Neutral Citation Number: [2019] EWHC 205 (TCC)

Case No: B50MA033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date: 7 February 2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

ZAGORA MANAGEMENT LIMITED & OTHERS	**Claimants**
- and –	
(1) ZURICH INSURANCE PLC **(2) ZURICH BUILDING CONTROL SERVICES LIMITED** **(3) EAST WEST INSURANCE COMPANY LIMITED**	**Defendants**

Jonathan Selby QC & Charlie Thompson (instructed by **Walker Morris, Leeds**) for the **Claimants**
Nicholas Baatz QC & Nicholas Maciolek (instructed by **Kennedys, Birmingham**) for the **First & Third Defendant**

Hearing date: 30 January 2019

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APPROVED JUDGMENT NO. 2 CONCERNING INTEREST

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Stephen Davies

1. This judgment is supplemental to my principal judgment ("**the judgment**") handed down on 30 January 2019 and addresses the claim by the individual leaseholders (who for ease of reference I shall refer to as the claimants, which term thus excludes the first claimant and freeholder, Zagora Management Ltd ("**Zagora**"), whose claim failed) for interest on the sums awarded to them under that judgment. It is contested by the third defendant, as successor to the first defendant and against whom those sums are awarded (but who for ease of reference I shall simply refer to as ZIP) on two grounds:
   (1) First, that it is not open to the claimants to pursue a claim for interest given that no claim for interest along the lines now advanced was claimed until the claimants had received the draft judgment.
   (2) Second, that the claimants have not demonstrated any legitimate basis for claiming interest at all, let alone over the period and at the rate claimed (which are also disputed).

2. The claim for interest was fully argued by counsel for the claimants and for ZIP in their written notes and oral submissions at the hearing and I am grateful to them all. Given the nature and complexity of the arguments raised and value of the claim for interest as advanced by the claimants I decided to reserve judgment at the end of the hearing.

The relevant facts

3. I shall need to begin by recording the relevant facts on the basis that anyone who needs to know more about the facts underlying the substantive litigation can do so by referring to the judgment [2019] EWHC 140 (TCC) and in particular section 1 which contains an introduction and a summary of my decision.

4. First, the claim by the individual leaseholders under the building warranties issued by ZIP was always advanced on the basis that they were entitled to claim against ZIP the full cost of the remedial works which the claimants asserted were required, said to amount to £10.9 million plus VAT. Importantly, these costs were always – from the date of service of the Particulars of Claim all the way through to trial and closing submissions – said to include an allowance for inflation up to and including the time when the claimants expected to obtain judgment and payment thereunder and then to be in a position to fund and thus undertake those remedial works. Furthermore, and equally importantly, ZIP did not dispute the proposition that any recovery should include an appropriate allowance for inflation which, in the end, was agreed on a subject to liability basis by the quantity surveying ("**QS**") experts. Indeed, this approach was consistent with one of the major defences advanced by ZIP which was that on a proper construction of the policy the claimants were only entitled to recover if they had already undertaken the remedial works or at the very least could establish that the works would be carried out.

5. It was in those circumstances that although the Particulars of Claim contained a general and unparticularised claim for interest under statute (s.35A Senior Courts Act ("**SCA**") 1981) it did not, as required by Civil Procedure Rule ("**CPR**") 16.4(2) in relation to claims for a specified amount of money, either state the percentage rate claimed or the date from which it was claimed. Unsurprisingly, therefore, ZIP did not respond to the claim for interest in its Defence other than simply to put the claimants to proof of their alleged entitlement to interest.

6. One of the other major defences advanced by ZIP was a defence based on a maximum liability provision ("**MLP**") in the building warranties which limited the maximum liability payable under each policy to the declared purchase price of each flat. I concluded in the judgment that the MLP applied and was effective to limit each of the individual leaseholder's claims to the declared purchase price of their flat. The result was that although otherwise the individual leaseholders would have succeeded in a much more substantial sum (said by the claimants to be in excess of £9.7 million plus VAT) in fact the total judgment was limited to £3.634 million ("**the ML cap**").

