

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY
(ACN 087 648 842)
Appellant

10 AND:

LIFEPAN AUSTRALIA FRIENDLY SOCIETY LIMITED
(ACN 087 649 492)
First Respondent



FUNERAL PLAN MANAGEMENT PTY LTD
(ACN 003 769 640)
Second Respondent

APPELLANT'S REPLY

20 **PART I: CERTIFICATION**

1. We certify that this reply to the Respondents' Submissions (LS) is in a form suitable for publication on the internet.

PART II: REPLY TO THE ARGUMENT OF THE RESPONDENTS

The BCP breaches (LS [12], [17], [25], [29] and [49])

2. The respondents (**Lifeplan**) (at LS [29] and [49]) accept that the account of profits ordered by the Full Court "turned on the BCP breaches".¹ But Lifeplan wrongly submits (at [12]) that "the strategic plan in the BCP was implemented after the establishment of the business". No finding to that effect was made by either the primary judge or the Full Court. It is therefore wrong for Lifeplan to contend (eg. at 30 LS [49]) that one of the matters that informed the Full Court's conclusion that a liability to account arose was "Foresters' implementation of the business plan laid out in the BCP".
3. Apart from the "but-for" connection between the profits earned by Foresters and its knowing assistance in Woff and Corby's breach of duty in relation to the use of confidential information in the BCP, the only additional matter that informed the Full Court's conclusion on causation is the finding (at [69]) that Foresters used the information in the BCP "in gauging the success of the undertaking, at least in the first six months of the operation of the business." As the clear and precise findings of the primary judge demonstrate, Foresters did not use the confidential information in the BCP in its business after the Board meeting on 13 September 2010, save for the reference to some of the annual sales figures of funeral directors disclosed in Appendix B to the BCP, which appeared in FPA's reports to Foresters' 40 Board in January and March 2011.²

¹ Lifeplan does not contend (at LS [29] and [49]) that the approach to funeral directors breaches and the Rules and disclosure document breaches described in the Appellant's submissions (FS) at [22]-[28] contributed to the profits made by Foresters.

² See PJ [161], [192], [283], [298] and [443] and, in particular, the explicit finding at [192] by the primary judge that this was the "only subsequent use" of the confidential information in the documents and information he found at [161] to have been disclosed in the BCP in breach of confidence.

4. As explained in FS [18]-[21] and [29]-[31], the breach of confidence which Foresters knowingly assisted did not include any business plan of Lifeplan's. The five year sales projections set out in Section 6.1 of the BCP were not confidential information of Lifeplan's (PJ [191]).³
5. The reports to Foresters' Board relied upon by Lifeplan in LS [12] were those referred to in FS [31] and footnote 10, which, save for FPA's reports in January and March 2011, did not refer to the BCP, or to any business plan or the five year sales projections in it or in the FPA agreement.
6. Having regard to the matters set out in [2]-[5] above, Lifeplan's reliance (at LS [17] and [54]) on the findings of the Full Court at FC [38] and [69] on the continuation of the use of "information" in the BCP by Foresters' Board "in gauging the success of the undertaking, at least in the first six months of the operation of the business" can only be a reference to FPA's reports to Foresters' Board in January and March 2011.⁴
7. Further, Lifeplan's reliance upon the supposed implementation by Foresters of the business plan laid out in the BCP (see [2] above), and the ongoing use of confidential information for the task of supervision and governance, is inconsistent with the causation case pleaded and conducted by Lifeplan at first instance, and involves propositions that, save for the disclosures in the FPA reports in January and March 2011, were not put to Foresters' witnesses and which Foresters, accordingly, did not have an opportunity to meet. Rather, before the primary judge, Lifeplan claimed that the confidential information disclosed in the BCP was important to Foresters' original decision to engage Woff and Corby and enter into the FPA agreement.⁵ In that context, FPA's reports to Foresters' Board in January and March 2011 were put to Fleming and Hughes.⁶ No other instances of ongoing use of the BCP, or of any business plan or the sales projections in it, were put to Fleming or Hughes or found by the primary judge.⁷
8. Lifeplan closed its case on the basis that Foresters was required to account for the entire capital value of its business because, but for its knowing assistance in the disclosures of Lifeplan's confidential information made by reason of the BCP breaches, the business would not have eventuated.⁸ The primary judge dealt with that case, as well as with the January and March 2011 reports, at [324] and [442]-[445] and found that the "but for" case propounded by Lifeplan case did not provide a sufficient link between Foresters' wrongful conduct and the account sought.⁹ Accordingly, the issue on the appeal and the related cross-appeal is as stated in FS [38].

³ The five year sales projections in the BCP were superseded by the Marketing & Service Agreement with FPA made on 31 December 2010 (**the FPA Agreement**) and by the different sales targets in cl 4.1 and schedule 2 of that agreement, which was itself terminated on 13 March 2013. See FS [31] and PJ [287].

