

***Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 (7 February 2003).**

The issue of awards of compound interest in equity arose incidentally in the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 (7 February 2003).

In that case, the Court of Appeal considered the legitimacy of an award of exemplary damages in equity. One question was whether equity ever made punitive awards and therefore whether such a jurisdiction could exist in equity. One example of such a punitive jurisdiction in equity, offered by counsel, was equity's award of compound interest against a miscreant fiduciary. In [Intro 20] we argued that the idea that interest awards in equity are punitive stems from a misunderstanding of *Attorney General v Alford*. In Chapters 3 and 4 we explain that compound interest in equity operates either to perfect an award of compensation, to perfect an award of restitution or to perfect a disgorgement award (such as an account of profits) by (respectively) ensuring that a plaintiff is fully compensated, that complete restitution is made or that a defendant has had all profits made from the wrong taken from him.

In a detailed scholarly assessment of the history of the jurisdiction to award compound interest in equity, Heydon JA (now a Justice of the High Court of Australia) discussed the compensatory and disgorgement awards in detail, with such cogency that it is worthwhile setting out substantial parts of his judgment. His Honour said:

303 The award of the higher rate of interest in cases of gross misapplication of trust funds thus rests not on ideas of punishment or penalty, but on two other bases. The first was articulated by the Full Federal Court (Burchett, Gummow and O'Loughlin JJ) in *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 112: the award of the higher rate of interest in cases of gross misapplication of trust funds rests "on the footing not that a penalty is imposed but that the defendant is estopped from denying that he received interest at such a rate which he ought to have received". The second is that the award ensures that the fiduciary retains no profit. Thus in *Southern Cross Commodities Pty Ltd (in liq) v Ewing* (1987) 11 ACLR 818 at 848, Acting Master Boehm, sitting in the Supreme Court of South Australia, in awarding compound interest at the higher rate, said: "It is not a punishment. It is not compensation. It is equity's way of ensuring, as far as possible, that no profit should remain in the hands of the trustee from so gross a breach of trust."

The second type of compound interest award to which Heydon JA refers is what is referred to in *Interest Awards in Australia* as interest perfecting a disgorgement award. The first type is interest to perfect a compensatory award. In relation to the first type, Heydon JA later quotes from Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, explaining why equity estops the fiduciary from denying that compound interest has been received when that ought to have been received:

" 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. The company should be compensated by the award of interest....[the presumption is made] in order to give adequate compensation, the money should be replaced at interest with yearly rests, ie compound interest."