7. In their Reply the claimants advanced various arguments as to why, on its true construction, the MLP did not have this dramatic effect, which I considered and rejected in the judgment. The claimant did not in their Reply or at any time subsequently until receipt of the draft judgment advance a positive case to the effect that if, contrary to their case, the MLP did apply they were entitled to interest on the ML capped sum at a specified rate and from a specified date. In particular, although the claimants gave evidence in their witness statements as to their general circumstances (which were – as I said in the judgment – that of the 26 individual leaseholders all but two were buy-to-let investors, some based overseas but the majority being UK residents, with the other two buying flats for their student offspring to live in whilst studying at Manchester) they did not purport to give evidence as to their financial circumstances with a view to advancing a claim for interest either at all or in the event that, contrary to their case, the MLP limited their claims to the declared purchase price.

8. Nothing was said about interest in either of the opening submissions, written or oral, and nothing was said about interest during the course of the trial. There was no cross-examination by Mr Baatz QC of the individual leaseholders as to their financial circumstances insofar as material to the claim for interest. In their closing written submissions the claimants said that: "Given that their claim is for future costs, the claimants accept that they cannot claim interest from ZIP on their damages up to the date of judgment. Of course, if there is any delay in satisfying the Court's judgment, interest on judgment monies will accrue in the usual way under section 17 of the Judgments Act 1838". In its closing submissions ZIP simply said that: "There is no claim for actual expenditure and so the claim for interest is a nullity". Nothing was said by Mr Selby QC or by Mr Baatz QC in oral closing submissions about interest.

9. In their written note for this hearing the claimants asserted that the submission made in relation to interest in their closing submissions was not directed to the eventuality which has materialised whereby the claim has been held to be limited to the ML capped amount. At the hearing I expressed my provisional view that the reason why nothing specific had been said by the claimants or their legal representatives in relation to making any claim for interest on the ML capped amount at any stage up to receipt of the draft judgment was that the claimants and their lawyers had simply not applied their minds to this issue. Mr Selby acknowledged that this was the case. In his submissions Mr Baatz suggested that that was not a conclusion which I could safely draw in the absence of express evidence to that effect. Whilst he was right to draw my attention to the absence of express evidence on the point I have no doubt, given my direct knowledge of this case from the first substantive case management conference through all of the numerous contested interlocutory hearings down to the trial itself, that this is indeed the explanation. I have no doubt whatsoever that if the claimants' legal representatives had applied their minds to this issue they would have made it clear that the claimants would indeed be advancing a claim for interest on the ML capped amount if the MLP was held to apply in the judgment. In short, I am completely satisfied that there was no deliberate intention or decision not to advance a claim for interest in the event that the claimants

were held to the ML capped amount and that the failure to qualify the acceptance in closing submissions was due to inadvertence by the claimants.

10. When I produced my draft judgment I addressed interest by recording that it had been agreed that interest should be left over until the draft judgment had been produced. On receipt of the draft judgment ZIP alerted me to the fact that this agreement had in fact only been reached as between the claimants and the Second Defendant, ZBC, and that – not surprisingly given the circumstances referred to above – there had been no reference at all made in oral closing submissions to interest in relation to the claim against ZIP. The claimants accepted that this was the case but, by letter dated 11 January 2019, notified ZIP that they intended to seek interest on the claim at 4.5% above base from a date in March or in April 2013. ZIP's response was to object that it was not open to the claimants to advance such a claim at this stage and, when this dispute was brought to my attention, I amended the judgment so that as handed down it simply recorded that I had not addressed interest and that the claimants were now seeking interest notwithstanding what was said in their closing submissions so that in the circumstances I would defer any issues arising in relation to interest to the hand down hearing.

The competing arguments

11. As advanced by the claimants at the hearing the claim for interest is advanced on the following basis:

(1) Although the ML cap has been applied to the claim as advanced by the claimants and determined by the court, namely on the remedial costs inclusive of inflation, since the cap is fixed by reference to the purchase price of the individual flats it bears no relation to the remedial costs which, even disregarding any increase for inflation, far exceeded the ML cap.

(2) Given that in the judgment I rejected ZIP's case that it was only liable to pay under the policy if the works had been or would be carried out, it follows that on the proper construction of the policies the claimants' cause of action arose when the right to indemnity arose which was, on the proper construction of the policies, when there had been major physical damage or a present or imminent danger to physical health and safety due to the developer's failure to comply with ZIP's technical requirements or the Building Regulations ("**Bldg Regs**") (under sections 3.1 and 3.2 of the policies respectively).

