SUPREME COURT OF QUEENSLAND

CITATION:	*Mulvaney Holdings Pty Ltd & Anor v Thorne (No 2)* [2012] QSC 146
PARTIES:	**MULVANEY HOLDINGS PTY LTD** **AS TRUSTEE FOR THE MULVANEY FAMILY TRUST** (First Plaintiff) AND **OZIBAR PTY LTD** **AS TRUSTEE OF THE OZIBAR UNIT TRUST** (Second Plaintiff) v **BRETT JOHN THORNE** (Defendant)
FILE NO/S:	S54/2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	6 June 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	31 May 2012
JUDGE:	McMeekin J
ORDER:	1. I fix the amount of interest assessed pursuant to s 47 *Supreme Court Act* 1995 at $593,849 2. I order the defendant to pay the costs of the first plaintiff fixed on the standard basis. 3. The first plaintiff's application is otherwise dismissed.
CATCHWORDS:	EQUITY – EQUITABLE COMPENSATION – INTEREST – whether interest should be awarded – whether there should be an allowance for the taxation to be imposed on the interest

component

Batchelor v Burke (1981) 35 ALR 15
Dwyer v National Companies and Securities Commission (1988) 15 NSWLR 285
Exelby & Ors v Tuite & Ors [1994] QCA 506
Hadzigeorgiou v O'Sullivan [1983] 1 Qd R 55
Hungerfords & Ors v Walker & Ors (1989) 84 ALR 119
MBP (S.A.) Pty Ltd. v Gogic (1991) 65 A.L.J.R. 203
Milatos and Anor v Clayton Utz [2007] NTSC 44
Newmont Yandal Operations Pty Ltd v The J Aron Corporation & The Goldman Sachs Group Inc & Ors [2007] NSWCA 195
Rabelais Pty Ltd v Cameron & Ors (1995) 95 ATC 4552
Serisier Investments Pty Ltd v English (1989) 1 Qd R 678
Tuite & Ors v Exelby & Ors (1992) 25 ATR 81
WA Fork Truck Distributors Pty Ltd v Jones & Ors [2003] WASC 102

Constitution of Queensland 2001 s 58(1)
Income Tax Assessment Act 1936 (Cwth) ss 96, 97(1)
Supreme Court Act 1995 ss 47, 48
Supreme Court Regulation 2008 s 4

COUNSEL: Mr PO Land for the Plaintiffs

No appearance for the Defendant

SOLICITORS: Kelly Legal Solicitors for the Plaintiffs

No appearance for the Defendant

[1] **McMeekin J:** On 21 March 2012 I handed down my reasons for judgment in this matter ("the primary judgment").[1] I awarded equitable compensation to the first plaintiff against the defendant in the sum of $1,955,884.05 together with interest pursuant to s 47 *Supreme Court Act* 1995.

[2] The first plaintiff now applies under the slip rule, or alternatively in the inherent jurisdiction of the Court, to amend that judgment. The judgment is yet to be perfected.

Jurisdiction

[3] At trial the first plaintiff had argued that if I acceded to its arguments then I should award interest pursuant to s 47 of the *Supreme Court Act* 1995. It was further argued that there would necessarily be a tax liability, in respect of the interest awarded, on the beneficiaries of the trust of which the first plaintiff was trustee, and on whose behalf the first plaintiff brought action and that too should be allowed as compensation. Evidence was led from an accountant of

[1] [2012] QSC 127

the appropriate interest component and of the estimated liability and an undertaking was given on behalf of the first plaintiff that if the taxation eventually assessed was in fact less than that estimated by the accountant then the difference would be refunded to the defendant.

[4] I overlooked making findings about the submissions in my reasons for judgment.

[5] The matter having been raised at trial the first plaintiff was plainly entitled to a determination of the issues and had the omission been raised with me at the time of delivery of the judgment I would have acceded to any request to make the findings I thought appropriate before pronouncing judgment. That approach does not require recourse to the "slip rule". The parties to a proceeding have a right to have the issues raised for determination dealt with.

[6] I do not see that I am prevented now from considering the issues. While the limits of a superior court's inherent jurisdiction may not be defined it is plain that any such court has an inherent jurisdiction to prevent injustice: *Dwyer v National Companies and Securities Commission* (1988) 15 NSWLR 285 at 287 where McLelland J said of the exercise of the inherent jurisdiction and the power under the slip rule: "Since it rests on necessity for the purpose of preventing injustice, the extent of the power is commensurate with the requirements of the necessity which calls it into existence".

