IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A37 of 2017

BETWEEN:

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

10 LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LTD ACN 087 649 492 and
FUNERAL PLAN MANAGEMENT PTY LTD ACN 003 769 640
First and Second Respondent

RESPONDENTS' OUTLINE OF ORAL ARGUMENT

Part I: Certification for publication on the internet

1. The respondents (Lifeplan) certify that this outline is suitable for publication on the internet.

Part II: Outline of propositions[1]

Ground 1 of Notice of Appeal and Grounds 2 and 3 of Cross-Appeal

Causation

20 2. The fiduciary breaches in which the appellant (Foresters) knowingly participated were of the most serious kind, involving infidelity, conflicts of interest and breaches of the no profit rule. Foresters knowingly took advantage of the opportunity and confidential information provided to it by the defaulting fiduciaries so as to establish and expand a business that it would not otherwise have undertaken, to the corresponding detriment of Lifeplan: FC, [29]-[33], [53], [66] and [69]. Foresters' conduct attracts the stringent causation approach that Equity applies to fiduciary wrongs of this kind, as illustrated by the seminal decisions in *Boardman v Phipps* [1967] 2 AC 46 and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

3. The Full Court applied established equitable principles in determining the nexus between breach and profit (LS, [41]-[48]), (FC, [62]-[68]). By reference to those principles, causation was not in
30 doubt; the real question was how much capital profit Foresters should account for (FC, [67]).

4. Foresters cites no authority capable of justifying the intrusion of common law notions, such as scope of liability, remoteness and *novus actus interveniens*, into a claim for an account of profits in equity (FS, [50], [64]; FRS, [12]). That kind of intrusion has been rejected by cases of the highest authority in Australia and Canada and mainstream authorities in England.[2] The decision in *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [108] that invoked common law rules by analogy is inconsistent with Australian law and has been heavily criticised.[3] The observations of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 17 were made in the different context of an obligation to exercise reasonable care and diligence and were directed to equitable compensation. They were doubted in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*
40 [2003] 212 CLR 484, [38]-[40]. *Swindle v Harrison* (1997) 4 All ER 705 and *Target Holdings Ltd v Redferns* [1996] 1 AC 421 do not support the argument (cf. FRS, [12]-[14]).

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[1] The submissions of the parties are referred to as follows: Foresters' submissions (**FS**); Foresters' reply submissions (**FRS**); Lifeplan's submissions (**LS**) and Lifeplan's reply submissions (**LRS**).

[2] LS, [50], *Murad v Al-Saraj* [2005] EWCA Civ 959 and *AIB Group UK v Mark Redler & Co* [2015] AC 1503, at [116] per Lord Reed.

[3] The Honourable William Gummow, 'Dishonest Assistance and Account of Profits' (2015) 74(3) *Cambridge Law Journal* 405.

5. The fact that the "*but for*" test is not an exclusive test of causation at common law is not relevant. Equity adopts a different approach in which deterrence assumes a central role (LS, [40]). The applicable policy considerations and control mechanisms differ between Equity and the common law, so causation analysis cannot be assimilated: *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 543-547; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 426-427; *Warman*, 558-562 and LS, [51].

6. Even if common law principles were available "to assist" the analysis in some undefined way (FRS, [12]), Foresters' suggested verbal formulae (e.g. "*materially contributed*") would not yield a different outcome on these facts (cf. FS, [66]). See also *O'Halloran v RT Thomas* (1998) 45 NSWLR 262, at 277A per Spigelman CJ.

7. Foresters seeks to downplay the "*but-for*" finding as something less than but-for (FS, [57], see also [11] and [20]). This rewriting of the facts is unsupportable (LS, [39]). There were clear factual findings below that, without Foresters dishonestly taking advantage of Lifeplan's confidential information and the opportunity for profit presented to it by the disloyal employees, there would have been no competing business (FC, [66]; PJ, [324], [443]; Hughes (AB239)). There is nothing to support Foresters' suggestion that the profits arose entirely from lawful competition (FS, [57], [62]; FRS, [11]).

Extent of the Liability to Account

8. In *Warman*, the High Court concluded that there was no acceptable basis for depriving Warman of an account in circumstances where the two knowing participants, BTA and ETA, took advantage of the opportunity that came to them from breaches of fiduciary duty to commence and carry on a distributorship business. That business was to be seen as "built upon" the fiduciary breaches: at 562, 564 and 566.

