INTEREST ON JUDGMENT DEBTS IN SINGAPORE

This article examines post-judgment interest, or interest on judgment debts. It is argued that such interest should be awarded at a rate that will encourage prompt payment, and that compensation for being kept out of money should not be the only consideration. The relevance of a contractually agreed rate is also considered, and it is argued that a contractually agreed rate should be applied even past the date of a judgment.

I. INTRODUCTION

NOT all judgment debts are satisfied immediately, or within a reasonable time after judgment. The judgment creditor may seek the court's assistance to enforce the judgment.[1] But some positive effort on his part is required. It would be useful to have a device that would encourage prompt payment, as well as compensate the judgment creditor for any loss resulting from the late payment of the judgment debt. An award of interest on the judgment debt can perform these functions. Until recently, most writing on interest focused on pre-judgment interest.[2] This article will address the two main questions concerning interest on judgment debts in Singapore:[3] how the rate should be set, and whether a contractually agreed rate can apply to a judgment debt in place of a rate fixed by the rules of court.[4] This article does not, as such, deal with the problems of interest for the late payment of money prior to a judgment.

1 Committal may, in extreme cases, be sought. But it is hardly ever resorted to in Singapore. The refusal to pay under an order of court can be contempt of court if there is no inability to pay. See Ord.45 rr. 1 and 5 of the Rules of the Supreme Court 1970. The Debtors Act, Cap. 73,1985 (Rev. Ed.) can also be resorted to. Under the Act, a judgment debtor can, in certain situations be arrested and committed: see ss. 3-12. It is not commonly resorted to because the creditor has to pay for the subsistence of the debtor in prison : s. 8.

2 The English Law Commission's *Report on Interest* (Law Commission No. 88) devotes only about two pages to interest on judgment debts: see pp. 52-4 of the report. The major problems have been with respect to pre-judgment interest and the interpretation of the legislation that confers a power to award interest. Post-judgement interest has recently been discussed in three articles: Yeo Yang Poh, "A Matter of Interest," [1986] 2 M.L. J. clxxiii; Loh Siew Cheang, "Order 42 Rule 12 of the Rules of the High Court, 1980, and All That," [1987] 2 M.L.J. ccx; and R.R. Sethu, "Chargee's Rights: Real & Personal and Effect of a Judgment," [1988] 1 M.L.J. cxxvii.

3 The Malaysian position will be considered where relevant to the position in Singapore.

4 As far as the second question is concerned, only contract claims will be relevant since there can be no agreed interest rate in tort and restitution claims.

II. THE STATUTORY BACKGROUND

A. *Interest on Judgment Debts*

In Singapore, the High Court is given the power to award interest by section 18(2)(g) of the Supreme Court of Judicature Act.[5] The conferred power has to be exercised in accordance with any written law or rules of court relating to them.[6] Section 80 of the same Act constitutes a Rules Committee for the Supreme Court, and confers on it the power to make rules of court. In particular, section 80(2)(j) allows the committee to make rules "regulating the rate of interest payable on all debts, including judgment debts ...: Provided that in no case shall any rate of interest exceed 8% per annum, unless it has otherwise been agreed between the parties[.]"

The Rules of the Supreme Court, 1970 (R.S.C.) were made by the Committee. Order 42, rule 12 of the R.S.C. directs that:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum *or at such other rate as the Chief Justice may from time to time direct or* or [sic] at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.[7]

A similar provision can be found in Order 42, rule 12 of the Malaysian Rules of the High Court, 1980 (R.H.C), which also adopts the same *prima facie* rate of 8 per cent.[8] Before it was amended in 1986, the Malaysian rule, as the Singapore rule, did not allow a court to award a rate higher than 8 per cent. It was amended in December 1986, since which the rate cannot exceed 8 per cent "unless the rate has been otherwise agreed upon between the parties."[9]

Order 42, rule 12 of the R.S.C. contains three alternatives: (1)8 per cent; or (2) a rate fixed by the Chief Justice;[10] or (3) a rate directed

5 Cap. 322, 1985 (Rev. Ed.).
6 *Id.*,*s.* 18(3).
7 As amended by S.304/82. Rule 7 of the 1982 amendment rules inserted the underlined words. It can be seen that there is now an additional "or," which must be a mistake. There is a similar provision in Ord.42 r.12 of the Subordinate Court Rules 1986; but the rule does not apply when an order is made under s. 43(1) or (2) of the Subordinate Courts Act, Cap. 321, 1985 (Rev. Ed.). The rules are made under statutory authority: s.69, Subordinate Courts Act. The Small Claims Tribunal cannot award interest on its awards, there being no similar statutory jurisdiction in the Small Claims Tribunals Act, Cap. 308, 1985 (Rev. Ed.).
8 In this article any reference to "per cent" will, unless the context does not allow it, be a reference to "per cent per annum." Mr. K.S. Dass argued in *The Law of Interest* (1980), at pp. 7-13, that the pre-1986 Malaysian order was *ultra vires* because the rule made the award mandatory while the enabling legislation was not in mandatory terms. See the reply of Y.P. Poh, "A Matter of Interest," [1986] 2 M.L.J. clxxiii at pp. clxxviii-clxxix. If the court can make a zero rate award, Mr. Dass' argument would be answered. The same arguments can be made with respect to the Singapore provisions.
9 Rules of the High Court (Amendment) Rules 1986, P.U. (A) 445/86, dated 11 December 1986.
10 This power is conferred by the Rules Committee: see Rule 7 of S. 304/82. It seems to be *delegated delegated* legislation. It is not clear whether the Chief Justice can exercise this power by subsidiary legislation or by internal directive. Section 27(2) of the Interpretation Act, Cap. 1, 1985 (Rev. Ed.) allows a conferred power to be exercised by an appointee: but this seems to extend only to an appointee acting on behalf of the original power holder, and not in his own right.

by the court not exceeding the "rate aforesaid." Though there is no punctuation to bear this out, the use of the singular together with the word "aforesaid" in the third alternative suggests that both one and two are alternatives to each other, *i.e.* the alternatives are actually: (1) 8 per cent or a rate fixed by the Chief Justice; or (2) a rate directed by the court, such rate not to exceed either 8 per cent or the rate fixed by the Chief Justice.

The Order basically sets a *prima facie* rate: 8 per cent or another rate fixed by the Chief Justice. A judge has the discretion to award a lower but not higher rate. Nothing in the order prohibits the Chief Justice from setting a rate higher than 8 per cent. But the order has to be consistent with section 80(2)(j) of the Supreme Court of Judicature Act,[11] so that the rate can only be higher if the parties have agreed to a higher rate. To date, the power to give effect to agreed rates has not been exercised. Unless the power is exercised to take into account an agreed rate that is higher than 8 per cent, the rule does not seem to allow a higher agreed rate on a judgment debt. A lower agreed rate can, of course, be awarded under the second alternative based on the discretion of the court.

Under Order 42, a judge has no discretion as to whether interest should be awarded: the mandatory "shall" is used.[12] This presupposes that there will always be some loss from late payment and is the reverse of the common law rule for late payment of money under a contract, which presumes that there is no loss flowing from the late payment of money.[13] There are important differences between the late payment of money under a contract and under a judgment. In the latter situation, the interest is technically not damages.[14]

Some of the provisions set out so far defer to rates of interest that are agreed to by the parties. It is of course perfectly sensible to give effect to the agreement of the parties. What is not clear about the provisions is whether the exception applies only when there is an agreement that a certain rate should apply to a judgment debt, as opposed to a simpler requirement for a rate of interest to govern a debt under the contract upon which the judgment is based. In short, must there be a specific agreement for "X per cent on a judgment debt" or would a simple "X per cent" suffice? In practice, it is unlikely that any rate set in a contract would refer specifically to a judgment debt, and to require it to be such will effectively reduce the significance of the exception.

11 Interpretation Act, Cap. 1, 1985 (Rev. Ed.), s.19(c).

12 The court can get around the mandatory "shall" by setting a zero rate of interest. See Y.P. Yeo, "A Matter of Interest," [1986] 2 M.L.J. clxxiii, at p. clxxix.

13 *London, Chatham and Dover Railway Co.* v. *The South Eastern Railway Co.* [1893] A.C. 429. The rule has since been modified by statute in England, Singapore and Malaysia. The rule has been the subject of criticism. See Mann, "On Interest, Compound Interest and Damages," (1985) 101 L.Q.R. 30 for a recent view. Five Law Lords in *President of India* v. *La Pintada Compania Navigacion S.A.* [1984] 3 W.L.R. 10 have recently chosen to follow the case, insofar as the common law is concerned, because of the problems that will be faced as a consequence of assuming that loss will result from late payment of money: the statutory rule is discretionary and does not cover all situations where there is late payment.

14 *McGregor on Damages,* (15th ed., 1988), at para. 600.