[7] Mr Land, who appeared for the first plaintiff, drew my attention to *Newmont Yandal Operations Pty Ltd v The J Aron Corporation & The Goldman Sachs Group Inc & Ors* [2007] NSWCA 195, a case concerning the jurisdiction of the Supreme Court of New South Wales to correct errors both under its version of the "slip rule" and in its inherent jurisdiction, where McLelland J's remarks in *Dwyer* were referred to with approval by Spigelman CJ.[2]

[8] Section 58(1) of the *Constitution of Queensland* 2001 provides that the "Supreme Court has all jurisdiction necessary for the administration of justice in Queensland".[3] Unless there were some legislative provision or rule of law preventing me from now considering the matter it would seem to me to be obviously unjust that I not deal with the issue raised at the hearing. I am not aware of any such restriction.

[9] I think it plain that I have jurisdiction to consider the matter now.

The Defendant's Position

[10] Since the proceedings were first heard the defendant has filed for bankruptcy. His trustee in bankruptcy is aware of the proceedings and has advised that he neither consents to nor opposes the orders sought.

Should Interest Be Awarded?

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2 At [69]

3 See also ss 9, 55 and 56(2) *Supreme Court of Queensland Act* 1991

[11] Here the interest was claimed pursuant to the discretion conferred by statute. Section 47(1) of the *Supreme Court Act* 1995 provides:

> **"47 Interest up to judgment**
> (1) In any proceedings in respect of a cause of action that arises after the commencement of the *Common Law Practice Act Amendment Act 1972* in a court of record for the recovery of money (including proceedings for debt, damages or the value of goods) the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[12] It was not necessary to have recourse to the statute necessarily as interest was always able to be awarded in a suit at equity. In *Hungerfords & Ors v Walker & Ors*[4] Mason CJ and Wilson J explained[5]:

> "Equity has adopted a broad approach to the award of interest. It has long been accepted that the equitable right to interest exists independently of statute: *Wallersteiner v Moir (No 2)* [1975] QB 373. Equity courts have regularly awarded interest, including not only simple interest but also compound interest, when justice so demanded, eg, money obtained and retained by fraud and money withheld or misapplied by a trustee or fiduciary: *La Pintada*,[6] at 116."[7]

[13] Nonetheless I cannot see that any difference in principle applies to the assessment.

[14] I have found that the first plaintiff applied monies to the defendant's business because of misleading statements made by the defendant in breach of his fiduciary duty to the first plaintiff.

[15] Here I have no information on the state of the first plaintiff's finances or of the alternative courses it may have taken with its monies but I do not see that as critical. Interest is awarded "to compensate the plaintiff for the detriment that he has suffered by being kept out of his money" (*Batchelor v Burke*[8]) and not necessarily because they have foregone investment opportunities (*MBP (S.A.) Pty Ltd. v Gogic*[9]).

[16] Here the defendant through his deceit obtained the use of the plaintiff's money. Had he endeavoured to obtain finance through a financial institution to support his business he would have been required to pay interest on the monies so obtained. Hence there is no unfairness to the defendant in requiring that he pay interest. And the first plaintiff has lost the opportunity of applying its money in some other way to its advantage.

[17] It seems to me that in the normal course interest ought to be allowed in these circumstances unless there are proper reasons for withholding interest:

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4 (1989) 84 ALR 119
5 Brennan and Deane JJ agreeing generally
6 A reference to *President of India v La Pintada Compania Navigacion SA* [1985] AC 104
7 (1989) 84 ALR 119 at 132
8 (1981) 35 ALR 15 at 19 per Gibbs CJ (Aickin, Wilson and Brennan JJ agreeing)
9 (1991) 65 A.L.J.R. 203 at 206

Hadzigeorgiou v O'Sullivan.[10] There are no such reasons evident to me here. In his pleading the defendant complained of delay in bringing the suit but I found in the primary judgment that there had been no undue delay.[11]

[18] In order to provide the first plaintiff with full compensation it appears to me to be just that interest be awarded.

The Rate and Period of Interest

[19] The statute leaves the assessment of both the rate of interest and the period over which the interest should be allowed to the discretion of the Court. That discretion has been described as "unfettered" in *Serisier Investments Pty Ltd v English*[12]a case concerning s 72 of the *Common Law Practice Act 1867-1981*, the predecessor to s 47.

