that the consequence of the inclusion of the words 'other than costs' in article 2(2) of the 1991 Order means that the effect of article 2(1) is that interest on costs must run from the date of the judgment which contains an order for costs – i.e. from the *incipitur* date. The defendant's contention is that the effect of these two provisions is the court is free to decide on the facts of a particular case from what date interest on costs runs.

33. I would reject the defendant's argument. Article 2(1) makes it clear that interest is to run on any judgment debt from the date of 'judgment'. In the absence of a provision such as article 2(2), it appears to me that, when it comes to an order for costs, the only 'judgment' is that reflected in the order for costs to be assessed or agreed: the subsequent quantification of the costs is either an agreement or a certification. Furthermore, the 1991 Order was promulgated very shortly after the House of Lords had stated in clear terms, and had then re-affirmed, that 'the balance of justice favours the *incipitur* rule' – see paras 10-12 above. Further, the practical consequences of the defendant's argument do not seem consistent with the prescriptive and simple terms of article 2(1) and 2(2) of the 1991 Order.
34. Thus, the natural meaning of the words used, policy considerations, as authoritatively laid down, and the general thrust of the 1991 Order support the claimant's case, which I would accept. The effect of the 1991 Order is, therefore, that interest on costs runs from the *incipitur* date. It is therefore strictly unnecessary to consider the other way in which the claimant puts its case, but I shall do so, as it is of some importance, and it provides a second reason for allowing the claimant's appeal.

*What is the normal rule under CPR 40.8?*

35. The claimant's case is that the normal rule under CPR 40.8(1), i.e. the position if paras (a) and (b) do not apply, is that interest runs on costs from the date on which judgment is given for costs to be assessed – i.e. from the *incipitur* date. The defendant's contention is that the normal rule under CPR 40.8(1) is that interest runs from the date on which costs are agreed or assessed – i.e. from the *allocatur* date.
36. The reasons given in paras 33 and 34 for accepting the claimant's case as to the meaning of article 2(1) of the 1991 Order equally justify accepting the claimant's case and rejecting that of the defendant on CPR 40.8(1). 'Judgment' is only used once in CPR 40.8(1), whereas it is used three times in article 2(1) of the 1991 Order, but that does not help the defendant (as the Bellman's instruction that 'what I tell you three times is true' rarely assists on issues of interpretation). Nor does it help the defendant that CPR 40.8 was made some ten years after the House of Lords cases discussed in paras 10-12 above, whereas the 1991 Order was much earlier. It is not as if there had been any subsequent decision which qualified the clearly expressed view of Lord Ackner as to where the balance of justice lay.
37. There is a further argument for rejecting the defendant's case as to the meaning of CPR 40.8(1) in the County Court. It would be very surprising if 'judgment' had a different meaning in CPR 40.8 in relation to the County Court from that which it has in relation to the High Court. Given the reference to section 17 in CPR 40.8(1), the meaning of 'judgment' in that rule, in relation to costs in the High Court, following the reasoning in *Hunt* [1990] 1 AC 398 must be the *incipitur* date. This, therefore, provides further support for the claimant's case.
38. It is right to record that we were referred by each party to other provisions of the CPR. I do not think it necessary to discuss them: to put it at its lowest, none of them is inconsistent with the conclusion I have reached. Indeed, I tend to the view that some of them rather support my conclusion, but it would pointlessly lengthen this judgment if I developed that aspect further.

*If CPR 40.8(1) applies, should the normal rule apply in this case?*

39. The final issue is whether, given that the general rule is that interest should run from the *incipitur* date under CPR 40.8(1), the defendant is right in contending that the court should nonetheless ‘otherwise order’ under CPR 40.8(1)(a) on the ground that, on the facts of the present case, interest should run from the *allocatur* date.
40. The defendant’s contention is essentially based on the argument that Lord Ackner’s reasons in *Hunt* [1990] 1 AC 398, set out in para 12 above, for concluding that ‘the balance of justice favours the *incipitur* rule’ do not apply in a case such as this. This argument involves focussing on differences between the position of a normal receiving party in the late 1980s and the position of a claimant such as Mr Simcoe.
41. I am unimpressed with that argument. Reason (i) applies in a case such as this, in the sense that the claimant’s solicitors will have done the work which is reflected in the costs awarded to the claimant (or, to put it another way, they will have incurred the overheads on which those costs are based) before the costs order was made. Similarly, reason (iii) applies in this case. It is true that the increased power and readiness of the courts to order payments on account of costs, and to make summary assessments of costs, somewhat reduces the force of the point when it is invoked in the present climate. However, it continues to be generally valid. In particular, it is valid in this case, where there was no order for payment on account and no summary assessment.
42. It is true that reason (ii) does not apply in a case such as this, involving a CFA, as no costs will have been paid by the claimant to his solicitors prior to the making of the costs order (or at all). However, that point is met by the fact that reason (iv) applies to virtually all the costs in a case such as this. The effect of the claimant not paying anything to his solicitors until after the costs have been recovered from the defendant is that those solicitors have been ‘financ[ing] their clients’ litigation’, and, as Lord Ackner said, they should not be expected to continue to do so until the costs are agreed or assessed.
43. It was also argued by the defendant that the fact that the CFA provided for a substantial uplift undermined the claimant’s reliance on the reasoning in *Hunt* [1990] 1 AC 398. Again, I do not agree. The purpose of the uplift is to compensate the solicitors for the fact that they are acting on a no win, no fee basis. If the claim had failed, they would have got nothing in respect of their costs. So the purpose of enabling them to recover the uplift if the claimant won was to compensate them for taking that risk. In other words, they were working on the claimant’s claim for between £270 and £500 per hour (ignoring the subsequently agreed reduction in uplift) if the claimant won, or for nothing if the claimant lost. As the claimant won, the rates were between £270 and £500 per hour, and it is to the costs based on those rates that interest is to accrue.
44. Thus, the defendant’s reliance on the uplift as a ground for not following the reasoning in *Hunt* [1990] 1 AC 398 is flawed, because the uplift is not in any way fixed at a rate which is intended to compensate the claimant or his solicitors for delay in receiving money from the defendant pursuant to the order for costs.
45. The defendant had another point, namely that the claimant’s solicitors’ hourly rates would have been calculated at a rate which took into account the delay in receiving

