TRUSTS, FIDUCIARIES AND AWARDS OF INTEREST IN EQUITY

1. Interest is a vitally important topic in commercial litigation. Without it, claimants may be undercompensated and wrongdoers may profit from the use of money or property. The interest component of a judgment may represent a substantial proportion of an overall money award. In *Duke Group v Pilmer*, for example, interest accounted for $41m out of an overall award of $117m against the accountants; the interest awarded against the directors was even higher.[1] The possibility of high interest awards may be heightened by compound interest, a jurisdiction which has long been recognised in equity.

2. Despite its importance, little attention tends to be devoted to the principles upon which interest is awarded and the basis on which it is calculated. Reasons given for judicial decisions on interest, insofar as reasons are given at all, tend to be brief. Sometimes (in academic writings as well as decisions) emphasis is placed on criteria which do not direct attention to the underlying question which the court is required to ask. The risk is that practitioners are left without adequate guidance when advising clients. Nowhere is there more need for elucidation of the principles upon which interest is awarded than the jurisdiction to award interest in equity. In recent times, some attention has been devoted to interest under statute (where compound interest is not available), and as well interest at common law following *Hungerfords v Walker* (1989).[2] But the same trend has not been evident in relation to the topic of interest in equity.

3. Part of the difficulty is that the jurisdiction to award interest in equity is capable of arising in a wide variety of contexts. This includes fraud,[3] rescission,[4] specific performance,[5] equitable tracing claims,[6] contribution and recoupment,[7] relief against forfeiture,[8] the taking of accounts as between co-tenants or on the winding up of a partnership or in the administration of trusts and deceased estates,[9] interest on legacies,[10] account of profits,[11] equitable compensation,[12] when the Court imposes terms,[13] and in many other areas.[14] The jurisdiction of courts of equity to award interest in some areas has been confirmed by

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1 *Duke Group Ltd (in liq) v Pilmer* (1999) 31 ACSR 213 (not challenged in HC: (2001) 207 CLR 165).
2 *Hungerfords v Walker* (1989) 171 CLR 125 (where, incidentally, compound interest was recovered).
3 Cf *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [74].
4 See *Alati v Kruger* (1955) 94 CLR 216, 230; *Maguire v Makaronis* (1997) 188 CLR 449, 475-7; Kerr on Fraud and Mistake 6th ed 1929 ed SE Williams, p467 et seq; JLR Davis, "Interest as Compensation", p137 in PD Finn (ed), "Essays on Damages", LBC 1992; O'Sullivan, Elliott & Zakrzewski, The Law of Rescission OUP p401-3.
5 *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [75]; *Davies v Littlejohn* (1923) 34 CLR 174, 185-6; *International Railway Co v Niagara Parks Commission* [1941] AC 328; Davis, "Interest as Compensation", supra, pp138-9; Cassidy (1997) 71 ALJ 514, 525.
6 *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 727-9.
7 *Morgan Equipment Co v Rodgers [No2]* (1993) 32 NSWLR 467, 486-7; *AE Goodwin Ltd v AG Healing Ltd* (1979) 7 ACLR 481; Halsbury's Laws of Australia [370-1130].
8 *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [74].
9 *President of India v La Pintada Compania* [1985] AC 104, 116; *In re Tennant* (1942) 65 CLR 473. But compare *Re Diplock* [1948] Ch 465, where an award interest against the charities was not justified on the particular facts.
10 *Maguire v Makaronis* [1995] V Conv R ¶54-533 per Brooking J at p66,320-1.
11 *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [75].
12 See eg *Harrison v Schipp* [2001] NSWCA 13.
13 See eg *Nelson v Nelson* (1995) 184 CLR 538; *Maguire v Makaronis* (1997) 188 CLR 449.
14 See eg Halsbury's Laws of England 4th ed volume 32 "Money", paragraphs 109, & 112 nn 4 &5.

statute.[15] Also, statutory remedies sometimes carry interest by analogy with their equitable counterparts, such as in the case of an account of profits for intellectual property rights.[16]

4. Against this background, it is hardly surprising that Lord Goff should remark that the "law of interest has developed in a fragmentary and unsatisfactory manner, and in consequence insufficient attention has been given to the jurisdiction to award compound interest".[17]

5. Indeed, the diversity of the contexts in which interest can arise in equity makes it hard to identify common themes running through the cases across these different remedial contexts. But common themes there are. The particular remedial context in which the question arises is not irrelevant. Without understanding the remedial context it is difficult to understand the decision made with regard to interest. But, as always in equity, it is necessary to look through the form to discover the substance that lies underneath.

6. The ultimate question in awarding interest is: what does the justice of the case demand?[18] This means that equity will not award interest, just as it will not grant other relief, if it would be inequitable to do so. However, that does not mean that there is an "at large" discretion. As in other areas of equity, the jurisdiction is to be exercised for proper purposes and within settled principles.[19]

7. There are two purposes of interest awards in equity. The first is to prevent a party from gaining an unjust benefit or enrichment. The epitome of this is the principle that a main purpose of the award of interest is "to prevent the trustee from making a profit out of his breach of trust".[20] The second purpose of interest is to ensure that adequate compensation is given to a party for being kept out of his or her money and for having lost the opportunity of earning profits or interest on it. Lord Denning MR expressed this view when he said, "mere replacement of the money - years later - is by no means adequate compensation, especially in days of inflation".[21]

8. Those goals are not opened ended. They have limits. Preventing unjust enrichment does not mean punishing a party, even though they acted wrongly. Lord Wright put it: "Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched".[22]

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15 See eg ss 27(1)(c) & 45(1) *Partnership Act* 1891 (Qld); s 52(1)(e) *Succession Act* (Qld) 1981.

16 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 584 [229]-[232].

17 *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 682.

18 *Hungerfords v Walker* (1989) 171 CLR 125, 148.

19 *Maguire v Makaronis* (1997) 188 CLR 449; *Warman International Pty Ltd v Dwyer* (1995) 182 CLR 544, 559.

20 *Fuller v Meehan*, unreported QCA 26/2/99 (de Jersey CJ, Pincus & Thomas JJA), BC9900463, at [44]. See to like effect *Wallersteiner v Moir (No2)* [1975] QB 373, 388; and *Scott v Scott* (1963) 109 CLR 649, 660.

21 *Wallersteiner v Moir (No2)* [1975] QB 373, 388 (per Lord Denning MR), also at 397 (per Buckley LJ) and 406 (Scarman LJ); *Burdick v Garrick* (1870) 5 LR Ch App 233, 241-2, 243-4; *Re Dawson* [1966] 2 NSWR 211, 218; *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 [101]-[109]. *Wallersteiner v Moir* is cited with approval in *Hungerfords v Walker* (1989) 171 CLR 125, 148.

22 *Spence v Crawford* [1939] 3 All ER 271, 288-9. See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41,109 per Mason J citing *Vyse v Foster* (1872) LR 8 Ch App 309 at 333; *Wallersteiner v Moir (No2)* [1975] QB 373, 388.

9. But the nature of these twin goals means that, where a person recovers money in equity, an award of interest will very nearly always follow. This is an empirical observation. Except in unusual circumstances, presumptions are available (when needed) which prove either the making of a profit from the use of the money or a loss from being deprived of it.[23] And there will rarely be equitable defences that operate to defeat interest without defeating the principal claim entirely. It is true that there can be and often are countervailing circumstances, for example where the interest claimed would overcompensate a claimant or allow a defendant to benefit from wrongdoing;[24] lack of causal connection or remoteness;[25] but not delay *per se*.[26] But these usually go to the quantum of interest, not to whether there should be interest at all.

10. Sometimes, equitable presumptions are seemingly elevated into rules. Often, a reference to a presumption is intended as no more than shorthand for the conclusion that a party is entitled to interest on the instant facts, because the presumption was not rebutted. But it should not ever be forgotten that presumptions do not replace the ultimate question. Assuming the principal claim succeeds and there are no circumstances making an award of interest inequitable, the question(s) to be asked are simply whether a party made a profit from the use of the money (and if so what profit) or whether a party suffered a loss by being held out of the money (and if so what loss). There are presumptions about the making of a profit or loss, about interest rates and about the basis of interest. For example, the presence of fraud gives rise to various presumptions considered below. But presumptions are all they are. Evidence can be led to rebut or to confirm them. The availability of such presumptions may mean that, empirically speaking, mercantile interest and/or compound interest, is more likely to be awarded when fraud is present. But that does not mean that the ultimate enquiry is whether or not the defendant was fraudulent.

11. This is subject to a qualification. There are some cases where a presumption does properly rise to the level of a rule. For example, there may be policy reasons why a fiduciary should not be permitted to raise a certain contention of fact at all. But, such cases aside, the presumptions referred to earlier are rebuttable by evidence.

12. It is the writer's intention in this article to elucidate the above principles by showing them at work in the cases, in the context of trusts and fiduciaries. This is where the case law is particularly rich on the topic of interest, and also where there has been a spate of recent activity by the courts, especially in the last few decades. It is territory which is likely to be of particular practical relevance to litigators.

13. The present article will address equitable interest in turn in each of the main remedial contexts in which interest arises within the scope just mentioned. They are: account for the

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23 *AG (UK) v Alford* (1855) 4 DeGM&G 843, 851; *Burdick v Garrick* (1870) LR 5 Ch App 233, 243; *Wallersteiner v Moir (No2)* [1975] QB 373, 388; *Re Dawson* [1966] 2 NSWR 211, 218-9; *Campbell v Turner* [2008] QCA 126 [72].

24 See eg *Fuller v Meehan* [1999] QCA 37 [47]; *O'Sullivan v Management Agency Ltd* [1985] 1 QB 428; *Ninety-Five Pty Ltd (in liq) v Banque National de Paris* [1988] WAR 132; *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378; *Aequitas v AEFC* [2001] NSWSC 14.

25 *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 285, 290.

26 *Aequitas v AEFC* [2001] NSWSC 14; *Ninety-Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132, 181.

administration of a trust, account of profits, equitable compensation and proprietary remedies. Rescission is outside the scope of this article, but it is also fertile ground for interest in equity. It deserves separate treatment. It is not dealt with here to avoid making this article any longer than it already is.

LIABILITY TO ACCOUNT FOR THE ADMINISTRATION OF A TRUST

14. In claims against trustees and other fiduciaries, interest is available in equity as an incident of the personal remedy of account. This includes an account of the administration of a trust.

15. A leading example is *Attorney General v Alford*.[27] There, an executor and trustee, who had a duty by the will to apply the residuary estate to certain charitable purposes, retained the residuary estate in his hands for over ten years without informing anyone of the existence of the charitable trust. The defendant, a solicitor, made investments of some of the funds in 3 per cent consols, claiming to have done so to better secure the capital of the trust. The Lord Chancellor concluded that the defendant had not intended to appropriate the money to his own use, but had misconceived and neglected his duties nonetheless. His Lordship held that the defendant should pay simple interest at 4 per cent, but no more, on the whole of the net residuary estate and on the income that was received on such investments that he did make. In so holding, Lord Cranworth LC stated:

> *What the Court ought to do … is to charge [the trustee] only with the interest he has received … or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it*.[28]

16. The defendant was chargeable with interest at 4 per cent, because "it is presumed that he must have made interest, and four per cent is that rate of interest which this Court has usually treated it right to charge".[29] His Lordship likened it to a case of "executors and trustees having money in their hands which they ought to invest and do not invest".[30] In other words, the defendant had a duty to invest the funds in a manner that would have achieved returns not less than, but also not greater than, those applicable to ordinary prudent trustee investments. The Court dismissed an argument that the defendant should pay 5% calculated with annual rests, because the evidence showed that the defendant had not earned 5 per cent and had not acted fraudulently to benefit himself such as would support a presumption that he earned 5 per cent.[31]

Three typical situations

17. It is convenient to distinguish between three main situations in which interest is typically awarded, although the categories can and do overlap in practice.

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27 (1855) 4 De G M & G 846.

28 *AG (UK) v Alford* (1855) 4 De GM&G 843, 851. See to like effect: *Vyse v Foster* (1872) LR 8 Ch App 309, 333; *In re Barclay* [1899] 1 Ch 674, 683; *Wallersteiner v Moir (No2)* [1975] QB 373, 397; *Re Dawson* [1966] 2 NSWR 211, 218.

29 At 851.

30 At 850.

31 At 852.

18. The first situation is where a trustee (including a constructive trustee[32]) has wrongly withheld trust funds or converted them to his/her own use. On taking an ordinary (or "common") account for the administration of a trust, the availability of interest does not depend on whether the trustee has acted fraudulently or innocently. As Long Innes J observed in *Nixon v Furphy*:[33]

> *This practice of the Equity Court as regards purely equitable demands is not confined to cases where the accounting party has been guilty of any wrongdoing, but extends practically to all cases in which he, in the contemplation of a Court of Equity, must be regarded as a trustee or quasi-trustee who has retained moneys to which he is not entitled and has thereby been the cause of the true owner losing the opportunity of earning interest on the money to which he was entitled.*

19. The common account calls on the trustee to account for what s/he received and of what has become of it. In such a case, proof of fault or loss is not required (although it is often present). If trust property has been wrongly withheld, "wrongly" in the sense of contrary to the terms of the trust, there is power to order the trustee to pay the amount found to be due to the person entitled, together with interest.[34] Whether and when an account serves compensatory or restitutionary goals, or both, is much debated, and this topic will be returned to below.[35] Street J remarked in *Re Dawson*, "The Court's jurisdiction in selecting the appropriate rate of interest is exercisable solely for compensatory purposes."[36] By the use of "solely", His Honour was distinguishing and eschewing punitive goals.

20. A variation on the above theme is where the trustee has converted trust funds to his or her own use and earned interest on those funds, where presumptions may be brought into play.[37] *Wallersteiner v Moir [No 2]*, discussed further below, could be viewed as an example of this.[38]

21. The second situation is where a trustee has misapplied trust property. An example is paying trust money to someone not entitled to it. This could be done fraudulently,[39] as occurred on one possible analysis of the facts in *Wallersteiner v Moir [No 2]*.[40] Or a misapplication could

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32 See eg *Nixon v Furphy* (1926) 26 SR (NSW) 409, aff'd (1925) 37 CLR 161; *Southern Cross Commodities Pty Ltd (In Liquidation) v Ewing* (1988) 14 ACLR 39 (SAFC); and *Nattrass v Nattrass* [1999] WASC 77 [158]-[159].

33 (1926) 26 SR (NSW) 409, 413.

34 *AG (UK) v Alford* (1855) 4 De GM&G 843; *Herrod v Johnston* [2013] 2 Qd R 102.

35 Cf *Re Dawson* [1966] 2 NSWR 211; *Maguire v Makaronis* (1996) 188 CLR 449, 469; *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484 [37]. See also Rickett, "Equitable Compensation: Towards a Blueprint?" (2003) 25 Syd L Rev 31.

