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 and

LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED (ACN 003 769 640)
First Respondent

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

RESPONDENT'S SUBMISSIONS

20 ## Part I: CERTIFICATION

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

Part II: ISSUES

2. The respondents (**Lifeplan**) accept the identification by the appellant (**Foresters**) of the issues which arise on the appeal.

Part III: SECTION 78B NOTICE

3. The respondents consider that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: CONTESTED FACTS

Foresters Summary

30 4. Prior to the events giving rise to the proceedings below, Foresters was not a serious competitor in respect of funeral plan products (cf. FS, [6])[1]. In 2010, Lifeplan had a large share of the market in the order of 70% (PJ, [73][2]; FC, [53][3]) and a business generating sales over $68 million per annum. In 2010, Foresters had a relatively small funeral fund business (PJ, [7]), FC, [6]). In the years leading up to 2010, Foresters had experienced some years of losses: in the 2007 financial year a loss of $209,000, in the

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1 Foresters' submissions dated 24 November 2017 (**FS**).
2 Decision of the primary judge reported as *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384; [2016] FCA 248 (**PJ**).
3 Judgment of the Full Court of the Federal Court reported as *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Limited* (2017) 120 ACSR 421; [2017] FCAFC 74 (**FC**).

Dated: 21 December 2017
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2008 financial year a loss of $200,000 and in the 2009 financial year a loss of $49,000, (FC, [6]) so that the investment proposal involved serious risks for Foresters (PJ, [303]; FC, [24]).[4]

5. From the time Woff and Corby became employees of Foresters, the Foresters Fund grew very substantially and Lifeplan's funeral business diminished correspondingly.[5] As at 30 June 2010, the balance of Foresters Funeral Fund was $13.2 million, whereas it grew rapidly after 2011 so that by 30 June 2013 it had a balance of $62.9 million of funds under management.[6]

6. Contrary to Foresters' submission at FS, [8], the courts below did not find that Foresters' growth came about entirely from lawful competition. Both in this respect and in other respects as explained below, Foresters' submissions present an incomplete and distorted picture of the factual findings made by the primary judge, and they disregard important additional findings that the Full Court made.

7. Foresters does not refer to the central perspectives that the Full Court identified at FC, [8], namely (a) the wholesale plundering of the confidential information and business records of Lifeplan by Messrs Woff and Corby, especially by the former, as part of an orchestrated plan to take as many of the clients of Lifeplan after they left as quickly as possible in a new venture with Foresters; (b) the use made by Messrs Woff and Corby of crucial financial information in the BCP to persuade Foresters to enter the venture with them; (c) the later utilisation of that information; and (d) the extent to which Foresters knowingly participated in these breaches. Nor does Foresters refer to the findings that the Full Court made in support of these perspectives at FC, [27]-[38], [41] and [69].

BCP

8. The BCP did not merely give Foresters the "confidence" to make its decision to proceed with the new business, and it cannot be downplayed as something that was "not irrelevant or completely peripheral": c/f FS, [11], [20] and [34].

9. As the Full Court rightly emphasised, the BCP was central to the planned venture, containing "crucial financial information" and 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, [8], [29]-[32]). It set out a strategic plan to deal with all of Lifeplan's existing clients, including a planned schedule of visits to funeral businesses and a strategic plan to make use of documentation which was, in fact, taken wholesale from Lifeplan and changed as necessary so as to achieve a seamless transition for those clients when they moved their business to Foresters: FC, [29], [30] and [36].

10. The primary judge made similar factual findings, but he did not carry those findings

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4 Fleming (T604.11, T605.7); Hughes (T659.33-659.45).
5 PJ [7], [73] and [426] and FC [53].
6 PJ [89] and [259].

through to his assessment of causation: PJ, [161] and [162]. His Honour also found that Foresters' directors, Hughes and Fleming, were fully aware that the BCP replicated Lifeplan's own business plan, and that Woff and Corby were going to target funeral directors who were clients of Lifeplan as set out in the BCP: PJ, [151] and [193].

11. Both the Full Court and the primary judge made findings concerning Woff's presentation to Foresters' board on 13 September 2010, as recorded in his Recipe Document. That presentation referred to a plan to use documents (that Hughes and Fleming knew had been copied from Lifeplan's confidential documents) to achieve a "seamless transition": PJ, [171] and FC, [36]. Following that presentation, Hughes wrote to Woff stating that "in measuring the traction of the product the Board will rely heavily upon your prediction of sales/growth that you provided in [the BCP].": PJ, [176] and FC, [37] and [38]. The Full Court correctly considered that, in this respect, the BCP played an important role in the implementation of the decision to establish the business: FC, [38].

12. The findings below leave no room for doubt that the strategic plan in the BCP was implemented after the establishment of the business. The primary judge found at PJ, [306] that "*FPA reported to the Board every month. FPA's reports were prepared in part by reference to the New Business Acquisition Timeframe to the BCP (ie Appendix B). In other words, it was used as a measurement of the progress of FPA*". The primary judge also found that the sales figures in the BCP had been used by Foresters to set initial sales targets and budgets for FPA: PJ, [310].

13. Foresters relies very heavily upon the statement by the primary judge at PJ [192] that the only subsequent use of the BCP involved the use of the annual sales figures it contained. The next sentence at PJ [192] then gives two instances where this occurred, January 2011 and March 2011. Given his other findings, it is tolerably clear that the primary judge did not intend those instances to be exhaustive, although Foresters seems to treat them as if they were.

14. The Full Court also found, correctly, that Woff and Corby copied a range of Lifeplan documents – contracts, marketing and administrative documents – that facilitated what they themselves referred to as a "seamless transition" marketing strategy for funeral directors to move from Lifeplan to Foresters: FC [9], [35] and [36]. The primary judge made consistent findings at PJ [263] that Woff and Corby presented documents to funeral firms in 2011 and 2012 that were very similar to those they used with Lifeplan and that they said would facilitate a seamless change to Foresters.

Causation

15. A central finding of the courts below was that the competing business would not have gone ahead without the BCP breaches (PJ, [443]; FC, [16]-[24], [66]).[7] The primary judge did not reach a conclusion as to the level of significance of the confidential

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[7] The chief executive officer of Foresters, Hughes, gave unequivocal evidence that the Board relied upon the BCP in going ahead with the business proposal and would not have taken the risk of doing so without the BCP (T665.1-5).

information in the BCP to Foresters' decision because it was not necessary for him to do so to establish the "but for" finding (PJ, [443]; cf. FS, [11]).