[20] No submissions were proffered as to how I should arrive at an appropriate rate, it being assumed that 10% was a proper rate to adopt. Nor was any evidence led on the point.[13] The assumption requires some analysis.

[21] A payment of interest serves a number of purposes. Where the damages to be awarded are in present day money for a past loss then there is a reason not to adopt commercial rates, as interest has, or can have, a component to compensate for inflation: *MBP (SA) Pty Ltd v Gogic*.[14] That is a factor in favour of commercial rates here as the compensation has been assessed for a past loss in the equivalent nominal monetary amount.

[22] Interest is paid for two further reasons – to induce the "lender" to part with his or her money rather than consume or apply it to their own purposes; and to compensate for the risk that it will not be repaid.[15] Both factors are relevant here.

[23] What is an appropriate rate to adopt depends on the facts of each case as the loss or detriment suffered by one plaintiff from being kept out of their money might be different to another's. See the judgment of Gibbs J in *Cullen v Trappell*.[16] Generally speaking it is often said that a commercial rate should be adopted: see *Serisier Investments*[17] and the cases there cited. However, to assert that a commercial rate is appropriate does not take the matter very far as the

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10 [1983] 1 Qd R 55 at 57

11 See [65]-[66]

12 (1989) 1 Qd R 678 per Thomas J, Kneipp and Derrington JJ agreeing with his reasons

13 I note that while it might be said that the plaintiff bears the onus of advancing evidence for any loss claimed there is authority for the view that the Courts do not encourage parties to call expert evidence on the subject of interest rates: See *Lawrence v Mathison* (1981) 11 NTR 1, 14; *Jones v South British United Insurance Co Ltd* (1984) 53 ALR 408, 411, 415 – both cited in *Serisier Investments Pty Ltd. v English* (1989) 1 Qd R 678 at 681. Of course, in a particular case it may be in the parties' interests to call evidence.

14 (1991) 65 A.L.J.R. 203 at 205

15 See e.g. *Assessment of Damages for Personal Injury and Death (4th edn)* Harold Luntz (2002) at p407 para 7.4.3 citing FC Kirby "The Principle of Compensation and the *Beaulieu* Rule" [1978] Ins LJ 447

16 (1980) 146 CLR 1 at 21, criticised on another point in *MBP (S.A.) Pty Ltd. v Gogic* (1991) 65 A.L.J.R. 203 at 205

17 (1989) 1 Qd R 678 at pp 680-681 per Thomas J

perception of what that rate is can change over time considerably. For example in *Serisier Investments*[18] the Full Court of the Supreme Court of Queensland rejected a submission that 15% was appropriate and accepted 12% as a median figure representing the then perception of commercial rates. That rate substantially exceeds any rate available in recent times.

[24] The point that Mr Land pressed was that the first plaintiff was entitled to full compensation. While the decision in *Hungerfords* concerned the awarding of interest as part of the damages suffered, a very different matter to the question I am considering, Mason CJ and Wilson J discussed the need to allow interest to achieve full compensation, a discussion which is therefore of some relevance to the submission here. As was explained by Mason CJ and Wilson J in *Hungerfords* in discussing the anomaly of restricting a right to interest to those plaintiffs who demonstrated that they had gone into debt because of the defendant's default:

> "… such a policy would be at odds with the fundamental principle that a plaintiff is entitled to *restitutio in integrum*. According to that principle, the plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss. In principle he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence. Judged from a commercial viewpoint, the plaintiff sustains an economic loss if his damages are not paid promptly, just as he sustains such a loss when his debt is not paid on the due date. **The loss may arise in the form of the investment cost of being deprived of money which could have been invested at interest or used to reduce an existing indebtedness. Or the loss may arise in the form of the borrowing cost, ie, interest payable on borrowed money or interest foregone because an existing investment is realised or reduced**."[19]

[25] It seems to me to follow that, at least in a general sense, in assessing an appropriate rate it is relevant to determine how the monies may have been applied by the first plaintiff.

[26] If the probabilities were that the first plaintiff would have applied the monies to some non income earning purposes – to fund the lifestyle choices of the beneficiaries say – then the appropriate rate would probably be the rate one could obtain from a reputable financial institution for monies on deposit. While I have no evidence on the point experience over the last several years suggests that rate would be very substantially less than the 10% rate assumed.