36 [1966] 2 NSWR 211, 218.

37 *Re Dawson* [1966] 2 NSWR 211, 218; *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45, 46; *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 [102]; *Herrod v Johnston* [2013] 2 Qd R 102; Ford & Lee [17.2250]; Jacobs' Law of Trusts in Australia 7th ed [2210]; Halsbury's Laws of Australia [370-6595].

38 *Wallersteiner v Moir (No 2)* [1975] QB 373 (and see also [1974] 3 All ER 217).

39 See eg *Mulleneux v Brennan* [2002] WASC 43. In cases of fraud, interest is available in equity (and at law) even in the absence of an express trust or fiduciary relationship: *Johnson v R* [1904] AC 817, 822.

40 *Wallersteiner v Moir (No 2)* [1975] QB 373 (and see also [1974] 3 All ER 217).

be the result of negligence, as occurred in *Alemite v Lubrequip Pty Ltd*, discussed below.[41] A trustee may make an improvident or speculative investment causing loss to trust corpus. That trustee can be required to restore the lost capital in an action for a common account, together with interest which the trustee ought to have received. Or trust funds might be placed in an investment with an inadequate return, as happened in *Attorney General v Alford* (which case might also be analysed as one of a trustee withholding trust funds). Street J said in the oft-cited case of *Re Dawson*: "The general principle is that where a trustee has, through his breach of trust, occasioned loss to the trust estate then he is liable to make good that loss, together with interest".[42]

22. In *Re Dawson* itself, the deceased left assets in New Zealand and Australia.[43] He appointed his son, Percy Dawson, as an executor. Percy wanted to transfer £4700 in funds realised from the sale of the New Zealand assets to New South Wales and to loan those funds to two companies in which he was interested. But it was illegal to transfer that amount of money across the Tasman. Percy therefore made a surreptitious deal with one Raymond Nelson to bring the funds into New South Wales by subterfuge. Mr Nelson absconded with the money and was never seen again. The New South Wales Supreme Court held that Percy's estate was liable to account for the moneys lost to the estate at the exchange rate applicable at the date of the order together with interest at the mercantile rate of 5%. More will be said about this case below.

23. A third situation is where, although the trustee never received trust property, he ought to have received it and will be obliged to account as if he did. This is referred to as an account on the footing of wilful default. In this sense, "wilful" is not limited to conscious wrongdoing, but can include negligence.[44] If the trustee has failed to get in property, either because of fraud or because of negligence, the trustee can be required to account for the value of that property lost to the trust together with interest. For the purposes of taking the account, the trustee is treated as if s/he had, and is presumed to have, received the property and interest.[45]

Rate of interest

24. Courts have recognised that a distinction should be drawn between cases where a lower rate is appropriate, sometimes referred to as the "trustee rate", and cases where a higher rate should be applied reflecting commercial rates of obtaining finance, sometimes referred to as the "mercantile rate".[46]

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41 (1997) 41 NSWLR 45.
42 *Re Dawson* [1966] 2 NSWR 211 at 218 per Street J.
43 [1966] 2 NSWR 211.
44 *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd* [2001] NSWSC 6 [38]-[40]; *Bartlett v Barclays Bank Trust Co Ltd [No2]* [1980] 2 All ER 92, 97.
45 Williams on Executors, 18th ed 2000 [55-12].
46 Halsbury's Laws of England 4th ed volume 32 "Money" paragraph 112 and nn 4 & 5.

25. It is sometimes suggested that the "trustee rate" applies where the trustee or fiduciary has not made a profit, there is no direct or positive breach of duty involved and the case is one of mere (sometimes called "innocent") negligence.[47]

26. For a long time, 4% simple interest was regarded as the proper "trustee rate" absent evidence justifying some other rate. In 1942, the High Court confirmed that 4% was appropriate as the mean trustee rate.[48] Dixon J referred to "the policy of the court in fixing for its own purposes a rate which over a long period represents a fair or mean rate of return for money".[49]

27. On the other hand, it has been suggested that a higher "mercantile rate" is applicable where (for example) there has been a direct breach of trust, or where the trustee or fiduciary has profited from his/her fraud or gross negligence, or when the trustee has in fact received commercial interest or ought to or is presumed to have received it.[50]

28. Historically, 5% simple interest was generally considered to be a proper mean mercantile rate, again in the absence of justification on the evidence for some other rate. As a mean mercantile rate, 5% simple interest seems to have commended itself to the Queensland Parliament in 1891.[51] In 1934 and 1955 respectively, the High Court applied 5% in circumstances where the mercantile rate was justified.[52]

29. In the writer's respectful opinion, such attempts to categorise when the "trustee rate" or "mercantile rate" should be applied have the potential to mislead. For one thing, those rates were always and remain subject to the evidence in the case.[53]

30. Thus, if a trustee has in fact received (or saved himself[54]) a higher rate of interest than the mean trustee rate or mean mercantile rate, the rate received will be appropriate if it is proven by evidence.[55]

31. For another matter, "definitions" of the above kind tend to give the concepts "trustee rate" and "mercantile rate" a life of their own. They tend to invite enquiry about the moral culpability of the trustee's infarction or whether it is direct or otherwise, when that is not

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47 *In re Tennant* (1942) 65 CLR 473, 507; *Re Dawson* [1966] 2 NSWR 211, 218; *Spangaro v Corporate Investment Australia Funds Management Ltd (No2)* [2003] FCA 1363 [5]; Jacobs, supra, at [2208]; Ford & Lee [17.2230]. The comments in *In re Tennant* were qualified by the use of the word "generally".

48 *In re Tennant* (1942) 65 CLR 473 (an appeal from South Australia).

49 *In re Tennant* (1942) 65 CLR 473, 507-8 (see also Rich J at 486); *Re Blume Dec'd* [1959] QdR 95, 117 (FC); Jacobs, supra, at [2208]; Ford & Lee, Principles of the Law of Trusts [17.2230].

50 *Re Dawson* [1966] 2 NSWR 211, 218; *Spangaro v Corporate Investment Australia Funds Management Ltd (No2)* [2003] FCA 1363 [5]; *Burdick v Garrick* (1870) LR 5 Ch App 233, 241.

51 See s 45(1) of the *Partnership Act* 1891 (5% on profits), but see s 27(1)(c) (6% on capital).

52 *Polkinghorne v Holland* (1934) 51 CLR 143, 170 (equitable compensation; appeal from South Australia); *Alati v Kruger* (1955) 94 CLR 216, 230 (rescission; appeal from Queensland).

53 *Herrod v Johnston* [2013] 2 Qd R 102, 124.

54 Ford & Lee, supra, [17.2230].

55 *Re Dawson* [1966] 2 NSWR 211, 218.

the central issue. The central question to ask is: what profit did the trustee make from the breach of trust and/or what loss did the beneficiary suffer by being kept out of the money?[56]

32. These are inherently factual questions. For example, If a trustee lost trust funds by negligently making a high-risk investment, so that there is no question of the trustee using the money for private purposes, the question which should be asked is as to the kind of investment the trustee or beneficiary (as the case may be) would have made with the money if it had not been lost, which will in turn depend on the activity the trustee or beneficiary was engaged in. Where (but for the breach of trust) the trustee would have placed the money in secure trustee investments, the rate will be one applicable to such investments; if the money would have been invested in a security carrying a higher rate of interest, the appropriate rate will be that of the particular security.[57]

33. If the claimant does not wish to prove up the returns which could have been obtained from those investments, it is open to the claimant to seek to rely on mean rates appropriate to the character of the kind of investment or activity. Similarly, it may appear from the circumstances of a given case that the defendant has very likely made a profit, but it may not be possible or practicable to prove the quantum. In such a case, the beneficiary can elect simply to claim interest at the mean rate which it is just to apply in the given circumstances.[58] But none of that means that the mean rates are applied as an end in themselves.

34. The decision to apply even mean rates (à fortiori particular rates proven by actual evidence) follows from a conclusion that a profit was made from the use of the money or a loss was suffered by reason of being held out of the money. This conclusion may not always be stated in terms. It may not take much evidence to warrant it and may even be supported by presumptions (see below). But that does not mean that the conclusion is not present.

35. That the above is true is shown by the fact that the mean rates have not remained rigid over time, but have been responsive to changes in financial market conditions. In times of more stable financial markets, the traditional mean rates of 4% and 5% were considered to be a fair approximation of the profit or loss in trustee and mercantile situations respectively. But during the recession of the late 1980s to early 1990s, interest rates rose substantially. It is not surprising therefore that the mean rates trended upwards.[59]

36. Influenced by Practice Notes, the "trustee rate" in New South Wales was increased to 8% simple interest for periods since 1975, and the "mercantile rate" 5% up to 1970, 7% to 1974 and thereafter as in the Practice Notes for pre-judgment interest.[60] In the Supreme Court of

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56 Cf Street J in *Re Dawson* [1966] 2 NSWR 211, 218 *ll* 40-50.

57 Ibid.

58 See eg *Docker v Somes* (1834) 2 My & K 655, 664-6, 39 ER 1095, 1098-9.

59 Cf *Hungerfords v Walker* (1989) 171 CLR 125, where the High Court in upheld a common law award of compound interest at 20% as damages for negligence and breach of contract.

60 *Hagan v Waterhouse* (1991) 34 NSWLR 308, 392-3, approved by NSWCA in *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45, 47. See also *Re Hatton Developments (Aust) Pty Ltd* (1978) 3 ACLR 484, 484. Those cases were cited in *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484 [35] n26.

New South Wales, like the Federal Court, Practice Notes now provide for a pre-judgment interest rate, broadly speaking, of 4% above the Reserve Bank cash rate.[61]

37. There is also evidence of judicial increases in the mean equitable rates in some other Australian States and in England.[62] In 1997, the High Court (on appeal from Victoria) moved away from 5% simple interest as the mean mercantile rate, in *Maguire v Makaronis*.[63]

38. In 1981, the Queensland Parliament increased the automatic rate of interest on legacies from 4% to 8%.[64] It is suggested that this was considered more as an analogy to the trustee rate than the mercantile rate.

39. In Queensland, there is evidence of a trend to resort to statutory interest provisions to identify mean mercantile rates absent evidence of the rate.[65] In the case of post-judgment interest, the rate was 8% by 1972.[66] But before long it increased to 10%.[67] Now it is, broadly speaking, 6% above the Reserve Bank cash rate.[68] As for pre-judgment interest, the Supreme Court of Queensland began promulgating Practice Directions from 1993 specifying the rate to be applied by the Registrar in entering default judgments, which rate settled out at 10%.[69] Now, broadly speaking, it is 4% above the Reserve Bank cash rate.[70]

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61 NSWSC: Practice Note CS Gen 16, 16 June 2010. FCA: Interest on Judgments (GPN-INT) 25 October 2016, replacing similar previous Practice Notes.

62 *Maguire v Makaronis* (1997) 188 CLR 449 (on appeal from *Maguire v Makaronis* [1995] V Conv R ¶54-533 per Brooking J at p66321); *Hagan v Waterhouse* (1991) 34 NSWLR 308, 392; *Wallersteiner v Moir (No2)* [1975] QB 373. In *Holmes v Walton* [1961] WAR 96, 97 the Supreme Court of WA allowed 6% in an equitable compensation case as " a very modest assessment of what it is possible to obtain on sound investments at the present time".

63 (1997) 188 CLR 449. That was an appeal from Victoria, but the case is evidence of a wider trend.

64 See s 52(1)(e) of the *Succession Act* 1981 increasing the provisional rate of interest on legacies to 8%, up from the 4% provided for by Order 67 r48 of the Rules of the Supreme Court of Queensland 1900. The Legislature did not keep apace in other areas though: see eg ss 27(1)(c) and 45(1) of the *Partnership Act* 1891.

65 *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222 [195]. In 1992, Derrington J considered that 15% was an appropriate commercial rate in equity in *Warman International Ltd v Dwyer*, (1992) 46 IR 250, 261 (QSC, Derrington J). On appeal, the High Court ordered that the account of profits be re-taken, but without casting any doubt on the reasoning adopted by Derrington J about interest: (1995) 182 CLR 544, 570. Interest awarded under statute by Queensland courts had risen as high as 15% in the 1980s: *Serisier Investments Pty Ltd v English* [1989] 1 QdR 678, 681. Cf also *Delbridge v Low* [1990] 2 Qd R 317, 335 (14%, common law claim).

66 See s 5 of the *Common Law Practice Act Amendment Act* 1972 (Qld).

67 *Supreme Court Regulation* 2008 (Qld), s 4 (now repealed); see s 59 of the Civil Proceedings Act 2011 (Qld) and Supreme Court Practice Direction No. 21 of 2012.

68 See eg Supreme Court Practice Direction No. 7 of 2013.

69 By Practice Direction No 2 of 2002, the rate was 9% from 1 April 2002. By Practice Direction No 6 of 2001, the rate was 9.5% from 1 September 2001. By Practice Direction No. 9 of 2000, the rate was 10.5 % from 1 November 2000. By Practice Direction No 19 of 1998, 9% from 1 July 1998 for purposes of O15 r15 and O31 r6A (default judgments). By Practice Direction No 8 of 1997, 10% from 1 May 1997. By Practice Direction No 15 of 1995, 11.5% from 1 July 1995. By Practice Direction No 9 of 1994, 10% from 1 June 1994. By Practice Direction No 3 of 1993, 11% "for all periods of time up to the date of this Practice Direction (viz 25 February 1993) and for all periods henceforth…". By Practice Direction No 6 of 2007 the rate was 10% from 1 July 2007. That rate was maintained in Supreme Court Practice Direction No. 22 of 2012.

70 Supreme Court Practice Direction No. 7 of 2013.

40. The view that Practice Direction rates can inform mean mercantile rates absent evidence has been taken in other States also.[71]

Alemite Lubrequip Pty Ltd v Adams

41. A case which illustrates the above principles is the 1997 decision of New South Wales Court of Appeal in *Alemite Lubrequip Pty Ltd v Adams*.[72] There, a number of investors had placed funds with accountants as a preliminary step in investing in a tax deductible agricultural investment scheme.[73] Mrs Roche was the promoter of the scheme. Having received the funds into their trust account, the accountants, honestly but negligently, disbursed the funds to various Roche interests before a condition required by the terms of the syndication agreements had been met. That was a requirement that one of the Roche companies serve a written notice requiring rent to be pre-paid prior to the end of the financial year, which went to the heart of why the scheme was said to be tax effective. Mrs Roche absconded with the money. The investors sued the accountants. Although equitable compensation may have been claimed, it was not necessary to differentiate from account. This was a case where there was no need to take an account because the sum stolen could be found as a fact by the Court, and together with interest made the subject of an immediate order for payment.[74] The Court of Appeal appeared to treat the case as one of a trustee recouping to the trust estate moneys misapplied.[75]

42. It was held at first instance and on appeal that the investors should recover the amounts they paid to the accountants which had been lost, together with simple interest at the then New South Wales "trustee rate" of 8%. Clearly, the accountants had not had the use of the money, and had not profited from it. But it was appropriate to award interest to compensate the investors for the loss of use of their money. It was also appropriate to award interest at the trustee rate. The duty of the accountants was to protect the trust funds until such time as Mrs Roche gave the proper acceleration notice, which never happened. A trustee acting properly would have invested the funds in a safe, trustee authorised investment until such time as either the conditions for disbursing the funds were satisfied or, if they were not satisfied, until such time as the moneys were required to be repaid to the investors. It was case not unlike *Attorney-General v Alford* where the Court could conclude that the accountants ought to have earned simple interest and the mean trustee rate was an appropriate rate to apply given the character of the investments that should have been made. It was not a case for awarding interest at a mercantile rate because the trustees had not used the monies for their own benefit, but lost them.