Section 80(2)(j) of the Supreme Court of Judicature Act states that the rate cannot exceed 8 per cent "unless it has *otherwise been agreed* between the parties." *[Emphasis added]* A literal reading will require the parties to agree that a higher rate should apply to a judgment debt if the rate for a judgment debt is in issue. The amended Malaysian Order 42, rule 12 can also be similarly interpreted. It reads: "Every judgment debt shall carry interest at the rate of 8 per centum or at such other rate not exceeding the rate aforesaid as the Court directs (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." *[Emphasis added]* Under both provisions, the parties must have agreed otherwise: *i.e.* that the rate to apply on a judgment debt should not be restricted to 8 per cent.[15]

The drafting should be improved upon. If agreed rates are to be applied, there should not be a strict requirement for them to be agreed rates for judgment debts. Agreements governing interest rates relating to debts under contract should suffice.

B. *Interest Prior to Judgment*

A different provision deals with jurisdiction to award interest for the period prior to judgment (*i.e.* pre-judgment interest). In Singapore, section 9 of the Civil Law Act[17] deals with pre-judgment interest whilst Order 42, rule 12 sets the interest to be paid on the judgment debt from judgment till satisfaction (post-judgment interest).

C. *Interest on Interest*: *Compound Interest*

In awarding interest on a contract debt, a court could be awarding it as special damages,[18] or under the jurisdiction conferred by section 9 of

15 In *Malayan United Bank Bhd.* v. *Mohammed Salleh bin Mohammed Yusoff,* the High Court of Malaysia assumed that the amended Ord.42 r. 12 allows a contract rate to be applied post-judgment.

16 Ord.39 r. 13 of the Rules of the Supreme Court 1934, which is a predecessor of the present Ord. 42 r. 12 incorporated an exception: "Unless it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of… ". The Registrar in *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.* [1981] 1 M.L.J. 280, at p. 281 assumed that the stipulated agreed rate in Ord.39 r. 13 was the rate applicable to the contract upon which judgment is based.

17 Cap. 43, 1988 (Rev. Ed.). Under this section, the award of interest is discretionary: "... The court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or 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[.]" This section is similar to s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 of England. Section 35A of the Supreme Court Act 1981 now governs the position in England. No similar provision has been adopted in Singapore and Malaysia. The position in Singapore is that no statutory interest can be awarded when there is late payment of money before legal action is commenced, or before a judgment. See *La Pintada v. President of India* [1984] 2 All E.R. 773 for a summary of the law. In *Foo Sey Koh* v. *Chua Seng Seng* [1986] 1 M.L.J. 501, Shankar J. allowed a claim for interest on sums paid late, even though they were paid before the commencement of legal proceedings. The defendants in the case seem to have actually worked out the interest for the plaintiffs! This aspect of the case may be defended on the ground that these sums represented part of a larger sum that had not been fully paid. But in theory, judgment was given for the balance, and not the original total sum.

18 For *e.g.* as in *Wadsworth* v. *Lydell* [1981] 1 W.L.R. 598. In such a case, no statutory jurisdiction is invoked.

the Civil Law Act. If Order 42, rule 12 of the R.S.C. is invoked thereafter, to allow interest on the judgment debt, there will be interest upon a capital sum that includes interest. To this extent, some form of compound interest will be awarded. It is important to distinguish between the two main situations where compound interest is in issue.

1. *Debts*

The first situation involves compound interest on the debt itself *(i.e.* not on the judgment debt). Under this situation, the court may sometimes award compound interest without invoking the statutory jurisdiction. The statutory jurisdiction is not relevant if the parties have provided for compound interest, as the court can simply give effect to a contract term. A court may also, under its equitable jurisdiction, grant compound interest as in *Wallersteiner* v. *Moir* (*No.* 2).[19] This jurisdiction applies only when a fiduciary like a director has misused the principal's money for his own benefit.

A different question arises when a court is exercising its statutory jurisdiction to award interest on a debt. Proviso (a) to section 9 of the Civil Law Act[20] prohibits the award of compound interest on the original debt: it prohibits the award of "interest upon interest." This does not apply to judgment debts as it only applies to the period up till judgment. It seems to be designed to prevent a court from awarding interest again under section 9 after awarding the interest that the parties have provided for themselves.[21] A literal reading would suggest that a court cannot, in the absence of agreement, award compound interest for the late payment of money under section 9. *Foo Sey Koh* v. *Chua Seng Seng*[22] supports this straightforward view, even though, on the facts, this was applied in a peculiar manner. The court only allowed interest on $10,000 from what seems to be the oral judgment date[23] even though the sum was due under the contract one and a half years earlier. The reason given was that "the law precludes the granting of interest upon interest."[24] This seems to confuse pre-judgment interest with post-judgment interest. Salleh Abbas F.J. in *Trengganu State Economic Development Corporation* v. *Nadefinco Ltd.*,[25] another Malaysian case, awarded compound interest with yearly rests. The latter case can be explained as being based on the equitable jurisdiction acknowledged by *Wallersteiner*[26] or as being based on the agreement of the parties. Both possibilities present

19 [1975] Q.B. 373 and 508, [1975] 1 All E.R. 849.

20 Cap. 43, 1988 (Rev. Ed.).

21 It does not prohibit interest on damages that are calculated by reference to interest. See *Bushwall Properties Ltd.* v. *Vortex Properties Ltd.* [1975] 1 W.L.R. 1649, [1975] 2 All E.R. 215, where Oliver J. at first instance said that s.3(l) of the Law Reform (Miscellaneous Provisions) Act of the U.K., upon which s.9 of the Civil Law Act, Cap. 43, 1988 (Rev. Ed.) is based, was aimed at interest bearing debts. The case was reversed on appeal on a different point: [1976] 1 W.L.R. 591, [1976] 2 All E.R. 283.

22 [1986] 1 M.L.J. 501.

23 The report lists the judgment date as 9 Feb. 1985. The action was commenced on 1 Oct. 1983. Interest on the $ 10,000 was awarded from 4 Feb. 1985 until realization. The judge probably announced his decision on 4 Feb.

24 [1986] 1 M.L.J. 501, at p. 504.

25 [1982] 1 M.L.J. 365.

26 [1975] Q.B. 373, [1975] All E.R. 849. This case was cited by the judge, but it was not made clear that it was the basis of this aspect of the decision.

problems. There was no fiduciary relationship on the facts, and the judge assumed that the jurisdiction can be applied to simple contract arrangements. The parties had agreed to pay interest at 11 per cent with no mention of whether this was to be simple or compound interest. In awarding compound interest, the court appears to have done so because the parties implicitly intended it to be compound interest.[27] "11% per annum" would probably be more logically interpreted to mean simple interest unless a period at which capitalization is to occur is stipulated.

Practically speaking, what actually matters at the end is the exact rate used. Simple interest at a higher rate can give more than compound interest at a lower rate. If no rate has been agreed upon, there may be little practical difference, except when the 8 per cent limit is reached. A court can give more by awarding 8 per cent compound interest than 8 per cent simple interest. If compound interest is awarded, a still greater sum can be awarded by shortening the period at which interest is capitalized.

2. *Judgment Debts*

The second situation involves judgment debts. If interest due at the judgment date is added to the principal sum to form the judgment debt, then the award of interest on the capitalized judgment debt will mean that some degree of compound interest is being awarded. There is no express statutory stipulation against this. Section 9 of the Civil Law Act[28] only applies to interest on debts, or pre-judgment interest. Section 80(2)(j) of the Supreme Court of Judicature Act[29] refers to interest "on all debts, including judgment debts... [.]" A judgment debt is the total sum due to the plaintiff at the judgment. As such, it will include interest due at that time. Section 9 of the Civil Law Act in fact allows the judge to include interest in the *sum for which judgment is awarded.* [*Emphasis added*] This suggests that it forms part of the judgment debt. On such a reading of the applicable provisions, it would appear that under Order 42, rule 12, interest can be awarded over the total sum due at the date of judgment.

The Malaysian case of *Foo Sey Koh* v. *Chua Seng Seng*[30] which has already been discussed[31] seems to have confused the prohibition against "interest on interest" directed at pre-judgment interest with post-judgment interest. Shankar J. in that case did not allow pre-judgment interest, and only awarded interest from the date of

27 [1982] 1 M.L.J. 365, at p. 369, where there seems to be a finding of fact that the defendants knew that the plaintiffs would accept nothing less than compound interest. Proviso (b) to s. 11 of the Malaysian Civil Law Act, which is *in part materia* with s.9 of the Civil Law Act of Singapore, states that nothing in the section "shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise." See Loh Siew Cheang, "Order 42 Rule 12 of the Rules of the Supreme Court, 1980, And All That," [1987] 2 M.L.J. ccx, at p. ccxx which argues that the case should be explained on the equitable jurisdiction. The writer however assumed that the jurisdiction could apply on the facts of the case. Dass, in *The Law of Interest,* (1980), at pp. 16-18, offers views on some of these arguments, but they are not argued out.

28 Cap. 43, 1988 (Rev. Ed.).

29 Cap. 322, 1985 (Rev. Ed.).

30 [1986] 1 M.L.J. 501.