(3) The authorities in relation to the date from which interest should be awarded in relation to insurance claims (as summarised by Langley J in *Kuwait Airways Corporation v Kuwait Insurance Company* [2001] CP Rep 60) establish that: (a) in principle interest is awarded under s.35A SCA 1981 to compensate the claimant for being kept out of money from the date when it was due to him, and is not based on fault or the wrongful withholding of payment by the defendant, therefore the date the cause of action arose is the starting point; (b) however, given that in practice an insurer is entitled to a reasonable time to investigate the claim, both as regards liability and quantum, that principle may be tempered by asking when the claimant could reasonably and commercially have expected to be paid.

(4) The authorities in relation to the rate on which interest should be awarded, as summarised by the Court of Appeal in *West v Ian Finlay* [2014] BLR 324 at [75], establish that:

"i) The rate of interest is in the discretion of the court;

ii) The purpose of an award of interest is fairly to compensate the recipient for being deprived of the money that he should have received;

iii) A broad brush approach is taken to determine what rate of interest is just and appropriate;

iv) The courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds;

v) The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than conventional."

(5) As regards the date from which interest should run, the claimants remind me that the first claim by an individual leaseholder was submitted on 13 March 2013. Zagora as freeholder made a claim ostensibly on behalf of itself and the individual tenants on 18 April 2013. ZIP duly investigated the claim and entered into discussions with Zagora in relation to the claim (all of which are referred to in detail in section 8 of the judgment) which resulted in a meeting held on 27 June 2013 at which an agreement in principle as to a resolution was reached, albeit one which was not – as I held – legally binding. Whilst in the event no concluded agreement could be reached because of the intervention of litigation between Zagora and a company known as CJS (see paragraph 1.8 of the judgment) the claimants submit that by 27 June 2013 ZIP had had a reasonable time to investigate the claims and the claimants could reasonably and commercially have expected to be paid and, thus, have been kept out of monies properly due to them from that date.

(6) As regards the rate of interest, the claimants submit that their general characteristics are such that it is reasonable to award interest at a rate which equates with the cost of unsecured borrowing over the relevant period from June 2013 to date which they say is fairly to be taken at 5.5% over base which is, they say, consistent with the approach in *West v Finlay*.

12. I have already identified (paragraph 1 above) the procedural and substantive objections taken by ZIP. In summary, ZIP's position as advanced at the hearing is as follows:

(1) The claimants failed to identify in their pleaded case that they intended to make a claim for interest on the ML capped sum if awarded to them or to plead any such claim by reference to the specific rate and specific period claimed, nor did they do so in their evidence as served or in their opening submissions.

(2) In the circumstances there was no basis or need for ZIP to cross-examine the claimants or otherwise to adduce evidence or to investigate at trial those issues. ZIP thus lost the opportunity either to adduce evidence or to cross-examine the claimants as to their individual circumstances and what, if any, financial loss they had suffered as a result of the alleged failure to pay them the ML capped sums in June 2013 or at any time subsequently. As a result they would be prejudiced if the court was now prepared to investigate the claim for interest unless the court was prepared to re-open the trial which would require the respective cases to be pleaded and any additional evidence obtained by ZIP and cross-examination of the claimants followed by closing submissions all of which, submitted ZIP, would clearly be wholly contrary to the overriding objective. The same considerations demonstrate that there

is no basis for permitting the claimants to resile from the admission made in their closing submissions that interest was not claimed against ZIP. These circumstances also demonstrate that the claimants elected to advance a claim for an inflationary increase in their damages instead of interest and, having so elected, are not entitled to resile from that election.

(3) On the merits of the claim for interest there is no justification for an award of interest because the claim was always advanced on the basis of a claim for remedial costs inclusive of inflationary increase in circumstances where the remedial works have not been carried out to date and thus the claimants have not laid out any monies on such works and thus not suffered any loss which requires to be compensated by award of interest. This analysis is unaffected by the fact that the claim has been capped by reason of the MLP. In the circumstances the court should not exercise its discretion to award interest. Reliance is placed upon the decisions of Akenhead J in *Hunt v Optima (Cambridge) Limited* [2013] EWHC 1121 (TCC) and of Picken J in *Kazakhstan Kagazy plc v Baglan Abdullayevich Zhunus and Harbour Fund 111 LLP* [2018] EWHC 369 (Comm). Moreover the claimants cannot claim interest on the basis that they have been deprived of the benefit of the ML capped insurance monies from July 2013 in circumstances where: (i) there is no evidence as to what they would have done with the money; (ii) from September 2016 the claimants would have been obliged to pay any sums to the Bank of Ireland as the funders of the litigation; (iii) they have been able to obtain rental income on the flats (at least to July 2017 when the flats had to be vacated).