16. Notwithstanding this finding, the primary judge refused an account of profits because the confidential information in the BCP was not used to "generate" profits in the sense that it was not directly used to produce particular profits (PJ, [443]; cf. FS, [13]). This aspect of the reasoning of the primary judge no longer appears to be supported by Foresters, or at least not overtly.

17. In its submissions, Foresters does not grapple with the fact that the primary judge's reasoning misstated the governing legal principles, and ignored the cumulative effect of the breaches in which Foresters participated. Nor does it bring to account the findings that there was continued use of the confidential information in the BCP to gauge the success of the business, not being an incidental or minor consideration (PJ [306]; FC, [37] and [69]), and that Foresters implemented the strategic plan laid out in the BCP.

18. It is wrong to suggest that the Full Court relied exclusively on a "but for" test (cf. FS, [14], [45]). The approach the Full Court adopted was to ascertain the existence of the necessary causal connection by undertaking the same principled inquiry as the High Court had in Warman[8] and in Maguire[9], i.e., was the profit obtained *by reason of* the fiduciary position or *by reason of* taking advantage of opportunity or knowledge derived from the fiduciary position (FC, [64]). There was no requirement for a strict or direct or proximate relationship between each particular transaction from which the profit in a business is derived and some particular breach. Nor was there a need to generalise about the adequacy or not of the so called but-for test; rather the task was to examine the facts to ascertain the causal relationship between the breaches and the profits to assess whether it was sufficient to "attribute" a liability to account for those profits (FC, [64]).

19. The Full Court considered that satisfaction of a but-for test provided a strong foundation for any causal analysis (FC, [66]). In this case, as the Full Court pointed out at FC [66], without the dishonest taking advantage of the information and without the breaches, Woff and Corby would not have been employed by Foresters, Foresters would not have expanded its business in the hands of Woff and Corby as it did, and Foresters would not have made the profits it did from the business written in the venture from Woff and Corby. However, it is clear from the Full Court's overall analysis that it did not rely solely on the proposition that Foresters would not have made the decision to proceed without its participation in the fiduciary breaches: see, e.g., FC [38] and [69].

20. Both the primary judge (PJ, [416]) and the Full Court (FC, [55]) observed that a constructive trust remedy was abandoned at trial, and so it is incorrect to suggest that the Full Court effectively treated Foresters as a constructive trustee of any contracts for the benefit of Lifeplan (cf. FS, [15]).

21. Foresters' description of the "but-for" issue does not match the analysis undertaken by

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[8] *Warman International Ltd v Dwyer* (1995) 182 CLR 544.
[9] *Maguire v Makaronis* (1997) 188 CLR 449 at 465.2.

the Full Court, so it is something of a straw man. It also focuses on aspects of the primary judge's analysis, rather than the Full Court's analysis. For instance, at FS [20], Foresters notes the judge's reference to the emphasis placed by Fleming and the Foresters Board on Woff and Corby's projected annual inflows rather than on any confidential information in the BCP; but this was not a factual finding, merely "*a fair summary of Mr Fleming's evidence*" (PJ, [303]) (cf. FS, [20]). Fleming's tendency to downplay reliance on the more specific information in, for example, Appendix B of the BCP was described by the judge as "somewhat surprising" (PJ, [304]).[10] Notwithstanding the equivocations of Fleming, the judge found that the confidential information played a part in Foresters' decision to proceed, and the judge did not consider it necessary to reach a conclusion as to how significant it was in terms of Foresters' decision (PJ, [324]). Fleming's evidence that "*it would have made no sense to ask Woff and Corby to remove the confidential information from the BCP*" (PJ, [304], referred to at FS, [20]) reflected poorly on him, but it has nothing to do with the causation analysis of the BCP breaches.

Personal Relationships

22. There was no finding that the personal relationships between Woff and Corby and funeral directors played an important role in the success of Lifeplan's funeral fund business (cf. FS, [7]). Although Woff gave evidence about this, the primary judge rejected his evidence except where corroborated by evidence which the judge did accept (PJ, [39]). The findings of the primary judge on the abilities of Woff and Corby were expressed with the utmost caution (PJ, [429]) and the judge declined expressly to make a finding as to how good they were as salesmen (PJ, [429]). The judge further found that financial considerations, such as returns on investments, were more influential on funeral directors than personal relationships (PJ, [427]).

23. Foresters points to the primary judge's finding that the poor performance of Lifeplan Funeral Benefits Fund No. 2 would have been an easy theme for Woff and Corby to exploit after they had left Lifeplan. However, this disregards other findings that Lifeplan had closed that fund, its Tax Minimiser Fund was performing satisfactorily (cf. FS, [8]; PJ, [429]), and, as at 30 June 2010, Lifeplan's sales had not only met budget, but were a record achievement (PJ, [429]).

Foresters' Participation

24. Foresters selectively identifies some of the evidence relied upon by the primary judge to support the finding that Foresters assisted Woff and Corby in their breaches (FS, [21]). His Honour gave two answers to Foresters' submission that its conduct was too inert to constitute assistance (PJ, [379]). The first answer was that it was open to Hughes and Fleming to require the removal of information they knew to be Lifeplan's confidential

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[10] The judge noted Fleming's tendency to emphasise his reliance (and by implication that of the Board) on the general financial figures, particularly the predicted annual inflows, set out in the email from Woff and Corby dated 5 August 2010, and Foresters' analysis of that information (PJ, [304]). An example of this kind of evidence is found at T588.39-45, however, Hughes confirmed that the 5 August email was not even circulated to the Foresters Board (T633.4-17), a factual finding confirmed by the Full Court (FC, [23]).

information. The second answer (omitted without explanation by Foresters) was that in the case of equitable duties, a broad approach to assistance was appropriate, and considering the events from July to September 2010, it was proper to conclude that Foresters provided assistance (PJ, [379]).[11]

25. The Full Court based its finding that Foresters was an active participant in a dishonest breach of fiduciary duty on the two reasons given by the primary judge and on other grounds. Its other grounds included the fact that it was evident that the material in the BCP must have been sourced in Lifeplan's confidential information and that this was known to Foresters' directors. As the Full Court said at FC [41], 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. Consequently, when Foresters made the decision to engage in the business and when it implemented the business plan and monitored its success, it was knowingly utilising information dishonestly gained: FC [41], [67] and [69].

26. In its submissions Foresters does not address these matters, but rather at FS [20], [21] and [35], it misstates the findings of the primary judge by omitting his second ground and then uses that misstatement in order to attack the Full Court's finding that Foresters was an active participant in a dishonest breach of duty. Foresters' criticisms are spurious.