31 See part II.C.1, above.

judgment. This seems to be on the ground that to do so would result in interest on the interest due at the date of the judgment. Even if the learned judge was correct, a fairer approach would be to allow interest from the due date till actual realization. It is possible to avoid capitalization by simply awarding judgment for the principal sum with interest at a certain rate to run till actual realization. If this is done, interest due at the judgment date is not capitalized. Interest simply continues to accrue until actual payment after the judgment. Such awards are not unknown.[32] If there is a contract rate of say 5 per cent, and 5 per cent interest is awarded on both the debt and the judgment debt, then capitalization will mean that effectively, slightly more than 5 per cent interest will be awarded. Non-capitalization will ensure that the same rate applies throughout. It is doubtful whether the present Order 42, rule 12 would allow this to be done. The jurisdiction is to award interest on the judgment debt. The judgment debt includes the interest due at the date of judgment. It would follow that if interest is awarded on the judgment debt at all, it has to include the accrued interest. There is no specific jurisdiction to allow interest to run from due date till actual realization. This may not be allowed by the present law, but it is arguably a useful alternative if compounding is found to be undesirable.

Compound interest on judgment debts can also mean compound interest on an already capitalized sum. For example, a court may add up principal and interest due at judgment date and then award 8 per cent compound interest on the total sum. Neither Order 42, rule 12 nor section 80(2)(j) of the Supreme Court of Judicature Act deals expressly with this point, except in so far as a maximum of "8 *per centum* per annum" is fixed. As there is no direct reference to a rest period, it may be inferred that it is to be simple interest. This is the generally assumed interpretation. It is however arguable that compound interest can be awarded. First, it may be interpreted as 8 per cent with yearly rests; and second, a limit of a rate of 8 per cent, even if it is calculated as simple interest may not disallow compound interest at a rate which results in a sum that does not exceed it. Ultimately, as was argued earlier, unless there is a fixed rate, the crucial detail is really the rate to be used. Simple interest is clearly easier to calculate, and should be used unless there is reason not to do so.

III. RELEVANCE OF THE CONTRACT RATE

An important question is whether the court can award the contract rate of interest on a judgment debt till actual payment. This question will only arise when there is an agreed interest rate in the contract. If there is none, Order 42, rule 12 will allow the creditor interest at 8 per cent or less, presumably depending on the actual market rate at the corresponding time. The wording of the Order suggests that the onus is on the judgment debtor to show why a lower rate should be awarded.

32 See *Trengganu State Economic Development Corporation* v. *Nadefinco Ltd.* [1982] 1 M.L.J. 365 where 11% compound interest at yearly rests was awarded so long as any part of the award remained unpaid (p. 370).

The wording of the Order states that 8 per cent is the limit, even if the contract rate is higher.[33] The reason for this is unclear. It may be that when the Supreme Court of Judicature Act was enacted, interest rates were so constant that it was considered acceptable to set a fixed rate in the statute itself. The Order makes no reference to, and exception for, the contract rate, even though the enabling statutory provision[34] contains a proviso that allows the Committee to stipulate an agreed rate higher than 8 per cent if the parties have so agreed.[35]

The Order's predecessor, Order 39, rule 13 contained a similar 6 per cent rule which was qualified by the agreement of the parties: "Unless it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6 per centum ... [.]" As these qualifying words were left out in the new Order 42, rule 12, the learned Registrar in *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.*[36] was of the view that the change of wording was deliberate, the intention of the Rules Committee being to ignore the contract rate if it was higher. It is difficult to justify the application of a rate other than a contract rate, and the learned Registrar's argument was recently rejected by Chan Sek Keong J.C. in the High Court.[37] If it really was the intention to ignore the contract rate, it must be questioned whether a committee given the power to make rules to regulate the interest payable can do so in the absence of much clearer enabling words.[38] To do so would, on any account, be considered going beyond the bounds of regulating procedure.

The doctrine of merger can explain the use of a different rate. Under the doctrine, which is discussed later, a judgment extinguishes the agreement, and the right thereafter will be an award of the court rather than the original agreement of the parties. But in principle, one will still have to explain why the court should use a different rate thenceforth.

An interesting argument has been canvassed by Mr. Loh Siew Cheang about the power conferred on the Rules Committee.[39] His conclusion is that the statutory provision that enables the rule to be passed in Malaysia[40] only confers a power in respect of debts that are non-interest bearing *i.e.* when there is no contractually agreed rate. The same argument can of course apply to the Singapore provisions.[41]

33 This is accepted by Y.P. Poh, *op. cit.*, at p. clxxx; and by Dass, *op. cit.*, at p. xiii.
34 *i.e.* s.80(2) (j).
35 See the discussion in part II.A, above.
36 [1981] 1 M.L.J. 280, at p. 281
37 *United Overseas Bank Ltd.* v. *Sin Leong Ironbed and Furniture Manufacturing Co. (Pte.) Ltd.* [1988] 1 M.L.J. 479, at p. 481. The learned Registrar had gone into private practice, and was counsel for the plaintiffs in this case.
38 The learned Registrar in *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.* [1981] 1 M.L.J. 280, did not consider this to be a problem.
39 "Order 42 Rule 12 of the Rules of the High Court, 1980, and All That," [1987] 2 M.L.J. ccx, especially at p. ccxxiv.
40 Courts of Judicature Act, 1964, s. 16(i).
41 In *Sim Lim,* [1981] 1 M.L.J. 280, the Registrar had suggested that the Committee could prescribe a rate other than the contract rate to apply. Why this is so is not clear. In any case, it is unlikely that the Committee would do so without any rational basis. In the Malaysian case of *Public Bank Berhad* v. *Ham Industries Sdn. Bhd.*, [1988] 2 M.L.J. 618, at p. 619, V.C. George J. expressed the view that the committee can prescribe a rate that is higher than the contract rate, even if it is more than 8%.

The problem with the argument is that it ultimately requires reading into the statutory provision words that are not there. A literal reading of the provision does not produce an absurd result, even if one may not agree with it; and it is questionable whether arguments based on the presumption against interference with contractual rights will allow words to be read into a statutory provision when there is no ambiguity. The rule is unambiguous: *"Every judgment debt* shall carry interest... [.]" [*Emphasis added.*] Even if Mr. Loh's argument is correct, it does not automatically mean that the Order will be interpreted to cover only non-interest bearing debts. The Order purports to cover all judgment debts, and the acceptance of the argument would result in an *ultra vires* rule of court rather than a more restricted one. The only way to avoid an *ultra vires* rule would be to read similar words into the rule. Even if this is done, the result will be that there will be no jurisdiction to award interest on a judgment debt based on an interest bearing debt.

Interest on judgment debt is an issue in every case which culminates in a money award, *i.e.* the greater part of all successful civil claims. The simple and sure solution is by way of amending legislation. At the very least, it should be made clear that a contract rate has to be awarded if there is one. This could be done both in section 80(2)(j) of the Supreme Court of Judicature Act[42] and Order 42, rule 12. A more straightforward approach is to incorporate the rules into one statutory provision.

IV. POLICY AND THE APPROPRIATE RATE

A. *Objectives*

Interest on judgment debts can play two useful roles. It can compensate the judgment creditor for any loss resulting from late payment of the judgment debt.[43] It can also provide an incentive to the debtor to pay promptly. Depending on whether one is inclined to accept a punitive role, it can also be used to punish a judgment debtor for failing to respond, within a reasonable time, to an order by the court to pay. But if this is done, the "fine" will go to the judgment creditor rather than to the State. Any punitive rate will be an incentive to pay promptly, though it is possible to think of a rate that will encourage prompt payment without really punishing the debtor.[44] It will ultimately be a question of degree.[45] All in, it hardly needs to be argued that the first two objectives are desirable. Anyone who has ever been involved in an attempt to recover money under a judgment will testify to that. The relationship between the rate adopted and the appropriate market rate of interest at the relevant time will determine how effective the award of interest on judgment debts will be. If the two are very close together, one can assume that the judgment creditor will be adequately compensated.

42 Cap. 322, 1985 (Rev. Ed.).

43 Even if there is no positive loss, the creditor would have been deprived of the use of money.

44 But if "punitive" means any rate that more than compensates, then even a slight incentive to pay promptly will be punitive.

45 For *e.g.*, if the market rate of interest is 10%, a rate of 12% may be an incentive but a rate of 20% would be punitive.

Two market rates are relevant. The first is the rate the judgement creditor would have to pay to borrow an equivalent sum. The second is the rate that he would have received had he invested the money.[46] Because relatively short time frames are the norm, the rates to be considered are interest rates for short-term loans and deposits.[47] A choice has to be made between the two. In theory, the former should be used when the judgment creditor is actually short of funds. It might be unfair and difficult in practice to require proof of the need to borrow. Mathematical precision may not be possible, and it might be acceptable to give the creditor any benefit derived from using the higher of the two. But if the objective is to compensate the creditor for being kept out of money, the deposit or savings rate should be used.[48]

It hardly needs to be emphasized that the judgment creditor will be under-compensated if the rate is lower than the market rate. Indeed, if it is lower, there will be an incentive to pay as late as possible because the debtor may profit from doing so. Even if the rate set is the market rate, there will be no incentive to pay promptly. This is because the debtor stands neither to gain nor lose. Indeed, if the debtor is fortunate enough to be able to invest in such a way as to obtain a higher return than the market interest rate, he may still profit by not paying promptly. So the expected rate of return on investment should also be considered. It would seem that the rate used by the law should be slightly higher than the chosen market rate of interest in order to ensure compensation and provide some incentive to the judgment debtor to pay promptly.

