

ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY LIMITED v LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED & ANOR (A37/2017)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 74

Date of judgment: 12 May 2017

Date special leave granted: 20 October 2017

The appellant ('Foresters') and first respondent ('Lifeplan') were both friendly societies which provided investment products, including funeral bonds and pre-paid funeral plan contracts. In 2010 two senior employees of Lifeplan (Woff and Corby) left Lifeplan and became employees of Foresters. In proceedings brought in the Federal Court in 2012, Lifeplan sought an account of profits on the grounds that Woff and Corby were in breach of fiduciary duties, duties of confidence and contractual duties owed to it, and that Foresters knowingly assisted those breaches, and induced them to breach their contracts of employment.

The primary Judge (Besanko J) found a number of breaches of duty by Woff and Corby. His Honour found, inter alia, that while still employed by Lifeplan, Woff used confidential Lifeplan documents containing detailed business and financial intelligence of Lifeplan to prepare a "business concept plan" and a presentation which he and Corby made to the board of Foresters; whilst employees of Lifeplan, Woff and Corby actively solicited the business of other funeral directors on behalf of themselves and Foresters; that they took and utilised for their new business a database of hundreds of funeral directors' contact details maintained by Lifeplan; and that they copied Lifeplan's disclosure documents, contracts, marketing and administrative documents for their new business with Foresters.

Besanko J further found that Foresters knowingly assisted Woff and Corby to breach their fiduciary duties to Lifeplan. He concluded, however, that although Foresters was involved in the breaches by the two employees and based its decision to employ them to develop the particular segment of business upon confidential information provided to it in breach of fiduciary duty, there was no causal connection between those breaches of fiduciary duty and the profits of the segment of business that was developed by Woff and Corby for Foresters.

Lifeplan's appeal to the Full Court (Allsop CJ, Middleton & Davies JJ) was successful. The Court found that without the breaches of duty in which Foresters was knowingly involved, without Woff and Corby taking advantage of their positions and of the confidential information taken from their employer, Foresters would not have made the profits it did from the business written in the venture with Woff and Corby. Their Honours held that to conclude that such is a sufficient causal connection to found a liability to account for profits of the business would not be to extend the causal relationship beyond the expressions of profits actually made by reason of the breaches; rather, it would be to fashion the remedy in a way that, in terms of a causal attribution, would conform to and enforce, and not undermine the strictness of, the duty by fashioning the remedy

to fit the nature of the case and the particular facts. Further, far from being an attenuating consideration, the satisfaction of a but-for test could be seen as a strong foundation for any causal analysis.

The grounds of the appeal include:

- The Full Court erred in concluding that there was sufficient causal connection between the profits the subject of the account of profits ordered against Foresters and the conduct that constituted its knowing participation in equity in breaches of fiduciary duty and confidence of Messrs Woff and Corby, and being a person involved in the contravention of ss 181, 182 and 183 of the *Corporations Act 2001 (Cth)* by Woff pursuant to s 1317H, because the Full Court was satisfied that but for that unlawful conduct by Foresters the occasion for the making of the profit would not have arisen, notwithstanding that the conduct was not the real or effective cause of any profit derived by Foresters.

The respondent has filed a notice of cross–appeal, the grounds of which include:

- The Full Court erred in fact and in law in holding that it was inequitable or inappropriate to order the appellant to account for the entire capital value of the business it established.