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71 See eg *Maguire v Makaronis* (1997) 188 CLR 449. That was a case where compound interest was awarded. See also *Fico v O'Leary* [2004] WASC 215.

72 (1996) 41 NSWLR 45.

73 The facts are set out in an earlier appeal: [1994] NSWCA 1.

74 See (1997) 41 NSWLR 45, 46A. For the trial judge's decision see [1996] NSWSC 45.

75 (1997) 41 NSWLR 45, 47E. See also [1994] NSWCA 1. Regard should be had to the precise nature of the trust. The monies were held by the accountants in trust to discharge the liabilities of the investors towards the Roche companies. The Court of Appeal recognized that the moneys were held in trust for the beneficiaries "unless and until something further happened": [1994] NSWCA 1, per Gleeson CJ.

43. *Alemite* illustrates that the appropriate rate depends on the use that was or would have been made of the money, which is a question of fact. It also shows that, absent evidence, the court can adopt a mean rate appropriate to the character of the activity.

Presumption that mercantile interest was (or would have been) earned

44. Presumptions can assist in proving not only that a profit or loss was made, but also the rate of interest that was or would have been earned. For example, if the trustee retained the money and there is no evidence of the precise use, it will be presumed that s/he earned mercantile interest if the trustee was in trade or acted fraudulently.[76] Presumptions of that kind do not apply if the trustee was not in trade or business and was not fraudulent. That does not mean that the trustee is exonerated from having to pay interest. Absent any evidence of use, an award of interest in such circumstances may need to rest on the fact that the trustee had a duty to earn interest. However, other presumptions can also come into play in appropriate cases. For example, if the beneficiary was relevantly in trade or the trustee acting properly would have invested the money in speculative investments (as the case may be), it is presumed that mercantile interest would have been earned on the money.[77] That presumption would apply even if the trustee could not have used the money personally, for example because the money was lost through negligence. Some examples of these points will be given below.

45. Presumptions of the above kind give way to evidence. However, there are some presumptions that do not. An example of the latter kind comes from *Re Dawson*, a 1966 decision from New South Wales where mercantile interest was awarded.[78] There, the executor (Mr Percy) had not profited from the use of the money; indeed he did not have the use of the money at all because Mr Nelson stole the money before it got to New South Wales. The report discloses no evidence that, but for Percy's breaches of trust, the money could have been invested properly by the executors for a commercial return or that it would have saved the estate interest on borrowings. The key lies in the following statement by Street J:[79]

> *It was a deliberate and wilful act the purpose of which was to deprive the estate of the moneys in question; and its intended manner of implementation involved illegalities according to the law of the country where this part of the estate was then situated. It does not appear to me to lie in the mouth of Percy Stewart Dawson to seek some more favourable terms of recoupment than would have been imposed upon him had his wrongful purpose in fact been achieved and the money safely reached the hands of the company*.

46. If the executor had used the trust moneys in his own business, it would have been a case for an award of mercantile interest because one could presume he earned mercantile interest on the money (or profits for which mercantile interest would be a fair approximation).

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76 *Burdick v Garrick* (1870) LR 5 Ch App 233, 241, 243; *Wallersteiner v Moir (No2)* [1975] QB 373, 388; Ford & Lee, supra, [17.2230].

77 *Alati v Kruger* (1955) 94 CLR 216, 230; *Aequitas v AEFC* [2001] NSWSC 14; *Harrison v Schipp* [2001] NSWCA 13.

78 [1966] 2 NSWR 211.

79 [1966] 2 NSWR 211, 218-9.

Although Percy had not in fact so used the money, he was not allowed to set up the theft which his own fraudulent breach of trust had precipitated. It was therefore a case where on special facts the executor was precluded from denying that he had earned mercantile interest, or it was open to *presume* that the executor earned such interest because otherwise the court would be approbating his own fraud and illegality. There were wider comments in Street J's judgment suggesting that mercantile interest is available because the case involves acts of misconduct, or direct breaches of trust, as opposed to mere negligence.[80] But those remarks need to be understood in the context of the case and should not be accepted as a rule of universal application.

Basis of calculation

47. The idea of compound interest is that each time interest is paid, it is added to (or compounded into) the principal and thereafter also earns interest. Of course, this can only apply where the investor reinvests the interest. If the interest is not reinvested, but is withdrawn and used (say) on living expenses, then obviously compound interest will not as a matter of fact be earned.[81]

48. Compound interest has long been available in equity. The jurisdiction arises in cases of "money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary".[82] In England, the equitable jurisdiction to award compound interest is limited to such cases.[83] It is not clear if the same limitation applies in Australia.[84]

49. Assuming jurisdiction, there is then the question when a proper case exists for exercising that jurisdiction. The two questions are separate, although they are sometimes conflated. The latter question, once again, in the writer's respectful opinion, comes down to the ultimate questions of fact of whether (and if so what) compound interest was earned or paid or would but for the conduct under examination have been earned.

50. Application of these principles is fairly routine if there is evidence on the point. Obviously, compound interest should be allowed when the trustee has actually earned compound interest.[85] Or, it should be allowed when the beneficiary (or the trustee acting properly) would have earned compound interest. An example of the latter case is an express trust for accumulation.[86]

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80 [1966] 2 NSWR 211, 218.

81 Cf JLR Davis, "Interest as Compensation", p137 in PD Finn (ed), "Essays on Damages", LBC 1992, 137, 139.

82 *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [74]; *President of India v La Pintada Companhia Navigacion* [1985] AC 104, 116. Fraud, of course, is not confined to cases of fraud by fiduciaries.

83 *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669.

84 Cf *Hungerfords v Walker* (1989) 171 CLR 125, 148. The statement in *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [74] did not necessarily suggest that the jurisdiction was so limited.

85 *Re Dawson* [1966] 2 NSWR 211, 218; *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45, 46; *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 [102]; Ford & Lee [17.2250]; Jacobs [2210].

86 *In re Barclay* [1899] 1 Ch 674, 684-5; Jacobs, supra [2209]. In *Barclay*, compound interest was directed despite the absence of a finding of wilful default.

51. In the absence of evidence, presumptions can lead to the conclusion that the trustee earned compound interest. One example, as noted earlier, is cases of fraud, and other "gross" misconduct.[87] In such cases, compound interest is not ordered to punish the wrongdoer, a point which is sometimes overlooked or not articulated.[88] It is justified because the fraud supports a presumption that the trustee made a profit and indeed made the most beneficial use of the money open to him/her, and there is no countervailing evidence.[89] This presumption was explained by Lord Cranworth LC in *Attorney General v Alford*, although it was held not to apply on the facts of that case:[90]

> *[The defendant's conduct] is not misconduct that has benefited him, unless indeed it can be taken as evidence that he kept the money fraudulently in his hands meaning to appropriate it to himself. In such a case I think the Court would be justified in dealing in point of interest very hardly with an executor, because it might fairly infer that he used the money in speculation, by which he either did make five per cent, or ought to be estopped from saying that he did not: the Court would not there inquire what had been the actual proceeds, but in application of the principle, "In odium spoliatoris omnia praesumuntur," would assume that he did make the higher rate, that is, if that were a reasonable conclusion*.

52. It can also be presumed that the trustee earned compound interest when trust funds have been used in the trustee's trade, even if the defendant did not act fraudulently.[91] Equity awards compound interest because "the court presumes that the party against whom relief is sought has made that amount of profit which persons do ordinarily make in trade, and in those cases the court directs rests to be made".[92] An example or extension of this principle is when trust funds have been used by the trustee in speculation for his/her own benefit, where the Court presumes that the trustee earned compound interest.[93] In such cases, the plaintiff might seek compound interest at mercantile rates. In cases where the money has been used in the defendant's trade, there is authority for an award of interest at a rate 1% above the minimum overdraft rate charged by the banks to their most favoured customers with such rests as are appropriate. But this is on the footing that the defendant was saved

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87 See eg *Hungerfords v Walker* (1989) 171 CLR 125, 148; *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [74]; *President of India v La Pintada Compania* [1985] AC 104, 116.

88 For example, in *Middleton v King* [2004] WASC 103 [79]-[81], the reasons given by the Court for refusing compound interest were that the trustee did not fraudulently derive a profit and was not in trade. The refusal of compound interest was correct. But it would have been more accurate to explain the reason as being that the executor paid some of the money to his wife and the rest to reduce a personal overdraft that had been taken out to purchase a salon for the benefit of the beneficiaries, who were the daughters of the trustee. This was enough. But because the executor was not in trade, and did not act fraudulently, there was also no occasion to presume that he derived compound interest from his breach of trust.

89 *Wallersteiner v Moir (No2)* [1975] QB 373, 388; *President of India v La Pintada Compania* [1985] AC 104, 116; *Hagan v Whitehouse* (1991) 34 NSWLR 308, 393; *Southern Cross Commodities Pty Ltd v Ewing* (1988) 14 ACLR 39, 52-3.

90 *AG (UK) v Alford* (1855) 4 De GM&G 843, 852.

91 See eg *Guardian Ocean Cargoes Ltd v Banco do Brasil SA [No3]* [1992] 2 Lloyd's L Rep 193. When there is no question of fraud or moral culpability, the Court might be able to be persuaded to order an inquiry as to interest (if there is some ambiguity as to the use to which the moneys were put) rather than draw presumptions adverse to the defendant: see eg *Mathew v TM Sutton Ltd* [1994] 1 WLR 1455.

92 *Burdick v Garrick* (1870) LR 5 Ch App 233, 242 (per Lord Hatherley LC).

93 See *AG (UK) v Alford* (1855) 4 De GM&G 843, 852; Jacobs, supra, [2209].

an expense that otherwise would have been incurred and/or that this approximates to the profit the defendant earned.[94]

53. In *Burdick v Garrick*, the Court of Appeal in Chancery affirmed the presumption that a trustee who has used trust money in trade earned compound interest, but refused to apply it on the facts of the case.[95] An American man appointed a London solicitor as his agent to sell his real estate in England, and invest the proceeds for him. The solicitor sold the real estate and paid them into the general account of his firm, mixing it with the firm's own moneys. The principal died intestate. The solicitor did not account for the proceeds, as he had apparently doubted that the deceased had left next-of-kin. But the solicitor still refused to account after the widow obtained letters of administration, on the ground that by that time the Statute of Limitations had run. The Court had no difficulty dismissing the limitations defence. On the question of interest, the Court held that the solicitor should pay simple interest at the mercantile rate of 5 per cent.

54. Mercantile interest was justified, because, as Giffard LJ put it, "If he has applied it to his own use, I think it is quite right to say that he ought never to be heard to say that he has made less than 5 per cent, and that is a fair presumption to make".[96] But it was not a case for compound interest. On this point, Lord Hatherley LC said:[97]

> *The principle laid down in Attorney General v Alford appears to be the sound principle, namely, that the Court does not proceed against an accounting party by way of punishing him for making use of the Plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either than he has made, or has put himself into such a position that he is to be presumed to have made, 5 per cent, or compound interest, as the case may be. If the Court finds it is stated in the bill, and proved, or possibly (and I guard myself upon this part of the case), if it is not stated, but admitted on the face of the answer, without any statement on the bill, that the money received has been invested in an ordinary trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made. But how does the case stand here? There is no charge made in the bill of any employment of this money which would produce compound interest; there is an admission in the answer that [the defendant ...] has paid into the common account of the [solicitor's] firm portion of this fund. But then it must not be forgotten that a solicitor's business is not such a business as I have described; it is not one in which they could make compound interest on the money embarked, or in which half-yearly rests, or yearly rests, as the case may be, would be made in making up the account. A solicitor's profit arises from the time and the labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor. On the contrary, he is out of pocket for a considerable period by those moneys which he expends, and upon which he receives no interest*

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94 *Wallersteiner v Moir (No2)* [1975] QB 373, 388; *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1987) 11 ACLR 818, 5 ACLC 1,110, (1988) 91 FLR 271, 307 (SAFC); *Tasmanian Seafoods Pty Ltd v MacQueen* [2005] TASSC 36.

95 (1870) LR 5 Ch App 233.

96 At p243. To like effect, Lord Hatherley LC said at p241 that mercantile interest was appropriate because "the money was retained in the [solicitor's] own hands, and was made use of" by him".

97 At p241-2.

> *for, possibly, three or four years. It appears to me, therefore, that no cases arises here in which you could say that a profit has been made, or necessarily is to be inferred ...*

55. This case also reminds us that presumptions remain subject to the evidence. Evidence might be led to show that compound interest was not in fact earned by the party against whom interest is sought, just as a claimant who is not in trade might be able to lead evidence showing that s/he was forced to borrow, at compound interest, because of being kept out of the money. Presumptions are however useful because such evidence is not always readily available.

Does compound interest only serve restitutionary goals?

56. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson (with whom Lord Slynn and Lord Lloyd agreed) said:[98]

> *In the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under common law or statute to award any interest. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee. We were not referred to any case where compound interest had been awarded in the absence of fiduciary accountability for a profit.... [I]n the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him*.

57. This statement was made in the context where the question was whether there was jurisdiction to order a defendant, who was held not to be a fiduciary and not fraudulent, to pay compound interest. It was not necessary to determine whether an award of compound interest could serve compensatory goals where the defendant was a fiduciary or was fraudulent. Indeed, as Lord Goff observed, "the scope of the equitable jurisdiction [to award compound interest] was not explored in depth in the course of argument before the Appellate Committee".[99]

58. It is difficult to believe that their Lordships intended to rule out entirely an award of compound interest against a fiduciary or fraudster on purely compensatory grounds, that is to say, on the basis of the interest that the plaintiff would have earned (or would not have paid) but for the wrong. After all, Lord Cranworth LC's formula in *AG (UK) v Alford*, cited above, refers to interest "which it is justly entitled to say he ought to have received".[100] *In re Barclay*, a trust for accumulation case (referred to above), is an example where the trustee was ordered to pay compound interest which he ought to have earned on behalf of the

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98 [1996] AC 669, 701-2. This passage was cited by the Queensland Court of Appeal in *Herrod v Johnston* [2013] 2 Qd R 102, 116. But that case had unusual facts, as discussed further below.