costs from the defendants, so that, if the *incipitur* rule applies, the claimant would recover, and the defendant would pay, the interest twice. There are several answers to that. First, there is no evidence that the claimant's solicitors' hourly rates were calculated on this basis. Secondly, given the general rule in CPR 40.8, the presumption must, if anything, be that the rates would have been calculated on the basis that interest would be paid from the *incipitur* date. Thirdly, the evidence relied on by the defendant in this connection, a report entitled *Guideline Hourly Rates – Conclusions* (March 2010) from the Advisory Council on Civil Costs, suggests, if anything, that in personal injury cases (unlike in clinical negligence cases), the delay in payment of costs is not a significant factor in the fixing of claimants' solicitors' hourly rates. Fourthly, if this point was a good one, it seems to me that it would be a reason for reducing the hourly rate claimed, rather than for departing from the general rule in CPR 40.8.

46. It is right to mention Lord Ackner's reason (v) as it deals with a case, postulated by the defendant, namely where the solicitors do not pay out a disbursement (e.g. the fees of counsel and an expert witness) until after they receive the costs from the defendant. In such a case, it seems to me, there can be 'an express agreement between the solicitor[s] and [the barrister and witness] that any interest ... on disbursements [shall] be held by [the solicitors] for ... the ... persons to whom they are ultimately paid.'
47. We were referred to *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch), [2009] 4 Costs LR 591, paras 25-30, in which Christopher Clarke J held, in summary terms, that the effect of CPR 40.8 was that (a) the general rule is that interest on costs runs from the *incipitur* date, (b) a departure from that general rule is justified if it is 'what justice requires'; (c) the notion that a departure can only be justified in 'exceptional' cases is an unhelpful guide; (d) the primary purpose of an award of interest is 'to compensate the recipient for [having] been precluded from obtaining a return on [his] money'; (e) '[s]ince the payment of solicitors' costs involves the payment of money which could otherwise have been profitably employed, the overwhelming likelihood is that justice requires some recompense in the form of interest'.
48. I agree with all those observations, but would add two precautionary comments on his observations. First, I would discourage too detailed an approach into the facts of the particular case in hand for the purpose of determining the date from which interest should run. As Lord Ackner's speech in *Hunt* [1990] 1 AC 398 implies, when making such a determination, the court should take a broad view of the position. Prolonged argument, let alone detailed evidence, on the issue must be avoided. There will often be no perfect date, and the decision inevitably will, indeed should, be broad brush. Further, if interest was to run from different dates on different components of the costs, it would, in many cases, lead to arguments which would do the legal system no credit. The second observation is that I would not necessarily agree with the suggestion, at [2009] 4 Costs LR 591, para 30, that it may be inappropriate to award interest on costs where the case is being funded by a third party entirely voluntarily or otherwise free of any cost. I would have thought that, following the logic of reason (v) in para 11 above (and see para 46 above), if interest on costs is payable from the *incipitur* date, the party to whom it is paid may have to account for it to the third party, and, if that is correct, there would seem to me to be a powerful argument for saying that the third party should get interest on costs in the normal way.

*Concluding remarks*

49. It would be wrong not to refer again, albeit briefly, to *Gray v Toner* (11 November 2010), the case on which the District Judge relied in this case. In that case, Judge Stewart gave an impressively thorough *ex tempore* judgment in which he came to a different conclusion. It is apparent that a significant number of the points which have persuaded me that the *incipitur* rule still applies were not raised before him. I mean no disrespect to his reasoning in saying that I do not think it would be useful if I were to analyse his reasoning in detail: it is sufficient to say that, for the reasons given in this judgment, I have reached a different conclusion.
50. I cannot end this judgment without referring back to the actual figures in this case. The claimant was seeking damages for significant, but relatively minor and straightforward, personal injury suffered while at work. The claim was presumably worth around £12,750, the agreed damages. The claimant's costs of pursuing that claim, which did not go to trial, were nearly £75,000. Unless this is an exceptional case, the fact that, without even incurring the cost of a trial, it cost the claimant nearly six times as much to pursue the claim as it was actually worth suggests that something is out of kilter in at least some parts of the civil justice system. Both my own experience in this court and the evidence contained in Sir Rupert Jackson's report on Civil Costs suggest that this is not a particularly exceptional case. It is therefore to be hoped that the changes which are in the process of being enacted and implemented in relation to civil costs and civil procedure will help ensure that costs become more proportionate. And that applies both to costs as between lawyer and client and to recoverable costs as between the parties to litigation.
51. As it is, for the reasons given in this judgment, I would allow the claimant's appeal, and hold that interest on the costs runs from the *incipitur* date, on the ground that (i) CPR 40.8 does not apply as it is ineffective in the County Court, so that article 2 of the 1991 Order still applies, and it mandates the *incipitur* rule, or (ii) if CPR 40.8 does apply, its effect is that interest runs from the *incipitur* date as a general rule, and the fact that the claimant's solicitors are acting under a CFA does not justify departing from that rule.

**Lord Justice Hooper:**

52. I agree.

**Lord Justice McFarlane:**

53. I also agree.