27. In respect of the approach to funeral directors' breaches, the findings relied upon by Foresters are de-contextualised (FS, [22] and [23]). Following Woff's attendance at the Hunter Valley conference of funeral directors, Woff wrote an email to Hughes referring to "*in excess of $15 million in annual funds ready to roll in*" (PJ, [223]). The judge found that although some funeral directors indicated that they would consider changing, rather than actually committing to do so, the figure of $15 million was accurate (PJ, [223], cf. FS, [23]). The observation at PJ, [225] that there was insufficient evidence to make a finding as to the number of funeral directors who were approached[12] should be seen in that context, and should not be taken to imply de minimis causal consequences (cf. FS, [23]).

28. In respect of the Rules and disclosure documents breaches, Foresters issued replacement documents at the start of October 2011 following a complaint made by Lifeplan's parent company (FS, [28]). However, there was no finding that Foresters ceased to use the Lifeplan list of funeral directors taken from Melbourne Mailing, there was an express finding that Foresters continued to use the Matgraphics templates until 2015, there was

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[11] The Full Court agreed with the primary judge, that the Foresters Board was not merely a "passive observer": it did not prepare the BCP, but it used that document in its decision-making process and, after employing FPA, in the governance process of checking performance: FC, [112]. This was "ample conduct" to support a finding that Foresters was knowingly concerned in the relevant breaches: FC, [113].

[12] The judge's finding at PJ, [225] may concern the attendances by Corby at meetings at Benalla on 20 October 2010 and at Warragul on 17 November 2010, and Woff's attendance at the Christmas function on 26 November 2010: PJ, [224] and [225].

no disclosure of the approaches to Tobins on behalf of Foresters which resulted in the loss of Lifeplan's major customer[13] and the primary judge found that Foresters continued to use very similar documents in 2011 and 2012: PJ [263].

Asserted factual errors of the Full Court

29. It is suggested that the Full Court erred in stating that the primary judge found Foresters knowingly assisted breaches in respect of the preparation of "other documents" (stationery request forms, funeral benefit claim forms, marketing flyers and pre-paid funeral contracts) as well as "disclosure documents" (FS, [33]). The argument relies upon reading "disclosure documents" at PJ, [402] narrowly and it is by no means clear that this was intended by the primary judge.[14] The point does not matter one way or the other because the account of profits turned on the BCP breaches.[15]

30. Seemingly, Foresters argues that it was a "factual error" for the Full Court to award an account of profits against Foresters by reference to a period from 1 January 2011 until 30 June 2015 given that the primary judge awarded an account of profits for only one year against Woff and Corby (FC, [37], [65]). This ignores that the account of profits awarded against Woff and Corby rested upon breaches *other than the BCP breaches* and assumed a trifling head start advantage (PJ, [444] and [446]). Given the divergence of starting points, a comparison between the two awards has no utility.[16]

Factual findings concerning cross-appeal – Tobins, Matgraphics and Melbourne Mailing

31. It was accepted at trial that Foresters could only be liable vicariously for the conduct of Woff and Corby concerning Matgraphics and Melbourne Mailing (PJ, [404] and [406]). The case against Foresters concerning Tobins was put on the basis of knowing involvement in the conduct of Woff and Corby, alternatively by reference to vicarious liability. All of those cases failed: the judge held that Foresters was not vicariously liable for the equitable wrongdoing of Woff and Corby (PJ, [374]) nor liable for

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[13] The breaches concerning those matters came to light as a result of subpoenas issued by Lifeplan rather than discovery and they are relevant to Lifeplan's cross-appeal concerning vicarious liability.

[14] The judge used looser expressions in the relevant part of his reasons such as "the disclosure and other documents for the Foresters funeral fund" at PJ, [230] and "Foresters' marketing or disclosure documents" at PJ, [231], and the finding at PJ, [236] implies knowing involvement through Hughes in the proposed FPA pre-paid contract which Foresters says would fall outside the description "disclosure documents". More generally, if Foresters' interpretation of "disclosure documents" in PJ, [402] was correct, one would expect the primary judge to have made clear that Foresters was not involved in all of the conduct analysed at PJ, [230]-[246].

[15] The Full Court treated the breaches concerning Matgraphics and Melbourne Mailing in a similar way, noting that even if Foresters was vicariously liable for those additional breaches, they were subsumed in the account of profits attributable to the BCP breaches: FC, [121]-[123].

[16] Originally Woff and Corby's vehicle, FPA, was entitled to a monthly commission of 0.50% based on the mean average of funds under management (approximately a 25% share) pursuant to a "Marketing & Service Agreement" between Foresters and FPA dated 31 December 2010 (PJ, [259]). FPA was placed into liquidation in June 2013 (PJ, [287]-[291]) so that FPA's 25% share fell into the hands of Foresters. The primary judge ordered an account against Woff and Corby based on their drawings and distribution from the trust of which FPA was the trustee ($24,238 against Woff and $24,198 against Corby) but not in respect of their salaries. There was no appeal by Lifeplan against those awards.

knowing assistance concerning the approaches to Tobins (PJ, [382]-[385]).[17] The factual findings below are relevant to Lifeplan's cross-appeal.

Tobins breach

32. Tobins Brothers was the top performing funeral director client for Lifeplan and its business was worth almost three times the next best performing funeral director client (PJ, [194]). During the course of 2010, Woff misinformed Walsh of Lifeplan that Lifeplan was likely to lose Tobins as a distributor of its funeral products and that Tobins intended to take their account to the Australian Friendly Society (PJ, [195]). That was not the case (PJ, [213]). Woff and Corby then set about obtaining Tobins as a funeral director client for FPA and Foresters (PJ, [196]-[212]), and in doing so disclosed further Lifeplan confidential information including its rebate formula, actual rebate payments for 2009/2010 and the likely (and lower) rebate payments to be offered by Lifeplan's parent, Australian Unity, in the future (PJ, [199]). The fact that Woff and Corby presented proposals to Tobins on behalf of Foresters meant that Lifeplan (which had dealt with Tobins solely through Woff and Corby) was excluded from consideration when Tobins determined its future funeral fund provider. Consequently, while Woff and Corby were initially unsuccessful in obtaining the Tobins account for Foresters, they harmed Lifeplan by severing its relationship with Tobins, and in any event they subsequently obtained the account for Foresters in December 2013 (PJ, [209]).

Matgraphics breach

33. In late 2010, Matgraphics held Lifeplan's designs of FPM's pre-paid funeral contract templates and customised templates arranged for specific funeral directors (PJ, [261]). This contained a database of hundreds of funeral director logos, names, addresses and funeral specifications that had been previously collected and supplied by Lifeplan to Matgraphics. Woff and Corby prevailed upon Matgraphics to use that database to produce customised pre-paid contract forms for funeral directors who agreed to transfer their business to Foresters and that conduct continued until early 2015 (PJ, [265]).