(4) Even if interest should be awarded in principle there is no proper evidential or other basis for awarding interest either from July 2013 or at the rate claimed.

The procedural objection

14. It is obviously appropriate to determine first ZIP's procedural objection although, as will be seen, that does require some consideration as to the way in which disputes as to the period and rate of interest are determined by the court.

15. As I have said, ZIP's starting point is that the claimants made an admission in their closing submissions which they require permission to withdraw under CPR Part 14. Whilst my decision does not turn on the narrow question as to whether or not it was an admission within Part 14 in my view it was not. Part 14.1 says that:

"(1) A party may admit the truth of the whole or any part of another party's case.
(2) The party may do this by giving notice in writing (such as in a statement of case or by letter)."

Here ZIP never advanced a positive case that the claimants were not entitled to statutory interest, whether at all or in the event that the court only awarded them the ML capped amount. It is scarcely surprising therefore that the claimants never admitted any such case, whether in their statements of case or otherwise in writing. There is an obvious difference between not asserting a case and admitting the truth of a case advanced by the other party. In my judgment it would be wrong to extend the application of Part 14 either to a party who seeks to advance a case which had not previously been advanced or to resile from a concession in argument that a claim was not being made where that was not also an admission of a positive case by the other party that no such claim was maintainable.

16. Nor do I accept ZIP's alternative argument that to allow the claimants to claim interest would have the effect of allowing them to resile from an election not to do so. In my judgment it is incorrect to characterise the claimants' approach as electing between inconsistent claims or remedies. They claimed an amount for inflation on the sums claimed against ZIP. On that basis, the appropriateness in principle of which was never challenged by ZIP and the amount of which was ultimately agreed as between the QS experts, the claimants did not – without specifically addressing their minds to what would happen if the ML cap was held to operate – consider it necessary or appropriate to maintain any claim for statutory interest. That however is very different from consciously electing between inconsistent substantive remedies.

17. However, I do accept that the claimants require the court's permission to advance the current claim for interest. That is for two reasons. First, I accept that the claim as pleaded was a claim for a specified amount of money and, thus, was required to contain details of the rate at which and period over which interest was claimed. The claimants ought to have pleaded in their Reply that if, contrary to their primary case, the ML cap applied, they were entitled to the ML capped amount plus statutory interest, giving details as to the rate and period of claim. That would have alerted ZIP to the point so that it could have formed one of the pleaded issues in the case to be addressed at trial. Second, having failed to plead the claim for interest, having failed to make it clear at trial that they were pursuing a claim for statutory interest in the event that the claim was held subject to the ML cap, and having failed to make submissions in relation to such claim, fairness to ZIP requires the court to consider whether it would be appropriate to permit the claimants to advance the claim after production of the draft judgment, even though I accept that there is no jurisdictional objection to the court revising its judgment after producing its judgment in draft or, as here, producing a supplemental judgment on matters not addressed in the principal judgment before making its final order.

18. I am of course aware of the principles to be applied when considering applications to amend a statement of case at trial. It is the case that the presence or absence of prejudice to the other party is not the only consideration. However, the consequences of allowing or refusing an amendment, both as regards both parties as well as regards the court and other court users are major considerations. If I was to accept Mr Baatz's submission that a fair trial in relation to the claim for interest could only take place if I required a formal amendment from the claimants with provision for ZIP to reply and for supplemental disclosure and/or witness statements and/or expert evidence with the opportunity for cross-examination if necessary and submissions then I have no doubt that it would not be fair to ZIP nor would it be in the wider interests of justice to allow that to happen. Thus, the real question in my judgment is whether that is what fairness requires.

19. If, contrary to my previous ruling, Part 14 is engaged then it is also clear that the same or similar considerations will apply when a court is deciding whether or not to allow a party to withdraw an admission. Thus paragraph 7.2 of Practice Direction 14 provides as follows:

"In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including—

(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

(b) the conduct of the parties, including any conduct which led the party making the admission to do so;

(c) the prejudice that may be caused to any person if the admission is withdrawn;
(d) the prejudice that may be caused to any person if the application is refused;
(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
(g) the interests of the administration of justice."

