

## **Youyang Pty Limited v Minter Ellison Morris Fletcher (2003) 196 A.L.R. 482.**

At [4.2] we explain that an equitable award available in cases where trust property has been disbursed without authorisation is a "common account". We explain that this award is simply based on the notion that the trustee has failed in his duty to maintain the trust fund or distribute it in an authorised manner. The award operates to effect "performance" that duty by requiring restoration of the value of the trust property.

This award was considered by the High Court in *Youyang Pty Limited v Minter Ellison Morris Fletcher* (2003) 196 A.L.R. 482. Youyang agreed to provide ECCCL with \$500,000 to invest. About half of this was to be first invested in a bank bearer deposit certificate which would guarantee return of the principal in 10 years. The second half was then to be invested by ECCCL in international money markets. ECCCL's solicitors, Minter Ellison, were paid the money by Youyang on trust to release on these terms. Minter Ellison paid the first half out in breach of trust because it had only obtained a certificate of indebtedness from the bank to ECCCL and the second half also in breach because it was not to be paid until a bearer certificate had been received. A certificate of indebtedness was never obtained and ECCCL later became insolvent and was wound up. Youyang recovered none of its investment. The High Court accepted the "performance" nature of an award of breach of trust and required that the full \$500,000 be restored by Minter Ellison. According to the court, the "trust moneys were lost when paid out in breach of trust" (para. [69]). This "loss" is the literal loss of the property that occurred when it passed into unauthorised hands (*Pelly's Case* (1882) 21 Ch.D. 492 at p. 506 per Brett L.J.). As we discussed at [4.1], remoteness and mitigation of loss do not fit with this concept. Indeed, the term "loss" is better avoided altogether in this connection. In *Re Windsor Steam Coal Company* [1929] 1 Ch. 151 at p. 156, Hanworth M.R. said that the misapplied fund in that case "was not lost. The liquidator received it, and having received it paid it away to the wrong person." (See also *Magnus v. Queensland National Bank* (1888) 37 Ch.D. 466, cited at para [63] of *Youyang* in which Cotton L.J. said that, having paid the money to the wrong person, the bank was accountable for it "just as if the money was still in their hands." (p. 477))

At [4.9] we explain that this restoration requires the property restored to be at current values and therefore interest at commercial rates (and compounded) to be paid on money disbursed without authorisation. This is because trustee remains charged with property disposed of without authority and the account (or "performance") must be taken (made) at present values. The High Court acknowledged that the "quantum" of liability for a trustee who misapplies trust property is not fixed at the date of the payment despite the immediate duty to repay (para [35]). However, the court noted that there had not been a claim made for compound interest so only simple interest was awarded and the issue of the availability of compound interest was not considered (para. [31]).