34. In this way, Foresters bypassed the time and cost associated with preparing individual funeral director contracts and avoided having to ask funeral directors for their Lifeplan contracts so they could be copied. This facilitated a "*seamless transition*" marketing strategy which permitted Foresters and FPA to sell their documentation as "*very similar to what your staff currently use*" (PJ, [263]).

Melbourne Mailing breach

35. Melbourne Mailing held a database for Lifeplan of hundreds of funeral directors' names and addresses, previously collected and supplied by Lifeplan to Melbourne Mailing, for use in communicating with Lifeplan's funeral director clients. Woff appropriated a copy of that database, emailed it to his private email address and then used it to send material to funeral director clients on behalf of Foresters (PJ, [267]-[281]).

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[17] As mentioned, the Full Court found it unnecessary to answer "the important question of principle" as to whether rules of vicarious liability or attribution can be used as a separate basis of liability for equitable relief for account of profits (FC, [123]).

Part V: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

36. The appellant's statement of applicable provisions is accepted.

Part VI: ARGUMENT (APPEAL)

Causation

37. Foresters argues that the central issue is whether the application of the "but for" test was a sufficient criterion of causation (FS, [45]). It contends that the Full Court erred in its reasoning by importing policy considerations (fidelity, conscience and trust) into the causation analysis (FS, [41] and [63]), and by failing to apply common law notions of scope of liability, remoteness and *novus actus interveniens*, at least by way of analogy, (FS, [50], [64]). Put another way, the argument is that policy considerations were used impermissibly to establish or confirm a causal link between breach and profit (FS, [63]), whereas common law tests should have been used instead.

38. Implicitly, that argument ought to proceed by accepting the core factual findings about the BCP breaches made by the courts below. The relevant factual findings by the Full Court and by the primary judge are described above. Importantly, they extend beyond the finding that the Board of Foresters based its decision to proceed on the confidential information in the BCP.

39. However, that is not the way in which Foresters' argument proceeds. Foresters misdescribes the factual findings by the primary judge, and ignores the Full Court's factual findings. Thus, it is said that the Full Court was distracted from asking what was acquired by Foresters in consequence of its knowing assistance *"(relevantly, greater confidence to move forward with Woff and Corby's proposal and a possible head start concerning its documents and future customers)"* (FS, [11], [20] and [57]). It is quite wrong to suggest that, by the BCP breaches, Foresters acquired nothing more than the modest advantages of "greater confidence" or a "possible head start". As a loss making business and a minnow in the funeral products market, Foresters was afforded, first of all, an opportunity to start a risky business undertaking which it otherwise would not have contemplated, and to do so by adopting and implementing a strategic business plan that it knew was based on Lifeplan's confidential information that had been brought to it by current employees of Lifeplan. Moreover, those employees were seeking to persuade the board of Foresters to make a decision to attack the business of Lifeplan for their joint future benefit in accordance with the strategies laid out in that business plan. Secondly, Foresters took up that opportunity by implementing the strategic business plan and using the confidential information in that plan to monitor and measure the success of the venture.

40. Turning to the attack on the "but for" element of the Full Court's reasoning, it is not possible to approach causation without focusing upon the relevant rule of legal responsibility. As this Court observed about negligence, the "but for" test is not a comprehensive and exclusive test of causation; value judgments and policy

considerations necessarily intrude.[18] The same applies to equity: in questions of causation, the focus is on the relevant equitable duty and the principles that attach to knowing participation.[19]

41. The relevant equitable duty here is the fiduciary obligation to account for any benefit or gain obtained or received by the fiduciary *by use of*, or *by reason of*, the fiduciary's position, or by reason of the fiduciary taking advantage of opportunity or knowledge derived from his or her fiduciary position.[20] That principle is entrenched in Australia,[21] in England,[22] and elsewhere.[23]

42. It has been described as an "*inflexible rule of a Court of Equity*"[24] and as being "*one of the most deeply rooted in our law*".[25] The rule is applied stringently because the objective is to ensure that the fiduciary cannot profit from fiduciary breaches and is not swayed by considerations of personal interest into misusing a fiduciary position for personal advantage.[26] The authorities deny that the liability of the fiduciary to account depends on detriment to the plaintiff or the dishonesty or lack of bona fides of the fiduciary.[27]

43. The liability of a *knowing assistant* to a breach of fiduciary duty is determined in the same way. That has been the established position since *Consul*,[28] where Gibbs J concluded that, if the maintenance of a very high standard of conduct on the part of a fiduciary is the purpose of the rule, then it is equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duty, and it is contrary to equitable principles to allow a knowing assistant to retain a benefit that resulted from the breach of fiduciary duty.

44. Where the remedy claimed is an account of profits, there must be a causal nexus between the third party's participation in breaches of fiduciary duty and its derivation of profits. There is no requirement, however, that the third party's participation in the breaches of duty must be the sole, proximate or direct cause of the profits that it made. It is enough that the profits claimed can be attributed to the third party's participation in

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18 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 413. See also *March v E & MH Stramare Pty Ltd* (1990) 171 CLR 506 at 515, 516 and 531, and *Gunnersen v Henwood* [2011] VSC 440, [379], cited at FS, [47] and [48].

19 *Youyang v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 502 [44], cited at FS, [42].

20 *Chan v Zacharia* (1984) 154 CLR 178, 199.

21 E.g. *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 393-394 per Gibbs J, 198-205 per Deane J; *Chan v Zacharia* (1984) 154 CLR 178; *Maguire v Makaronis* (1996) 188 CLR 449, 468 per Brennan CJ, Gaudron, McHugh and Gummow JJ; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107 per Mason J; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [503]-[584] per Finn J.

22 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 154; *Boardman v Phipps* [1967] 2 AC 46.

23 *Meinhard v Salmon* (1928) 164 NE 545.

24 *Bray v Ford* [1896] AC 44, 51, adopted by Lord Hodson in *Boardman v Phipps* [1967] 2 AC 46, 111.

25 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 153.

26 *Meinhard v Salmon* (1928) 164 NE 545, 546, adopted in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557.

27 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557.