⁴ A fair reading of the two reports does not support the conclusion that any confidential information disclosed in them was relied upon in gauging success, or for supervision or governance, of Foresters' undertaking.

⁵ Lifeplan closing submission (T899.37-900.22).

⁶ Fleming (T607.45 – T611.17, in particular at T608.31 – 608.39, T609.40 – 609.43). See also cross-examination of Hughes (T661-664).

⁷ See also the findings in PJ [298], [303] and [310].

⁸ Lifeplan closing submissions (T924.38 – 930.14).

⁹ It is wrong for Lifeplan to submit at LS [54] that the primary judge approached the case at [430]-[445] on the basis that the breaches must "directly" generate the profits claimed.

Foresters contracts were acquired exclusively as a result of competitive activities lawfully undertaken by Foresters in its own interest (cf LS [4], [6], [9], [11], [14], [25], [34], [39], [57], [61], [67] and [68])

9. Lifeplan is seeking to resurrect the case rejected by the primary judge at PJ [8] that Foresters did not have the financial capacity or resources to establish and operate the business it did from 2011 onwards. Lifeplan then contends at LS [5]-[7] that the rapid expansion of Foresters' business at the expense of Lifeplan's business from 2011 onwards occurred as a result of widespread breaches of duty by Woff and Corby, which Lifeplan impermissibly seeks to conflate at LS [7] with the breaches which Foresters knowingly assisted. Lifeplan seeks to support its case by submitting at LS [67] and [68] that Foresters did not direct any evidence to establish that the profit the subject of the account, or a significant proportion of that profit, "was generated by the skill, efforts, property and resources" of Foresters and of the capital and the risks it undertook, notwithstanding the primary judge's finding to the contrary at PJ [8] and the finding at PJ [429] that Foresters could, and in fact did, devote considerable resources to the new venture.¹⁰
10. Lifeplan's attack on Woff and Corby's targeting of funeral directors who were clients of Lifeplan at LS [14] and [69] is misconceived. As was observed by the primary judge at [193], it was inevitable that Woff and Corby would target funeral directors who were clients of Lifeplan, because they knew them and had done business with them and because Lifeplan had approximately 70% of the market. Consistently with the primary judge's observations at PJ [444], the absence of any restraint of trade clauses in Woff and Corby's employment contracts with Lifeplan had the consequence that from January 2011 they were entitled to "attack" Lifeplan's business (cf LS [9], [25], [39] and [70]) and target funeral directors who had been Lifeplan's clients (cf LS [14] and [69]). Nor was it unlawful for Foresters to make the process of funeral directors moving their business from Lifeplan to Foresters as "seamless" as possible (cf LS [9], [11], [14] and [34]). This is the essence of lawful competition.¹¹
11. Contrary to Lifeplan's submissions, the evidence establishes that the growth in Foresters' business from January 2011, and relevantly, the growth in the funeral bond contracts entered into by it in the usual and ordinary course of that business, were attributable to Foresters' skill, efforts, property, resources and the risks it undertook and were not attributable to the BCP breaches that Foresters knowingly assisted.

¹⁰ The primary judge at PJ [10], [303] and [429] referred to the costs, risks and resources devoted by Foresters to its new business, which had accumulated losses to 30 June 2014 of \$1,098,031. Further, the Expert Report of Campbell Jackson (Annexure CJ-3 of his affidavit sworn 11 December 2014) at Appendix E sets out in detail the substantial expenditure incurred by Foresters in its funeral fund business during the relevant period.

¹¹ *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191 per Mason CJ and Wilson J.

Causation (LS [37]-[55])

12. At LS [48] Lifeplan does not dispute Foresters' formulation of the relevant causation questions at FS [50]. Rather, Lifeplan (at LS [50]) submits that common law principles relating to causation should not be imported into equitable claims for compensation. But, Foresters' submission at FS [50] was not that the relevant principles should be applied but rather they "can assist" by analogy. That submission is not inconsistent with the High Court's consideration of this issue in *Youyang*¹² where the causation analysis in respect of equitable claims for compensation of Mummery LJ in *Swindle v Harrison*¹³ was cited with approval. Part of that analysis included a reference to Lord Browne-Wilkinson's comments in *Target Holdings Limited v Redferns*¹⁴ that, although equity and common law differ in their detailed rules in relation to causation, the underlying principles are the same.
13. Applying the causation rules in equity in *Swindle*, Mummery LJ emphasized (at 735) that the wrongdoer was not liable for all the consequences of the course of action which included the breach but, rather, was only liable for the loss that flowed from the breach and not otherwise. In that case, the Court was satisfied that, as the loss would have been suffered in any event, it did not flow from the breach of duty. An analogous causation analysis can be applied to the account for profits in the present case by asking whether those profits were made *in or through* the breach of duty and therefore flowed from the breach, which Foresters' knowingly assisted.¹⁵
14. Applying the reasoning of Mummery LJ it may be accepted that, but for the breaches of duty Foresters' knowingly assisted, Foresters would have not undertaken the business venture proposed by Woff and Corby and therefore would not have entered into the contracts the subject of the account of profits. But, those contracts were not entered into *in or through*, and therefore did not flow from, any breach of duty which Foresters knowingly assisted. That analysis is consistent with, and assisted by, the common law principles set out at FS [50] and discussed at FS [51]-[56].