[27] But here the directors of the first plaintiff had very different aims at the time of their investment in Ozibar. They were looking for commercial ventures into which they could invest. The evidence suggests that they had been reasonably astute in their investments to that time. A commercial return was their expectation. The defendant knew this. What return investment of its monies may have brought the first plaintiff is impossible to know. Investment in a

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18 (1989) 1 Qd R 678

19 (1989) 84 ALR 119 at 128. Emphasis added.

successful business venture may have resulted in a significant return on their investment well in excess of the 10% assumed.

[28] These considerations give some guide to what might need to have been paid to compensate the first plaintiff for parting with its money and taking on the risks inherent in ventures of this type.

[29] What can be said is that at least a reasonably significant commercial rate of interest, and not some nominal rate, would be appropriate given the circumstances of this case. As I have said no evidence was led of the commercial rates expected. Nor does judicial knowledge extend so far.[20]

[30] Section 4 of the *Supreme Court Regulation* 2008 provides that a 10% rate of interest should be applied, unless the Court determines otherwise, on debts under judgments or orders pursuant to s 48 of the *Supreme Court Act* 1995. Thomas J thought the prescribed rate to be applied after judgment (then under s73 of the *Common Law Practice Act*) not to be a "particularly persuasive indication" of the appropriate rate under the equivalent of s47 in *Serisier Investments*. Generally speaking, interest rates payable to financial institutions on monies borrowed, or payable by such institutions on monies deposited, have been well below 10% for the period in question. Much of course depends on securities proffered and the purpose of the investment.

[31] Despite that cautionary statement I propose to adopt the rate prescribed. The rate that I determine best meets the exigencies of this case is one higher than that expected by a bank on a loan secured by first mortgage on conservatively valued real estate which I take to be around 7%. I am content to adopt the rate set out in the Regulation as some guide to the reasonable cost of keeping this plaintiff out of its money prior to judgment. It accords, perhaps coincidentally, with my view as to an appropriate rate.

[32] An accountant engaged by the first plaintiff has calculated the interest component on the monies advanced by the first plaintiff by adopting a rate of 10% and applying that rate over the periods of time since the various amounts were advanced (at least in a broad sense) as pleaded in the Further Amended Statement of Claim.[21] As I mention in the primary judgment[22] there was no denial of the pleading that monies were advanced as the first plaintiff alleged. That assumption of the periods over which the interest should be allowed is reasonable.

[33] Using these assumptions the accountant has calculated the amount of interest at $593,849.[23] Mr Land has submitted that that sum be adopted, albeit that the calculation made by the accountant stops a little short of the full period over which interest could be allowed.

[34] I therefore fix the amount of interest allowed under s47 of the *Supreme Court Act* 1995 at $593,849.

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20 *Serisier Investments Pty Ltd. v English* (1989) 1 Qd R 678 at 680 per Thomas J

21 See para 1 of the prayer for relief at p24 of the pleading

22 At [15]

23 See p32 of Ex 5

Tax is Payable

[35] The accountant has advised that the interest component I have fixed will be taxable in the hands of the beneficiaries of the trust of which the first plaintiff is trustee. The accountant has adopted the corporate tax rate of 30% for the purposes of arriving at an amount of the likely tax component.

[36] Any income earned by the trustee is not the income of the trustee but that of the beneficiaries. Section 96 of the *Income Tax Assessment Act* 1936 (Cwth) provides that "[e]xcept as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate." The usual taxation treatment of monies received by a trustee on behalf of "a beneficiary of a trust estate who is not under any legal disability [and who] is presently entitled to a share of the income of the trust estate" is that "the assessable income of the beneficiary shall include … so much of that share of the net income of the trust estate as is attributable to a period when the beneficiary was a resident": s 97(1)(a)(i) *Income Tax Assessment Act* 1936 (Cwth). My attention was not drawn to any provision in the *Income Tax Assessment Act* which has the effect of making the trustee liable for any tax that may become owing.

[37] I accept that the accountant is probably right and that the interest component I have fixed will be taxable in the hands of the beneficiaries of the trust.

[38] The amount of that liability however cannot be known. The adoption of the corporate rate of tax is simply a convenient fiction – the true rate of tax payable will depend on the individual circumstances of each beneficiary, none of whom are corporations, and indeed the exercise of the trustee's discretion. In order to avoid any over payment Mr Land advised in open court that the first plaintiff provided an undertaking that if the tax eventually assessed on the interest component was less than that allowed in my judgment then the balance would be repaid to the defendant.[24] This course, he submitted, was in accordance with the procedure adopted by Shepherdson J in *Tuite & Ors v Exelby & Ors*[25] and followed by Pullin J in *WA Fork Truck Distributors Pty Ltd v Jones & Ors*[26].

