Conveyancing and property

Editor: Peter Butt

COMPOUND INTEREST: WHEN SHOULD IT BE AWARDED?

In two recent decisions, Pembroke J of the Supreme Court of New South Wales awarded compound interest. He held that such an award is not limited to matters involving breach of fiduciary obligations (of which breach of trust is but one of a large group). His Honour, with respect correctly, applied compound interest to borrowings of money.

The first decision is *Thomas v SMP (International) No 6 Pty Ltd* [2010] NSWSC 1311. In considering whether to award compound interest, the starting point, his Honour said, was the "danger that simple interest will not provide sufficient compensation having regard to ordinary commercial principles" (at [3]). Simple interest rarely reflected accurately the extent of a plaintiff's loss, because it did not reflect the commercial reality. "Merchants, traders, banks, financial institutions and consumers ordinarily conduct their affairs on a basis that is predicated on the accumulation of interest that compounds at periodic intervals." (at [4]). As his Honour pointed out, this "fundamental proposition" was emphasised by the House of Lords in *Westdeutsche Bank v Islington LBC* [1996] AC 669 where Lord Goff (at 691) expressed his entire agreement with the following statement of the primary judge, Hobhouse J:

> Anyone who lends or borrows money on a commercial basis receives or pays interest periodically and if that interest is not paid it is compounded ... I see no reason why I should deny the plaintiff a complete remedy or allow the defendant arbitrarily to retain part of the enrichment which it has unjustly enjoyed.

The second decision is *Tanya Tadrous v Michael Tadrous* [2010] NSWSC 1388 (at [61]). Pembroke J considered that the plaintiff's claim for compound interest was reasonable in the circumstances. This was because:

> The monies made available to the defendant were drawn down by the plaintiff and her husband from a loan facility on which interest would have accrued on a compounding basis. At the other end, the defendant has, since 2003, been the recipient of the undoubted appreciation in value of the [property] as well as the income from the rental of the two tenanted dwellings.

In his Honour's view, the equitable jurisdiction to award compound interest is broad, and is not confined to cases of breach of fiduciary duty, let alone cases where the defendant has profited at the expense of the plaintiff (at [63]). But nor is it "at large". Rather, "there must be features in each case which justify a departure from the normal rule that simple interest is awarded" (at [63]). On the facts, his Honour saw the present case as appropriate for the award of compound interest. This was not to punish the defendant, but to give the plaintiff "the most complete remedy, appropriate in the circumstances, that equity permits" (at [64]).

These decisions are, with respect, correct. Many instances arise when both commerciality and fairness to the successful party dictate that an order for compound interest be made both at common law and in equity. Such an order ought certainly not to be restricted to breaches of fiduciary obligations. An appropriate case might be, for example, in a claim for unpaid rent and interest thereon, where the tenant has occupied land without paying rent. In the absence of special facts, a compound interest order ought and would be made.

David K L Raphael

EASEMENTS: COSTLY BATTLES OVER PRINCIPLE

Two recent cases illustrate basic tenets of easements law. They also show how neighbours may fall out over matters of principle, where a little commonsense and a spirit of cooperation would have saved a lot of money.

The first decision is *Staley v Pivot Group Pty Ltd (No 6)* [2010] WASC 228. The plaintiff's vineyard had the benefit of a right of way over the defendant's vineyard, to provide access to a public