20. Mr Selby submitted that it was not unfair to ZIP to allow this point to be taken, given the well-established approach to the way in which interest claims are disposed of by the courts. He submitted that since the law as summarised in *West v Ian Finlay* referred to above established that the court was not concerned with the personal circumstances of the claimants, such as the rate at which they might individually have borrowed funds, as opposed to their general characteristics, in order to decide whether to assess interest at a rate that is higher or lower than conventional, the further evidence and exploration suggested by Mr Baatz as necessary to do justice to his client was simply irrelevant and thus unnecessary. He submitted that the same was true as regards fixing the appropriate start date, where the court had all that it needed to make its decision.

21. In my judgment Mr Selby is right in his submission. So far as the law is concerned, in addition to the *West v Ian Finlay* case:

(a) In paragraph 9 of their note on interest Mr Baatz and Mr Maciolek referred me to the well-known decision of Forbes J in *Tate & Lyle v Greater London Council* [1982] 1 WLR 149 at p154 which is worth setting out in full so far as relevant:

"Despite the way in which Lord Herschell L.C. in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429, 437 stated the principle governing the award of interest on damages I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money: I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld — this would indeed involve a scrutiny of the defendant's financial position — but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind, mean that you exclude entirely all attributes of the plaintiff other than that he is a plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1 per cent. over the minimum lending rate, while for smaller and less prestigious concerns the rate might be as high as 3 per cent. over the minimum lending rate. I think it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate. If commercial rates are

appropriate I would take 1 per cent. over the minimum lending rate as the proper figure for interest in this case.

… [I]n commercial cases it seems to me that the rate at which a commercial borrower can borrow money would be the safest guide. I should add, perhaps, that the proper question is: At what rate could the plaintiff borrow the required sum and not what return could the plaintiff have expected if he had invested it? It is immaterial, therefore, to consider, as Mr. Davies suggested, whether the plaintiff could have used the money profitably in his own business or what rate of profit he could have expected to achieve by so doing. I think, therefore, interest should be calculated at 1 per cent. over the minimum lending rate (or bank rate)."

(b) In the *Kazakhstan Kagazy* case referred to by Mr Baatz, Picken J referred to two previous authorities which I have found of assistance in the context of this case.

(c) The first, to which he referred at [71] was the summary of Hamblen LJ in *Carrasaco v Johnson* [2018] EWCA Civ 87 at [17], drawing upon various authorities ranging from *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149 to *Reinhard v Ondra* [2015] EWHC 2493 Ch (Warren J):

"The guidance to be derived from these cases includes the following:

(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.

(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.

(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

(d) The second, to which he referred at [72], was the decision of Andrew Smith J in *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm), in which he stated as follows at [16]:

"A 'broad brush' is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to

attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate: see the *Banque Keyser Ullman* case (cit sup). The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional. So, for example, in *Jaura v Ahmed*, [2002] EWCA Civ 210, Rix LJ awarded interest at base rate plus 3% to reflect that 'small businessmen' had been kept out of their money and in recognition of the 'real cost of borrowing incurred by such a class of businessman'. Thus, the court will examine what has been called 'a question of categorisation of the plaintiff in an objective sense' (see the *Banque Keyser Ullman* case, cit sup), recognise relevant characteristics of the party who is awarded interest and reflect them when determining the fair and appropriate rate."

22. Thus, in my judgment there can be no question of ZIP being able to say that fairness requires that it be allowed to investigate the personal financial or other circumstances of the claimants in order to determine the appropriate rate of interest. Nor can it be said that ZIP has even arguably been deprived of the opportunity to investigate the general characteristics of the claimants as a class. In reaching that conclusion I make it clear that all that the court needs to know is that the claimants were all private individuals buying relatively modest flats in Manchester, the vast majority as buy-to-let investors but a minority to provide a home for their student children, in circumstances where some had previously bought similar properties but others did not and some had to borrow on mortgage to do so whereas others did not. In this case the claimants have not of course funded any remedial works as yet and, if ZIP is right, may never do. Thus it follows that any loss suffered by the claimants due to ZIP's non-payment prior to trial and judgment may either be the loss of the opportunity to use that money to reduce their existing indebtedness, which itself might be unsecured or secured by mortgage, or of the opportunity to invest that money, whether in a savings account or by acquiring another buy-to-let investment or in any one of a myriad of other ways.

23. All this is important because it demonstrates why it would have been irrelevant for Mr Baatz to have investigated what the individual claimants might have done with the money had they received it earlier, since there is no reason for considering that the answer would inform the court's decision in relation to interest.

