

COMPOUNDED INTEREST IN FATAL ACCIDENT AND PERSONAL INJURY CLAIMS IN MALAYSIA: THE DEPARTURE FROM THE TRADITIONAL APPROACH

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Abstract

The issue on whether compounded (interest upon interest) can be awarded in Malaysia has not been conclusively answered. Although there have been few articles and cases which allow compounded interest for money due under contract, there is still a dearth such materials in respect of personal injury and fatal claims. Section 11 of the Civil Law Act 1956 is often presumed as the provision which put a total bar on the award for compounded interest. This presumption is not definite. Perusal of the local cases and publications show that recently, a number of attempts have been made to re-examine the traditional approach on compounded interest. The courts are seen to have re-interpreted the law on interest in Malaysia so as to allow compounded interest to be awarded in fatal accident and personal injury claims in Malaysia. As such, this paper attempt to highlight these cases as well the grounds behind their departure from the long accepted notion against compounded interest in the effort to get a clearer picture of the current judicial uptake on this matter.

Keywords: *Interest upon interest, Loss of Future Earnings, Road Traffic Accidents*

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1.0 INTRODUCTION

Compounded interest is interest which is assessed on principal sum together with the accumulations of other interest (Syed Ahmad Aidid, 1993). It is similarly known as interest upon interest, compound interest or compounding interest. While simple interest is calculated based on principal sum only, compounded interest is interest awarded on top of interest on principal sum already awarded. It is generally assumed that the law prohibits the award for compounded interest. Section 11 of the Civil Law Act 1956 (Act 67) (hereinafter referred to as s.11 CLA 1956) is often cited as the provision which prohibits judges from awarding compounded interest (Davidson, 1993, Pawancheek Marican, 1997 and Dass,1980). The section reads;

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section-

- (a) shall authorize the giving of interest upon interest;
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonor of a bill of exchange.

The argument is based on proviso (a) to the section which states that ‘nothing in this section shall authorize the giving of interest upon interest.’ In *Yeng Hing Enterprise Sdn. Bhd. v Datuk Dr Ong Poh Kah* [1988] 2 MLJ 60, the Kota Kinabalu Supreme Court presided by Lee Hun Hoe CJ (Borneo), Seah and Mohamed Azmi SCJJ held;

‘Having regard to the provisions of section 11 of the Civil Law Act 1956 and in particular proviso (a) which forbids the giving of interest upon interest...’

Similarly in *Foo Sey Koh & Ors v Chua Seng Seng & Ors* [1986] 1 MLJ 501, the court allowed post-judgment interest from only the principal sum still owing to the plaintiff. The pre-judgment interest was not included in the assessment of the sum in which the post-judgment interest is to be awarded. Shankar J in his judgment held;

‘It is well established that in all cases where in the opinion of the court, the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by the payment of interest, it is incumbent upon the court to allow interest for such time and at such rate as the court may think right. The law precludes that granting of interest upon interest.’

Unfortunately, despite the seemingly conclusive nature of the provision, the assumption that compounded interest cannot be awarded is however not conclusive. So far there is no authoritative judgment on this matter (Rutter, 1993). Judges are split into two camps on the issue of simple and compounded interest; one in favour of the simple interest while another allowing for compounded interest. The introduction of the Rules of Court 2012 to replace the Rules of High Court 1980 [PU (A) 50/1980] (herein after referred to as “the RHC 1980”) and the Subordinate Courts Rules 1980 [PU (A) 328/1980] (hereinafter referred to as “the SCR 1980”) also does not offer any solution to the problem. Since the provision in Order 42 Rule 12 of the Rules of Court 2012 is almost similar to the provisions in Order 29 Rule 42 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980, the same quandary still persist even with the introduction of the new court’s rule.

2.0 INTEREST IN PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF ROAD TRAFFIC ACCIDENTS

Awarding interest for damages is a common feature in personal injury and fatal accident claims arising out of road traffic accidents in Malaysia. Interest in these claims is regarded as the compensation for any loss or damages suffered as the result of being kept out of the money which ought to have been paid (Per Lord Herschell in *London, Chatham & Dover Railway Co. v South Eastern Railway Co.* (1893) AC 429. See also *Lim Yik Hua v Eastern & Oriental Hotel* [1988] 3 MLJ 151 and *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156) to the plaintiff upon delivery of the judgment by the court. Lord Wright in *Riches v Westminster Bank Ltd.* (1947) AC 390 said:

“The essence of interest is that it is a payment which become due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due to any other reason in law.”