99 [1996] AC 669, 691.

100 (1855) 4 De GM&G 843, 851.

beneficiaries.[101] Lord Browne-Wilkinson even cited Lord Brandon in *President of India v La Pintada Companhia Navigacion SA* where it was said that:

> *Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or* ***misapplied*** *by a trustee or anyone else in a fiduciary position ...* (emphasis added).[102]

59. In the writer's respectful opinion, in Australian law, there is jurisdiction in equity to award compound interest, against at least a fraudster or a trustee or other fiduciary, where there is a basis for concluding that compound interest would have been earned (or would not have been paid) but for the wrong, even where the defendant has not profited from the wrong. This is further shown by the authorities to be discussed below.

Wallersteiner v Moir [No. 2]

60. A leading example of an award of compound interest against a trustee in trade is *Wallersteiner v Moir [No 2]*.[103] It is worth staying to consider this case because it is a leading authority, and it exemplifies well the principles discussed above when properly understood. Dr Wallersteiner acquired 80% of the shareholding in Hartley Baird Ltd (HBL), a public company that carried on engineering activities through a number of subsidiaries. He bought 10 million shares in all, worth about £500,000.[104] But he did not pay a cent in cash for those shares. About one-half of the consideration for the shares was a promise to discharge a debt owed to HBL by the vendor of the shares. The vendor was Camp Bird Ltd (CBL), a public company engaged in mining activities. Instead of paying out the debt, Dr Wallersteiner, having become chairman of the board, orchestrated a round robin of cheques that gave the appearance of paying the debt but, in reality, merely substituted Dr Wallersteiner as the debtor (through a concern controlled by him registered in the Bahamas) for CBL. Most of that debt was never repaid. The other half of the consideration was meant to be a cash payment to CBL, but that payment was not made, as a result of transactions that were equally colourable.[105]

61. But matters did not stop there. Dr Wallersteiner caused HBL to pay £50,000.00 of its own funds to release a charge which existed over the shares which had resulted from unrelated borrowings previously made by CBL. The true purpose of the payment was covered up by the pretense that it was for the purpose of paying a deposit on a share purchase in a mining company. As Lord Denning MR said "Those shares [in the mining company] were owned beneficially by Dr Wallersteiner. So the payment was made for his benefit. But that purchase never took place".[106] The books of HBL thereafter treated the payment as a loan. Despite

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101 [1899] 1 Ch 674.

102 [1985] AC 104, 106.

103 *Wallersteiner v Moir (No 2)* [1975] QB 373. For the earlier judgment of the Court of Appeal on the substantive issues see [1974] 3 All ER 217.

104 They would have been worth £625,000, but for the fact that the vendor had charged them to secure borrowings of £125,000 for an unrelated purpose: [1974] 3 All ER 217, 238j.

105 Suffice it to say that Lord Denning MR described the dealing as a "most amazing transaction": [1974] 3 All ER 217, 224a.

106 [1974] 3 All ER 217, 236f.

another series of round robins, that "loan" was never repaid. Presumably, that was always the intention.

62. In a derivative proceeding brought by Mr Moir, a minority shareholder in HBL, the Court of Appeal held in the first judgment that the transactions were illegal because HBL had given financial assistance to Dr Wallersteiner in connection with the acquisition of shares by him in HBL.[107] The dealings were also held to amount to breaches of trust, and/or knowing participation in such breaches, by Dr Wallersteiner. The report does not say what precise equitable remedy was sought, nor whether there was any claim for statutory damages under the *Companies Act* 1948 (UK) for breach of director's duties.[108] It seems likely an account at least was claimed, although ultimately there was no necessity to actually take the account only to order what was due together with interest.[109] In the end, not much turns on the particular remedy.

63. In the second judgment, the Court of Appeal held that Dr Wallersteiner should pay mercantile interest on the moneys due, calculated with yearly rests. As regards the proper mercantile rate, the Court rejected the traditional mean rate of 5% and concluded that interest should be awarded at 1 per cent per annum above the official bank rate or minimum lending rate in operation from time to time. All members of the Court held that this was profit Dr Wallersteiner should be presumed to have made from the use of HBL's money. Buckley LJ emphasised:[110]

> *The defaulting trustee is normally charged with simple interest only, but if it is established that he has used the money in trade he may be charged compound interest... The justification for charging compound interest normally lies in the fact that profits earned in trade would be likely to be used as working capital for earning further profits ... There has been no investigation of what profit, whether in the form of dividends or otherwise, Dr Wallersteiner has secured by the acquisition of the Hartley Baird shares. The transaction was, however, clearly one of a commercial character, and in the absence of evidence to the contrary the court should assume that it has been profitable to him. Accordingly it is ... equitable that the judgment awarded against him should include interest as a conventional measure of the profit he is to be taken to have made. Considering the nature of Dr Wallersteiner's operations as a financier and as a dealer in and manipulator of large shareholdings in commercial companies, it is in my opinion right to treat the investment in shares of Hartley Baird as made by him in the course of that business and as calculated to be*

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107 This was held to contravene s 54(1) of the *Companies Act* 1948 (UK),

108 The All England Report records at page 223a that the judge at first instance had found that Dr Wallersteiner was "guilty of fraud, misfeasance and breach of trust".

109 In the first judgment, Lord Denning MR spoke of Dr Wallersteiner as "liable to recoup to the company any loss occasioned by the default", which sounds rather like the language of account: at 239d. His Lordship cited *Selangor United Rubber Estates Ltd v Cradock [No3]* [1968] 2 All ER 1073, which was a case concerned with the liability of a trustee to account. In the first judgment, Buckley and Scarman LJJ agonised over whether the claims should be for "interlocutory judgment for damages to be assessed", or judgment for a specified amount plus interest: At 249j, 255b. However, in the second judgment, which was concerned with interest, the judgments of Buckley and Scarman LJJ suggest that the case was one of account: [1975] QB 373, 397-8, 406. In the second judgment, Lord Denning MR seemed to have in mind liability to account: [1975] QB 373, 388. The fact that he referred to compensatory principles as well as unjust enrichment, is not inconsistent with account.

110 [1975] QB 373, 397-9.

> *commercially valuable to him in the prosecution of that business. [Counsel for HBL] suggested that compound interest should be awarded on the ground that the moneys were working capital of the defendant companies. I feel unable to accept this argument. In cases of this kind interest is not ... given to compensate for loss of profit but in order to ensure as far as possible that the defendant retains no profit for which he ought to account. In any case, I do not think that it has been established that these moneys did constitute working capital for trading operations. As I understand the facts, Hartley Baird is, at least in the main, a holding company*.

64. Scarman LJ said:[111]

> *The question whether the interest to be awarded should be simple or compound depends upon evidence as to what the accounting party has, or is presumed to have done with the money... Dr Wallersteiner was at all material times engaged in the business of finance. Through a complex structure of companies he conducted financial operations with a view to profit. The quarter million pounds assistance which he obtained from [HBL] in order to finance the acquisition of the shares meant that he was in a position to employ the money or its capital equivalent in those operations. Though the truth is unlikely ever to be fully known, shrouded as it is by the elaborate corporate structure within which Dr Wallersteiner chose to operate, one may safely presume that the use of the money (or the capital it enabled him to acquire) was worth to him the equivalent of compound interest at commercial rates with yearly rests, if not more*.

65. In short, Dr Wallersteiner profited either because he saved himself compound interest representing the cost of borrowing to buy shares, or because he could be presumed to have earned compound interest at commercial rates by using the company's money.

66. Lord Denning MR agreed with much of that reasoning, but he took a different view on the relevance of (and the result of) enquiring into what HBL would have done with the money if it had not been deprived of it. He observed:[112]

> *[I]n equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or trustee or anyone else in a fiduciary position – who has misapplied the money and made use of it himself for his own benefit. The court:*
>
> > *'presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the court directs rests to be made,' ie compound interest: see Burdick v Garrick ....*
>
> *The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof.*
>
> *In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation.*

111 [1975] QB 373, 406.
112 [1975] QB 373, 388.

> *The company should be compensated by the award of interest.... But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf Armory v Delamirie (1723) 1 Str. 505. It may be that the company would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whatever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e. compound interest.*
>
> *Applying these principles to the present case, I think we should award interest at the rate of 1 per cent per annum above the official bank rate or minimum lending rate in operation from time to time and with yearly rests.*

67. His Lordship has been criticised in some academic writings for having taken a compensatory approach as an alternative justification for the decision. However, in the present writer's view, such criticism is misplaced. An account for the administration of a trust can serve compensatory goals as well as profit stripping goals, although for historical reasons equity has never referred to it as damages.[113] So too, an interest award can serve compensatory goals, not just profit stripping goals.

68. Further, it is worth saying something about the question on which Buckley LJ and Lord Denning MR disagreed, namely whether HBL was "in trade" for the purpose of working out the basis of interest. Buckley LJ considered that HBL was not in trade because it was merely a holding company. With respect, that is taking too narrow a view. HBL owned shares in its subsidiaries and stood to profit from their activities either by way of dividend and/or the capital growth of the shareholdings in those subsidiaries. That should be sufficient. Those profits would have been greater if HBL had made interest free loans to its subsidiaries. Alternatively, HBL was a public company in trade; it might be expected to have invested the funds at commercial interest. Either way, in the writer's respectful opinion, this is the very kind of case where the beneficiary should be entitled to the presumption that it would have made the best use open to it, because it was in trade and was kept out of the money due to fraud.

Campbell v Turner

69. Another example of the presumption that the defendant earned compound interest because he was in trade is *Campbell v Turner*, a 2008 decision of the Queensland Court of Appeal.[114] There, the plaintiff had paid $30,000.00 for the purchase of a lot for which a certificate of title had not yet been issued, on the basis that the monies would be repaid if a subdivision proposal did not proceed and separate certificates of title did not ultimately issue. The agreement pursuant to which the monies were paid was void as contrary to the *Land Sales Act* 1984, but the Court of Appeal held that the plaintiff had an equity of expectation to be repaid the $30,000.00 together with interest, whether because the defendant was liable to account as a constructive trustee or by way of an award of equitable compensation. Interest

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113 *Re Dawson* [1966] 2 NSWR 211, 214-6; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41,109 per Mason J citing *Vyse v Foster* (1872) LR 8 Ch App 309 at 333; Rickett, "Equitable Compensation: Towards a Blueprint?" (2003) 25 Syd L Rev 31.

114 [2008] QCA 126 [72].

was awarded at yearly rests at 9% per annum which was a rounded figure based on evidence which had been adduced of indicator lending rates since 1991. In delivering the leading judgment, Fraser JA (with whom the Chief Justice and Douglas J agreed) observed that:[115]

> *The object of such an order is not to punish, but rather turns upon a perception of the use that has been made of the claimant's money. Compound rather than simple interest may be awarded on the basis of a presumption that the plaintiff, had it not been deprived of the money, would have made the most beneficial use of it open to it.*

70. As this passage suggests, compound interest was justified on either or both of two bases. First, the defendant was in the business of property development and had used the $30,000.00 to improve the entire parcel of land. On the facts, the Court held there was a presumption that this improvement was reflected in the subsequent sale price of the land to a third party.[116] Second, the plaintiffs were also in trade. The deal with the defendant came about because the plaintiffs had been looking for land on which to re-locate a bus depot and workshop. They had made improvements themselves to the proposed lot in the two years prior to the sale to the third party, who ultimately required them to quit. The plaintiffs thereafter purchased an alternative site. The Court was therefore prepared to presume that the plaintiff would have made the most beneficial use of the money that was open to it.[117] The Court did not say that this latter strand of reasoning was irrelevant insofar as an account was sought. It may have been unnecessary to do so, given that equitable compensation was also sought. But Fraser JA's observations did not seem to be confined to equitable compensation.

71. As to the rate of interest and period of interest, Fraser JA said:[118]

> *At the hearing of the appeal, the plaintiffs tendered a schedule of the Reserve Bank of Australia records of indicator lending rates in the relevant period from September 1991. The defendants did not object to this fresh evidence. Overdraft rates varied over that period. I would accept the submission on behalf of the plaintiffs that overall the rates support a figure of 9 per cent per annum and that it is not overly generous to compound the interest on yearly rests. Under the judgment of the trial judge simple interest runs, as s 8(2) [of the Land Sales Act 1994] requires, from the date the $30,000 was paid, namely 21 March 1990. Compound interest should accrue from 16 September 1991, the date when the first defendants finally abandoned the subdivision.*

Wilkinson v Feldworth

72. A novel case where compound interest was awarded, at the "trustee rate", is *Wilkinson v Feldworth*.[119] There, a trust estate comprising retirement savings of 40 investors was entirely lost by the trustee failing to supervise its solicitors in what was held to amount to a gross

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115 At [72].
116 At [73].
117 Fraser JA cited with approval Lord Denning MR's judgment in *Wallersteiner v Moir (No 2)* [1975] QB 373, 388. Fraser JA may also have had in mind the likelihood that the plaintiffs would have needed to borrow because it was kept out of its $30,000.00.
118 At [74].
119 *Wilkinson v Feldworth* (1998) 29 ACSR 642, 706-8.

breach of trust. The 40 investors who were of or approaching retirement age were duped by a financial advisor into believing they were investing in a safe investment, when in fact it was an investment in a company (EC Consolidated Capital Ltd, or "ECCC") which carried on derivatives trading. A critical feature of the scheme was that investors' capital was guaranteed by a deposit certificate to be issued by a prime bank. The structure of the investment scheme was that the investors became members of a superannuation fund, and the trustee would use the funds invested to purchase preference shares in ECCC as trustee for the members. The trustee's solicitor was to hold the funds in its trust account and was to release the funds at settlement in return for the appropriate deposit certificates. At settlement, the appropriate deposit certificates were not provided, only documents which on their face allowed ECCC to withdraw the entirety of the funds from the issuing bank, which ECCC went on to do. ECCC proceeded to lose the funds and ended up in liquidation. In a proceeding commenced by originating summons, the Supreme Court of New South Wales held that the trustee was guilty of a gross breach of trust in that it did not supervise its solicitors at all. The trustee was ordered to restore the money lost to the superannuation fund, together with interest at the trustee rate calculated with yearly rests.

73. In awarding interest at the trustee rate (then 8% in New South Wales), Rolfe J followed *Alemite Lubrequip Pty Ltd v Adams* to hold that just because there was gross negligence does not mean the mercantile rate should be applied when the trustee had not profited from the breach of trust.[120] But His Honour relied on the fact of the trustee's gross breach of trust as the reason why compound interest should be awarded.[121] By so doing, His Honour might have intended to address the jurisdictional issue as to whether he had the power to grant compound interest. But because it was the only reason his Honour gave for awarding compound interest, it seems at least equally plausible that his Honour regarded the trustee's gross breach of trust as a sufficient reason why the jurisdiction ought to be exercised in this case. With respect, the fact that the trustee was guilty of a gross breach of trust was not a reason why compound interest at the trustee rate was appropriate. If it was appropriate, it could only have been because it was necessary to compensate the beneficiaries for the loss of the use of their money.