24. It is also important for another reason. As I have already noted, Mr Baatz sought to persuade me by reference to the decisions in *Hunt v Optima* and *Kazakhstan Kagazy* that interest ought not to be awarded in this case because the claimants had not suffered any loss in that they had not laid out any monies in undertaking remedial works. In my judgment this submission is not persuasive for two reasons.

25. The first is that, as I held in the judgment, there was no obligation on the claimants to have carried out remedial works as a pre-condition of recovering under the policies; ZIP's obligation was to pay the reasonable cost of such works regardless of whether or not they had been carried out.

26. The second is that the submission ignores the principle that interest is awarded to compensate claimants for being kept out of money rather than as compensation for damage done. Whilst the cases cited by Mr Baatz are illustrations of cases where in the particular circumstances the court exercised its discretion not to award interest where the essence of the claims made was that the successful claimants had incurred or would incur a liability which they had successfully claimed

against the defendant but had not, as at the date of trial, actually paid. As Picken J said at [89] when considering this point:

> "… In my view, however, it would not be right, as a matter of principle, to award interest in relation to a liability which has not to date had to be discharged (or, in fact, been discharged) and in relation to which, therefore, the party seeking the interest is not out of pocket. The fact that that party could have made other use of the money, had it been received, pending its use in discharging the liability is neither here nor there since, in my view, the appropriate assumption which falls to be made is that, had the claimant been put in funds to enable its liability to be discharged, those funds would have been used for that purpose and not in some other unconnected way. Even if this is wrong, in any event, as a matter of discretion, it seems to me that it would be appropriate to decline to award interest on these aspects of the claim."

27. I agree with Mr Selby that there is a real difference between the claim as presented and the claim as it has succeeded. The claim as presented was put on the basis, albeit disputed by ZIP, that the claimants could and would use the monies awarded to fund remedial works post judgment, hence the basis for the inflation claim. The claim as successful was on the basis that the policy allowed ZIP to discharge its liability by making a lump sum payment of the declared purchase price where the cost of undertaking the remedial works exceeded that sum. It therefore became irrelevant whether or not the claimants intended to or would be able to undertake remedial works. They were entitled to receive this lump sum capped payment and to do with it as they thought best. Thus, in this case the claimants were entitled to be paid the ML capped amounts regardless of whether or not they were to be used to fund repairs.

28. I also reject Mr Baatz's submission that ZIP would be prejudiced in having to contest the claim for interest in circumstances where it was deprived of the opportunity of investigating matters relevant to the start date from which interest should run. On the facts I have no hesitation in rejecting this argument. The circumstances from March 2013 onwards were very fully explored and addressed in my judgment in the context of the claim relating to the agreement to rectify and the assorted defences advanced by ZIP in relation thereto, one of which was ultimately successful. Mr Baatz submitted that it would be relevant to ascertain the rental income which the claimants obtained through continuing to rent out their flats instead of carrying out remedial works and further submitted that in that respect it would have been relevant to investigate the circumstances in which the claimants through their solicitors sought to persuade the Greater Manchester Fire and Rescue Service to issue a notice prohibiting occupation in June 2017. As Mr Selby submitted, this issue is doubly irrelevant since: (a) as I have already recorded, interest is awarded to compensate claimants for being kept out of money, rather than as compensation for damage done; (b) the ML capped claim is not dependent on remedial works being done.

29. In summary, there is no prejudice to ZIP in permitting the claimants to advance a claim for interest on the ML capped sums due to them. As Mr Selby submitted, the best way to look at this is to enquire what would have happened had it been made clear in written closing submissions that the claimants would, if held to the ML cap, claim interest on the ML capped amount on the basis now advanced. The answer is that, had Mr Baatz objected, those objections would have been addressed in oral closing submissions and I would have concluded that they were without substance on the basis that: (a) amending to plead the details of the claim was a mere formality; (b) on a proper analysis of the legal principles there was no evidential prejudice to ZIP in permitting the claim to be advanced in closing submissions; (c) it would be more unfair to the claimants to deprive them of the

opportunity of claiming interest if their claims were dramatically capped by virtue of the MLP than to ZIP in depriving it of a windfall defence which it was perfectly capable of arguing on the merits in closing submissions; (d) insofar as either party was entitled to the benefit of the doubt, given the absence of an opportunity to investigate the claim or to adduce or test evidence bearing on the point, the benefit of the doubt would go in favour of ZIP.