28 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 397, applied in *Colour Control Centre Pty Ltd v Ty* (1996) 39 AILR 5-058; *Zhu v Treasurer of NSW* (2004) 218 CLR 530, [121].

the breach of fiduciary duty.[29]

45. The Full Court applied those principles in the conventional way, mirroring the way in which the same principles had been applied by the High Court in *Warman*. In *Warman*, the fiduciary breaches by its manager, Dwyer, led to the loss of Warman's sales agency for the distribution of an Italian manufacturer's gear boxes. On the probabilities, that agency would only have continued for another year. However, the High Court concluded that other advantages were gained by the entities that knowingly participated in those fiduciary breaches, being BTA (which was partly owned by Dwyer and partly owned by the Italian manufacturer) and ETA (which was wholly owned by Dwyer and his wife): at 564.7 and 567. The other advantages comprised Dwyer's persuasion of employees to leave Warman to join BTA ; the fact that BTA's entitlement to assemble the Italian products was "acquired and exploited" by BTA as a result of its acquisition of the agency; and the fact that ETA's associated distributorship was likewise established upon the basis of BTA's acquisition of the agency: 566.5. In these circumstances, the High Court said that there was no acceptable basis for depriving Warman of any right to elect to have an account of profits and thereby allowing Dwyer, BTA and ETA to retain benefits that flowed from the breaches of fiduciary duty: 562.5.

46. As to the nature and extent of the account awarded in *Warman*, the High Court recognised that the main basis for BTA's new agency rested on the Italian manufacturer's pre-existing right to exploit the local goodwill of its products in Australia after termination of the agency and its control over the right to assemble those products locally. Nonetheless, given the benefits that BTA and ETA knowingly derived from the breaches, the High Court said that the appropriate approach was to see the two businesses of BTA and ETA as having been "built, to the extent of that benefit" upon Dwyer's breach of fiduciary duty, but otherwise upon the Italian manufacturer's ownership of local goodwill and local assembly rights: 566.9-567.1. For this reason, the High Court held that there should be an account of profits limited to a period of two years – i.e., a period extending beyond the likely one year continuation of Warman's agency and that included a further period to cover the other benefits that BTA and ETA acquired through their participation in the fiduciary breaches: 567.

47. The Full Court also identified, correctly, that questions of causal connection in equity depend upon the nature and character of the relevant rule of responsibility and of the remedy sought (FC, [62]). The rule of undivided loyalty implied "nothing narrow" in the causal connection embodied in the phrase "by reason of" (FC, [63] and [64]). For this reason, the causal enquiry required an assessment of whether the rule and its policy would be undermined if the causal connection or relationship were to be adjudged inadequate and a liability to account not attributed (FC, [64]).

48. There is no practical difference between the Full Court's approach to the ascertainment

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[29] *Warman International Limited v Dwyer* (1995) 182 CLR 544, 557-558; *Maguire v Makaronis* (1997) 188 CLR 449, 468; *Howard v Commissioner of Taxation* (2014) 253 CLR 83, [62]-[63]; *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296, [710]; *V-Flow Pty Ltd v Holyoak Industries* (2013) 296 ALR 418, [56] and [57].

of a sufficient causal link, and an approach that inquires whether the breaches in which Foresters participated "materially contributed" to the profits: cf FS [48] and [49]. Whether the question is framed by reference to the phrase "by reason of", or the phrase "materially contributed", the answer on these factual findings will be the same.

49. In the Full Court's view, a liability to account arose on the facts through a *combination of* matters: satisfaction of a but-for connection in the manner and to the extent described in FC [66]; Foresters' implementation of the business plan laid out in the BCP; Foresters continuing utilisation of confidential information for the important task of supervision and governance of the business; and reference to the relevant rule of responsibility. The Full Court did not rely upon mere satisfaction of the "but for" test (cf. FS, [45]), although Lifeplan submits that in this case the findings in FC [66] would afford a sufficient causal connection without recourse to the other matters that the Full Court identified. No authority is cited by Foresters for the submission that "policy considerations" (fidelity, conscience and trust) ought to be excluded from the causation analysis (FS, [41]).[30] And it would be repugnant to fundamental equitable principles to do so.

50. Foresters also cites no authority for its radical prescription that common law techniques such as remoteness and *novus actus interveniens* should be introduced to causation analysis for equitable liability (FS, [50]).[31] In claims for equitable compensation, courts do not ask the common law question whether the loss was caused by or flowed from the breach but instead "*whether the loss would have happened if there had been no breach*".[32] Common law terminology is just as inapposite to the account of profits remedy.

51. Moreover, equity has established principles that respond to the risk of overcompensating a plaintiff on account of the strict rules of fiduciary liability. They include the following:

(a) it is for the wrongdoer to establish that it is inequitable to order an account of the entire profits, and if this burden is not discharged then the wrongdoer must bear the consequence of mingling the profits attributable to the breach of duty and the profits attributable to its independent efforts and investments;[33]

(b) although the liability of a fiduciary to account is not governed by the doctrine of

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[30] In fact, authority to the contrary is cited (FS, [42], [47] and [48]). Foresters is not assisted by the reference to "settled principles" in *Warman*, 559 which is directed to equitable defences and not causation (cf. FS, [41]).

[31] This Court has expressed reservations about introducing the common law rules of causation and remoteness to a breach of duty by a trustee to exercise reasonable skill and care (*Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, [38]-[39]), implying no room for those principles in the field of liability for a breach of fiduciary duty or knowingly assisting another to breach a fiduciary duty.

[32] *Re Dawson (deceased)*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, 215; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 275-277; *McCann v Switzerland Insurance* (2000) 203 CLR 579, 621-622; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 226; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 94; *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 434; *Youyang Pty Ltd v Minter Ellison* (2003) 212 CLR 484, [46]. See also the observations in *Maguire v Makaronis*, 470 that "*there is no translation into this field of discourse of the doctrine of novus actus interveniens*".