74. The decision to award interest at all, and at the "trustee rate", was plainly correct. Although it is not exactly clear what the precise remedy was,[122] it seems likely that, like *Alemite*, it was a case of a personal liability to account where it was not necessary to actually take the account only to determine at the hearing what was the amount (including interest) for which final orders for repayment could be made. The brevity of the reasons given to justify the award of any interest at all tends to suggest that his Honour approached it as a case where the trustee had a personal liability to account. It is not inconsistent with this, that His Honour cited Street J in *Re Dawson* ("The general principle is that where a trustee has, through his breach of trust, occasioned loss to the trust estate then he is liable to make good that loss, together with interest").[123] Translated to the language of account, this would be an

120 *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45.
121 (1998) 29 ACSR 642, 708.
122 The claim is described in the report, somewhat obliquely, as for "equitable compensation": see p 752 line 15, and 766 line 50. See also the reference to "damages" at p 705 line 50.
123 At 706.

example of Lord Cranworth's LC's principle concerning interest that the trustee ought to have earned.[124] But this is only another way of saying that it could be presumed that the beneficiaries suffered a loss, namely that interest would have been earned but for the breach of trust. The "trustee rate", which was 8% in New South Wales, was appropriate as it was not a case for an award of mercantile interest. The "mercantile rate", at the higher rates provided for by Schedule J to the *Supreme Court Act* 1970, was too high, because the trustee did not in fact use the money commercially or for its own benefit. Nor could it be said that the trustee would have earned a mercantile rate or the investors would have earned a mercantile rate if the trustee had not committed a breach of trust. Until such time as the proper deposit certificates were presented, the moneys ought to have stayed in the solicitor's trust account or should otherwise have been invested by the trustee in safe, authorised trustee investments. It was a case of restoring or replenishing a fund thereafter to be held on trusts yet to be fully performed.

75. As regards compound interest, this could not be justified on the basis of what the trustee earned or could be presumed to have earned. Quite plainly, the money was lost, and the trustee never had the use of it.[125] There could be no presumption that the trustee profited, based for example on the degree of culpability of the trustee's breach. Anyway, His Honour regarded it as a case more of a professional trustee company wholly abdicating all responsibility to its solicitors (whose negligence precipitated the loss) than one where the trustee had actual consciousness of or was recklessly indifferent to the solicitors' negligence. This was not conduct of a kind sufficient to raise a presumption that the trustee had profited from the use of the money – or even if it was, such presumption was rebutted on the facts.

76. The decision to award compound interest could only have been justified on the basis that compound interest would have been earned but for the trustee's breach of trust. The report does not disclose the terms of the superannuation trust deeds or the minutes of the trustee, but given the nature of the investment in ECCC the trustee must have been given fairly broad powers of investment and it presumably resolved to adopt an investment strategy of a kind that consistent with the aim of earning compound interest. Anyway, such considerations may not have been decisive. The matter may have been approached by asking what would have happened assuming the solicitor's negligence occurred, but the trustee picked it up. If the trustee had picked up the solicitor's oversight and required a proper deposit certificate issued by a prime bank, then it would be natural to assume that the money would have been held in the solicitor's trust account or otherwise in authorised trustee investments until such time as that occurred (if ever). Given the kind of investment that was ultimately envisaged by the investors, it might be reasonable to assume that the investments would have been placed at compound interest, even if only it was a case of safe term deposits rolled over periodically. The qualification is that there is reason to doubt whether the investors would in fact have left the funds in trustee investments, without at least drawing down at least some income.[126] But, in the event, no draw-downs in fact

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124 *AG (UK) v Alford* (1855) 4 De GM&G 843, 851.

125 At 708.

126 The evidence was that the plaintiffs were or were approaching retirement age who had thought that they had made safe investments to fund their retirement. It is unclear from the appeal report what if any evidence had been adduced as to how many of the plaintiffs were in fact retired and in pension phase,

happened. Perhaps, the Court was prepared to presume that the investors would have been willing and able to leave the funds temporarily in authorised trustee investments pending completion of the requirements for settlement, and that the time from when the trustee should have picked up the solicitor's negligence until judgment fairly equated with that period. Perhaps it was a case where it was possible to apply the presumption that the investors would have made the highest and best use of the monies available to them.

77. We do not know if these are the kinds of matters that influenced His Honour. Ideally, the considerations influencing an award of compound interest should be spelt out. Even though the result in the case was justifiable, it serves to remind us that mercantile interest and compound interest are not awarded merely because the defendant has been fraudulent or even guilty of gross negligence (although that may be a jurisdictional fact). They are only awarded when they represent the profit made on the money or the loss suffered by a person being kept out of its money.

78. On one reading of the judgment at first instance in *Alemite Lubrequip Pty Ltd v Adams*, discussed above, the learned trial judge seemed to treat the jurisdiction to award interest as being unfettered in the sense of taking all relevant factors into account (including the presence or absence of fraud or gross negligence) and giving all considerations such weight as the court thinks fit on the particular facts.[127] One of the things the learned trial judge said which give rise to that impression was:[128]

> *Where the situation is more analogous to trustee responsibility than a commercial one and the trustees have acted honestly and in good faith but have made a mistake or an error of judgment or been negligent (but not grossly so) and have not:*
>
> *(a) profited from the breach of trust; or*
>
> *(b) used the money for their own purposes; or*
>
> *(c) been guilty of fraud, serious misconduct or gross negligence; or*
>
> *(d) received compound interest on the moneys in question;*
>
> *simple interest at the trustee rate is usually selected*.

79. The Court of Appeal in *Alemite* did not agree with the statement. It held that trustees who have been guilty of gross negligence are not for that reason liable to pay interest at the mercantile rate.[129] In the writer's respectful opinion, the Court of Appeal was right to so hold. Interest is awarded in equity to strip the trustee of profit made by using the money, and/or to compensate the beneficiary for loss by being kept out of the money. The proper rate and basis depend on what was the profit or what was the loss. Those things do not turn on whether the trustee was fraudulent or grossly negligent (as opposed to "mere negligence" or even reasonably mistaken). Fraud (and no doubt gross negligence where

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and (of those retirees) what proportion of the income or profits was being drawn down to live on rather than being re-invested. Perhaps it was considered that, the absence of evidence of that kind meant that the presumption was not rebutted.

127 *Alemite Lubrequip Pty Ltd v Adams* [1996] NSWSC 45.

128 *Alemite Lubrequip Pty Ltd v Adams* [1996] NSWSC 45.

129 (1997) 41 NSWLR 45, 57F.

recklessness is present) can be jurisdictional facts, and they can support rebuttable presumptions which assist the beneficiary in proving facts necessary to support a claim for interest. But they do not replace the ultimate enquiry.

Ninety-Five Pty Ltd (in liq) v Banque Nationale de Paris

80. The confusion which can arise if the ultimate questions are not kept firmly in mind is demonstrated by a 1987 Western Australian decision, *Ninety-Five Pty Ltd (in liq) v Banque Nationale de Paris*.[130] The case also shows that some particular facts might in the interests of justice require withholding or limiting interest even if the trustee made a profit from the use of the money or the beneficiary has suffered a loss by being deprived of the use of the money. In *Ninety-Five Pty Ltd (in liq) v Banque Nationale de Paris*, a ceiling was placed on interest because otherwise the primary wrongdoer would have benefitted from an illegal and deliberate breach of trust. This was also a case where a company gave financial assistance to fund the purchase of shares in itself. But this time the claim was against a bank on the basis that it was an accessory to the breach of trust.

81. There, Freecorns Pty Ltd owned a chain of supermarkets in WA. On 5 May 1976, Bicton Investments Pty Ltd (Bicton) purchased the entire shareholding in Freecorns. At settlement, at 10.00am on that day, Bicton paid the purchase price by a bank cheque drawn on the Banque Nationale de Paris (BNP). Bicton, which had lately opened a bank account with the Perth branch of the BNP, had agreed to put its account with BNP in credit later on 5 May 1976, by depositing a number of cheques which were (as BNP knew) to be obtained at or shortly after settlement. Two of the cheques to be provided to BNP (worth $1.3m) were, as BNP knew, to be received at settlement from the Metro group, the vendor of the shares in Freecorns. They were cheques drawn by Metro to Freecorns. On 5 May 1976, after settlement, those cheques were endorsed in favour of Bicton. That endorsement was done on behalf of Freecorns by the persons who stood behind Bicton, who secured appointment as directors at a directors meeting of Freecorns held at 12.45 on the day of settlement. The rest of the cheques to be provided to BNP (worth $600,000) were, as BNP knew, to be drawn by Freecorns and could only be signed after settlement when those standing behind Bicton would be able to secure appointment as directors of Freecorns. Freecorns went into receivership in September 1976 and a liquidator was subsequently appointed. Bicton was also placed into liquidation, although by the time of judgment its liquidator had resigned.

82. In proceedings started by the liquidator of Freecorns in 1980, the Supreme Court of Western Australia held BNP liable under both limbs of *Barnes v Addy*, as having received the $1.9m in the knowledge that it was transferred to BNP in breach of trust, and as having participated with knowledge in that breach of trust. BNP was held to have a state of mind falling within the fourth level of the *Baden* five-point scale of knowledge.[131] Smith J made an award of equitable interest, but an award of interest for the entire period would have meant that Freecorns would have had a surplus over and above that which was necessary to pay all the creditors of Freecorns and pay the costs of the liquidation. That would have benefitted

130 [1988] WAR 132.

131 Namely, actual knowledge of facts that would have revealed the truth to an honest and reasonable person in the bank's position.

Bicton (the liquidator of which had since resigned) and those who stood behind it, notwithstanding Bicton's participation in the illegal share acquisition and in the deliberate breach of trust. In those circumstances, BNP maintained successfully that interest should be capped by the amount necessary to enable the liquidator to discharge in full Freecorns' liabilities and the costs, charges and expenses of the liquidation.

83. Unnecessarily, however, there was confusion in the case as to the basis upon which interest should be awarded at all. In the primary reasons for judgment, Smith J seemed to regard it as necessary to find a connection between the interest to be awarded and the use BNP had made of the money it had received. In rejecting a submission based on delay, Smith J described interest in equity as "founded squarely upon the rule of stripping a fiduciary of profits made rather than compensating the beneficiary for the loss suffered".[132] No quarrel is made about the decision from delay; it was clearly not "so unreasonable so as to render it inequitable and improper for the plaintiff to recover an award of interest".[133] But the view about the purpose of an award of interest in equity may have been influenced by a concession from Counsel for BNP that, so far as compound interest was concerned, "the money which the plaintiff seeks to have restored to it in this action had been used by BNP in the course of trading as a commercial bank and that BNP would have lent out the money to customers for overdrafts in excess of $100,000 interest based on such interest being capitalised at six monthly rests until 31 March 1984 and capitalised at quarterly rests in arrears from 1 July 1984".[134]

84. The present writer respectfully disagrees with the assumption that interest was to be awarded because of profits BNP made from the use of trust money in its business of commercial lending. Although BNP did receive the sum of $1.9m, it received the money in exchange for a bank cheque it had given at about the same time. It may be true to say, in point of theory, that the $1.9m received was impressed with a constructive trust because of BNP's state of knowledge at the time of receipt. BNP was properly required to account for that $1.9m because it had received it and it belonged beneficially to Freecorns – BNP misapplied that money by paying it to the vendor of the shares and the Freecorns were not able to recoup that money from the buyer (Bicton) which was insolvent. But it would be to stretch credulity to conclude that BNP made a profit from the use of that $1.9m so received. By having to account to Freecorns for the $1.9m trust money, BNP ended up paying $1.9m twice, once to the vendor of the shares in Freecorns and once to Freecorns itself. Any profits made by BNP on the $1.9m received by it were offset by BNP's capital loss in using the bank cheque and paying an equivalent sum to the vendors of the shares. With respect, it could not fairly be said that BNP had in substance used trust moneys in trade and could be presumed to have earned compound or any interest on it. That is not to say that an award of interest was not justified. But the justification was not because of a need to strip BNP of a supposed profit from the use of the money. Rather it was because of the need to compensate Freecorns for the loss of the use of the money, up to the ceiling imposed, quite properly, by the Court.

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132 [1988] WAR 132, 181 lines 20-23.
133 [1988] WAR 132, 181.
134 [1988] WAR 132, 181.

85. In later, separately published reasons on the question of interest, Smith J seemed to recognise the difficulty of justifying an award of interest on profit stripping ground, resorting unambiguously to compensatory principles as a reason to award interest:[135]

> *Wallersteiner v Moir [No2] [1975] QB 373 demonstrates that interest is awarded by a court in its equitable jurisdiction first to compensate the party wrongfully deprived and second to deprive a person in a fiduciary situation of any profit made out of his misapplication of trust funds. In this case an award of interest sufficient to meet the shortfall between the plaintiff's moneys which I have found BNP holds as constructive trustee for the plaintiff and the sum required to discharge in full all the plaintiff's liabilities and all the costs, charges and expenses of its liquidation would adequately compensate the plaintiff. Such a limitation may have the result that BNP will not be stripped of the whole of the profit arising out of the use of the plaintiff's moneys in its business as a banker. As to this aspect two things, I think, should be said. First, that the situation of BNP cannot be seen as a parallel to the situation of a trustee who, having trust money, uses the money for his own commercial benefit and secondly the evidence is silent as to the allowance which should properly be made for time and effort on the part of BNP in the earning of interest on the money and the impact of income tax on the money so earned.*

86. Smith J was correct, with respect, to take a compensatory approach to interest, even though the remedy was account. There was little difficulty in presuming that Freecorns suffered loss of which interest capped as aforesaid was a fair measure. Freecorns was placed into receivership by another bank, with whom Freecorns had an overdraft facility. It is not a huge leap to presume that Freecorns would have used the $1.9m to reduce that overdraft. Alternatively, Freecorns would have used the money in its business to earn further income from it. However, in the writer's respectful opinion, there was no need to agonise about whether BNP would be left with any profits of its wrongdoing, because BNP did not in substance gain the benefit of the use of Freecorns' $1.9m. Freecorns gave up at least $1.9m and more at about the same time it received Freecorns' money.

ACCOUNT OF PROFITS

87. Interest can also be awarded as an incident of the personal liability of a fiduciary to account for profits. A trustee or other fiduciary might have made an unauthorised profit from his or her position (whether or not it comprises interest), or might have profited from some other breach of trust or fiduciary duty. In ordering an account of profits, the Court has power to order that the fiduciary pay interest on those profits, to ensure that the fiduciary is completely stripped of all profits earned from the breach of fiduciary duty.[136] The same applies when the defendant has made a profit from breach of some other duty for which an account of profit lies, such as breach of confidence or infringement of statutory intellectual property wrongs.[137]

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135 [1988] WAR 132, 185.
136 *Commonwealth of Australia v SCI Operations Pty Ltd* (1998) 192 CLR 285 [75].
137 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 584 [229]-[232].