30. In the absence of any basis for any suggestion that the claimants had taken a deliberate decision not to make a claim for interest on the ML capped amount in order to obtain some tactical advantage which they were now seeking to resile from having seen the draft judgment there is really no justification for refusing to allow the claimants to advance this claim. As was said during submissions it is not uncommon for all questions of interest to be deferred until the substantive judgment is handed down, nor is it uncommon for arguments to be raised at that point about the presence or absence of evidence adduced at trial relevant to questions of rate and period, with the judge making a decision on the basis of the evidence which was before the court. The only difference between that not untypical situation and the present is that the claimants had made a concession in closing submissions that no question of interest arose but which as I have said I am satisfied was never intended to apply to the position as it has transpired, viz the success of the MLP defence, and – insofar as relevant - there can be no suggestion that ZIP or its advisers ever positively believed that the concession was intended to apply in such circumstances.

31. In the circumstances I allow the claim to be made and now address the claim on the merits.

The claim for interest

32. I have already referred above to the relevant legal principles and need not repeat them here.

33. So far as the rate is concerned, apart from the evidence about the claimants' general characteristics the only relevant evidence which has been placed before me is that adduced by the claimants for the interest hearing, in the form of evidence obtained from the Bank of England website providing details of borrowing rates over the period from June 2013 to November 2018, which reveals that:

    (a) The average interest rate for new advances to households over this period (apparently based on fixed and floating rates) varied from 8.38% in June 2013 to 6.98% in November 2018.

    (b) The average interest rate for new advances to households on a floating rate over this period varied from 3.76% in June 2013 to 3.57% in November 2018.

    (c) The average interest rate for personal loans of £10,000 to households over this period varied from 6.62% in June 2013 to 3.81% in November 2018.

34. It is unclear to me at least whether or not these figures included secured lending and, if so, whether they included fixed term secured lending by way of mortgage over residential property.

35. The claimants submit that these are the relevant rates to consider given the circumstances of the claimants as private individuals acquiring modest investments, many with the aid of mortgages, which are currently un-mortgageable. They contend for a rate of 5.5% over base (which has varied from 0.25% to 0.75% over the period in question). This submission appears to borrow very heavily from the approach of the Court of Appeal in *West v Ian Finlay*, where the court concluded that the

trial judge was wrong to allow interest based on the claimants' actual borrowing but awarded interest at 4.5% over base by reference to a finding that the claimants might either have borrowed monies to fund the remedial works on mortgage or on an unsecured basis and on the basis of admissible evidence that standard variable mortgage rates over the relevant period were between 5.59% and 7.15% and interest rates for small personal loans were between 8% and 11%.

36. Helpful guidance appears in the notes in the current *2018 White Book* at 16A1.7, where the cases are reviewed. It is noted that historically the Commercial Court has generally awarded interest at base plus 1%, on the basis that this is somewhere between a typical borrowing rate and a typical rate of return on lending, but there is no presumption to this effect and awards of 2% above base are common. Reference is made to the cases to which I have referred above as regards the extent to which it is appropriate to take into account the personal circumstances of the claimant. I have found particularly helpful the illuminating observations of Warren J in *Reinhard v Ondra* [2015] EWHC 2943 (Ch) where, considering earlier authority, he came to the view that whilst some cases would fall into either the pure commercial camp (where the claimant is a commercial concern where the norm is to borrow money to fund the business) or the pure "accretion" camp (where the claimant would have invested the money), there would be other intermediate cases where the claimant might have either borrowed (and, if so, on varying bases and thus at varying rates) or invested (and, if so, again on varying bases and thus at varying rates). In that case he decided to award 3% over base.

37. In my judgment this is also an intermediate case. It cannot be said of these claimants as a class that all would have borrowed unsecured or borrowed secured or even borrowed at all, and those who did not may well have acted quite differently in terms of any investment or application of the monies and thus the reward obtained. In those circumstances it is not appropriate in my judgment to select a rate based on unsecured borrowing or even based solely upon borrowing in general but nor is it appropriate to select a rate based on the short term investment account or even based solely on lending in general. Having regard to all relevant factors including the base rate over the relevant period I am satisfied that a rate of 3.5% is appropriate over the whole of the period in question, to which topic I next turn.