9. In structuring the relevant account, causal connections do not cease to be relevant in this exercise but they are not at large. Equity has established principles that respond to the risk of over-compensating a plaintiff on account of the strict rules of fiduciary liability and causation. Those principles include a shifting of the onus of proof to the wrongdoer, so that it is for the wrongdoer to establish that it is inequitable to order an account of the entire profits: LS, [51]. The High Court also indicated that it was necessary to ascertain what was acquired in consequence of the breach of duty and what was lost by the innocent party: *Warman*, 565.

10. An account of profits for two years was awarded in *Warman* because the Bonfiglioli distributorship would have continued only for a further period of about one year and the Court considered that two years would capture the additional benefits that the defendants gained by reason of the fiduciary breaches. In this case, Lifeplan suffered permanent damage to a business which would have continued long into the foreseeable future absent the wrongful conduct of Foresters (LS, [4]-[7], see also AB519-532). Lifeplan's loss was Foresters' gain (FC, [53]).

11. Other findings bearing upon the structuring of an account include:

    11.1. the BCP was more than a decision-making tool; it established a strategic plan to create a business identical to that of Lifeplan, with a similar name and documents, and targeting its funeral director clients (LS, [9]-[14], [39]; BCP (AB877); Recipe document (AB469); PJ, [113]-[114], [176]-[177], [192]-[193], [214]-[226], [230]-[246], [306], [310], [409]; FC, [32]-[38], [69], [88]);

    11.2. Foresters' business was "*sufficiently the same*" as that conducted by Lifeplan: *Warman*, 568; and Foresters' involvement in the breaches contributed to the success of the business (LS, [27], [29]; FC, [35]-[36], [43], [47]-[51]);

    11.3. the Board of Foresters failed to act honestly (LS, [70]; LRS, [2]-[3]; cf. FRS, [19]);

11.4. Foresters' involvement in the breaches, including those concerning the BCP, was not mere knowledge gained as a spectator, but active participation in a dishonest breach of fiduciary duty (LS, [71], see also FC, [41] and [51]; LRS, [5]-[9]; cf. FRS, [19]); and

11.5. 25% of the value of the business fell into Foresters' hands for nothing when FPA was placed into liquidation on the application of Foresters (LS, [72]; PJ, [288]). Had this not occurred, FPA would have been liable to account for that value.

12. An account of the full capital value of the business, less any just allowance or an appropriate discount, was the more appropriate remedy (LS, [67]-[73]). By reference to the two approaches in *Re Jarvis*, the true measure of the gain to Foresters was the capital value of the entire business since Foresters led no evidence showing that such a result was inequitable. Nor did the evidence support a significant allowance or discount (LS, [22]-[23], [68]), and a just allowance is generally not appropriate for dishonest conduct (LRS, [2]-[9]). Foresters' expenditures and losses in the early years had been offset in arriving at the capital value. And there was no risk of unjustly enriching Lifeplan given the losses inflicted on it: FC [53].

13. An alternative approach is the award made by the Full Court which balances some of the above factors in a different way, by reference to the capital value of contracts secured up to 30 June 2015 (FC, [88]-[89]).

Ground 2 of Notice of Appeal

14. An errant fiduciary or knowing assistant can be made to disgorge a capital profit (LS, [63]). The accounting experts calculated actual not anticipated capital profits, by reference to the present value of the future cashflow of Foresters' funeral fund business (FS, [74]). The observation in *Dart* about profits "*actually made*" does not bear the connotation suggested by Foresters (FS, [73]), the phrase being intended to distinguish actual profits from profits that might have been made by alternative efforts: *V-Flow v Holyoake* (2013) 296 ALR 418, [57].

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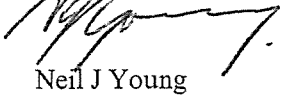
15. The outcome of the causation enquiry is no different whichever meaning of "*resulting from*" is adopted (LS, [65]-[66]).

Grounds 4-7 of Cross-Appeal

16. A combination of policy considerations, *Coulthard* and overseas authorities supports the imposition of vicarious liability on an employer for the equitable wrongdoing of its employees (LS, [74]-[78]; LRS, [10]-[14]). The contrary reasoning of the primary judge at PJ, [363]-[376] is unsound (LS, [79]). Foresters delegated the entire conduct of its funeral fund business and the implementation of the business plan to the defaulting employees. It charged them with a task of producing profits from that business in the interests of Foresters and its co-venturer, FPA. In those circumstances, Foresters' vicarious liability requires that it should account for the profits that the employees wrongfully generated (if not already recovered from the fiduciaries), and that embraces the capital profit obtained by Foresters (LS, [81]-[82]; LRS, [13]-[14]).

Dated: 11 April 2018



Neil J Young

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