Capital profits (LS [56] – [64])

15. Lifeplan incorrectly states that the accounting experts gave evidence that "in accounting terms" that the present value of anticipated cash flows is an existing capital profit. Lifeplan's expert, Ms Wright, was not asked to, and did not, address the question. Foresters' expert, Mr Jackson, was asked to identify Foresters' trading and capital profits up to 30 June 2014 to which he responded that Foresters had incurred a loss in the funeral fund business.¹⁶ Mr Jackson was separately asked to estimate the net present value of "future profits" which may be earned after 30 June 2014 by reason of funds invested in the Foresters Funeral Fund¹⁷ in response to which he estimated the net present value of future profits which may be earned by reason of funds invested.¹⁸
16. Mr Jackson did not treat the present value of anticipated future profits (or cash flows) as an existing capital profit. Further, Mr Jackson's evidence in that regard was in response to Ms Wright's evidence. However, Foresters' case at trial and in the Full Court was that Lifeplan's claim for the net present value of the contracts was not open as it was not a claim for a capital profit that had actually been made (PJ [421], FC [116]).

¹² (2003) 212 CLR 484 at 502 [44]: see also FS [42].

¹³ (1997) 4 All E.R. 705 at 733-734.

¹⁴ [1996] AC 421 at 432.

¹⁵ See FS [66] and *Warman* at 558 and 568.

¹⁶ Affidavit of Campbell Jackson sworn 11 December 2014, Annexure CJ-3 at paragraph 2.15(a)

¹⁷ *Ibid* at paragraph 2,15(b)

¹⁸ *ibid* at paragraph 3.5

17. A party seeking an account for future profits that may be generated by a breach of fiduciary duty can do so by claiming a constructive trust in respect of the asset that will produce those profits but as disclosed at LS [20] Lifeplan disavowed any such claim. Foresters contends (FS [15]) that Lifeplan's account of profits is akin to a claim that the contracts entered into by Foresters from January 2011 are being held on a constructive trust for, and for the benefit of, Lifeplan but no proper basis for that claim has been made out.

Cross-appeal (LS [67]-[73])

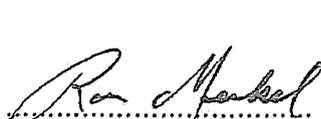
18. Special leave to cross-appeal should be refused in respect of the account of profits, alternatively the cross-appeal should be dismissed, as Lifeplan is not entitled to the account of profits it claims.
- 10 19. Lifeplan submits at LS [70] that Foresters "failed to act honestly". No finding was made by the primary judge or the Full Court that Fleming or other members of Foresters' Board acted dishonestly. The primary judge correctly analysed the relevant conduct of the Board members (at PJ [303]-[304] and [324]) in a way that did not suggest dishonesty. Only Hughes and Fleming gave evidence for Foresters and it was not put to them that they, or the Board, acted dishonestly. The Full Court did not purport to make an adverse finding at FC [41] against the honesty of Hughes or of Foresters' directors. If it did intend to do so that would have been inappropriate given that no such allegation was put to Fleming or Hughes. Accordingly, this is not a case of active dishonesty such as arose in *Warman*.

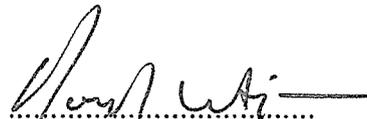
Vicarious liability (LS [74]-[82])

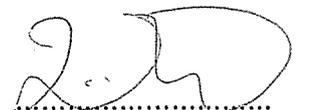
- 20 20. Special leave to cross-appeal on the question of vicarious liability should be refused as this case is not a suitable vehicle for addressing that question. Because the primary judge at PJ [362]-[375] rejected the vicarious liability claims in principle he did not undertake the factual analysis that would be required if the claims were upheld, including determining whether the impugned conduct was that of FPA for which Foresters is not vicariously liable. In addition to the absence of the necessary factual findings by the primary judge the High Court does not have before it any consideration by the Full Court of this novel claim. Further, the election by Lifeplan not to claim any loss has distorted and restricted any proper analysis of this cause of action by the High Court because it cannot be assumed that that election is required.
- 30 21. In any event, special leave should also be refused, or the cross-appeal dismissed, for the reasons given by the primary judge at [363] – [376].
22. Further, even if Foresters were vicariously liable as claimed there is no proper basis on which the amount to be assessed against Foresters should exceed the total profits of \$24,238 and \$24,198 for which Woff and Corby respectively were required to account for breaches that included, but were not confined to, the breaches relied upon by Lifeplan in its vicarious liability claim.

Dated: 8 February 2018

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