HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY LIMITED — APPELLANT

AND

LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED & ANOR — RESPONDENTS

Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited
[2018] HCA 43
10 October 2018
A37/2017

ORDER

1. *Appeal dismissed.*

2. *Special leave to cross-appeal, limited to the grounds in paragraphs 2 and 3 of the respondents' notice of cross-appeal, granted.*

3. *Cross-appeal allowed.*

4. *Set aside order 2 of the orders made by the Full Court of the Federal Court of Australia on 16 June 2017 and, in its place, order that Ancient Order of Foresters in Victoria Friendly Society Limited account to Lifeplan Australia Friendly Society Limited and Funeral Plan Management Pty Ltd for profits in equity in the sum of $14,838,063.*

5. *The appellant pay the respondents' costs of the appeal and cross-appeal.*

On appeal from the Federal Court of Australia

Representation

R Merkel QC with D C Gration and Z E Maud for the appellant (instructed by TurksLegal)

N J Young QC with P W Collinson QC and M D Douglas for the respondents (instructed by Ashurst Australia)

CATCHWORDS

Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited

Equity – Knowing assistance in breach of fiduciary duty – Remedies – Account of profits – Causation – Where employees of first respondent breached fiduciary duties to respondents by assisting appellant, and then joined appellant – Where appellant knowingly assisted in breaches of fiduciary duty – Where primary judge found profits of appellant's business not direct result of appellant's knowing assistance – Whether account of profits available.

Equity – Knowing assistance in breach of fiduciary duty – Remedies – Account of profits – Assessment of quantum – Whether knowing assistant obliged to account for entire capital value of business acquired – Whether account of profits may be ordered in respect of anticipated profits.

Words and phrases – "account of profits", "actual profits", "anticipated profits", "as a result of", "but for", "causation", "disgorgement" "knowing assistance", "material contribution".

1 KIEFEL CJ, KEANE AND EDELMAN JJ. We agree with the orders proposed by Gageler J. In our view, however, when the facts of the case are fully appreciated the issues of causation and the quantification of the benefit for which Ancient Order of Foresters in Victoria Friendly Society Ltd ("Foresters") should account to Lifeplan Australia Friendly Society Ltd ("Lifeplan") and Funeral Plan Management Pty Ltd ("FPM") may be resolved without the need for any revision of principle.

2 An examination of the facts of the case shows that Foresters knowingly took advantage of Messrs Woff and Corby's dishonest and fraudulent design, which involved breaches of fiduciary duty, in order to enhance its business by appropriating the business connections of its competitors. It succeeded in doing so. In such a case, equity requires that Foresters account for the full value of the enhancement.

3 Gratefully accepting the summary by Gageler J of the findings and reasons of the courts below, we proceed to explain why we take this view.

Causation

4 Foresters submitted that its liability to account and disgorge should be confined to those profits that are the direct result of each of the particular acts by which it committed the equitable wrong of knowingly assisting Woff and Corby in a dishonest and fraudulent design to breach their fiduciary obligations to Lifeplan and FPM[1]. By focusing on each act of knowing assistance and its direct consequences, rather than the overall effect of Foresters' wrongful conduct, the submission ignores the obvious reality that Foresters' particular interactions with Woff and Corby resulted, as they were always apt to do, in the wholesale acquisition by Foresters of the business connections that Lifeplan and FPM had with funeral directors, these connections being, as Foresters well knew, essential to Lifeplan and FPM's funeral fund business[2].

5 Another way of putting this point is to say that Foresters could not limit its liability to disgorge profits by claiming that only limited profits were caused by particular acts of knowing assistance when the consequences of those acts were inseparable from the consequences of Woff and Corby's general scheme of

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1 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 140 [111]; [2007] HCA 22.

2 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 416 [147], 417 [152], 421 [171]; *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 15-16 [41].

breach of fiduciary duty. This point is further reinforced by the cross-appeal, which relied upon other acts by Woff and Corby for which Foresters was said to be vicariously liable. Although it is unnecessary to decide this issue of vicarious liability, it should be noted that there is no novelty in equity attributing to one person the wrongful acts of another[3]. As Lord Millett observed in *Dubai Aluminium Co Ltd v Salaam*[4], the Court of Chancery recognised vicarious liability of partners in this manner at least as early as 1842[5].

6 In *Consul Development Pty Ltd v DPC Estates Pty Ltd*[6], in a passage accepted as authoritative by both sides in the present case, Gibbs J said that:

> "a 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."

7 So described, the liability to account and to disgorge benefits encompasses "any benefit" received by the knowing participant in a breach of fiduciary duty "as a result of" that participation. The benefit of a business connection is such a benefit. Foresters' submission fails to come to grips at all with the fact that the benefit that Foresters stood to gain, and in fact acquired, from its participation in the various acts of disloyalty by Woff and Corby was not sporadic deposits from retail customers; it was the business connections of Lifeplan and FPM.

8 In addition, Foresters' submission, by framing the issue as involving an enquiry as to whether there was a causal connection between each of the particular acts of Foresters, whereby it participated in the strategy formulated by Woff and Corby, and particular deposits associated with its new business, diverts attention away from the significance of the circumstance that Foresters' acts of participation in the disloyalty of Woff and Corby were not only informed by, but were also an integral part of, the strategy for despoiling the business of Lifeplan and FPM.