[33] *Warman*, 561-2.

unjust enrichment, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff;[34]

(c) in the case of a business, it may be appropriate to allow the equitable wrongdoer a proportion of the profits where a significant proportion of the profits has been generated by the skill, efforts, property and resources of the wrongdoer, the capital which it has introduced, and the risks which it has taken.[35] But, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses;[36]

(d) instead of a proportion of profits, a just allowance may be awarded in favour of the equitable wrongdoer so as to take account for skills, expertise and other expenses that have generated the relevant capital or income profit;[37]

(e) a just allowance of this kind is not granted as of right and may be unavailable where a fiduciary has acted dishonestly;[38]

(f) the cardinal principle of equity is that the remedy must be fashioned to fit the nature of the case and the particular facts.[39]

52. As to the various citations at FS, [51]-[56]:

(a) the statements of Professor Mitchell do not assist Foresters in this case, for example, its gain could hardly be described as coming about exclusively as a result of activities legitimately undertaken in its interest (cf. FS, [51]);

(b) the observations of Professor Barnett are directed to disgorgement damages for breach of contract (cf. FS, [52]);

(c) the quotation from Professor DeMott is uncontroversial but it does not assist Foresters in the circumstances of this case (cf. FS, [53]);

(d) the judgment of McLachlin J in *Canson*[40] concerned a case of equitable compensation where but for causation was not established, and that same judgment was cited in *Youyang*[41] for the distinction drawn between fiduciary obligations and those arising in negligence and contract (cf. FS, [54]);

(e) *Kao Lee*[42] contains a conventional exposition of the account of profits remedy

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34 *Warman*, 561.
35 *Warman*, 561.
36 *Warman*, 561-2.
37 *Warman*, 562; *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296, [529].
38 *Boardman v Phipps* [1967] 2 AC 46; *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296 at [531]; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [311]-[336]; *Paul A Davies (Australia) Pty Ltd v Davies* [1983] 1 NSWLR 440, 448; *US Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 241.
39 *Warman*, 559.
40 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534.
41 *Youyang v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, [40].
42 *Kao Lee & Yip v Koo Hoy Yan & Ors* [2003] 3 HKLRD 296.

and the reference to "remote" was not intended to invoke the common law (cf. FS, [55]);

(f) *Novoship*[43] is distinguishable on the facts[44] and inconsistent with Australian law to the extent that the Court of Appeal invoked common law rules by analogy (cf. FS, [56]; see the analysis in FC, [68]).

53. Foresters asserts that *Warman* provides some support for the idea that a common law approach to causation is to be applied (by analogy) to the account of profits remedy (FS, [57] and [58]), but no passage supporting this interpretation is identified. The truth is that *Warman* is flatly inconsistent with that assertion.

54. Among the causation errors said to have been made by the Full Court, the first is described as a failure to recognise that the scope and ambit of the duties breached by Woff and Corby concerned an obligation not to provide Foresters with confidential information which could be employed by it *in its business* to its advantage (FS, [61](a)). It is unclear what Foresters means by this terminology. Certainly it is wrong to the extent that it adopts the primary judge's unduly narrow view that the information must be used to directly "generate" particular profits (PJ, [443]). In any event, it is disconnected from the factual findings, including the fact that, as the Full Court observed, the confidential information in the BCP was utilised by Foresters to implement a strategic business plan and to gauge the success of the undertaking (FC, [69]).

55. Foresters concludes with assertions that scope of duty, remoteness or *novus actus* considerations would recognise that the "profits" were earned entirely from legitimate competitive activities, and were not materially contributed to by Woff and Corby's breaches on a "common sense" evaluation of the evidence (FS, [50]-[62] and [66]).[45] Foresters does not explain how it is possible to reconcile those assertions with the evidentiary findings relied upon by the Full Court at FC, [8], [9], [27]-[38], [41], [43], [66], [69], [81] and [88].

Structuring the Account

56. Applying settled equitable principles, it is not to be surmised that practical difficulties in determining the true measure of profit derived by reason of breaches of fiduciary obligations should defeat a plaintiff's right to an account once it has been established that a fiduciary, or a participant in fiduciary breaches, has derived financial benefits from those breaches: *Warman* at 560.3, 562.6, 563.2 and 566.9.

57. Further, in circumstances where a business has been built wholly or partly on the basis of fiduciary breaches, such as in the present case and in *Warman*, the starting point of the analysis is that it is for the defendant to establish that it is inequitable to order an

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[43] *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499.

[44] The profits made by Nikitin derived from a later movement in market rates. For that reason, the Court of Appeal held that the Henriot charters were merely "the occasion" for Nikitin to make a profit and that the "real or effective cause of the profits" was the unexpected change in the market (at [114]).

[45] On the limitations of "common sense" in relation to causation questions, see Edelman, *Unnecessary Causation* (2015) 89 Australian Law Journal 20, 24.

account of the entire profits or capital value of the business. If the defendant does not establish that would be so, then the defendant must bear the consequence of mingling the profits attributable to the fiduciary breach and the profits attributable to the defendant's efforts and investments: *Warman* at 561.9-562.2. Assuming the evidence is available, the question whether it is appropriate to restrict the account to a proportion of profits, or to profits derived during a limited period, or to make an allowance in respect of skill, expertise and other expenses, comes down to a matter of judgement that will depend on the facts of the given case: *Warman* at 562.2.

58. In *Warman*, there was no logical or mathematical precision about the two year period chosen by the High Court: at 567.7. Indeed, the High Court explicitly noted that an account will often be extremely difficult to structure, and there will rarely be any mathematical exactness about it: at 558, 562.2 and 567.7-568. Necessarily, it will come down to an exercise of judgement or reasonable approximation that is tailored to the particular facts of the case. The pragmatic objective of the exercise will be to determine as accurately as possible the true measure of the profit or benefit obtained by reason of the breach of fiduciary duty.

59. The cardinal principle is that equitable remedies must be fashioned to fit the nature of the case and the particular facts: *Warman* at 558 and 559.7. In the present case, the alternatives available to the Full Court were basically twofold: FC [71]-[74]. First, the Full Court could have awarded an account for the capital value of the entire business as it was built upon fiduciary breaches and the opportunities they created, less any just allowance established by Foresters. Secondly, the Full Court could have structured an account to capture the capital value of the contracts that secured a flow of income where those contracts were written during a limited period. The second of the alternatives reflected the evidence that, once written, contracts generated an assured flow of income as the member was precluded from withdrawing any funds or changing the fund prior to his or her death: PJ [71] and [469].

60. The second of the alternatives was advanced by both Lifeplan and Foresters, albeit Foresters did so on the footing that if its causation case failed it needed to discharge its onus to establish a basis for an account or just allowances that fell short of a requirement that it account for the full capital value of the business. The relevant evidence was advanced through experts. The first such expert report (Jackson) was filed by Foresters, and his approach was adopted and extended by Lifeplan's expert (Wright): FC [71]-[74]. To that extent, both parties advanced alternative cases that proceeded on the footing that an account could be awarded by reference to the capital value of contracts that were written during a specified period of time following the establishment of Foresters' business.

61. The Full Court recognised that it was for Foresters to establish that it was inequitable to order an account of the entire profits or to establish the basis for a just allowance (FC [84]), and that the business would not have been available to Foresters in the form of the business run by Woff and Corby but for the fiduciary breaches. But it considered that it would be disproportionate to award an account to Lifeplan for the whole capital value of

the business of Foresters: FC [84] and [85]. On the other hand, it considered that the alternative basis for an account presented by both parties, albeit for different periods, would enable a balancing of the relevant factors: FC [86]. In this way, the Full Court tailored the account of profits to fit the circumstances of the case. There is no substance in Foresters' criticism that the Full Court's approach amounted to a bare exercise of discretion: FS [58]. Rather, it exercised a judgment in accordance with settled principles and shaped an account that accorded with its factual findings and the expert evidence before it.