88. Interest will not be awarded, though, where it would amount to double dipping, such as where the profits were reinvested to earn further profits that are already included in the account.[138]

89. Much of the discussion above concerning the rate of interest and basis of calculation is relevant here. That is at least true so far as one focuses on the profit-stripping objective. In an account of profits, it seems counter-intuitive to approach the question of interest by considering what the beneficiary would have done with the money. But this is a difficult issue which must await judicial guidance in a case in which it has to be decided.

90. An example where interest was allowed as part of an account of profits is the 1942 decision of *Regal (Hastings) Ltd v Gulliver*.[139] There, the directors of Regal had resolved in 1935 that the company should subscribe for shares in a recently formed company, up to a certain limit. But due to certain commercial exigencies, it was decided that the directors, individually, should take up additional shares in the subsidiary that Regal lacked the funds to take up, but the company had not authorised that in general meeting. Shortly thereafter, the concern carried on by Regal and its subsidiary was sold by way of takeover, and directors made a handsome profit on their shares in the subsidiary. The directors did not act in bad faith, but acted in the interests of Regal. But they were held to have used their fiduciary position to make a profit, and to have placed themselves in a position of conflict of duty and interest. The House of Lords held that the directors must account for the profit they made personally on the shares, together with interest at 4% from the dates the profits were received.[140]

91. The decision on interest was not explained. Perhaps it had been the subject of agreement between the parties. Presumably, there was no evidence that the directors used the profits in trade or further speculation. For that reason, as well as the fact that the directors acted with bona fides, it was not a case for presuming without evidence that the directors earned compound interest. The selection of the trustee rate was understandable, although it would have been preferable if the reasons had been articulated. The directors may not have been in trade, but Regal was, and the directors presumably held qualifying shares in Regal as well as the shares they bought in the subsidiary. Perhaps the view was taken that the directors' shareholdings were isolated transactions and purely incidental to their positions as directors. In such circumstances, they might have been considered more likely to have earned interest on the profits at only the trustee rate. As *Burdick v Garrick* shows, it can be presumed that mercantile interest was earned from the mere fact that the trustee used the profits for private purposes.[141] Perhaps the difference between that case and *Regal (Hastings) Ltd v Gulliver* was the simple fact that the directors were not in business (including the business of speculating in shares). Perhaps there were also special circumstances here because of the effects of the Great Depression and the War. Interest rates were at all-time lows.[142] 4% might have better reflected mercantile rates at that time.

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138 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* [1999] FCA 584 [229]-[232].

139 [1967] 2 AC 134 (note); [1942] 1 All ER 378.

140 At 152E-F.

141 *Burdick v Garrick* (1870) LR 5 Ch App 233, 241, 243.

142 Forrest Capie & Alan Webber, A Monetary History of the United Kingdom, 1870-1982 (George Allen & Unwin 1985), vol 1, Table III (10), pp494-5.

92. In *Warman International Ltd v Dwyer*, there was recognition at first instance that interest at a commercial rate of 15% was appropriate.[143] However, in that case, as the fiduciary had ploughed the profits back into its businesses, the trial judge only awarded a modest sum for interest as otherwise the constituent would have recovered interest twice. The High Court did not cast any doubt on what the trial judge had said about interest. It merely directed a re-taking of the account of profits on a footing that differed from the approach adopted by the trial judge on matters not relevant, adding that "it will be for the trial judge to determine the amount of interest accruing on the amount due..."[144]

93. A 2005 example where compound interest was allowed is *Tasmanian Seafoods Pty Ltd v Kossman*.[145] Tasmanian Seafoods Pty Ltd was a processor of abalone. It had provided a diver with funds to purchase a fishing licence, under a trust deed the terms of which recited that the licence was held on trust for the diver and Tasmania Seafoods in equal shares. Under the deed, the diver was to sell his catch to Tasmanian Seafoods and also pay it 25% of the average Tasmanian market price for abalone payable to him from the sale of any abalone caught by him. Following a series of changes in the regulatory regime and the issue to the diver of various consecutive replacement entitlements, the diver refused to continue to sell his catch to Tasmanian Seafoods and to make the payments to it. He incorporated his own company, the second defendant, to process abalone.

94. It was common ground in the case that the trust deed did not in terms apply to the new entitlements. But the Supreme Court of Tasmania concluded that he held the current licence on constructive trust to give effect to the rights of Tasmanian Seafoods and should account for the profits of his breach of fiduciary duty, the 25% figure being a fair measure of that profit. The Court further held that the diver should pay interest "based on the object of stripping the defendants of the profits or benefits they gained from Mr Kossman's breaches of fiduciary duties he owed the plaintiff".[146] On the evidence, the second defendant operated on a bank overdraft, interest on which was compounded with monthly rests. By withholding the profits due to Tasmanian Seafoods, the defendants saved themselves from having to borrow further monies to carry on business. Crawford J ordered the defendants to pay the interest at the applicable overdraft interest rates from time to time, calculated at monthly rests, which they saved by reason the breach of fiduciary duty. Crawford J said:[147]

> *Where money has been used for the purpose of a transaction of a commercial character, the court should assume, in the absence of evidence to the contrary, that the transaction has been profitable to the wrongdoer and he will be accountable for the profit which he has made, or which he is assumed to have made, from the use of the money. Wallersteiner v Moir [No2]...*

INTEREST IN AID OF AN AWARD OF EQUITABLE COMPENSATION

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143 (1995) 182 CLR 544, reversing [1992] QCA 12. The first instance decision is reported at (1992) 46 IR 250.
144 (1995) 182 CLR 544, 570.
145 [2005] TASSC 5.
146 At [60].
147 At [70].

95. There is jurisdiction in equity to order interest as part of or in aid of an award of equitable compensation.[148] Equitable compensation is a remedy available for breach of trust, breach of fiduciary duty, breach of confidence, fraud and other unconscionable conduct, and accessory liability amongst other equitable obligations.[149] In awarding interest in claims for equitable compensation, there is authority for the proposition that the Court has regard to the loss that was caused to the plaintiff by reason of the breach of equitable duty.[150] In point of principle, the enquiry ought not to be as to the interest the trustee did earn, or would have earned if s/he had properly performed his or her obligations.[151] The focus of attention should be the use to which the beneficiary would have put the money but for the breach of duty, or to the interest paid by the beneficiary which would not otherwise have been paid.

86. That is clear enough as regards simple interest.

87. A 1961 case from Western Australia is an example of the basic proposition that equity can allow for interest in awards of equitable compensation on the basis of what would have been earned but for the wrongdoing. In *Holmes v Walton*, a lady had money invested on first mortgage security.[152] The solicitor who had acted for her in that mortgage transaction convinced her to change the investment, to make instead a loan to a company of which he was chairman of directors. The company later failed. Relying on the principle in *Nocton v Ashburton*, she recovered equitable compensation for the amount she had lost. Virtue J held that "interest which the client may be expected to have lost is a proper matter to be taken into account in arriving at an assessment of her damages".[153] As to the rate, Virtue J held that "In the absence of evidence I have come to the conclusion that a proper rate to be fixed would be six per cent which I consider is a very modest assessment of what it is possible to obtain on sound investments at the present time".[154] He allowed interest from the time it was advanced to the company to the time of judgment. But, as the plaintiff had the money invested on first mortgage security, there was evidence on which the Court could find that she would have continued to earn a return on her money and at a commercial rate.

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148 See eg *Polkinghorne v Holland* (1934) 51 CLR 143, 170; *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45; *Duke Group Ltd (in liq) v Pilmer* (1999) 31 ACSR 213 (SAFC) (the decision on interest was not challenged on the appeal to the High Court: (2001) 207 CLR 165); *Harrison v Schipp* [2001] NSWCA 13; *Campbell v Turner* [2008] QCA 126.

149 See eg Meagher, Gummow & Lehane, Equity: Doctrines & Remedies 4th ed Chapter 23; I Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melb U L R 349.

150 See eg *Duke Group Ltd (in liq) v Pilmer* (1999) 31 ACSR 213 (SAFC) (the decision on interest was not challenged on the appeal to the High Court: (2001) 207 CLR 165); *Harrison v Schipp* [2001] NSWCA 13; *Alemite Lubrequip Pty Ltd v Adams* (1997) 41 NSWLR 45. Cf also *Re Dawson* [1966] 2 NSWR 211, 215. See too *Wallersteiner v Moir (No2)* [1975] QB 373, 388 (per Lord Denning MR); *Ninety-Five Pty Ltd v Banque Nationale de Paris* [1988] WAR 132, 185; *Ledger v Petagna Nominees Pty Ltd* [1989] 1 WAR 300, 302.

151 Putting to one side cases of restoring funds thereafter to be held on trusts yet to be fully performed: *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484 [37].

152 [1961] WAR 96.

153 At 98.

154 At 98.

She was effectively in business, albeit a business comprising a single residential property investment.[155]

88. It follows that it is no defence to a claim for simple interest as part of an award of equitable compensation that the trustee has not profited from use of the money.[156]

Compound Interest in claims for equitable compensation

89. In the writer's respectful opinion, compound interest at mercantile rates is recoverable in actions for equitable compensation where the circumstances justify it, at least where the defendant is a trustee or other fiduciary or has been fraudulent. In such regard, it is submitted that plaintiffs can call in aid the presumption that the plaintiff would have made the most beneficial use of the money open to him/her, when such a conclusion is reasonably open. But there needs to be some foundation in the evidence for the conclusion that the plaintiff would have used the money to make a profit, such as the fact that the plaintiff was in trade, whereupon it can be presumed that the plaintiff would have earned compound interest.

90. The compensatory strand of reasoning was evident in cases canvassed in the Account section, including *Campbell v Turner*.[157] There, the Queensland Court of Appeal cited with approval the remarks of Lord Denning MR in *Wallersteiner v Moir [No2]*.[158]

91. However, there are two decisions which appear to decide that, in equitable compensation cases, compound interest is not awarded for compensatory reasons. On closer inspection, however, they are cases confined to their own facts.

92. One of them is the Queensland Court of Appeal decision in *Herrod v Johnston*.[159] That was a case where executors and trustees had converted to their own use a share of a cattle partnership which the deceased had bequeathed to his two daughters. The trial judge had ordered that the plaintiffs have an account of profits, alternatively at their election, an award of equitable compensation in a specified sum including compound interest. The plaintiffs chose the equitable compensation award. In awarding compound interest, His Honour took into account the principle that it should be presumed that the plaintiffs would have made the most beneficial use of the money open to them.[160] On appeal, it was argued for the defendants that the plaintiffs were shut out from compound interest because of a concession made at the trial. The concession was that the plaintiffs were not claiming loss calculated by reference to the specific use the plaintiffs had asserted in their material they would have made of the money if they had received it. The Court of Appeal held that compound interest was justified on the basis that the defendant/wrongdoers should be

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155 The judgment is silent as regards compound interest. We do not know if it was sought. If it was, it may be, for example, that the plaintiff lived off the income from her investments. That might have been the case also in *Polkinghorne v Holland* (1934) 51 CLR 143, 170.

156 Cf *Harrison v Schipp* [2001] NSWCA 13.

157 [2008] QCA 126.

158 [2008] QCA 126 [72], citing *Wallersteiner v Moir (No2)* [1975] QB 373, 388. See also *Herrod v Johnston* [2013] 2 Qd R 102 [39], [43].

159 [2013] 2 Qd R 102.

160 *Johnston v Herrod* [2012] QSC 98 at [123]-[126].

presumed to have made the most beneficial use of the money open to them, and compound interest should be awarded to ensure that the defendants did not retain any profit.

93. It is submitted that this decision is not authority for the proposition that in cases of equitable compensation regard must always be had to the defendant's gain, as opposed to the plaintiff's loss. Because of the concession by the plaintiffs at trial, it was not open to them to claim interest on the footing that they would have made use of the money to earn profits. The Court found a path to an award of compound interest which did not depend on compensatory reasoning. In the writer's respectful view, the Court was not intending to deny that the compensatory route could justify an award of compound interest when such a case was advanced. In any event, the case should be confined to the context of the order sought, which is more properly to be regarded as a common accounting. The purpose of the order was to make the defendants repay the value of the daughters' shares in the partnership which the defendants had retained, together with interest. The defendants were trustees who were obliged to account, and the order really served as an order for payment of money consequential on an account which did not have to be taken because the precise sum was able to be quantified by the Court. Resorting to a presumption about the profit made by the defendants was therefore entirely understandable.

94. The second case is *Fico v O'Leary*.[161] There, the Supreme Court of Western Australia awarded equitable compensation for breach of fiduciary duty, with simple interest under statute at mercantile rates, accepting in that regard ordinary judgment rates prescribed by rules of court. In rejecting a submission that compound interest should be awarded, EM Heenan J stated:[162]

> *When it comes to interest on money compensation awarded in a case of breach of fiduciary duty I consider that the cases in which interest is invariably allowed, at commercial rates, and sometimes a compound interest are those in which the fiduciary has made a gain, or is presumed to have made a gain, from his improper use of property or opportunities derived from his fiduciary position. On the other hand, where the remedy which is being awarded by the court is not to strip the fiduciary of any gain made at his beneficiaries' expense, or to account for profits which he should have earned for his beneficiary, different considerations apply. Where, as in the present case, equitable compensation is being awarded to restore the beneficiary to the position in which he would have been had the loss not occurred, the principle is, as already described, to restore the plaintiff as far as possible to his original situation. In my view, in these circumstances this requires no more than an award of simple interest at or near market rates to compensate the plaintiff for the loss of the opportunity to apply the moneys which he had lost in other income producing endeavours*.

95. But those comments were made in a case where a special award of compound interest would have been entirely inappropriate. The plaintiff had been misled into purchasing a "greenfield" pharmacy business that was represented as a sound investment. The business, which was a financed investment, in fact operated at a loss and the plaintiff eventually shut it down. There was a finding of fact that, had there been no breach of fiduciary duty, the

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161 [2004] WASC 215 (the relevant rate was 6%).

162 At [280].

plaintiff would not have bought the said pharmacy at all or would have rescinded the purchase, and would have remained in employment as an employed pharmacist for the immediate future until a suitable established pharmacy business presented itself for sale. The compensation award included the purchase price of the business, plus trading losses (which no doubt included compound interest on the borrowings from the bank to fund the purchase), plus the plaintiff's loss of opportunity to earn income calculated at 60 hours per week at $30 per hour for 100 weeks. In these circumstances, the plaintiff in fact recovered compound interest as part of the principal compensation award, and there was no factual foundation on which to base a conclusion that the plaintiff would have earned any other compound interest. Indeed, it would have been double recovery or to penalise the defendants to make a further order for compound interest.