There is, of course, the objection of over-compensation to consider. To allow over-compensation is to detract from the general principle of awarding compensation. The principle of compensation has been repeatedly emphasized in both contract and tort judgments.[49] The policy considerations are different when there is a judgment. The plaintiff's case has been accepted by a court and an order of a court is not being met with reasonable speed. Some punitive element can be justified on the grounds of upholding respect for the courts, and providing incentive for the expeditious conclusion of the action. Late payment *per se* may not amount to contempt, but it does undermine the authority of the courts. A punitive award of interest can be as effective (but less drastic) than committal. A party whose case has been accepted by a court should not have to wait as if he were a mere accuser with an unproven case.

If a punitive rate is to be adopted, an exception may be made for cases where there is an inability to pay as opposed to a reluctance to

46 Because of the relatively short time frames, investment is likely to be by way of deposit with a bank.

47 Of, say, one to two years at most.

48 See *Wong Hoe Kan & Sons Sdn. Bhd.* v. *Bandar Raya Development Bhd.* [1973] 1 M.L.J. 60. The case deals with pre-judgment interest, but the principle applies equally to post-judgment interest: a reasonable rate is one which the plaintiffs would have enjoyed if they had the use of the money if it was paid on time. *Quaere*: Whether a judgment creditor who suffers special damage as a result of late payment can sue on the judgment for the loss. Prior to legislation in England, an action for interest can be brought for the late payment of a judgment debt: *Gaunt* v. *Taylor* 3 M.Y. & K. 302, 40 E.R. 115. Such an action would be a separate action on the judgment itself.

49 For *e.g.* see *B. T. C.* v. *Gourley* [1956] A.C. 185. In contract, one notable exception is that for reasonable pre-estimates of loss, *i.e.* liquidated damages clauses.

pay. A line can be drawn to exclude defaulting parties that become bankrupt or companies under receivership within a fixed time (say, one year) after judgment. But this will be at the expense of finality, and it may be both preferable and acceptable to simply apply the rule across the board.

B. *Need for Revision*

The legislature and the Rules Committee formed by the legislature to draft the R.S.C.[51] have not paid very much attention to the role that interest on judgment debts can play. The maximum rate of 8 per cent has been in the Rules since its publication in 1970. Order 42, rule 12 was amended in 1982 to allow the Chief Justice to vary the *prima facie* rates of interest;[52] but the power has yet to be exercised. One probable reason for this is section 80(2)(j) of the Supreme Court of Judicature Act[53] which sets a limit of "8% *per annum,* unless it has been otherwise agreed between the parties."

Eight per cent was a reasonable limit in 1969 when the Act was passed.[54] In 1968, 1969 and 1970, the minimum lending rate in Singapore was constant at 8 per cent, while the average lending rate was 8.9 per cent. The savings deposit rates in the same years remained at 3.5 per cent and the deposit rates for a time deposit of 12 months was 6 per cent.[55] Looking at the statistics, the upper limit of 8 per cent was two percentage points above the time deposit rate for twelve months, and four and a half points above the savings account rate. It was also the prime lending rate[56] of banks at that time.

It should be remembered that this was before the oil crisis in the early 1970s, and the onslaught of inflation in this part of the world. Interest rates were fairly constant then.[57] Viewed in such light, the statistics would suggest that the intention in 1969 was to have the prime lending rate as a ceiling, with the court having a discretion to award more than the deposit rate: *i.e.* a rate that would more than compensate a creditor for being kept put of money. In fact, the *prima fade* rate was a full two percentage points above the deposit rate for 12 months, and four and a half points above the savings deposit rate. This suggests that the *prima facie* rate was intended to be higher than a rate that would have compensated a creditor for being kept out of money. If the *prima facie* rate was awarded, there would have been an incentive to pay promptly. This could have been the policy in 1969.

Another possible policy may have been to award on the basis of the cost of money *i.e.* based on the need to borrow. This is indicated by the use of the prime lending rate as the *prima facie* rate. This is

50 It is beyond the scope of this article to deal with the problems arising on insolvency.
51 See s.80 of the Supreme Court of Judicature Act, Cap. 322, 1985 (Rev. Ed.).
52 S.304/82.
53 Cap. 322, 1985 (Rev. Ed.).
54 As Act 24 of 1969.
55 Source: *Economic and Social Statistics, Singapore 1960-1982,* Department of Statistics, Singapore (1983). The deposit rates for shorter periods would of course be even smaller.
56 The minimum rate of interest that banks would accord their best customers.
57 See the Department of Statistics tables cited above, at note 55.

however less likely because the prime rate is at least two to three percentage points lower than the rate that most borrowers will have to pay. The average lending rate then was 8.9 per cent.

Interest rates have fluctuated considerably since the 1970s. The *prima facie* rate under Order 42, and the limit imposed by section 80(2)(j) of the Supreme Court of Judicature Act[58] have remained constant. Until the late 1970s, the rates did not vary significantly. But in 1980, the prime lending rate was 13.6 per cent, while the deposit rate for 12 months was 10.55 per cent.[59] The statutory rates remained constant. The effect was gross under-compensation even when the maximum of 8 per cent was awarded. In July 1988, the deposit rate for 12 months was 3.51 per cent, and the prime lending rate was 5.85 per cent.[60] The effect was over-compensation unless the lawyers had argued that a lower rate should be awarded. Such a change in the role of Order 42, rule 12 could not have been intended and is more likely to have stemmed from absence of consideration.

The present system can only be up-to-date if the Chief Justice were to monitor the financial marketplace in order to fix the most suitable *prima facie* rate. Even then, there is no discretion to raise the upper limit in the absence of legislation amending section 80(2)(j) of the Supreme Court of Judicature Act.[61]

There is certainly much to be said for a *prima facie* or fixed rate that is up-to-date whether or not the original policy is to be retained. It will take away the need for arguments to be made at the end of each hearing on the existing and appropriate interest rates. In practice, it may be preferable to relieve a judicial officer of such a task. It may be more efficient to simply allow or require the courts to refer to an official quotation of current or past interest rates. The Monetary Authority of Singapore for example, publishes monthly statistical tables that include interest rates. If an upper limit is to be maintained in order to prevent too punitive awards of interest, it might be better to simply say that the limit is, say, two or three percentage points above the current average prime lending rate.

There are other possible approaches. There could be a formula in place of a *prima facie* rate: for example, X percentage points above the average deposit rate for, say, 12 months, with a ceiling of Y percentage points above the prime lending rate, subject of course to any agreement. How X and Y are fixed will depend on the extent to which prompt payment is to be encouraged. However, all these are relatively complicated.

A more convenient approach is to have a periodically revised fixed rate that is either the prime lending rate for the time being, or a rate that is a few points above it. The advantage of having a positive

58 Cap. 322, 1985 (Rev. Ed.).

59 *Economic and Social Statistics, Singapore 1960-1982,* Department of Statistics, Singapore (1983).

60 Monetary Authority of Singapore, *Monthly Statistical Bulletin,* July 1988, Vol. 9 No. 7.

61 Cap. 322, 1985 (Rev. Ed.). The same will have to be done for s.69(3)(d) of the Subordinate Courts Act, Cap. 321, 1985 (Rev. Ed.), which is similar to it.

margin over the prime rate is that there will be an incentive to pay promptly because the cost of paying late to the judgment debtor will be higher than the benefit. In addition, the judgment creditor will be adequately compensated even if he actually has to borrow an equivalent sum.

For the reasons set out, the present scheme should be reconsidered. Setting the margin above the prime rate will be arbitrary. It might be reasonable to take a rate of about 3-5 percentage points above the prevailing market rate. Even if a positive margin is not accepted, the rate should be changed to reflect the market rate.[62] If a greater punitive element is to be adopted, a margin of 5-10 percentage points may not be unreasonable. A fixed rate will ensure certainty and remove the need for each court to consider the exact rate to be paid.[63]

A comprehensive review should, of course, also consider the position when there is an agreed interest rate. If the agreed rate is higher than the fixed rate, the higher should be awarded in order to ensure that the promisee is no worse off. If the agreed rate is lower, the fixed rate should be awarded in order to encourage speedy payment. It is necessary to consider the concept of merger before expressing a final view on this.

V. MERGER

A. *The Doctrine*

As has been pointed out, an interesting question is whether the parties to a contract can agree to an interest rate that is higher than the rate prescribed by Order 42, rule 12.[64] Considering the use of "shall" in the Order, the immediate answer might be a confident "no." But any lay creditor will find it difficult to understand why the agreed rate is not applied past the date of judgment.

