

Liability for knowingly assisting in a breach of fiduciary duty

David Smith reports on Ancient Order of Foresters in *Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43

Introduction

The High Court has considered and, by majority, confirmed the principles applicable to causation and quantification where an account of profits is ordered against a knowing assistant to a fraudulent breach of a fiduciary duty. The court considered an account of profits could include anticipated future profits.

Facts

In 2010, Lifeplan Australia Friendly Society Ltd (Lifeplan) had a 70 per cent share of the ‘funeral products’ market in Australia. The funeral products involved a customer making payments to Lifeplan which were managed in a fund for a fee. A guaranteed sum would then be paid out upon the customer’s death to meet the expenses of their funeral. Ancient Order of Foresters in Victoria Friendly Society Ltd (Foresters) was also involved in the funeral products business. It had a much smaller market share and its business was not very profitable, if it was profitable at all.

Messrs Woff and Corby were senior employees in Lifeplan’s funeral products business. Woff was responsible for creating and maintaining relationships with funeral directors and Corby reported to Woff.

While still employed at Lifeplan, Woff and Corby developed a proposal to capture as many of Lifeplan’s clients as quickly as possible for Foresters. This was formalised in a comprehensive five-year business concept plan (BCP) which they presented to Foresters. The BCP was prepared by the ‘wholesale plundering’ of confidential information and business records from Lifeplan (as so described by the Full Federal Court; (2017) 250 FCR 1 at [8]), and this would have been apparent to any honest and reasonable person.



“I’m no attorney, but that’s a material breach if I’ve ever seen one.”

Foresters’ board approved the BCP and its new funeral products business flourished at Lifeplan’s expense. From 2010 to 2012, Foresters’ annual ‘inflows’ grew from \$1.6 million to \$24 million and Lifeplan’s inflows shrank from \$68 million to \$45 million.

Appellant’s claim

The primary judge (Besanko J; *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384; [2016] FCA 248) held that, as employees, Woff and Corby owed fiduciary duties to Lifeplan which they breached and ordered an account of profits against Woff and Corby. Further, and relevantly, his Honour held that Foresters had knowingly assisted Woff and Corby in breaches of their fiduciary duties to Lifeplan where Foresters was aware of circumstances which would indicate to any honest and reasonable person that Woff and Corby had used Lifeplan’s confidential information to prepare the BCP, solicited funeral directors’ business while still employed by Lifeplan and prepared rules and disclosure documents for Foresters’ funeral products business while still employed by Lifeplan.

Besanko J found that Foresters would not

have proceeded with an expansion of its funeral products business without the BCP. However, his Honour refused to order an account of profits against Foresters on the basis that the confidential information was not in itself used to generate profits and there was nothing to stop Woff and Corby from approaching funeral directors once they left Lifeplan.

The Full Court of the Federal Court (*Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1; [2017] FCAFC 74; Allsop CJ, Middleton and Davies

JJ) considered that Besanko J had taken an unduly narrow approach to consideration of whether to order an account of profits against Foresters. The Full Court held that Foresters would not have made the profits it did but for the breaches of duty by Woff and Corby. The Full Court ordered Foresters to account for profits made and projected to be made on contracts entered into from February 2011 to June 2015. The Full Court considered that this ‘...sets the account within the framework of the five-year business plan, with a modest deduction of six months’ to factor in the capital, skill, expertise and risk involved in Foresters establishing a new business ((2017) 250 FCR 1 at [88]).

Appeal to the High Court

It was not in issue before the High Court that Foresters was liable to account. Relevantly, there were two issues before the High Court, namely, (i) the extent of the causal connection between the account ordered against Foresters and the conduct that constituted its knowing assistance in breaches of duty and (ii) the quantification of the account.

By majority (Kiefel CJ, Keane and Edelman JJ in a joint judgment and Gageler J), the High Court held that Foresters must account for the full value of its funeral products business. Nettle J would not have disturbed the orders of the Full Court.