There are two (2) types of interest awarded in personal injury and fatal accident claims arising out of road traffic accident cases; pre-judgment and post-judgment interest. Pre-judgment interest is interest awarded over damages calculated over a period which spans between the dates the cause of action arose until the date of judgment. The purpose of this award is to compensate the plaintiff for being kept out of the money which he is entitled to. Since the defendant had the use of the money which legally belongs to the plaintiff from the date of the accident until the date of the judgment, he must compensate the plaintiff accordingly (*Lee Guan Par v Hotel Universal Sdn. Bhd.* [2005] 4 MLJ 589). Post-judgment interest is interest awarded over damages calculated starting from the date of judgment until the date of defendant paid off the damages in full. It is the interest that accrues prior to actual payment of the damages. Since a successful plaintiff has the right to the damages once the judgment is delivered, he should be compensated for the time between the rendering judgment and the actual payment of the damages.

In personal injury and fatal accident claim arising out of road traffic accidents cases, the issue of compounded interest arises with regard to the assessment of post-judgment interest. The question is whether judges in assessing post-judgment interest should award it over damages only or over damages together with the pre-judgment interest? Or in other words, whether the pre-judgment interest should or should not be calculated as part of the ‘judgment debt’ in which post-judgment interest is to be awarded?

Perusal of case laws shows that there are several cases in which judges were seen to have adopted a different approach to the issue of compounded interest. The basis of the departure from the general presumption that compounded interest is prohibited rests on three (3) main points:

(a) The Restrictive Interpretation Of Proviso (A) To S11 Of The CLA 1956,

Unlike the generally accepted interpretation that proviso (a) in s.11 of the CLA 1956 prohibits the courts from awarding compounded interest, the section has been re-interpreted as only prohibiting the section from being used as the authority for allowing compounded interest. The phrase ‘nothing in the section shall authorize the giving of interest upon interest’ in the proviso do not extend to prevent the courts from awarding compounded interest *in toto*. Applying this interpretation, the courts are not totally prohibited from awarding compounded interest (Rutter, 1993). Should they are able to find any reason or authority (other than s.11 CLA 1956) which allows the award for compounded interest, the compounded interest can be awarded.

This interpretation was accepted in *Re Woo Yoke San @ Woo Yoke Sam; Ex P Ocbc Bank (M) Bhd v Crescent Court Management Corp* [2006] 5 MLJ 638 where the Kuala Lumpur High Court held that while s.11 CLA 1956 deals with the powers of courts to awards interest on debt and damages, it does not declare that interest upon interest or compounded interest as illegal or invalid. The court is at liberty to allow compounded interest provided that it can find other authority which allows such award. Ramli Ali J in allowing appellant’s appeal stated that;

‘S.11 is just enabling provisions giving powers to the court to award interest for the whole or any part of the period “between the date when the cause of action arose and the date of judgment”. Proviso (a) of the said s11 specifically states that the provision does not authorize the giving of interest upon interest. What it means is that s11 is not an authority for awarding interest upon interest. If the award of interest upon interest is to be made then the court has to find other form of authority to do so but not on the authority of s11.’

Similar interpretation was also adopted by the court in Singapore in dealing with section 12 of the Civil Law Act (cap 43) which is *in pari materia* with s. 11 CLA 1956. In *The Oriental Insurance Co. Ltd. v Reliance National Asia Re Pte. Ltd.* [2009] 2 SLR 385, Chan Seng Onn J held the following:

“Section 12 of the Civil Law Act (Cap 43, 1999 Rev Ed) did not expressly prohibit the court from granting compounded interest per se or from granting damages assessed with reference to the actual compounded interest lost or foregone by the plaintiff who had suffered those damages as a result of a debt. The courts in Singapore had an unfettered discretion to award simple or compounded interest as damages which was appropriate to justly compensate any loss suffered.