There is a theoretical explanation. The defendant becomes a judgment debtor once judgment is given against him. The court awards what is owing at the time of the judgment. From then on, the obligation to pay will be based on the judgment and not the original contractual promise. The judgment merges the principal sum owing and the accrued interest at the agreed rate up till the time of the judgment. Thereafter, the agreement to pay the agreed rate of interest ceases to exist.[65] The obligation is to pay the total sum awarded by the court. It is at this stage that the State takes over, not just in terms of enforcing the judgment if requested, but also in prescribing the rate of interest to be paid on the total sum awarded. In England, this is done

62 *Cf.* the English Judgments Act 1838 (s. 17), where the rate has been periodically amended. See the Supreme Court Practice 1985, para. 42/1/12. Even then, there have been complaints about the rate set being unrealistic: see Law Commission No. 88. para. 179.

63 Under the present Ord. 42 r. 12, the court is technically obliged to consider a lower rate. In practice, this is not always done. The *prima facie* rate is usually awarded unless counsel argues otherwise.

64 Assuming that the agreed rate does not amount to a penalty for breach of contract.

65 See *Florence v. Jennings* 2 C.B. (N.S.) 454, 140 E.R. 494; *In Re Sneyd, Ex. Parte Fewing (1883)* 25 Ch.D. 338.

by section 17 of the Judgments Act 1838. In Singapore and Malaysia, this is done by Order 42, rule 12 of the R.S.C. and R.H.C. respectively.

On judgment, a new capital sum is "created," and any interest that may be due on the contract would be added on to the original principal to produce a new capital sum: the judgment debt. Any interest on the judgment debt will be computed on this new capital sum. There is an element of convenience in such a straightforward approach. The contract rate becomes irrelevant on judgment. Only one rate need ever be used. But one possible consequence of this is that the creditor could be worse off in terms of interest after a judgment: a result that is difficult to justify. So even though in theory the contractual rate does not have any automatic right to be applied, it should be applied unless there is an argument to counter the aim of ensuring that the plaintiff is no worse off.

If merger does not occur, the contractual rate can be applied till actual payment. There are, in law, several situations where merger will not occur, and it is very common to find attempts by promisees like banks and other financial institutions to avoid it.

B. *Avoiding Merger*

In England, it is accepted that it is possible to avoid merger by suitable planning and drafting, even though section 17 of the U.K. Judgments Act contains the mandatory "shall": "Every judgment debt shall carry interest at the rate of... from the time of entering up the judgment... until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

The rate of interest is periodically amended by statutory instrument. Order 42, rule 12 of the R.S.C. is also in mandatory terms: "All judgment debts shall...". It would seem that the use of "shall" alone will not always mean the application of the prescribed rate. As will be seen later, the courts can only award the set rate, but in certain cases, Order 42 may not be in issue at all.

1. *New and Separate Agreement*

If the parties make a fresh and separate agreement for interest on a debt, judgment on the earlier agreement will not result in the merger of the fresh agreement. This is supported by the case of *In re Agriculturist Cattle Insurance Co. Ex. Parte Hughes*.[66] The plaintiff sued the defendant for a sum of money with interest at the contractual rate of 6 per cent. An agreement was made with the defendant whereby the defendant was to agree to judgment against himself. The plaintiff in return agreed to allow the loan to continue, and not to enforce the judgment for two years unless there was default in paying interest. Judgment was obtained on that understanding. The defendant later defaulted in paying interest. The Judgment Act at that time allowed 4 per cent interest. The contract provided for 6 per cent. The plaintiff went back to court, and the Court of Appeal ruled that the plaintiff was entitled to 6 per cent interest from the date of the judgment.

66 (1876) 4 Ch.D. 34n. The case itself was decided in 1872.

The decision cannot be faulted. The fresh agreement was not sued upon in the earlier action, so it could not possibly have merged with the judgment. The case does not stand for the proposition that any agreement for interest will avoid merger. If there is no fresh contract, the case is of no relevance.[67] Since a new and separate agreement is required here, this "exception" is not of much significance because the important question is how to avoid merger in the original agreement.

2. *Independent Covenant*

If the promise is to pay the interest so long as the principal is due under the covenant to repay, judgment on an action based on the covenant to repay will result in merger. This is because the judgment will extinguish the covenant to repay, and no more money will be due on the covenant.[68] But if the covenant to pay interest is not merely ancillary or incidental to the covenant to repay the principal debt, but is an independent covenant, the contract rate can apply till actual payment.[69] This distinction is technically indisputable. If it is independent, it will not be extinguished on a judgment based on another promise. But in practice, it can and will result in fine distinctions because all will depend on the words used in the promise: a question of construction. This will be discussed later.

3. *Security*

A distinction is drawn between personal actions and actions based on security (if any). If there is an action against any security for repayment, the sums due on it will be computed as *per* the agreement.[70] This should be contrasted with a case where the promisee is sued personally on the covenants to repay the sums lent with interest.

Whenever there is security, it is important to analyze the actual promises made. A personal action that is successful will not necessarily mean that the contract rate will become irrelevant. A judgment that is based on a personal action will not extinguish the security, and if the promise is suitably worded to cover any sums due on the security, the promisee will be entitled to the agreed rate. If a lower rate of interest is awarded in a personal action against the debtor, the creditor will be able to obtain the difference in an action on the security.

4. *Statute*

A statute may expressly allow or require a certain interest rate to run till actual payment.

C. *The U.K. Case Law*

The major English decisions will be examined in order to illustrate and clarify the basic principles that have just been set out.

[67] In *In re European Central Railway Co. Ex. pane Oriental Financial Corporation* (1876) 4 Ch.D. 33, *Agriculturist* was distinguished because there was no fresh agreement.
[68] See *Fisher and Lightwood's Law ofMortgage* (10th ed., 1988), by E.L.G. Taylor, at pp. 618-21.
[69] Fry L.J. in *Re Sneyd, Ex. Pane Fewing* (1883) 25 Ch.D. 338, at p. 355.
[70] *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, at p. 154, *per* Lord Davey. See also *Lowry* v. *Williams* [1895] 1 I.R. 274.

The case of *Popple* v. *Sylvester*[71] shows a general willingness to interpret agreements in a manner that will avoid merger. A loan at 7 per cent interest was made. Some assurance policies were mortgaged as security. There were several covenants by the borrower, one of which was to repay on a certain day. Another covenant stated that if the money was not paid on that day, 7 per cent interest was to be paid "so long as the sum ... or any part thereof should remain due on the security."

The payment of interest fell into arrears. The lender obtained judgment against the borrower. The award was the sum of all that was due at the date of the judgment *i.e.* principal and interest due till judgment. The judgment debt was subsequently paid, but with interest at 4 per cent, *i.e.* the rate prescribed by the Judgment Act at that time. The plaintiff sued again for the difference in interest between 7 per cent (the contract rate) and 4 per cent (the statutory rate). Fry J. declared that the "judgment extinguished the personal covenant to pay the principal sum — that has become a *res judicata* — but the judgment has not determined the security, or put an end to the charge."[72] The covenant to pay 7 per cent interest so long as any part of the sum remained unpaid continued in force because the judgment did not extinguish the security. Thus, the plaintiff was entitled to interest at 7 per cent.

The covenant in *Popple* was interpreted as being independent. Though it is not necessary to have a separate covenant in the same contract, the drafting of separate covenants will make it more obvious that a judgment will merge the personal covenant to repay, but not necessarily the covenant relating to the security. The case should be contrasted with the earlier case *of European Central Railway* Co.,[73] where the contract rate was not awarded. It was distinguished in *Popple by* way of an interpretation of the actual words of the covenant. The court held that there was no covenant in *European Central Railway* to pay beyond the date fixed for payment. This was despite the fact that the promise in *European* was to pay the interest "until repayment thereof." Fry J. in *Popple* said that these words were interpreted by the judges in *European Central Railway* to mean "until the day fixed for payment."[74] It is difficult to see any material difference between the two sets of words used in the two cases.

Whatever the finding on the facts in the two cases, it is clear that it is possible to avoid merger by suitable drafting, and a subsequent action on the security. But the result seems to be that a separate action is required to obtain the difference in interest. Though it became possible, after *Popple,* to avoid merger without a fresh agreement, the minute examination of words in decided cases became necessary. The courts sometimes declared that differences existed when they could not see them themselves, simply because the cases went different

71 (1882)22Ch.D. 98.
72 *Id*., at p. 99.
73 (1876)4Ch.D. 33.
74 (1882) 22 Ch.D. 98, at p. 100.

ways.[75] The end result of any case then rests on what has been called a very fine distinction.[76]

Fry L.J. sitting in the Court of Appeal in *Re Sneyd*[77] accepted that "a covenant to pay interest may be expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or the judgment."[78]

But the covenant in that case was interpreted as not avoiding merger. The covenant was made on a mortgage to secure a loan. The contract rate of interest was 5 per cent. One covenant stated that principal and interest at 5 per cent was to be paid by a certain day. Another stated that should any of that sum remain unpaid by then, interest was to be paid on such balance as "for the time being remain[ed] unpaid, at the rate of 5% per annum ... [.]"[79]

There were in effect two separate covenants. But the words used were not considered sufficient by the whole Court of Appeal to show that the rate was also to apply until actual payment, whether on the covenant or the judgment. If they had been, the agreed rate would have effectively applied till actual payment. The interpretation of the covenant suggests an unwillingness to follow the result of *Popple.* In fact, Bacon C.J. at first instance had held that the covenant did not even operate till after the judgment was signed.[80] It was open to the Court of Appeal, with no abuse of the English language, to find that "unpaid" meant just that, but it declined to do so.[81]

Cotton L.J. expressed a view that suggests that there must be a separate covenant,[82] and that there was no separate covenant. Considering the way the covenants were drafted, it is not very clear how he could have formed this view unless by "separate" he meant separate from the original agreement as in *In re Agriculturist Cattle Insurance* Co..[83] Whatever may have been found on the facts, the Court of Appeal did not deny that merger can be excluded by suitable agreement. The judicial attitude on this point placed judges in lower

75 For *e.g.* see *Usborne* v. *The Limerick Market Trustees (No. 2)* [1900] 1 I.R. 85, especially at pp. 110 and 113.

76 See *Lowry* v. *Williams* [1895] 1 I.R. 274, at pp. 281-3. Barry L.J. frankly admitted that the alleged distinction between *Popple* and *Arbuthnot* v. *Bunsilall* (1890) Ex. 11 N.S. 234 was unintelligible to himself.