96. Therefore the comment that compound interest only serves a restitutionary goal should not be seen as necessary for the decision.

97. In contrast to these cases, there is significant authority for the proposition that, in equitable compensation cases, compound interest can be awarded to compensate the plaintiff for loss suffered.[163] I turn to consider that authority now.

98. In *Harrison v Schipp*,[164] a lady had recently come into some money following a divorce. She was persuaded by a real estate agent to invest that money with him and another in a development joint venture. The subdivision did not proceed as planned, but a capital profit was made from the sale of the property to which she was held to be solely entitled. That capital profit, as well as other moneys of hers, was then contributed to another venture which was utterly unsuccessful. It was held that she had been deprived of the money by pressure, deceit, unconscionable conduct and breach of fiduciary duty. It was not in dispute that she was also entitled to mercantile interest, but it was submitted for the real estate agent that she was not entitled to compound interest because the defendant had not profited from the transactions. In rejecting this argument, Giles JA (who delivered the leading judgment) said:[165]

> *Equitable compensation does not depend on gain to the defendant ... and it is immaterial that the defendant did not use or obtain the money. The defendant is liable because he deprived the plaintiff of the money, not because he obtained the money for himself, and so a fiduciary whose breach of equitable obligation causes loss to the plaintiff must make good the loss with interest even though he did not obtain the money*.

99. It was not denied in that case that, if there were jurisdiction to order compound interest, it was a proper case for it. The concession was presumably made for the reason that the plaintiff's money was available for investment; as she was in the business of investing her

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163 See also *CBA v Smith* (1991) 42 FCR 390. There, the defendant bank was held to have stood in a fiduciary relationship to its client/customer who purchased a hotel business in reliance on advice from the bank. The interest allowed in aid of equitable compensation was the compound interest which the customer paid the defendant bank to purchase the business which, but for the bank's conduct, the customer would not have bought.

164 [2001] NSWCA 13.

165 At [130].

money, it was a case where it could be presumed that she would have earned compound interest.

100. A case where the constituent was in the business of lending money is *Aequitas v AEFC*.[166] Aequitas was formed ostensibly to carry on the business of equity investment/funding, by way of providing development capital to growing commercial concerns considered to have good prospects. For that purpose, Aequitas would raise working capital from investors. The only investment Aequitas ever made was to pay an inflated price in November 1985 and June 1986 for a 75% shareholding in a company which collapsed a short time later. The claim was to recover the purchase price and other loans lost, plus interest. Australian European Finance Corporation Limited (AEFC), which was the promoter of and financial advisor to Aequitas, placed itself in a position of conflict of duty and interest, and failed to make full disclosure of the risks of the transaction. Two directors of Aequitas had also placed themselves in a position of conflict. One defendant participated with knowledge in the breach of fiduciary duty of the directors.

101. The court ordered recovery of the purchase price, together with compound interest at mercantile rates (accepting for that purpose the Schedule J rates under rules of court). In explaining why compound interest was appropriate, Austin J observed:[167]

> *The breaches of fiduciary duty that I have found to exist are serious breaches, although I have not found that Mr Gledhill was motivated by dishonesty. One of the breaches involves the giving of a bribe, a matter which the cases treat particularly seriously, as I have shown*.

His Honour must have been discussing the question of whether he had jurisdiction to order compound interest, because the nature of the conduct of the fiduciaries was relevant to that, but it does not explain why it was a proper case on the merits for ordering compound interest. In terms of the decision whether it was a proper case on the merits for compound interest, it was necessary for His Honour to ask the question what interest award was necessary to compensate Aequitas. Given that Aequitas was in the business of equity investment/funding, it was appropriate to presume that Aequitas would have earned compound interest at mercantile rates on its money if it had not been deprived of it. It could be presumed that Aequitas would have made the best use of the money open to it had it not been deprived of its money.

102. However, interest was not allowed for the whole period. Aequitas had unjustifiably delayed before commencing proceedings until 1991. In the particular circumstances, given the length of the delay and that compound interest was awarded to be at commercial rates, Austin J seems to have concluded that it would have overcompensated Aequitas to order interest for the entire period.[168]

Duke Group Ltd (in liq) v Pilmer

166 [2001] NSWSC 14.
167 At [464].
168 Cf at [457].

103. A further case where a company in trade recovered compound interest is *Duke Group Ltd (in liq) v Pilmer*.[169] There, the directors of the plaintiff company caused the company to takeover another public company (Western United Ltd), and to pay an inflated price for 97% of the shares. The shareholders and directors of Western United included a number of the directors of the plaintiff company. Those self-interested directors knowingly put up to the shareholders of the plaintiff company an accounting report which they knew to be unsound. As a result of the takeover, which was completed on 31 December 1987, those individuals secured a substantially higher price for their shares in Western United Ltd than they could have obtained on the market. The plaintiff company gave $82m ($26m of its own cash and shares issued in the plaintiff worth $56m) as total consideration for the acquisition, but the shares received in return were truly worth only $6.5m.[170] The plaintiff failed in 1999, following a separate disastrous transaction in June 1988, a reverse takeover of the plaintiff by the Duke Group. The liquidator brought proceedings against the directors and the accountants to recover the difference between the value given away in the initial takeover and the true value of the shares in Western United received in return.

104. On the common law claims against the accountant, the Full Court of South Australia upheld an award of *Hungerfords v Walker* interest for the period between 31 December 1987 and 30 June 1988, and interest under statute from 1 July 1988 to the date of judgment.[171] *Hungerfords* interest was allowed at commercial rates for the six-month period, calculated with quarterly rests. It was found that, but for the takeover, the plaintiff would have placed the $26m on deposit with a merchant bank carried on by Western United, for six months, at 10.25% for three months, and 11.2% for the next three months.[172] Interest was calculated at quarterly rests because after the first three months, the plaintiff would have reinvested the deposit together with the interest earned on it for a further three months. There was a solid foundation for these conclusions (and there needed to be as it was a common law claim), because there was evidence that prior to the takeover, the plaintiff had consistently invested spare cash with that merchant bank. But such interest was limited for six months, because there was a finding that the directors would not have continued to make a profit on the funds beyond that time if the takeover had not proceeded, but would have dissipated them.[173] Further, the overall money award (including *Hungerfords* and statutory interest) was reduced insofar as the claim in tort was concerned, as the plaintiff was held to have been contributory negligent. The plaintiff was held responsible for the primary loss to the extent of 35%.

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169 (1999) 31 ACSR 213 (SAFC) (the decision on interest was not challenged on the appeal to the High Court: (2001) 207 CLR 165).

170 The stock market crash occurred on 19 and 20 October 1987, after the accountant's report but before the extraordinary general meeting. But the price paid for the shares in Western United would have been excessive even if the stock market crash had not happened.

171 Statutory interest was calculated at 7% simple based on a rough average of money market rates from July 1988 to the time of judgment in 1998 and was limited to a period of 7.5 years to have regard to the fact that the liquidator had chosen to put this dispute on hold whilst it brought other proceedings relating to the reverse takeover: 31 ACSR 213, 313-317.

172 *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1, 415; on appeal 31 ACSR 213, 306-312.

173 27 ACSR 1, 414-5; 31 ACSR 213 [536].

105. However, the award of interest in equity against the directors was more liberal. The self-interested directors were held to have acted dishonestly, placed themselves in a position of conflict, and used their fiduciary positions to make a profit. Even the two supposed "independent" directors, who did not profit from the transaction, were guilty of at least "constructive fraud" and also failed to exercise reasonable care and diligence. They failed to act bona fide in the best interests of the plaintiff by failing to consider where the best interests of the plaintiff lay, instead merely acquiescing in the wishes of others with whom the two had pre-existing relationships. Against all director defendants, there were findings of contravention of statutory directors' duties referred to in s 229 of the *Companies Code*. In allowing interest against the directors as a component of equitable compensation, the Full Court observed:[174]

> *They had an obligation to employ the assets of [the plaintiff] in the best interests of the company as a whole. In so far as the loss to [the plaintiff] was caused by their breaches of fiduciary duty, the presumption that, but for their actions, the company would have employed the money in legitimate business activities must apply. It must be presumed that, but for their default, the company would have made the most beneficial use of the money that it could. It would be wrong to allow the director defendants to limit their liability by reference to their own wrongdoing*.

106. The wrongdoing referred to was the entry into the transaction in June 1988 (the reverse takeover) or other conduct of like nature which the trial judge had found in considering the common law claims would have been engaged in leading to the dissipation of the assets of the company or at least the failure to properly employ such assets to make a profit. In this regard, the Full Court's comment was also an application of the presumption that when a fiduciary can discharge its functions rightfully, s/he is not allowed to say that he did it (or would have done it) wrongfully.[175]

107. The award of compound interest against the directors was therefore not limited to the six months for which *Hungerfords* interest had been awarded against the accountants, but for the whole period from 31 December 1987 until judgment. The Full Court held:[176]

> *The rate of interest awarded by the trial judge for the period for which interest was awarded was based on market rates paid by Western United on deposits for that period, with quarterly rests. There was evidence before his Honour of the rates paid by Western United until the date of its liquidation, and of equivalent Reserve Bank rates thereafter until the date of judgment. In our opinion, those are the appropriate rates at which compound interest with quarterly rests should be paid on the compensation payable by the directors.*

108. This was a case where interest, and in particular compound interest, was awarded to compensate a plaintiff for interest foregone. There was evidence on which to base a conclusion that the cash would have been invested and in a particular manner if the takeover had not occurred, because the plaintiff had a practice of placing all surplus cash with the Western United merchant bank. There was also evidence of the commercial

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174 31 ACSR 213 at 375 [817].
175 Cf *Maguire v Makaronis* (1997) 188 CLR 449, 469.
176 31 ACSR 213 at 375 [818].

interest rates paid by Western United on deposits of the nature which the plaintiff was accustomed to make, at least for the period until 30 June 1988. It was calculated with quarterly rests probably because the plaintiff rolled over its deposits (including interest) once they matured. For the period after 30 June 1988, the evidence of the Reserve Bank rate was presumably a reference to the official cash rate. That was evidently considered a sufficient approximation of the interest rate the plaintiff would have earned after 30 June 1988 by continuing to make deposits with Western United Bank charges on quarterly terms, and then rolling over the deposits together with interest on maturity. There was therefore actual evidence in the case to warrant the award of compound interest. As the plaintiff was in trade, this evidence reinforced the presumption that the plaintiff would have made the best use of the money open to it.

109. It should be noted that the Court rightly rejected an argument that the higher bank lending rates should be applied; the plaintiff was not a borrower, but an investor.[177] Nor was the plaintiff in the business of commercial lending.

PROPRIETARY REMEDIES

110. The above section deals with personal liability, including liability to account as a constructive trustee. However, what is now being considered is proprietary relief, including where a constructive trust is sought to be imposed as a proprietary remedy. In such cases, interest can be factored into consideration in determining the size of the beneficial interest in property. When a constructive trust is not an appropriate remedy, such as where the facts require tracing through a mixed fund, an equitable lien may be appropriate instead. In that case, there is also a jurisdiction in equity to award interest.

Fuller v Meehan

111. *Fuller v Meehan*, a 1999 decision of the Queensland Court of Appeal, illustrates the awarding of interest in the course of imposing a constructive trust as a proprietary remedy. There, the court was concerned with a claim by one former de facto against the other for unconscientiously refusing to recognise the beneficial title to property of the first party after the relationship had broken down. Declarations had been granted as to the beneficial interest of the woman in certain assets in the man's sole name, the extent (including interest) of which was specified in the declarations. The appeal was concerned with whether compound interest was appropriate, at rates which had been proven by evidence. In upholding compound interest in respect of a claim to a share of the man's taxi licences, Thomas JA (with whom the Chief Justice and Pincus JA agreed) observed:[178]

> *It is not doubted that a court of equity may in an appropriate case direct a trustee to pay compound interest on trust monies withheld or misapplied by the trustee.... Consistently with the above authorities, "the question whether the interest to be awarded should be simple or compound depends upon evidence as to what the*

177 31 ACSR 213, 375-6.

178 *Fuller v Meehan* [1999] QCA 37 [42]-[44] (per Pincus JA with whom the Chief Justice agreed) (footnotes omitted).

> *accounting party has, or is presumed to have done with the money". The main object seems to be to prevent the trustee from making a profit out of his breach of trust. The court does not award such interest by way of punishment, but rather by a perception of the use that has been made of the claimant's money. There is however a greater inclination to award such interest against a trustee who has retained money by fraud.*

112. The Court of Appeal seemingly relied on the presumption that compound interest was earned, because the man was in trade and the taxi licence was the main asset used in that trade. However, the Court of Appeal declined to uphold compound interest insofar as the balance of her claim sought a constructive trust over the man's half-share of the residence, which they owned at law as tenants in common. The facts were complicated. The plaintiff had paid more than her one-half share towards the purchase of their previous residence which they held at law as tenants in common. That unit, together with another unit in the same block in the defendant's sole name, were sold to fund the purchase of the property in which they resided at the date of separation. Moreover, the defendant had previously sold a restaurant business in his own name and put the proceeds of sale into the purchase of the two said units. The plaintiff was beneficially entitled to a share of the proceeds of sale of that restaurant business, but had not received her share when the restaurant was sold because the money went into the new residence. Whilst upholding the constructive trust over the man's half-share in the residence, Thomas JA refused compound interest in computing the quantum of her beneficial interest because:[179]

> *This would seem to have resulted principally in the application by him of additional monies towards domestic expenses and in payments towards the acquisition of assets including those which in due course were used in the acquisition of Messines Crescent which of course has benefited both parties. Some of the benefits can be seen to have flowed into the assets of which Mr Fuller has sole ownership (subject to Ms Meehan's charge) but this is certainly not a case where the extra monies held by him at the claimant's expense can be seen to have resulted in the sole or even close to sole commercial advantage of the trustee such as to justify the imposition of commercial compound interest.*

113. Therefore, as regards the residence claim, the monies belonging to the plaintiff had not been employed in trade. On the contrary, there was evidence that some of her moneys were used in the purchase of the residence which was a domestic asset and which benefited both parties. The fact that the plaintiff had contributed to the previous unit and to the restaurant business also had flow on effects which benefitted the plaintiff, by freeing up the defendant's ability to contribute to the relationship in other ways. It was not clear when the court regarded the plaintiff's entitlement to a share in the proceeds of the restaurant business to arise. But even if it arose from the time she made her contributions, which is unlikely, she benefitted from having done so. Accordingly, it not being a case of the defendant using the money in trade, and indeed the evidence was that it was not used in trade, it could not be presumed or concluded that compound interest was earned by the defendant.

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179 At [47].