38. I have already summarised the claimants' case above. ZIP's case is that it would be unjust to award interest from June 2013 in circumstances where at that time there was no agreement as to the nature and scope of the necessary remedial works and, hence, on the cost of those works, so that it cannot be said that ZIP ought to have appreciated that the MLP would bite and the claimants would be entitled to payment of the ML capped amount. Mr Baatz submitted that this case is similar to that of *Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805 (TCC) where, in the context of a final account claim to be valued on a quantum meruit basis, Jackson J held that interest should only run from when the contractor has furnished the final account to the employer who has had a reasonable opportunity to assess that account. Mr Baatz submitted that this never happened here until the claimants provided their pre-action letter of claim in September 2016 attaching the remedial works schedules and until after the QS experts had met during the course of the litigation and begun the process of agreeing figures as figures.

39. I am unable to accept Mr Baatz's submissions. Whilst I shall address the specific date from which interest should run below, I accept the general thrust of Mr Selby's submission that by the time Mr Robinson sent his post-meeting letter to Zagora on 4 July 2013 outlining ZIP's proposed way forward it had been dealing with claims being made under the building warranties for almost 3 months. It had asked for and been provided with details of the claim in terms of the nature and

extent of the non-compliances with its technical requirements and the Bldg Regs and had – and had taken – the opportunity to inspect the development and to obtain input from appropriately qualified professionals. ZIP had decided, for perfectly understandable reasons as I said in my judgment, to adopt the pragmatic approach of seeking to reach a resolution with Zagora as freeholder on the basis of treating it as an insured which could make a building warranty claim in its own right rather than standing on their strict legal rights to require each individual leaseholder to make a separate claim and to address those claims strictly in accordance with the policy terms and, hence, to apply the MLP if they considered that this would apply given the reasonable cost of the necessary remedial works. The policy terms required the claimants to give written notice of the claim and – to paraphrase - if requested by ZIP to provide full claim details and provide such supporting information as it might reasonably require. ZIP did not seek to invoke this policy condition at any time from April 2013 to the July 2013 letter.

40. This case is not similar to the *Claymore* case where the employer's only obligation was to respond to the final account claim once submitted with appropriate supporting information. Consistent with the policy terms and the analysis of the authorities in relation to insurance claims as summarised by Langley J in *Kuwait Airways Corporation v Kuwait Insurance Company* ZIP was obliged to investigate the claim, both as to liability and to quantum, and to make payment once a reasonable time had elapsed for it to complete its investigations albeit that as a matter of contract law the cause of action accrued at an earlier date. Whilst it was quite free to decide to adopt an alternative approach to seek to reach a commercial resolution it cannot now suggest that this excuses a delay in investigation, notification and payment where no commercial resolution was in fact reached. Nor can it seek to rely on the delay caused by the subsequent litigation involving Zagora and CJS. There has never been any suggestion nor basis for a suggestion that the injunction would have prevented ZIP from arranging to undertake suitable inspections to comply with its obligations under the insurance policies. Nor is it relevant in my judgment that there was then a delay on the claimants' side in pursuing the matter whilst the litigation with CJS was underway.

41. Even if there was any force in ZIP's argument, by December 2014 after the CJS litigation had concluded Zagora had contacted ZIP seeking to revive the insurance claim, by January 2015 the claimants' solicitors were in contact with ZIP's solicitors in relation to the insurance claim and by March 2015 the claim had been issued and notified to ZIP and ZIP's solicitors had written attaching a schedule indicating which items ZIP was prepared to consider under the policy and confirming that ZIP would proceed to deal with the claim under the policy terms. There is no basis for suggesting that ZIP was entitled to wait until it received a formal pre-action protocol letter of claim in September 2016, after without prejudice discussions had not produced a resolution, or even until the QS experts had reached agreement on figures as figures. This analysis wrongly assumes that ZIP's only obligation was to act as a passive recipient of information sufficient to enable it to satisfy itself that there were valid claims and that they exceeded the MLP. I am satisfied that it had a positive obligation to investigate and reach a conclusion within a reasonable time and to tender payment of the ML capped amount once it had done so.

Conclusion

42. In my judgment a reasonable time would have been by early August 2013 at the latest, thus allowing almost 4 months from initial notification to when ZIP ought, acting reasonably and with reasonable diligence, to have reached a point when it was able to pay the claimants the ML capped amount. I see no reason why the claimants should not have interest at 3.5% for a period of 5 ½ years from 7

August 2013 to 7 February 2019. On my calculations that amounts to 19.25% which when applied to the total judgment sum of £3,634,074.65, results in an award of interest of £699,559.30.