77 *Ex. parte Fewing* (1883) 25 Ch. D. 338.

78 *Id.*, at p. 355. This was accepted by the Earl of Halsbury in *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, at pp. 149-50.

79 (1883) 25 Ch.D. 338, at p. 340.

80 *Id.*, at p. 345.

81 *Id.*, at pp. 346-7.

82 See above, note 77, at pp. 350-1. This was based on *Florence* v. *Jennings* 2 C.B. (N.S.) 454.

83 (1876) 4 Ch.D. 34n. His Lordship also suggested, 25 Ch.D. 338, at p. 350 that *Popple* was different because it was an action on the security: see above, note 77 at p. 350. His Lordship said that even assuming it was correctly decided, it did not apply because the action on the present case was in debt, "not a claim in an action for redemption or foreclosure." But in *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, at p. 152, Lord Davey said that *Popple* involved the enforcement of a demand for personal payment.

courts in a difficult position because they had to decide whether the case before them was closer to *Popple* or *Re Sneyd.*[84]

Modern contracts, especially loan agreements, will contain provisions that attempt to exclude the doctrine of merger.[85] Such provisions would be extremely important when there is a commercial loan. If there is default in payment, the lender will most certainly prefer the higher contract interest rate to apply until actual payment. Considering the cases so far, a sure formula would be to draft a separate covenant that refers to any sums due, whether on the covenant or on a judgment or on the security. It should be remembered that the rate of interest under a loan agreement incorporates the expected profit of the lender. To award a lower rate after judgment can mean that the lender is worse off for having speedily commenced an action if the borrower continues to delay payment.

The construction approach towards merger has been accepted by the House of Lords in the case of *Economic Life Assurance Society* v. *Usborne.*[86] The same basic question arose over a mortgage transaction. The contract provided for 5 per cent interest while the Judgment Act provided, at that time, for interest at 4 per cent. Money was borrowed on the security of a mortgage. The contract provided for repayment on a certain date with 5 per cent interest. There was a further covenant to pay interest at the rate upon so much as remained unpaid after that date.[87] There was default in repayment, and the lender obtained judgment for the balance then due.

Later, the mortgagee, together with other mortgagees applied for the appointment of a receiver, an account, and the payment of rents etc. according to priority. It thus became necessary to quantify the actual sums owing to the parties. The subsequent action was therefore an action on the security. The mortgagee wanted the higher rate to apply to the judgment debt. The mortgagor argued that it should be lower. The House unanimously agreed that it should be the higher, holding that there was no merger. Their Lordships agreed that it depended on the construction of the deed in question.

The Earl of Halsbury, with whom Lord Shand concurred, accepted as accurate and precise,[88] Fry L.J.'s statement in *Re Sneyd*[89] that a covenant can be expressed as not to merge. To his Lordship, the question was a simple one: "it is a question of the construction of the particular deed and the remedy that is now being enforced."[90] It was clear that there was a right to the agreed rate. The fact that there was a judgment already did not affect this.

[84] For *e.g. Arbuthnot* v. *Bunsilall* (1890) Ex. 11 N.S. 234 follows *Re Sneyd,* while *Lowry* v. *Williams* [1985] 1 I.R. 274 follows *Popple.* See Walker's interpretation of the cases in *Lowry,* at pp. 281-2.

[85] Assuming that the agreed rate is higher than 8%. The payee will be the party interested in this. If it is agreed damages for late payment, the penalty rule will apply. But in the ordinary loan agreement, the interest is pan of the whole loan agreement, and is not, as such, agreed damages for late payment.

[86] [1902] A.C. 147, on appeal from [1900] 1 I.R. 85.

[87] [1902] A.C. 147, at pp. 147-8.

[88] *Id.*, at p. 149.

[89] (1883) 25 Ch.D. 339, at p. 355.

[90] [1902]A.C. 147, at p. 150.

Lord Davey found that on a true construction, the covenant entitled the mortgagee to keep the deeds until they had been paid every penny, "together with interest measured by what is expressed in the covenant."[91] Lord Davey also stressed the importance of the nature of the current proceedings. *In re European Central Railway*[92] was identified as a case of a creditor proving in winding up proceedings. To his Lordship, a winding up is not a proper place to enforce security. Something that was recoverable in foreclosure or redemption proceedings may not necessarily be enforceable in personal actions.[93] A creditor could only prove his personal rights. *Popple*[94] was seen as a case where there was a demand for personal payment. Because it was not an action on the security, it was necessary there to decide if the covenant was independent or ancillary.[95] In other words, if there is a personal action, the contract rate can be recovered in a subsequent personal action if the covenant to pay interest is independent and not ancillary. Whether or not it is independent is a question of construction. Lord Davey held that the promise in question was not a security to secure the performance of the covenant, but it entitled the mortgagee to keep the deeds until they were paid every penny together with interest as *per* the agreement.[96] The distinction drawn is extremely fine. But if there is security, the question to ask is still whether the agreement allows the security to be kept until full payment, with interest calculated according to the contract rate.

More recently, in *London Borough of Ealing* v. *El Isaac and Another*[97] the construction approach was applied to an interest rate prescribed by statute. Section 6(4) of the Housing Act 1969 provided for a certain rate of interest to be paid "until repayment." It was held by the Court of Appeal that the words of the statute excluded merger, and that the doctrine was ousted by statute. Templeman L.J. expressed the view that merger does not apply when there is an independent covenant, nor does it apply to a security as distinct from a contract.[98] Lord Davey's speech in *Economic Life* was cited as authority. More interesting is his general interpretation of *Usborne's* case:

> It appears, therefore, that merger has a very restricted operation. It does not, as appears from the *Usborne case...* apply to security. It does not apply to what is said to be an independent covenant and in most mortgages and deeds of borrowing these days care is taken to make the covenant an independent covenant. So that, in practice, the number of times on which interest ceases to run from a date of judgment is very small. But on principle and on the authorities, it seems to me, the merger doctrine only applies to contracts and covenants.[99]

In the context of modern commercial transactions, the interpretation of Templeman L.J. will not be unrealistic. This is especially

91 *Id.*, at p. 155.
92 (1876) 4 Ch.D. 33.
93 [1902] A.C. 147, at pp. 151-2.
94 22 CH.D. 98.
95 [1902] A.C. 147, at pp. 152-3.
96 *Id.*, at pp. 154-5.
97 [1980] 2 All E.R. 548.
98 *Id.*, at pp. 551-2.
99 *Id.*, at p. 552.

so in the context of security transactions where the interest rate is a major component of the agreement, being part of the "price" for the loan. Few loan agreements will be affected by merger if this realistic approach is adopted by judges.

D. *Possible Justification*

If, as it is, the function of the court is to try to give effect to the agreement, there is no justification for the court giving effect to the agreed rate only up to the date of the judgment. Convenience in computation alone cannot justify the use of a different rate. In times of negligible inflation and low interest rates, such a policy may not have significant consequences. The older cases on merger were decided in such an environment. However, economic conditions are much more volatile today and the sums involved can be substantial. It has been suggested that a judgment creditor has the benefit of the court's assistance in enforcing the judgment and that this justifies a fixed rate being applied even if it is lower than the contract rate.[1] Since rules of court are designed to facilitate the process of justice, it is difficult to see why the promisee should get less simply because he has the court's assistance. That is the court's duty. It is certainly not the business of the court, or the Rules Committee, to require the creditor to give a discount for this public service.

Lindley L.J. in *Re Sneyd*[2] suggested that the plaintiff is getting compound interest, and therefore is effectively getting more than the set rate. This is because the statutory rate is applied to a total sum that includes accrued interest at the date of the judgment. If this is objectionable, the answer is not to capitalize the interest due at the date of the judgment. The judgment could, in appropriate cases, be for the capital sum plus interest at the contract rate until actual payment. Then there will be no question of compound interest. Even if there is compound interest, no one can seriously believe that the creditor is unacceptably better off as a result. This argument does not explain why he is to be worse off. Order 42, rule 12 of the R.S.C. does not distinguish between those with different agreed rates, and the courts have a discretion to award a non-contract rate on the judgment debt.[3] But the exercise of the discretion should be based on some rational ground. Convenience alone would not be strong enough to deprive the plaintiff of the contract rate, and it should be awarded if the court is in a position to do so.