62. From a total business value of $14,838,063 as at 30 April 2015, Foresters was permitted to retain $8,279,568, Lifeplan's award being $6,558,495. That outcome was generous to Foresters.

Actual or anticipated profits

63. It is beyond argument that an errant fiduciary or knowing assistant can be made to disgorge a capital profit.[46] This point is now conceded by Foresters, subject to a qualification that the profits must be actual or realised, not anticipated (FS, [74]).

64. Foresters submits, incorrectly, that none of the accounting experts gave evidence that "in accounting terms" the present value of the anticipated cashflows of Foresters' funeral fund business was an existing capital profit (FS, [78]). In her first report, Lifeplan's expert valued Foresters' funeral product business by calculating the profit stream from pre-paid funeral product policies written by or on behalf of Foresters from and after 1 January 2011. This approach was recognised and accepted by Foresters' expert and accepted by the courts below (PJ, [418]; FC, [72]). The calculations of lesser figures to reflect the net present value of policies written up to various dates corresponding to the end of a financial year are sub-sets of that business value. Plainly, the value of a business can be measured by reference to the cash flows it generates, and that value can represent an existing capital profit. Similarly, the expert evidence below was led by both parties, and the experts proceeded, on the footing that the capital value of particular contracts was to be measured by reference to the income flow they secured. Observations in the taxation case *Myer*[47] about the right to interest not being treated as an additional capital asset are not to the point.

Special Leave Question 4: Section 1317A

65. If "resulting from" in s 1317H(2) is to be free from the strictures of analogies with equitable claim,[48] then it must equally be free from analogies derived from the common law.[49] The outcome of the causation inquiry on the facts of this case ought to be no different, whichever meaning of "resulting from" is adopted (FC, [117]).

66. Further, if "resulting from" is given its ordinary meaning, or a meaning equivalent to "caused or materially contributed to", the factual findings below make out that

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[46] FC, [77], citing *Warman*, 563; *Apand Pty Ltd v Kettle Chip Co Pty Ltd (No 2)* (1999) 88 FCR 568, 599 [156] and *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* (2013) 296 ALR 418, 430 [58].

[47] *Federal Commissioner of Taxation v The Myer Emporium Ltd* (1987) 163 CLR 199, 217.

[48] *Adler v ASIC* (2003) 179 FLR 1, [709].

[49] *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 510.

connection.

Part VII: ARGUMENT (CROSS-APPEAL)

Grounds 2 and 3: Capital value of the business

67. In *Warman*, at 561, this Court pointed out that it is for the wrongdoer to establish that it is inequitable to order an account of the entire profits, and if this burden is not discharged then the wrongdoer must bear the consequence of mingling profits.[50] Subject to such proofs, it may well be inappropriate and inequitable to compel a fiduciary to account for the whole of the profit of a business where it appears that a significant proportion of an increase in profit was generated by the skill, efforts, property and resources of the fiduciary, the capital it introduced and the risks it undertook: FC, [83]-[85].

68. However, at trial, Foresters directed none of its evidence to those matters. Notwithstanding wide discovery orders against the respondents below, very few documents were produced which explain how they developed the funeral products business. Numerous subpoenas served upon Tobins, Matgraphics, Melbourne Mailing and funeral director clients tended to expose wrongdoing rather than legitimate business activities. Essentially no evidence was led by Foresters before the judge evidencing the launch of FPA, the development and approval of the disclosure documents and marketing collateral, how the custom of funeral directors was sought and obtained, what capital was invested by Foresters and what risks it undertook. Given the nearly complete absence of evidence on those matters, the judge made very limited findings at PJ, [429] and the Full Court was driven to infer the deployment of capital, skill and expertise and the undertaking of business risks (FC, [85]).

69. Accepting the need for a degree of proportionality (FC, [85]), the evidence nonetheless raised an inference that, absent the misconduct, Lifeplan would have retained all of the business that it lost to Foresters, implying a direct relationship between falling Lifeplan sales and growing Foresters sales. In addition, the judge found that the initial plan was to target funeral directors who were Lifeplan clients (PJ, [193]).[51]

70. Another factor tending against a significant discount to Lifeplan's claim is that the Board of Lifeplan failed to act honestly. Fleming admitted that he knew that some information in the BCP was confidential[52] and that it was obviously taken from Lifeplan.[53] Hughes adopted a contrary stance[54] but his evidence was rejected (PJ, [378]). The Full Court observed 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

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50 *Warman*, 561-2.
51 See also Walsh (18 September 2014), [155]-[167].
52 Fleming oral evidence (T585.23-T585.31).
53 Fleming oral evidence (T584.16-T584.22, T585.22-T585.31; T591.14-T591.33).
54 Hughes oral evidence (T636.20-T636.36; T637.17-T637.20; T637.35-T638.3; T640.24-T640.26; T641.43-T641.46; T644.24-T644.43).

confidential information (FC, [41]). In the opinion 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]); and it deployed and monitored the detailed strategy it set out to attack the commercial base of Lifeplan (FC, [8], [29]-[32]).

71. Thus, the Full Court concluded 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]).[55]

72. Another consideration is that 25% of the value of the Foresters funeral funds business was acquired by Foresters for nothing when the corporate vehicle of Woff and Corby, FPA, was placed into liquidation in June 2013, that 25% share being a reflection of the equitable wrongdoing of Woff and Corby (PJ, [287]-[291]). This acquisition occurred under the terms of the Marketing & Service Agreement which is linked directly to the reliance by Foresters on the tainted BCP (PJ, [287]-[292]).

73. In the circumstances, the Full Court ought to have ordered Foresters to account for the full capital value of the business it built on fiduciary breaches, given that any just allowance was unproven or minimal.

Grounds 4–6: Vicarious liability

74. It is now established in English[56] and Canadian[57] law that an employer is liable for the equitable wrongdoing of an employee, and there is supporting Australian authority as well.[58]

75. The question was resolved, decisively, for England by the decision in *Dubai Aluminium*,[59] which concerned the vicarious liability of partners for the equitable wrongdoing of other partners, specifically dishonest assistance and knowing receipt. The Full Court in South Australia resolved the question in the same way in *Coulthard v State of South Australia* (1995) 63 SASR 531.