114. The court (with respect) asked the right question, namely did the defendant make a profit from the use of the plaintiff's money and if so did the plaintiff benefit from such profit so as to make it inequitable to award compound interest? In the case of the taxi-licence, the defendant was in trade and could be presumed to have earned compound interest. There were no countervailing circumstances, as the profits in that taxi business were earned for the defendant's exclusive benefit. There was no similar presumption in respect of the residence as the defendant was not relevantly in trade. He still made a profit on the plaintiff's money by reason of the capital appreciation of the residence. But the plaintiff benefitted too, because her money went into their place of residence, her one-half share of the residence will also have experienced capital appreciation and she also benefitted by the defendant's relatively greater contribution towards other domestic expenses. So far as the residence was concerned, it would have been inequitable to order compound interest.

115. The case shows that compound interest is not awarded automatically irrespective of the evidence, just because there may be unconscionable conduct. There was actual evidence in that case that the plaintiff had benefitted from the use of some of the monies in the ways described by Thomas JA. There was also actual evidence that the parties had not worked for a number of years, choosing to live off the income of the investments. It would have left her unjustly enriched (and punished the defendant) to order compound interest in such a case.

Re Diplock

116. A tracing case where the question of interest was raised was *Re Diplock*.[180] There, the claim was not against trustees, but was against third party volunteers to whom trust moneys had been paid by executors. The monies had been paid by cheque to the charities who were legatees pursuant to a bequest ultimately held to be invalid. The monies were as a result paid to them in breach of trust. As the Court of Appeal recognised, the next-of-kin were the beneficial owners of the cheques when the charities received them.[181] At that point, the charities could be regarded for some purposes as having received the cheques on constructive trust for the next-of-kin.[182] But the next-of-kin did not bring their action at that point. The charities deposited the cheques into their general bank accounts, thereby mixing the trust moneys with their own. Thereafter, they withdrew part of the balances from the accounts in the execution of works on land or buildings already belonging to the charities. By the time of the proceedings, the money which had belonged to the next-of-kin in equity had lost its identity, so a constructive trust was not an appropriate remedy. However, it was a different question whether the next-of-kin could have an equitable charge or lien over the

180 [1948] Ch 465.

181 At p522.

182 There was not a constructive trusteeship on *Barnes v Addy* grounds as the charities had no knowledge of the breach of trust when they received and dealt with the cheques. That does not necessarily mean, however, that they did not receive the cheques on constructive trust by reason that the charities were not bona fide purchasers for value without notice. On the contrary, the equitable ownership of the cheques remained with the next-of-kin until they were banked when they lost their identity as the next-of-kin's property, albeit the trusteeship was not one which gave rise to a personal liability to account: cf *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 707E-F.

real properties, enforceable by sale if necessary and payment out of what was due.[183] The Court of Appeal recognised that this was the kind of case where there was jurisdiction to grant a charge or lien. But, on the facts, it was held not to be equitable to grant such a remedy given that it would compel the sale of land which the charities already owned.

117. What is important about *Re Diplock* for present purposes is that the Court of Appeal acknowledged that the next-of-kin might have been entitled to interest if its claim *in rem* had succeeded.[184] The Court ultimately did not say anything further about the point, because the claim *in rem* failed on the facts. But the Court's use of the word "might" was appropriate as, although there was jurisdiction to award interest, the recovery of interest on the merits was no sure thing.

118. The report does not disclose actual evidence that the charities profited from the use of the money. It is difficult to regard the charities as having been in trade insofar as they were not-for-profit organisations. But they had used the money in constructing buildings or improvements. They might have saved the cost of borrowing to do so. Or a profit might have been received through capital growth in the realty. There was no evidence that the next-of-kin (43 in number) were in trade. There was no evidence that they would have reinvested the moneys as opposed to say spending the moneys on consumables.

119. If it were possible to presume in a case like this that simple interest at the trustee rate was or would have been earned, there was one important factor which made it inappropriate to draw such a presumption, although it was not mentioned. The deceased died in 1936, and the matter was decided by the Court of Appeal in 1948. The facts occurred against the background of the Great Depression, the war and its immediate aftermath. During the entirety of the period, interest rates and inflation were low, and unemployment was high.[185] In peacetime, and during times of economic prosperity, courts might be prepared to be more robust in making assumptions on slender facts about what ordinary people might do with money, and about what returns could be expected to be gained from using money. But it was not at all self-evident that the same assumptions would be made in this case.

120. That is underscored by the fact that the Court of Appeal did not allow interest on the (otherwise successful) personal claim against the charities.[186] The refusal was said to be based on an old decision of Lord Eldon, where his Lordship had said:[187]

> *If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment, I apprehend that the rule of the court is, not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice may be done out of his share*.

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183 This might equally be said to be a case of the charities holding the said properties on constructive trust for themselves and the next-of-kin as tenants in common in equity in proportion to the amounts for which each could claim a charge: cf p541.

184 At 517.

185 Forrest Capie & Alan Webber, A Monetary History of the United Kingdom, 1870-1982 (George Allen & Unwin 1985), vol 1, Table III (10), pp494-5.

186 However, in the case of two charities, the trial judge allowed the next-of-kin an award of interest in the personal claim, but the Court of Appeal noting that there was no appeal from those two instances: p517. It is unclear what rate of interest was ordered in those two cases. Presumably it was 4%.

187 *Gittins v Steele* (1818) 1 Swanst. 199, 200, cited by the Court of Appeal at [1948] Ch 465, 507.

121. It is not clear how settled this so-called "rule of court" was.[188] In the case with which Lord Eldon was concerned, interest was in fact ordered at 4%. The moneys, which had been paid into court, had earned interest in the hands of the court. The passage quoted by the Court of Appeal omitted the previous sentence, in which Lord Eldon said: "Where the fund out of which the legacy ought to have been paid is in the hands of the court making interest, unquestionably interest is due."[189] Therefore, even if there had been a "rule of court" of the kind mentioned, it has exceptions. One of them is if interest has in fact been earned on the money.[190]

122. More likely, the application of the so-called "rule of court" merely reflected a conclusion on the facts not to award interest.[191] No doubt the economic climate at the time contributed to that result.

PRACTICE POINTS AND CONCLUSION

123. The question has not been firmly settled whether statutory pre-judgment interest is available when the claim is for equitable relief in the nature of a money order at least.[192] The statutes of different jurisdictions are not identical. Some states, such as New South Wales but also Queensland, have departed from the narrow form of words ("debt or damages") used in the 1934 Imperial statute.[193] At least in such jurisdictions, equitable relief involving an order for the payment of a sum of money probably falls within the statute.[194] But the equitable jurisdiction remains whether or not the statute is applicable. The philosophy of the statutory interest provisions is arguably that other avenues of interest should be exhausted first.[195] That would usually be so, if not because of the express wording of the statutory provisions, then because of the discretion of the Court.

124. Having said that, there is nothing to lose by claiming statutory interest in the alternative, at least when the claim includes an order for payment of money or a claim for equitable compensation.

125. On the other hand, it may be necessary to claim interest in equity which has a number of advantages including those which could translate into a greater interest recovery. Apart from the fact that interest is available in equity in a wide range of contexts that do not fall within the ambit of the statute, the advantages include:

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188 See *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 729-30.

189 (1818) 1 Swanst. 199, 200.

190 The so-called rule of court would not apply beyond administration of estates. It would not extend to personal actions in equity by beneficiaries under *inter vivos* trusts: see eg s 113 of the *Trusts Act* 1973 (Qld).

191 *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 694E, 730A-D.

192 See Edelman & Cassidy, Interest Awards in Australia, Lexis Nexis Butterworths 2003 pp132-134; JLR Davis, "Interest as Compensation", p141 n70, in PD Finn (ed), "Essays on Damages", LBC 1992.

193 For NSW, see s 100 of the *Civil Procedure Act* 2005 (NSW). See *Dome Resources NL v Silver* [2008] NSWCA 322. For Qld, see s 58 of the *Civil Proceedings Act* 2011 (Qld). Section 58 replaced s47 of the *Supreme Court Act* 1995 (Qld)). Section 47 of the 1995 Act had been inserted by s 4 of *The Common Law Practice Act Amendment Act* 1972 repealing the older form of s 72 of the *Common Law Practice Act*.

194 *Bloch v Bloch* (1981) 180 CLR 390; *Dome Resources NL v Silver* [2008] NSWCA 322. But see *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 [41]-[42].

195 Cf s 58(2)(b) of the *Civil Proceedings Act* 2011 (Qld).

- the ability to award compound interest;
- the availability of relief irrespective of whether a judgment is entered for the principal amount which (in Queensland at least) cannot be said for interest under the statute;[196]
- a plaintiff is aided by equitable presumptions;
- courts exercising equitable jurisdiction can aim to strip a fiduciary of a profit, which cannot always be said of all jurisdictions.

Interest in equity is discretionary, but it is a discretion that falls to be exercised within settled principles.[197]

126. A plaintiff should explicitly plead a claim for interest whether the applicable rules of court require that or not. For example, the *Uniform Civil Procedure Rules* 1999 (Qld) require a claim for interest to be specifically pleaded, including the rate and the method of calculation (see r150(1)(h) & 158). UCPR 159(3) also requires the plaintiff to give particulars in the pleading of the amount on which interest is claimed, the interest rate claimed, the day(s) from which interest is claimed and the method of calculation. In the writer's view, this requires (and in any event it is desirable) that the claim for interest should be averred in the body of the pleading, together with the appropriate particulars subjoined to that plea.

127. The rate(s) claimed should be included in such particulars. Under the Qld rules, this does not have to be done if the Practice Direction rate is claimed: UCPR 159(4). But in that case, the particulars should say that the Practice Direction rate is claimed.

128. Whether simple or compound interest is claimed, it should be stated expressly in the Statement of Claim, at least in the particulars subjoined thereto. If compound interest is claimed, the direction sought as to rests should be stated.[198] When compound interest is awarded, it will be with yearly rests unless the circumstances justify a direction for rests on some more regular basis.[199]

129. As regard the period over which interest is awarded, some comments have been made about this above. It is difficult to generalise, because much depends on the particular equity and the facts of the case. Interest is commonly awarded from the date of the payment or receipt of the monies.[200] But it depends on the nature of the equity. In some cases, it is

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196 See *FA Pidgeon & Son Pty Ltd v Daneshurst Investments Pty Ltd* [1986] 1 QdR 448; *Mathew v TM Sutton Ltd* [1994] 1 WLR 1455; cf *Skinner v James Symphonic Visible Measures Ltd* (1927) 28 SR (NSW) 20, 21. Some New South Wales authority points in the other direction: see eg *State Bank of New South Wales Ltd v Commissioner of Taxation* (1995) 62 FCR 371, 385. But the matter was left open in *Commonwealth v SCI Operations Pty Ltd* with the exception of Gaudron J who thought the statute applies because the courts has power to include interest in an order for costs: (1998) 192 CLR 285 [27]-[28].

197 Cf *Warman International Pty Ltd v Dwyer* (1995) 182 CLR 544, 559.

198 This would also avoid problems of the kind that arose in *In re Barclay* [1899] 1 Ch 674.

199 Halsbury's Laws of England 4th ed, volume 48 paragraph 956; Ford & Lee, supra [17.2250].

200 *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 [75]; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, 461-2; cf *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 388-9; *Westdeutsche Landesbank Girozentral v Islington LBC* [1996] AC 669, 717A-B.

appropriate to order interest or compound interest from the point when the purpose of making the payment fails or its continued retention becomes unjust.[201]

130. Properly pleading interest goes beyond a mere matter of good practice. Failure to plead interest in a more than cursory way sends a signal that interest is unimportant. Explicitly averring a claim for interest can help to lay the foundation for an assertion that the defendant must make disclosure of documents showing what s/he has done with the money. This would be useful information indeed to have in one's armoury when walking into a mediation, as well as for afterwards if necessary. Proper pleading is also necessary to comply with the pleading rules to preserve the opportunity to seek default judgment in the Registry: see UCPR 283 (Qld). For a related point, see also UCPR 150(3).

131. In some cases, it may be necessary or desirable to plead other facts which bear on the claim for interest. If a demand has been served by the plaintiff, especially if that has occurred in a timely fashion, it is useful to plead that and the defendant's failure to account or as the case may be, as this may assist in proving up the case for interest for the entire period. Sometimes, for example where the plaintiff must "do equity", it is necessary to plead that the plaintiff has offered to pay reasonable interest.[202]

132. Further, where there is a basis for believing that the defendant has used the money in his or her trade or business and earned profits thereon, it is surely preferable to plead this to assist in setting up a claim for compound interest and/or interest at mercantile rates.[203] If the defendant is in trade, it may be appropriate in any event to plead that the defendant used the money in that business to make profits, the foundation for that allegation being the applicable equitable presumption. Correlatively, it may be useful to plead what the beneficiary would have done with the money, even in the alternative. The need to plead and prove the facts showing how the plaintiff lost the use of the money and what that is worth in money terms carries greater importance in cases where the defendant was not fraudulent, and when there is no suggestion that (or it is not clear whether) the defendant made a profit from the use of the money. If the plaintiff is in trade, it can be presumed that s/he would have earned mercantile interest. A proper plea would include but not be limited to, averring in the early part of the pleading that, "At all material times, the plaintiff was and is in the business of ...". In appropriate cases, something more might be desirable, such as a plea that the plaintiff suffered loss and damage by being kept out of the money, with particulars describing how. This might be desirable for example when compound interest is sought, in a case when the defendant is not in trade and was not fraudulent.

133. One advantage of formally pleading and particularising the claim for interest and interest rate(s) claimed is that, as has been said, it tends to encourage the expeditious settlement and prosecution of disputes in the public interest.[204] Also, it tends to focus the minds of the parties and practitioners at an early stage to the matters they ultimately will have to prove

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201 See eg *Campbell v Turner* [2008] QCA 126 [74]; *Guardian Ocean Cargoes Ltd v Banco do Brasil SA [No3]* [1992] 2 Lloyd's L Rep 193.

202 Cf *Maguire v Makaronis* (1997) 188 CLR 449, 476; *Nelson v Nelson* (1995) 184 CLR 538, 562.

203 See the passage excerpted from *Burdick v Garrick*, above.

204 *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd* [2003] 1 Qd R 26 [62]; *Serisier Investments Pty Ltd v English* [1989] 1 QdR 678, 679.

to obtain relief of which an award of interest is an important part (or to minimise the award of interest, as the case may be). This is often not an easy task because the topic of interest in equity has developed in a piecemeal fashion, it can be (but need not be) complex and decisions on interest are not always adequately explained. But it is a topic that should be part of the stock-in-trade of practitioners, as an award of interest will commonly follow when a claimant for equitable relief is otherwise successful. Rather than treating interest as a matter which is worked out only at the end of litigation, the topic should in the interests of clients be focussed on at an early stage of a dispute. It is hoped that this article helps to put interest at the forefront of the minds of practitioners, thereby both advancing the interests of clients and promoting those policy goals in the public interest.

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