[39] As well, Mr Land sought and obtained instructions in the course of argument on this application to offer to the Court a further undertaking that the trustee would not distribute monies received in respect of the interest component. This was to meet a concern that I raised that any undertaking by Mr Long would not bind other beneficiaries. On reflection it was not necessary for that undertaking to be given, and indeed I am not at all sure that it was wise to proffer it. It was not necessary as on checking the transcript I see that the undertaking originally proffered was given by Mr Land on behalf of the first plaintiff and not by Mr Long personally in evidence as I had thought during argument. That undertaking I think is sufficient in all the circumstances. It would be in the beneficiaries' interests presumably to ensure that the trust was put in funds to honour the undertaking, if that ever became necessary.

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24 T1-31/10

25 (1992) 25 ATR 81

26 [2003] WASC 102 at [112]-[114]

[40] Given the undertaking proffered, if I was otherwise persuaded to award the amount of taxation payable, I would adopt the figure suggested by the accountant of $178,154.88.

An Allowance for the Tax to be Imposed?

[41] I turn then to the final question whether an additional sum should be allowed to compensate for the impost of taxation on that interest component.

[42] The first plaintiff's contention is that the diminution of the benefit of the award of compensation that I have made by the payment of tax on the interest component is itself compensable. The only authorities cited were the two decisions that I have already referred to – that of Pullin J in *WA Fork Truck Distributors Pty Ltd v Jones*[27] and Shepherdson J's decision in *Tuite & Ors v Exelby & Ors*[28]. Neither decision however concerned the taxation treatment of an award of interest on equitable compensation.

[43] In *Tuite* Shepherdson J based his decision to increase the award of damages to include an amount reflecting the taxation liability to which the plaintiffs would become exposed on the finding that it was "reasonably foreseeable by the first and second defendants that their breaches of the restraint on trade covenant would expose the first plaintiffs to tax under Part III A on an award of damages for any loss in value of the plaintiffs' shares in Wenmar caused by such breaches."[29] Hence it was the circumstance that the breach itself exposed the plaintiffs to a tax labiality that was the basis for the additional assessment. Significantly, in addition to damages for loss in the value of shares, Shepherdson J separately assessed damages for loss of income and expressly declined to award any compensation for the tax liability on that component. Nor did he allow any amount for any taxation applicable to the award of interest that he made in that case.

[44] However the allowance against the possibility that the award might be assessable to income tax was abandoned on appeal and so Shepherdson J's decision is of no persuasive authority: *Exelby & Ors v Tuite & Ors*.[30] Indeed the issue argued on appeal was whether the award for lost profits should be reduced to allow for the tax payable on the profits. Dowsett J would have reduced the award by the amount of tax payable, a step that the majority (Macrossan CJ and Pincus J) were not prepared to take.

[45] Similarly in *Milatos and Anor v Clayton Utz*[31] Thomas J declined to "gross up" an award for the possible tax effect on the damages holding that he was "not persuaded it [was] appropriate to make the declaration as sought by the plaintiffs as [he was] not satisfied the award of damages would be subject to Capital Gains Tax 'or that it would accord with the principles upon which the assessment of damages proceeds to make any adjustment in respect thereof',

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27 [2003] WASC 102 at [112]-[114]
28 (1992) 25 ATR 81 - BC9202414
29 *Tuite & Ors v Exelby & Ors* (1992) 25 ATR 81at [93]; BC9202414
30 [1994] QCA 506; BC9404190
31 [2007] NTSC 44 at [662]

Davis J in *Namol Pty Ltd & Anor v AW Baulderstone Pty Ltd & Ors* [1993] 93 ATC 5101 at 5104."[32]

[46] The situation in *WA Fork Truck Distributors Pty Ltd v Jones* & Ors was the converse of the argument before Shepherdson J in *Tuite*. The question for Pullen J was not whether he should increase the amount awarded for the taxation liability to be incurred but rather whether he was over compensating the plaintiff and should reduce the amount awarded to adjust for the tax effect – the issue considered on appeal in *Tuite*.