76. The language of King CJ in *Coulthard* at 535 is apt: equity acts upon the conscience of the employer by requiring the employer to "accept responsibility" for the employee's breaches, given that the employer has put the business enterprise into the community for its own advantage.

77. Many of the policy considerations referred to in the leading decisions are readily adaptable to liability in equity.[60] If it is "*right and just that the person who creates a*

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[55] Cf. *Phipps v Boardman* [1964] 2 All ER 187 at 208 (see also *Phipps v Boardman* [1965] Ch 992 at 1020-1021, 1030-1031, 1032 and *Boardman v Phipps* [1967] 2 AC 46 at 104, 112).

[56] *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224, [10]; *Flogas Britain Ltd v Calor Gas Ltd* [2014] F.S.R. 34, [123]-[127]; *Pintorex Ltd v Keyvanfar* [2013] EWPCC 36, [46]-[50]; Stafford and Ritchie *Fiduciary Duties Directors and Employees,* 2015, [8.5].

[57] *Clayburn Industries Ltd v Piper* (1998), 62 B.C.L.R. (3d) 24; *57134 Manitoba Ltd v Palmer* [1989] 37 B.C.L.R. (2d) 50; *United Services Funds v Richardson Greenshields of Canada Ltd* (1988) 22 B.C.L.R. (2d) 322.

[58] *Coulthard v State of South Australia* (1995) 63 SASR 531, 535 and 554.

[59] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366.

[60] Cf. FS, [59]-[63].

risk bear the loss when the risk ripens into harm",[61] then it is equally so where that harm takes the form of equitable wrongdoing so as to produce tainted profits for an employer. The need for deterrence of future harm favours equitable liability as well.[62]

78. As their Lordships pointed out in *Dubai*, there is no reason as a matter of policy to exclude equitable wrongdoing from the field of vicarious liability. Knowing assistance is "based on fraud",[63] and the slender difference between equitable fraud on the one hand and fraud in deceit or the common law sense of conscious dishonesty on the other[64] favours an extension of vicarious liability to equitable wrongdoing.[65] In other words, as vicarious liability extends to wrongdoing even if fraudulent,[66] it should not matter that the liability arises in equity and not at common law or by statute.

79. The primary judge advanced three reasons for rejecting the claim that Foresters was vicariously liable for the equitable wrongdoing of Woff and Corby after they became its employees at the end of 2010 or early in 2011 (PJ, [374]). The reasons advanced by the judge do not stand scrutiny:

(a) The fact that the general run of vicarious liability cases are concerned with loss merely reflects the reality that such claims are usually brought in tort, and in any event vicarious liability for equitable wrongdoing might lead to a loss-based remedy such as equitable compensation. The judge's observation tells you nothing about the availability of vicarious liability in respect of equitable wrongdoing.

(b) The judge's dismissal of *Coulthard* as the only Australian authority was based on the erroneous view that the case did not consider the question of vicarious liability "in a major way". All of the judges in *Coulthard* proceeded on the footing that the State could be held vicariously liable for breaches of an equitable duty of confidence by its employees, albeit that liability was not established on the facts.[67]

(c) The judge's view that vicarious liability should not be allowed to make significant inroads on the carefully constructed rules for accessory liability under *Barnes v Addy* is wrong. *Barnes v Addy* occupies a wider and different sphere when compared with vicarious liability. It is concerned with strangers to the fiduciary relationship, not simply employers, who can be held liable if they participate with requisite knowledge in a breach of fiduciary duty by another party.

80. The practical relevance of vicarious liability here is that Foresters would then be liable for the conduct of Woff and Corby concerning Tobin Brothers, Melbourne Mailing and Matgraphics, making it more difficult to accept that Foresters should escape liability for

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61 *Bazley v Curry* [1999] 2 SCR 534, [31].
62 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [53].
63 *Williams v Central Bank of Nigeria* [2014] 2 All ER 489, [35].
64 *Derry v Peek* (1889) LR 14 AC 337, 350-352.
65 *Nocton v Lord Ashburton* [1914] AC 932, 954; *Maguire v Makaronis* (1996) 188 CLR 449, 465.
66 *Lloyd v Grace, Smith & Co* [1912] AC 716.
67 King CJ said so explicitly at 535.

the profits made from their wrongdoing.[68]

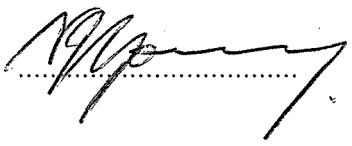
81. While he did not decide the point, the judge was inclined to favour a submission by Foresters that were Foresters vicariously liable for the wrongdoing of Woff and Corby, then such liability would be limited to the profits made by Woff and Corby as the defaulting fiduciaries (PJ, [375]). However, this fails to distinguish *liability* from *remedy*, and would carry the odd consequence that the usual election between an account of profits or equitable compensation could not be made, the plaintiff being confined to the latter remedy. The hallmark of equitable intervention is flexibility:[69] it would be wrong to introduce a notion of "partial" vicarious liability with some remedies precluded automatically irrespective of the circumstances of the case.

82. Moreover, the suggested limitation would be inconsistent with the policy that underpins vicarious liability. [70] An employee who engages in equitable wrongdoing on behalf of the employer will almost always generate profits for the employer rather than personally, the employee's salary not typically being regarded as a "profit" for the account of profits remedy.[71] Having put the employee in his place to do that class of act on his behalf, the employer should be liable for his conduct and any benefit he derives from it.[72]

Part VIII: TIME FOR ORAL ARGUMENT

83. It is estimated that 2.5 hours will be required for the presentation of the oral argument of the respondents.

Dated 21 December 2017



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[68] Notably that misconduct extended to at least early 2015 in the case of Matgraphics (PJ, [265]) and for an indeterminate period in the case of Melbourne Mailing (PJ, [279]).

[69] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559; *Giumelli v Giumelli* (1999) 196 CLR 101, [34]-[47].

[70] The underlying idea behind the doctrine of vicarious liability lies in policy not analytical jurisprudence: *Darling Island Stevedoring & Lighterage Co Ltd v Long* (1957) 97 CLR 36, 56-57, approved in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 37. See also Fleming *The Law of Torts* (9th Ed), 410; *State of New South Wales v Lepore* (2003) 212 CLR 511, [106]; *Bazley v Curry* [1999] 2 SCR 534, [26]; *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224, [15].

[71] E.g. *Polyaire Pty Ltd v K-aire Pty Ltd* [2012] SASC 75, [36]-[56].

[72] *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259, 266, which is described as a classic judgment in *Kooragang v Richardson & Wrench* (1982) AC 462, 472.