As such, it seems that there is an attempt to depart from the traditional approach relating to the award for compounded interest. S.11 CLA 1956 is no longer considered as the provision which prohibits the award of compounded interest. By virtue of this new interpretation of the section, compounded interest is no longer prohibited.

(b) The Broader Interpretation of Term ‘Judgment Debt’

The award for post-judgment interest is regulated by Order 42 Rule 12 of the Rules of Court 2012. The provision is almost similar to the now repealed Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 42 of the SCR 1980 except for the rate of interest prescribed. The provision allows post-judgment interest to be awarded on ‘judgment debt’. Order 42 Rule 12 of the Rules of Court 2012 states;

Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.

Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 42 of the SCR state;

Every judgment debt shall carry interest at the rate of 4 per centum per annum, or at such other rate not exceeding the rate aforesaid as the Court shall direct (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

Since the term ‘judgment debt’ is not defined, it is generally assumed that it refers only to the damages awarded by the courts. Therefore, traditionally, it is accepted that Order 42 Rule 12 of the Rules of Court 2012, Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 42 of the SCR 1980 allow the award for interest on damages to be calculated from the date of judgment to the date of realization of the judgment i.e. post-judgment interest. The ‘damages’ referred to is not inclusive of the pre-judgment interest.

Perusal of the local cases however showed that in several cases the interpretation of term ‘judgment debt’ in Order 42 Rule 12 of the Rules of Court 2012, Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 42 of the SCR 1980 has been widened to represent the damages and the pre-judgment interest on the judgment sum. By merging the damages and pre-judgment interest to form ‘judgment debt’, the courts are actually allowing post-judgment interest to be awarded for both the damages and pre-judgment interest (Yeo, Yang Poh, 1986). Thus, allowing for interest to be paid on top of another interest; compounded interest. The same was stated by The Kuala Lumpur High Court in *Trans Elite Equipment Rental Sdn. Bhd. v Psc-Naval Dockyard Sdn. Bhd.* [2003] 4 MLJ 30. The plaintiff in this case appealed against the SAR’s decision in not allowing post-judgment interest on the pre-judgment interest. The issues before the court were whether the post-judgment interest is to be imposed on ‘judgment debt’ which includes damages and all interest up to date of judgment (pre-judgment interest) and whether there is a bar against grant of compounded interest. Abdul Malik Ishak J in allowing the appeal held that the damages and also the pre-judgment interest make up for ‘judgment debt’ and post-judgment interest is to be awarded on the ‘judgment debt’. He offered the following reasons for his decision:

‘(1) that both the principal sum claimed and the pre-judgment interest (which represents damages for the period which the plaintiff could not use the principal sum) merged into the judgment debt on 24 June 2002 and that could be the date of judgment. (2) that this is prescribed by statute, namely, O 42 r 12 of the RHC and that there is no room, at all, for the exercise of discretion by the learned SAR to award post-judgment interest on only the principal sum and not the judgment debt; and (3) that the award of post-judgment interest on both the principal sum claimed and also the pre-judgment interest are practiced in our country as well as in Singapore.’

The Penang High Court in *Tan Phaik See v Multi Purpose Insurance Bhd.* [2004] 6 MLJ 474 also applied similar interpretation in deciding on the Appellant’s appeal for compounded interest. The Appellant upon being allowed his appeal for loss of dependency by the Court of Appeal, made further claim for the total damages, cost, interest on the damages as well as interest over the interest for the damages (compounded interest) amounting to RM 299, 104. The respondent paid RM 278, 269 and refused to pay the balance on the ground that the balance was compounded interest which is prohibited under s. 11 CLA 1956. The court allowed the appeal and awarded post-judgment interest on the ‘judgment debt’ which consist of the damages and pre-judgment interest. RK Nathan J held;

‘To my mind, once the defendant had agreed that the amount due to the plaintiff as at 30 September 1994 was the principal sum of RM 197,443 and the interest of RM 29,616 amounting to RM 197,779 the said total become a debt due and owing to the plaintiff from the defendant. In other words the interest had merged with the damages awarded, as a new judgment debt owed to the plaintiff by the defendant. The plaintiff is therefore entitled by law that is O 42 R 12 of the RHC 1980, which states that every judgment debt shall carry interest at the rate of 8% per annum, to the said interest at 8% on the unpaid judgment debt.’