[47] Pullen J assessed $84,133.60 in compensation. It was made up of two parts. The first was a sum of $55,207.35 comprising the gross revenue received in a particular period by the first defendant's company which had been set up in breach of duty. The second was a sum of $28,926.25 which represented the amount of wages paid to the first defendant by the plaintiff whilst he was busy with his own affairs and acting in breach of duty. Pullen J's intention plainly was that the plaintiff receive the net after tax amount as compensation. That was so because in respect of the lost profits component the plaintiff would have been required to pay tax had it received the monies in the ordinary course of its business, as the judgment assumed, and in respect of the wages component the plaintiff had already had the advantage of the wages paid out reducing its tax burden because they had been claimed as a deduction. Pullen J found that the plaintiff would in all probability be required by the taxation commissioner to pay tax on each component as being income in the plaintiff's hands even though received in the form of equitable compensation. Because of that finding Pullen J did not reduce the compensation to a net after tax amount. To allow for the possibility that his finding might be wrong he required of the plaintiff an undertaking that it refund to the defendants any amount by which 30% (the corporate tax rate) of the compensation amount exceeded the tax assessed. So he did not award an additional sum representing the tax payable on those two components, quite the reverse.[33]

[48] So far as the judgment shows no interest was claimed and so his Honour did not award interest and so did not consider the issue of any taxation of interest.

[49] Thus neither case cited is authority for the proposition that the tax payable on an award of interest should be added to an award to achieve full compensation. That is not to say that such a claim must in principle fail. The decision of Hodgson J in *Rabelais Pty Ltd v Cameron & Ors*[34] for example provides some support.

[50] If the amount sought to be awarded here was the income tax payable on the amount of compensation, as opposed to the amount of interest on that compensation, then I could understand the claim for additional compensation.

[51] In this case the compensation that I determined to award reflects funds invested in the defendant's business by the first plaintiff. Those funds would not have

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32 *Ibid* at [661]

33 [2003] WASC 102 at [113]-[114]

34 (1995) 95 ATC 4552 at 4553

been taxed in the hands of the first plaintiff. If the effect of the tax laws on my award of equitable compensation was to convert those monies into a taxable form – whether a capital gain or income – so as to reduce the net amount that the first plaintiff recovered from the defendant then the tax payable might well be a compensable loss.

[52] But it seems to me that the interest component is of a different character. As I have explained the assumptions here are that the plaintiff would have used the money to good effect whether by paying down its own debts (if it had any - I have no evidence) or, more likely here, investing the monies in some alternative venture and so earning a profit on them.

[53] In either case there would be a tax effect. In the first case, if the first plaintiff had debts that it did not reduce because of its investment in Ozibar then presumably the interest paid on those borrowings was deductible and was claimed. If its monies had been so applied then the first plaintiff would have paid more tax than it in fact did. How much more and what difference might exist between that notional sum and $178,154.88 is unknown.

[54] In the second case, if the monies had been invested and earned a 10% return, as the award here assumes, then that return would itself have been taxable income of the trust and dealt with in the same general way, for taxation purposes, as this interest component.[35] Alternatively it might be said that the monies invested would not have brought an immediate return but rather have resulted in some increase in the value of a business purchased with no immediate taxation consequences. But nonetheless an increase in the value of a capital asset would eventually be taxable when sold or would result in an increase presumably in earnings which would eventually be taxable.

[55] The only other point to make is that if the monies were not to have been used in the ways that I have discussed then I would not have adopted an interest rate as high as 10%.

[56] Thus if the monies had been retained and not paid out as they were there would have resulted an increase in tax payable in any of the possible scenarios. It is therefore not immediately apparent to me that a requirement of providing full compensation necessitates an allowance for the tax impost on the interest component. In my view the plaintiff has not discharged its onus of persuading me that the calculated and probable tax liability on the interest component ought, in fairness, be added to the award to achieve full compensation.

[57] I therefore fix interest in the sum of $593,849 as claimed and otherwise dismiss the application.

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35 The significant difference would be that the whole of the interest income would not have been earned in the one financial year as will now occur. The adoption of a flat rate of tax of 30% obviates any difference in the calculation of the liability but in reality the amount of the tax could well be significantly different depending on the individual circumstances of the beneficiaries to whom the income would have been distributed in each of the financial periods in question. That very uncertainty seems to me to count against the allowance. That however is not necessary to explore further given my determination.

[58] As it was necessary to bring the application the first plaintiff should have its costs. I have previously ordered that the costs of the proceedings be assessed on the indemnity basis but in relation to this application, as the first plaintiff has only been partially successful, I order that the defendant pay the costs of the application on the standard basis.