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

LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LTD ACN 087 649 492

First Respondent

FUNERAL PLAN MANAGEMENT PTY LTD ACN 003 769 640

Second Respondent

RESPONDENTS' REPLY ON THE CROSS-APPEAL

Part I: CERTIFICATION

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: REPLY TO THE ARGUMENT OF THE APPELLANT ON THE CROSS-APPEAL

Foresters' Failure to Act Honestly

2. As a general rule, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but may award an allowance for skill, expertise and other expenses,[1] a rule which draws attention to the significance of any entitlement of Foresters to an allowance, there being no such antecedent arrangement with Lifeplan. The submission that there was no finding below that the Foresters' Board acted

[1] *Warman*, 562.

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dishonestly fails at a number of levels.[2] Most obviously, it is contradicted by the findings that Foresters knowingly assisted the wrongdoing of Woff and Corby (PJ, [378], [388] and [402]; FC, [52], [91]-[114]). Satisfaction of *Baden*[3] categories i-iv of knowledge is irreconcilable with honesty.[4]

3. Therefore the primary judge did in fact analyse the relevant conduct of the Board members as implying dishonesty, the mental element of knowing assistance having been established (cf. FSR, [19]). In turn, the dishonesty of the Board derived from the evidence of Fleming and Hughes which underpinned those factual findings (cf. FS Reply, [19]).[5] Further, the suggested puttage to those witnesses that they, or the Board, acted dishonestly would have been an objectionable line of questioning (cf. FS Reply, [19]).

4. A second point is that eligibility for the grant of a just allowance is not resolved by a formulaic classification of conduct into "*honest*" or "*dishonest*" categories. Many expressions are found in the cases in the context of an application by an erring fiduciary for an allowance, among them "*honestly or dishonestly*,"[6] "*dishonesty or bad faith or surreptitious dealing*",[7] "*dishonesty or other grave forms of misconduct*",[8] "*conscious wrongdoing*"[9] and "*bad faith*".[10] The true principle is that the overall behaviour of the claimant for a just allowance is a factor to be taken into account on a sliding scale of culpability, with the onus lying upon that claimant and the liberality of any allowance influenced by moral blameworthiness.[11]

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2 Foresters' reply submissions dated 8 February 2018 (**FS Reply**), [19] responding to Lifeplan's submissions dated 21 December 2017 (**LS**), [70].

3 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575-576, referred to at FC, [96]-[98].

4 In *Barnes v Addy* (1874) LR 9 Ch App 244, 251-252, after describing persons falling within the two limbs of accessorial liability, Lord Selborne LC continued: "*But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.*" As noted by Stephen J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR373, 408, Lord Selborne contemplated that an ingredient of liability was the existence of "*fraud and dishonesty*" on the part of the stranger, and for this purpose one may leave to one side the distinction (if any) between "*dishonesty*" and *Baden* categories i-iv: *Royal Brunei Airlines v Tan* (1995) 2 AC 378, 387-392; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [159]-[178].

5 The evidentiary references are collected at LS, [70], footnotes 52-54.

6 *Grimaldi v Chameleon Mining NL & Anor (No. 2)* (2012) 200 FCR 296, [531].

7 *Phipps v Boardman* [1965] Ch 992, 1021, adopted in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, 467-469, *Green & Clara v Bestobell Industries (No. 2)* [1984] WAR 32, 37, *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [252]-[254].

8 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [335].

9 *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440, 448.

10 *Calvo v Sweeney* [2009] NSWSC 719, [272].

11 See generally *Phipps v Boardman* [1965] 1 Ch 993, 1020, 1030-1031; *Phipps v Boardman* [1967] 1 AC 46, 104, 112; *Green & Clara v Bestobell Industries (No. 2)* [1984] WAR 32, 28-39; *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, 112; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, [311]-[335]; *Paul A Davies (Australia) Pty Ltd (in liq) v Davies* [1983] 1 NSWLR 440, 448; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 241-243; *Guinness Plc v Saunders* [1990] 2 AC 663, 693-694, 701; *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [251]-[254]; *Calvo v Sweeney* [2009] NSWSC 719, [272]; *Chirnside v Rattray Properties Ltd* [2006] NZSC 68, [121]-

5. A third point concerns Foresters' resistance to its conduct being characterised as "*active dishonesty*" (FS Reply, [19]). To the extent that the supposed distinction between "*active*" and "*passive*" conduct is of assistance, the primary judge rejected Foresters' submission below that its conduct was too inert to occasion liability (PJ, [379], [388] and [402]). The Full Court affirmed that opinion, observing that the information throughout the BCP was of such detailed specificity and commercial importance, including historical financial information, that no honest and reasonable person, not shutting his or her eyes to the obvious, could conclude other than that the document was based on Lifeplan's confidential information brought by current employees of Lifeplan who were seeking to persuade the board of Foresters to make a decision to attack the business of Lifeplan for the joint future benefit of the employees and Foresters (FC, [41]).

6. Appendix D to the BCP was a "*Lifeplan table, evident as such*" (FC, [31]). In the view of the Full Court, Foresters did more than observe the conduct of Woff and Corby: it knew the opportunity was coming to it in breach of duty and was complicit in the steps of preparation of the BCP (FC, [70]).

7. The BCP was central to the planned venture, setting out a detailed strategy to attack the commercial base of Lifeplan in order to win as many clients as possible after they left it, and so to take as quickly as possible the business presently enjoyed by Lifeplan and replicate its success for the benefit of Foresters (FC, [29]-[32]). It contained "*crucial financial information*" that was utilised in conducting Foresters' new business (FC, [8] and [69]; PJ [160], [192], [306], [310] and [320]).