An unfair contract argument was advanced in the Singapore case of *Sim Lim Finance Limited* v. *Pelandok Enterprises Pte. Ltd.*[4] The learned Registrar suggested that the rationale for the use of a non-contract rate "is as profound as the rationale behind the power of the

[1] Yeo Yang Poh, "A Matter of Interest," [1986] M.L.J. clxxiii, at p. clxxxiii. This point was also made judicially in *In Re European Central Railway Co.* (1876) 4 Ch.D. 33, at p. 38 *per* Bramwell J.A.
[2] (1883) 25 Ch. D. 339, at p. 354.
[3] Subject to the 8% limit. See V.C. George J.'s judgment *in Public Bank Berhad v. Hara Industries Sdn. Bhd.* [1988] 2 M.L.J. 618, at p. 619, where a very wide discretion was claimed.
[4] [1981] 1 M.L.J. 280.

court to refuse to enforce penalties agreed upon...[.] Contractual freedom is one thing, but to give permanence to it in a judgment, without so much as asking whether it is fair, is another."[5] With all due respect, the argument cannot stand any logical analysis.

If the Rules Committee was attempting to make a rule that allowed the court to adjudicate on contract fairness, then the rule must be *ultra vires.* This would be outside the jurisdiction of any body that is formed to make rules for the administration of the law. It is not for them to change it. It is also highly questionable whether the proper time to adjudicate on contract fairness is after a judgment that acknowledges and applies the so-called "unfair" term. In any case, the present position would strike down what might be considered to be a "fair" interest rate as well. The Registrar's argument has since been judicially disapproved.[6]

A stronger argument is that a lower rate will encourage judgment creditors to act expeditiously.[7] Otherwise, they will benefit by waiting. The answer to the argument is that it is the choice of the debtor. A simple payment by the judgment debtor will prevent this. It should not be forgotten that any unsecured creditor who waits will run the risk of insolvency, while a secured one will run the risk of a drop in the value of the security. There is nothing wrong in a creditor obtaining the very interest that had been promised him. If, for some reason, the contract rate is seen to be unfair, it should be tackled by way of an examination of the term providing for the interest itself: it would be an affront to common sense to allow the rate to be applied to determine the judgment debt, but not thereafter.[8]

E. *Limiting the Effects of Merger*

The interpretation approach to avoiding merger is a useful device for those who have the relevant legal knowledge. But most without legal training will be surprised to know that a contractually agreed rate of interest will not always run till actual payment, and that a judgment may carry interest at a different rate. The present system is very technical. The exact nature of the promise is crucial. The nature of the proceedings is also important. If there is a personal action, the court can only award the statutory rate. Some subsequent action is needed, whether on the security or independent covenant for the difference in interest. To require such further action is really to require the incurring of unnecessary expense.

On the whole, it is preferable to have a system that does not require fine distinctions, an examination of whether there is security, and the nature of the action brought. No one without competent legal advice will suffer under such a system. Such a situation is possible if a statutory flat rate system is adopted. This would be by way of statutory rules that will award the agreed rate in all cases. An exception may be made when the agreed rate is lower than the rate prescribed by law.

[5] *Id.*, at p. 281.
[6] *United Overseas Bank Ltd.* v. *Sin Leong Ironbed and Furniture Manufacturing Co. (Pte.) Ltd.* [1988] 1 M.L.J. 479, at p. 481.
[7] *Ibid.*
[8] There is of course no general jurisdiction to adjudicate on contract fairness.

Under this system, two situations will have to be considered: (1) when there is no agreed interest rate; and (2) when there is an agreed rate. Under the former, the present practice can be retained. Pre-judgment interest is capitalized, and interest paid at a rate fixed by statute. Under the latter, the agreed interest rate is applied regardless of whether there is security, or whether the agreement is for the agreed rate to apply until actual payment, or until judgment. This will take away the need to make fine distinctions in interpreting promises. This will also make the position the same for personal actions and actions on the security.

One resulting advantage will be simplicity of application. It removes the need to resort to highly technical and fine distinctions. Even if the parties did not think of the post-judgment position, it is not unfair to assume that if they had been asked, they would have opted for machinery that would ensure that the contract rate would apply until actual payment. If the contract rate is lower than the statutory rate, "the incentive to pay" argument will justify the award of the higher rate.

VI. SINGAPORE AND MALAYSIAN CASE LAW ON MERGER

The courts in Singapore and Malaysia have accepted the concept of merger.[9] The principles set out in the English cases have been accepted, though they may not always be fully appreciated.

A. *Statute*

The Federal Court of Malaysia in *American International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.*[10] accepted that a statute can direct the agreed rate to run till actual satisfaction. There was default in payment under a mortgage of land governed by the National Land Code.[11] The mortgagee applied for and obtained an order for sale under the Code. Section 268(1)(c) of the Code dealt with the distribution of the proceeds of the sale, and it provided for the payment of "the total amount due under the charge at the time of the sale." This was held to mean that interest at the agreed rate of 11 per cent was to be paid till the actual sale.[12]

American International Assurance was approved and applied recently by the Supreme Court of Malaysia in *Malaysian International Merchant Bankers Bhd.* v. *Dhanoa Sdn. Bhd.*.[13] Seah S.C.J. in the latter case further explained the former decision on the ground that an

[9] *Arnerican International Assurance Co. Ltd.* v. *Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 M.L.J. 95; *Sim Lim Finance Ltd.* v. *Pelandok Enterprises Pte. Ltd.* [1981] 1 M.L.J. 280; *Supreme Finance (M.) Bhd. v. Koo Sin Ken* [1987] 1 M.L.J. 296; *United Overseas Bank Ltd.* v. *Sin Leong Ironbed and Furniture Manufacturing Co. (Pte.) Lid.* [1988] 1 M.L.J. 479.

[10] [1973] 1 M.L.J. 95.

[11] Act 56 of 1965.

[12] The appeal was based on the decision of the High Court which applied the statutory rate of 6 per cent on the basis of merger. The approach of the Federal Court is similar to that in *London Borough of Ealing v. El Isaac and Another* [1980] 2 All E.R. 548.

[13] [1988] 1 M.L.J. 257.

action for an order to sell under the Code did not produce a judgment debt. Thus, Order 42, rule 12 of the R.H.C. was not applicable.[14]

B. *Independent Covenant or Security*

In *Sim Lim Finance Limited* v. *Pelandok Enterprises Pte. Ltd.,*[15] Chief Justice Wee Chong Jin stressed that the court can only award the prescribed rate of 8 per cent on a judgment debt, but accepted that a promise can be drafted in such a way that the security can be kept until full payment according to the contract rate. The plaintiff finance company lent money to the defendant on the security of a mortgage. The agreed interest rate was 21.29 per cent.[16] There was default in repayment and the plaintiffs sued. They later applied for leave to enter judgment in default of appearance under Order 83, rule 4 of the R.S.C. The only issue before the learned Chief Justice was the relevant interest rate on the judgment debt.

The plaintiff argued that section 18(2)(g) of the Supreme Court of Judicature Act[17] gave the court the power to award a rate in excess of the rate in the R.S.C.[18] This argument was rejected on the ground that Order 42, rule 12 of the R.S.C. had "the force of law."[19] The court held that section 18(2)(g) was a general provision that gave the court the power to award interest, *i.e.* it was an enabling provision. It did not set out the rule. The rules were set out by the Rules Committee.[20] If the rules did not allow the agreed rate to apply, the court could not do so. The Chief Justice's interpretation of the law cannot be faulted, though it may be asked why the Rules Committee did not draft a rule that would have given fuller effect to the enabling provision. The learned Chief Justice also held that *Economic Life*[21] was distinguishable. The issue before him was whether the mortgagees, in an action for judgment in default of appearance, were entitled to interest on the judgment debt at the contract rate of 18 per cent of at the statutory rate of 8 per cent. He then went on the state:

> Similarly, in the present case, the plaintiffs are entitled to retain their security until they were paid the principal sum and the interest at 18 per cent (the covenanted rate) but, in my judgment, they were not entitled under the present application for leave to

14 *Id.*, at p. 258. See the comments of R.R. Sethu, "Chargee's Rights: Real & Personal Effect of a Judgment" [1988] 1 M.L.J. cxxvii. In *Malayan United Bank Bhd.* v. *Mohammed Salleh bin Mohammed Yusoff* [1988] 3 M.L.J. 165, the Malaysian High Court expressed the view, at p. 168, that *American International Assurance* was based on the then Ord. 42 r. 16 of the Rules of the Supreme Court 1957. The rule allowed an agreed rate to be applied. But the rule was immaterial as the case was not decided on the order but the interpretation of the National Land Code.

15 [1981] 1 M.L.J. 280.

16 It was not suggested that it was penal. The interest rate set under a loan agreement is analogous to the price for a contract. It is not as such, agreed damages for late payment.