9 Whether a benefit can be said to be obtained "as a result of" knowing participation in a breach of fiduciary duty by another contrary to the principles of

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3 *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at 229 [10].

4 [2003] 2 AC 366 at 395 [104].

5 *Brydges v Branfill* (1842) 12 Sim 369 [59 ER 1174].

6 (1975) 132 CLR 373 at 397; [1975] HCA 8. To similar effect see at 387 per McTiernan J.

equity is a question of causation or contribution that depends on "a precise examination of the particular facts" of the case, rather than upon attempts to refine the expression "as a result of", as if that phrase has some determinate operation of its own that may be discerned and applied independently of the equitable principle of which it is part[7]. The equitable disgorgement principle with which we are concerned is a "prophylactic rather than a restitutionary principle"[8]. It is sufficient to show that the profit would not have been made but for dishonest wrongdoing. Further, whatever may be the position for wrongdoing that is not marked by dishonesty[9], a defendant cannot avoid liability to disgorge profits dishonestly made by showing that those profits might have been made honestly. This is not an approach to causation that is unique to dishonesty in equity. A defendant who is liable to compensate for deceit cannot avoid that liability by showing that the loss would have been suffered even without the deceit; and it is sufficient that the deceit was an inducement to engage in the conduct that occasioned the loss even if there were other inducements[10]. And in taking an account of profits for dishonest infringement of intellectual property rights, courts do not reduce the profit by reference to opportunity cost, that is, the revenue that would have been received by a lawful alternative[11]. As Lord Radcliffe said in the context of disgorgement of profits for a breach of fiduciary duty involving non-disclosure, "it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in

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7 *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; [1953] HCA 2. See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 426 [122]; [2013] HCA 25.

8 Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty", (1968) 84 *Law Quarterly Review* 472 at 474.

9 Glister, "Accounts of Profits and Third Parties", in Degeling and Varuhas (eds), *Equitable Compensation and Disgorgement of Profit*, (2017) 175 at 196.

10 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483; *Barton v Armstrong* [1976] AC 104 at 118-119; *Gould v Vaggelas* (1984) 157 CLR 215 at 236, 250-251; [1984] HCA 68; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 366; [1986] HCA 68; *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos 2 and 4)* [2003] 1 AC 959 at 967 [16].

11 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111, 114, 125; [1993] HCA 54; *Celanese International Corp v BP Chemicals Ltd* [1999] RPC 203 at 220 [41].

possession of the same amount of profit"[12]. For these reasons, the deterrent effect of an order for disgorgement of profits should not be diminished by acceding to Foresters' attempt to confine the scope of the causal enquiry implicit in the expression "as a result of".

10 Foresters' submission also ignores the obvious reality that Foresters' participation was not merely that of a passive recipient of the benefits of the success of the Woff and Corby strategy. Foresters provided the commercial vehicle which would acquire and exploit the business connections to be appropriated from Lifeplan and FPM[13]. That vehicle was necessary to enable Woff and Corby to implement the strategy of despoliation that they had devised. There was no suggestion in the evidence that the strategy could have been implemented by Woff and Corby acting alone or, indeed, with any other competitor in the market.

11 That Foresters' role was crucial to the implementation by Woff and Corby of the strategy devised by them is confirmed by the urgency and diligence with which Woff and Corby pursued Foresters' participation[14], and the absence of any suggestion in the evidence that they ever had it in mind to pursue their strategy either by themselves or with some other participant. Given the knowledge and experience of Woff and Corby of this particular market[15], there is no reason to suppose that their appreciation of the central importance of the participation of Foresters to the success of their strategy was not soundly based. And there is no reason apparent from the evidence to decline to attribute the same level of understanding to Foresters.

12 As a matter of fact, the strategy proposed by Woff and Corby to acquire the valuable business connections of Lifeplan and FPM with funeral directors

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12 *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 15. See also *Murad v Al-Saraj* [2005] WTLR 1573 at 1591 [67], 1601 [105]-[107]; Conaglen, "The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms", (2011) 70 *Cambridge Law Journal* 548.

13 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 6-7 [18]-[21], 7 [25], 12-14 [34]-[36].

14 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 410-417 [117]-[152].

15 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 466-467 [429]; *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 13-14 [35]-[36].

succeeded, and could only have succeeded, by reason of the knowing participation of Foresters. Accordingly, the quantification of the benefit to be disgorged by Foresters requires an assessment of the attributable value of the business connections acquired by Foresters as a result of its participation in the disloyalty of Woff and Corby.

Quantification

13 Once it has been determined that a benefit or advantage has been caused by the acts of knowing assistance, there remains the question of quantification of the benefit to be disgorged. While it is true that equity will not require an errant fiduciary or a participant in a breach of fiduciary duty to account for an advantage which the breach of fiduciary duty has not caused or to which it has not sufficiently contributed[16], where causation is sufficiently established the onus is upon the errant fiduciary or participant to show that he or she should not account for the full value of the advantage. That onus is not discharged by mere conjecture or supposition giving the benefit of the doubt to a proven wrongdoer. The requirement of proof conforms with the obligation of a party charged with a breach of fiduciary duty to show why the full value of an advantage obtained in a situation of conflict of duty should not be disgorged[17].