(c) Limited Application of S11 CLA 1956.

The notion that compounded interest is prohibited is also negated by the limited application of s.11 CLA 1956. The proper the application of s.11 CLA 1956 is limited to pre-judgment interest only (Yeo, 1986). Although the esteemed KS Dass commented that that proviso (a) to s.11 CLA 1956 conveys the general intention of the legislature prohibiting compounded interest in all cases as there is nothing in the section which indicates that there is an intention to divide the pre and post-judgment interest (Dass, 1980), the literal interpretation of the section does not support his opinion. This is by looking at the restrictive effect of the phrase ‘the period between the date when the cause of action arose and the date of the judgment’ in the section. Had the legislature intended it to include post-judgment interest, it would have either omitted the phrase or extend it to include period after judgment until date of realization.

Furthermore, s. 3(1) of the English Law Reform (Miscellaneous Provision) Act 1934 from which s.11 CLA 1956 is patented from is also limited to pre-judgment period. Further, since the section co-exist together with s.17 of Judgment Act 1838 which specifically provides for post-judgment interest, it reinforces the argument that the application of section 3(1) of the Law Reform

(Miscellaneous Provision) Act 1934 cannot be extended to post-judgment interest. Hence, by extension, the application of s.11 CLA 1956 also cannot be extended to post-judgment interest.

Based on the above, any attempt to impute additional power to s.11 CLA 1956 to extend to post-judgment interest would be contrary to the literal interpretation of the section as well as the origin of the provision. Consequently, since proviso (a) is only applicable to pre-judgment interest only, the proviso will not be applicable as a prohibition against the award of compounded interest which is awarded via post-judgment interest. In a Singapore case of *The Oriental Insurance Co. Ltd. v Reliance National Asia Re Pte. Ltd.* [2009] 2 SLR 385, the court in dealing with the question of whether s.12 of the CLA (cap 43), have removed power of the High Court to direct post-judgment interest to be paid on compounded basis held;

‘Has s.12 also taken away or emasculated the power of the High Court to direct compounded interest to be paid on (a) debts or damages from date of judgment till date of satisfaction of the judgment sums awarded (ie, post-judgment interest); (b) sums found due on taking accounts between parties; and (c) sums found due and unpaid by receivers or other persons liable to account to the court? I do not think so. Although s.12(2)(a) of the Civil Law Act makes clear that the section itself does not authorise the giving of compounded interest for debts and damages covering the pre-judgment period, it does not expressly prohibit the court from granting compounded interest per se or from granting damages assessed with reference to the actual compounded interest lost or forgone by the plaintiff who has suffered those damages. I do not think that s.12 of the Civil Law Act is meant to be exhaustive concerning the power of the courts to award interest on debts and damages in any specified manner, ie, only on a simple basis and on no other.’

3.0 CONCLUSION

The general presumption that the law prohibits compounded interest is faulty. The courts in several occasions have been seen to have allowed the award for compounded interest due to the absence of authoritative decision on the matter. Salleh Abas FJ in *Terengganu State Economic Development Corporation v Nadeфинco Ltd.* [1982] 1 MLJ 365 in deciding the issue of whether the interest to be calculated is simple or compounded interests, said “there seems to be a dearth of local authorities concerning the issue I am now called upon to decide...” The courts seems to have taken the approach that although the law did not specifically allow the courts to award compounded interest there is also nothing in the law which prevents the courts from allowing the same. As such, they have the discretion to award compounded interest if they find it fair, reasonable and necessary to do so. “The fact that the court is not authorized does not mean that it is prevented from doing so” (*Terengganu State Economic Development Corporation v Nadeфинco Ltd.* [1982] 1 MLJ 365).

The uncertainties and confusions with regard to compounded interest are the result of fragmentary and piecemeal development of the law on interest in Malaysia. Lack of consistent and well-argued decisions further complicate the problems. The best way forward is to amend

the all the provisions relating to the law on interest to suit and complement each other. The provisions must also be defined correctly to avoid wrong interpretation and application. The uncertainty in the interpretation and application of the provisions not only leads to injustice to the parties involved but also to the insurance companies who have to pay the judgment sum as well as the interest for all personal injury and fatal accident claims arising out of road traffic accidents.

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