17 Cap. 322, 1985 (Rev. Ed.).

18 [1981] 1 M.L.J. 280, at p. 280.

19 *Ibid.*

20 Made under the authority of section 80 (2) (j) of the Supreme Court of Judicature Act, Cap. 322, 1985 (Rev. Ed.). See *Malayan United Bank Bhd.* v. *Mohammed Salleh bin Mohammed Yusoff* [1988] 3 M.L.J. 165, at p. 167, where the same observation with respect to the Malaysian provisions was made.

21 [1902]A.C. 147.

> enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8 per cent prescribed under Order 42 rule 12 ...[.] Order 42 rule 12 prescribe[s] the maximum rate of 8 per cent per annum payable on every judgment debt and it has the force of law.[22]

In short, he was of the view that the contract could be given effect to in the sense that the security could be held until the contract rate was paid but that in a judgment on a personal action, the court could only award the rate of 8 per cent. The promisee could still get his due, but not in the personal action.

The decision is consistent with English case law, but it is difficult to understand why the rules were not subsequently changed to allow for contractually agreed rates to be awarded by the courts. The original rules of the court in 1934[23] in fact made allowance for the agreement of the parties to be given effect to. It read: "Unless it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of six per centum ... [.]" The Registrar who first heard the action in *Sim Lim* had highlighted this fact and made the conclusion that the omission was intentional.[24] He thought that it was possible that the Rules Committee had wanted to strike a balance between contractual freedom and fairness. The weakness of the argument has already been discussed.

In *Supreme Finance (M.) Bhd.* v. *Koo Sin Ken*[25] the Supreme Court of Malaysia held that as Order 42, rule 12 of the R.H.C. drew no distinction between cases where there was an agreement in respect of interest and those where there was no such agreement, the maximum rate that could be awarded was the limit specified in the Order.[26] This is correct so long as the court is looking at a case where Order 42 is relevant. The case involved an action under the National Land Code. Land was charged under the code. On default in repayments, a statutory notice was issued to the borrower to show cause why the land should not be sold by auction. The lender sought to calculate the total interest due according to the contract rate.

Lee Hun Hoe C.J., delivering the judgment of the Supreme Court, observed that there was "no equivalent English rule" to Order 42, rule 12. No mention was made of section 17 of the English Judgments Act of 1838, upon which Order 42 is based. The learned judge did not clearly distinguish between situations where Order 42 is in issue and cases where it is not. Few will doubt that Order 42 does not allow a rate higher than 8 per cent. But it may not be relevant at all in an action on the security, especially under the National Land Code of Malaysia.[27] It is probable that doubt was cast by his Lordship on the *American International Assurance*[28] case because the distinction based on the nature

22 [1981] 1 M.L.J. 280, at p. 280. Note that the Registrar, at p. 281 had referred to a different rate of 21.29 per cent. This difference has no bearing on the principle upon which the case was decided.
23 Then Ord. 39 r. 13.
24 [1981] 1 M.L.J. 280, at p. 281.
25 [1987] 1 M.L.J. 296.
26 *Id.*, at p. 297.
27 See part VI.A, above, and *Malaysian International Merchant Bankers Bhd.* v. *Dhanoa Sdn. Bhd.* [1988] 1 M.L.J. 257.
28 [1973] 1 M.L.J. 95.

of the action was not clearly appreciated.[29] The position has since been cleared by the Supreme Court, which recently applied the *American International Assurance*[30] case in *International Merchant Bankers Bhd.* v. *Dhanoa Sdn. Bhd.*[31]

The reasoning of Wee Chong Jin C.J. in *Sim Lim Finance*[32] was adopted by the Supreme Court in *Supreme Finance.* The court however went on to hold that the judgment creditors were "entitled to retain their security until they were paid the principal sum and specified rates of interest *up to the date of judgment* but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under 0.42 r. 12."[33] [*Emphasis added.*] This is not the decision in *Sim Lim,* which involved a personal action. The decision there was that interest could only be awarded at 8 per cent, but that the security could be retained till full payment at the contract rate of interest. Contractual interest was not limited to the date of judgment. The difficulty with the *Supreme Finance* case is that the court did not make clear what type of action was before it. The judgment begins with a statement that "the only issue in the appeal concerned the rate of interest to be given after date of judgment."[34] If this means that it was a personal action, then only 8 per cent could have been awarded instead of the contract rate of 18 per cent, and the final outcome would be correct. But the action was based on a statutory notice under the National Land Code, which is in essence an action to show cause why the land should not be sold by public auction. If this makes it an action upon the security, then the *American International Assurance* case should have been applied. The Supreme Court in *International Merchant Bankers* explained the *Supreme Finance* case as one dealing with the rate payable after the date of judgment. In this sense, it was distinguished as being based on a personal action.[35] Since this classification problem is based on the provisions of the Malaysian National Land Code, it will not arise in Singapore.

The local cases follow and accept the technical distinctions made by the English courts. It has already been argued that the best approach, insofar as post-judgment interest is concerned, is to take away the discretion of the court, and to have fixed rules for the award of interest.[36] Suitably drafted agreements with security can ensure that the full interest rate will be obtained, even if only by enforcing the security. But unless the law is changed, the ordinary promisee with no independent covenant or security, but with an agreed rate of interest high than 8 per cent will have to be content with 8 per cent.

29 [1987] 1 M.L.J. 296, at p. 297. Lee Hun Hoe C.J. criticised the case for not having discussed Order 42. Order 42 was not discussed because it was held to be inapplicable.
30 *Malaysian International Merchant Bankers Bhd.* v. *Dhanoa Sdn. Bhd.* [1988] 1 M.L.J. 257, at p. 258.
31 [1988] 1 M.L.J. 257, at p. 258.
32 Above.
33 [1987] 1 M.L.J. 296, at p. 298.
34 *Id.*, at p. 296.
35 See Sethu, *op. cit.*, at p. cxxxi.
36 See part IV, above.

VII. A MODEL FOR LEGISLATION

The arguments in this article basically point to statutory clarification, with effect being given to any agreed interest rates. If an agreed rate is to be applied to a judgment debt, the required "agreed rate" should not have to be to an agreed rate for a judgment debt. This would be rare as most agreements would not consider the judgement.[37] The arguments advanced in this article can be given effect to by a single statutory provision. Section 80(2)(j) of the Supreme Court of Judicature Act[38] should be amended.[39] The new rules can be incorporated in an amended Order 42, rule 12 of the R.S.C. or a new section.[40] The following should be included:

1. A fixed rate of interest should apply to all judgment debts, subject to stated exceptions. For simplicity, simple interest rather than compound interest should be used.

2. The fixed rate should be subject to change by subsidiary legislation. The rate should not just compensate for being kept out of money, and should be an incentive to pay promptly. The cost to the judgment debtor of not paying promptly should be clearly greater than the benefit that can be derived from late payment. A suitable guide would be a few percentage points above the current prime lending rate.
3. If there is a valid[41] agreed interest rate, the agreed rate should apply regardless of the presence or absence of security. This will be so even if the agreement is for pre-judgment interest only. This should apply even in personal actions.
4. If the agreed rate is lower than the fixed rate, the fixed rate should apply. In other words, the agreed rate should apply only if it is larger than the fixed rate. This is in order to encourage prompt payment. One problem may arise if this idea is adopted. The agreed rate may be a compound rate, so that the court will not be comparing like with like. The solution will be to compare the total interest that will be due over a period of say one year under both rates, and to use the rate that will give a larger interest.

The judgment debt should, as it is now, be the sum of principal and interest due at the date of judgment *i.e.* the sum of principal and pre-judgment interest. It will be difficult to adopt the alternative of not capitalizing interest at the date of judgment as a different rate may be applied to the pre-judgment period. An agreed rate may be lower than the fixed rate; and a court may, where there is no agreed rate, award pre-judgment interest at a rate lower than the fixed rate for judgment debts. The arguments for pegging the fixed rate do not apply to pre-

37 For example, an agreement may cater for x% interest until payment. See part II.A, above.
38 Cap. 322, 1985 (Rev. Ed.).
39 It deals with pre-judgment interest as well as post-judgment interest. This article does not consider the former. Corresponding changes will have to be made to the Subordinate Courts Act, Cap. 321, 1985 (Rev. Ed.).
40 This could be included after s.9 of the Civil Law Act, Cap. 43, 1988 (Rev. Ed.). Section 9 deals with pre-judgment interest.
41 The test should be based on whether it is valid and enforceable as a term of the contract upon which the judgment is based.

judgment interest. As the main consideration for pre-judgment interest is compensation, the fixed rate under these proposals is likely to be higher.

If this scheme is adopted now, a reasonable fixed rate may be a rate of about 10 per cent.[42] This is not very different from the present 8 per cent limit. But this does not mean that there is no need to adopt the scheme at the moment. The scheme does more than fix the rate applicable. It will allow an agreed contract rate to be applied, and it will not allow a lower rate to be awarded.

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[42] The prime lending rate of DBS Bank on 17 Nov. 1988 was 5.25 per cent. The rates for the other banks in Singapore will not be significantly different.

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