8. Thus, the Full Court concluded, without evident hesitation, that Foresters' involvement in the breaches concerning the BCP was not mere knowledge gained in a role of spectator to another's role, but active participation in a dishonest breach of fiduciary duty (FC, [41]).

9. Other wrongful conduct was characterised in a similar way – Foresters played an "*active role*" in the preparation of disclosure documents (FC, [46]) and its involvement in the approaches to Lifeplan funeral directors by Woff and Corby meant that Foresters, through its CEO, Hughes, acted "*in concert*" to take such steps as were necessary to get the business plan operational as soon as possible (FC, [51]).

Vicarious Liability

10. It is inapposite to describe the vicarious liability of an employer for equitable wrongdoing as "*novel*", that liability now being established under English and Canadian law[12] and assumed by an Australian intermediate appellate court (cf. FS Reply, [20]).[13] As Lord Millett put it,[14] there is no rational ground for restricting vicarious liability to tort, or for excluding liability in equity, particularly when equitable liability often has its

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136]; *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* (1988) 2 Qd R 1, 12-13; *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584, 596.

12 LS, [74].

13 *Coulthard v State of South Australia* (1995) 63 SASR 531, 535 and 544.

14 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 396.

counterpart at common law.[15] The point was anticipated although not resolved by the observation of Willes J in *Barwick* that "*no sensible distinction can be drawn between the case of fraud and the case of any other wrong*",[16] and given that the wrongdoing is undertaken for the benefit of the employer, difficult policy issues like those found with the sexual abuse cases are absent.[17]

11. The Full Court did not deal with vicarious liability because the additional breaches were subsumed in the relief that it ordered, the Court noting however that it was an "*important question of principle*" (FC, [123]). Instances sometimes arise where this Court deals with a significant question of law that was not considered below (cf. FS, [20]),[18] but in this case the point was fully argued and this Court has the benefit of the reasoning of the primary judge (PJ, [362]-[376]). The present state of the law in Australia is unsatisfactory, there being a conflict in views expressed by a single judge of the Federal Court and a Full Court of a State superior court. Additionally, the brevity of Foresters' submission implies that a consideration of the matter would not be unduly burdensome for this Court, or add appreciably to the time allocated for oral argument.

12. It is not open for Foresters to now suggest that the primary judge failed to undertake a complete "*factual analysis*" by omitting consideration of whether the breaches concerning Tobins, Matgraphics and Melbourne Mailing amounted to conduct on behalf of FPA rather than Foresters (cf. FS, [20]). After leaving Lifeplan, Woff and Corby were full time employees of Foresters, this being admitted on the pleadings[19] and conceded by its evidence,[20] and no suggestion was ever made below that their wrongful conduct was undertaken in a different capacity.

13. An employer is "*answerable*"[21] for the equitable wrongdoing of an employee, but this does not mean that a partial cause of action should be made available to the wronged party shorn of the usual discretionary remedies (cf. FS Reply, [22]).[22] There is an analogy with at least one of the policy goals underlying an employer's liability for torts committed by an employee,[23] and it is "*fair and just*"[24] to award an account of profits against the employer, it being the entity that obtained substantial benefit[25] from the wrongful conduct of its employees.

14. Moreover, to circumscribe the liability of an employer in the manner suggested runs

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15 *Dubai* was referred to by Gummow and Hayne JJ in *New South Wales v Lepore* (2003) 212 CLR 511, [209] but not on this point.

16 *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259, 265.

17 Cf. *Lepore*, and *Prince Alfred College Inc v ADC* (2016) 258 CLR 134.

18 For example, in *Lepore* the plaintiff's case was based on an alleged breach of non-delegable duty rather than vicarious liability, and the plaintiff was permitted to argue vicarious liability notwithstanding that it was not argued in the Court of Appeal (*Lepore*, [77]).

19 Third further amended statement of claim dated 29 May 2015, [23](b) and (c); fourth further amended defence dated 4 June 2015, [23](b) and (c).

20 Hughes affidavit dated 15 March 2013, [44] and [49]; Marketing and Service Agreement dated 31 December 2010, attaching Employment Agreements for each of Woff and Corby dated 3 December 2010.

21 *Barwick*, 265; *Lloyd v Grace-Smith & Co* [1912] AC 716, 733; *Lepore*, 537.

22 The formulation of this point by the primary judge is addressed at FS, [81] and [82].

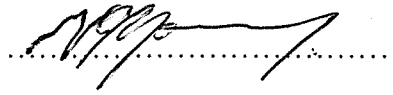
23 In *Bazley v Curry*, 553 McLachlin J noted that vicarious liability improves the chances that the victim can recover judgment from a solvent defendant, see also *Lepore*, [197], *Lister v Hesley Hall Ltd* [2002] 1 AC 215, [14]. An account of profits corresponding to the salary entitlements of the wrongful employee is likely to be of marginal value, and possibly unavailable at all.

24 *Lister*, [28], followed in *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677, [46].

25 *Barwick*, 265; *Lloyd v Grace-Smith*, 725; *Kooragang Ltd v Richardson & Wrench* [1982] AC 462, 472.

counter to the discretionary remedialism of equity,[26] whereby the court examines all of the circumstances to decide the best way the equity can be satisfied.[27]

Dated 15 February 2018



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[26] Evans S, "Defending Discretionary Remedialism", (2001) 23 *Sydney Law Review* 463; Gummow W, "Is Equity Too Successful?" (2003) 77 ALJ 30, 40-42.

[27] By way of example, see *Warman*, 559; Meagher, Gummow & Lehane, "Equity Doctrines and Remedies" (5th Ed), [3-050]; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 114; *Giumelli v Giumelli* (1999) 196 CLR 101, 113; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 413 and 443; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 108; *Bridgewater v Leahy* (1998) 194 CLR 457, 473.