On the question of causation, Foresters argued that it should only be liable to account for profits that were the direct result of the particular acts by which it knowingly assisted Woff and Corby in their breaches of fiduciary duty. In a joint judgment, Kiefel CJ, Keane and Edelman JJ disagreed. Their Honours referred with approval with the decision of Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397 where his Honour said “person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation”. Their Honours held that it was sufficient to show that the profit would not have been made ‘but for’ the dishonest wrongdoing (at [9]). The dishonest wrongdoing by Foresters resulted in the capture of business connections essential to Lifeplan’s funeral products business and so Foresters was liable to account for those profits. It was irrelevant that Foresters could show that the profits might have been made honestly (at [9]).

Gageler J agreed but added (at [88]) that where a breach of fiduciary obligation is dishonest and fraudulent (as will be the case where one is dealing with knowing assistance), there is a sufficient causal connection so long as the breach ‘...played a material part in contributing to the benefit or gain of the fiduciary or knowing participant even in circumstances where it cannot be concluded that the benefit or gain would not have been obtained but for the breach’.

As to quantification, all members of the court stated, consistently with *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-561 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), that once causation is established, the onus is on the defendant to show that he or she should not account for the full value of the benefit obtained (joint judgment at [13]; Gageler J at [91]; Nettle J at [186]).

Kiefel CJ, Keane and Edelman JJ said that the defendant can demonstrate that in two ways: (i) by proving an entitlement to an allowance for costs, labour and skill; or (ii) ‘by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account’ (at [15]). The second of these was pursued by Foresters before the High Court. Their Honours observed that there is no precise test for determining the issue and all the circumstances must be considered (at [16]).

Gageler J’s formulation of how a defendant can show that he or she should not account for the full value of the benefit obtained was similar to that of the joint judgment. His Honour said that the defendant must show either (i) it is ‘practically just’ that the advantage be apportioned or some allowance be made, or (ii) there is some other reason why there would be a windfall to the plaintiff that would fail to vindicate the purposes for the imposition of the fiduciary duty (at [92]).

The majority held that the advantage to Foresters was not limited to the five-year plan set out in the BCP. The advantage was the business connections and that benefit would be enjoyed for as long as those business connections remained with the business (joint judgment at [16]; Gageler J at [119]). Foresters did not demonstrate that any of its increased profitability was generated by matters other than the business connections appropriated from Lifeplan. Accordingly, the majority held that it should account for the full value of the business (joint judgment at [16]; Gageler J at [119]). Kiefel CJ, Keane and Edelman JJ also considered it pertinent that the profits were made from deliberate and dishonest conduct and were the very profits that were sought to be achieved (at [16]).

Finally, there was a question whether an account of profits could be ordered in respect of anticipated future profits. Kiefel CJ, Keane and Edelman JJ held that there was no justification in principle or in authority to limit an account of profits to realised profits. Their Honours considered that unrealised profits were still profits (at [24]; see likewise Nettle J at [203]). Gageler J considered that this argument by Foresters was misguided because the discount rate applied to pro-

jected cash flows took into account the risk assumed by Foresters in carrying on the business (at [111]).

Accordingly, Foresters was required to account for the full value of the business connections appropriated by it from its participation in the disloyalty of Woff and Corby.

Nettle J, in dissent, held that the test of causation is whether the breach of fiduciary duty has ‘materially contributed’ to the profit the subject of the account (at [179] and [191]) and observed that, ultimately, quantification of the account involves a ‘judicial estimation of the available indications’ rather than mathematical precision and is a matter on which reasonable minds may differ (at [197]). His Honour considered that it was open to the Full Court to order an account based on the net present value of Foresters’ funeral product business after five years with a deduction of six months. The BCP was a five-year plan and Foresters could not have operated the business and derived profits from the BCP to a significant extent after that period. Nettle J also said that Woff and Corby’s personal skills were largely responsible for the growth in Foresters’ business and that it would not have taken them long lawfully to solicit clients they had unlawfully solicited before leaving Lifeplan (at [188]).