14 There are two ways in which the wrongdoer might discharge that onus and reduce the extent of the liability to disgorge profits. The first way, which can involve notorious difficulties in attribution of costs, is by proving his or her entitlement to an allowance for costs incurred, and labour and skill employed[18]. No issue of an allowance arises, or was relied upon, in this appeal because it was accepted that the expenses included in the discounted cash flow included an amount for the work and effort of Woff and Corby.

15 The second way, which was the focus of this appeal, is by demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should account for profits. A wrongdoer might prove that some profit or benefit is beyond the scope of liability for which he or she should account if the profit or benefit has no reasonable connection with the wrongdoing. For

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16 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557, 561; [1995] HCA 18.

17 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 398; [1929] HCA 24.

18 *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111.

example, in *Frank Music Corp v Metro-Goldwyn-Mayer Inc*[19], the Ninth Circuit Court of Appeals accepted that a copyright infringement by MGM Grand Hotel Inc in a performance at the MGM Grand Hotel entitled the plaintiffs to the profits directly from the performance. It also entitled the plaintiffs to a proportion of indirect profits, including from the consequential increase in hotel room bookings which were held to have a "sufficient nexus" with the performance[20]. But the direct profit from the performance to be disgorged was limited to nine per cent because the copyright infringement comprised only the substantial part of Act IV in a ten-act performance. Nor did it entitle the plaintiffs to any profits made by the liable parent company, Metro-Goldwyn-Mayer Inc, as a result of "the advertising value" of the hotel.

16 No precise test has been prescribed for determining when it will be inequitable to account for a benefit on the basis that it has no reasonable connection with wrongdoing. Nor is there any need for such a test. All of the circumstances must be considered, including the nature of the conduct. It is pertinent here that the profits were from deliberate and dishonest conduct, and were those desired to be achieved[21]. The advantage to be valued in this case was not limited to the flow of funds derived during the five-year period identified in the "Funeral Fund Business Concept" ("the BCP") prepared by Woff and Corby to encourage Foresters to participate in the despoliation of the business of Lifeplan and FPM. No doubt, as the Full Court held, the confidence in the success of the proposed strike against Lifeplan and FPM engendered by the five-year projections in the BCP influenced the decision of Foresters to fall in with Woff and Corby[22]; but the advantage to be obtained was not limited to what might be obtained by way of deposits during that period. The advantages of the business connections appropriated from Lifeplan and FPM were to be enjoyed by Foresters for as long as those connections could be retained in its business.

17 It is important to bear steadily in mind that the onus was upon Foresters to show that it would be inequitable to require it to account for the whole of the advantage it acquired by its acquisition of the business connections of Lifeplan

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19 886 F 2d 1545 (1989). See also *Polar Bear Productions Inc v Timex Corp* 384 F 3d 700 at 714, fn 11 (2004).

20 886 F 2d 1545 at 1553 (1989).

21 Restatement Third, Restitution and Unjust Enrichment, §51 citing *Falk v Hoffman* 135 NE 243 at 244 (1922).

22 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 12 [33].

and FPM[23]. Before the adoption and implementation of the Woff and Corby strategy for the despoliation of the funeral fund business of Lifeplan and FPM, Foresters' funeral fund business was not very profitable, if it was profitable at all[24]. The evidence demonstrated that, after the implementation of that strategy, there was a compelling correlation between the increase in the profitability of Foresters' funeral fund business and the decrease in the profitability of the business of Lifeplan and FPM. Annexure A to these reasons is a graph which shows the inflows into the funeral funds of Lifeplan and FPM on the one hand, and Foresters on the other, since 1999[25].

18 There was no attempt by Foresters to prove that there was any reason to expect an increase in the profitability of its business apart from the success of the Woff and Corby strategy. Foresters adduced no evidence to show that what was, on any view, an extraordinary increase in the profitability of its business could be explained by any circumstance other than the success of the Woff and Corby strategy.

19 It is also important that one not be distracted by the consideration, which seems to have weighed heavily with the primary judge, that once Woff and Corby had terminated their employment with Lifeplan they would be at liberty to solicit the business connections of Lifeplan and FPM for their own benefit and, should they so choose, for the benefit of Foresters[26]. So much may be accepted. But with the benefit of hindsight it can be seen that the success of the Woff and Corby strategy was assured by the arrangements that were being put in place before their employment with Lifeplan came to an end. Those arrangements were put in place, as Foresters knew, with a view to their immediate implementation so as to maximise the likelihood that Lifeplan and FPM would not be able to respond effectively to protect their business connections[27]. In this

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23 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-562.

24 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 3-4 [6].

25 This graph was tendered in evidence. It was prepared from the published annual reports of the relevant entities obtained from the Australian Securities and Investments Commission website.

26 Cf *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 464 [419], 470-471 [443]-[444].

27 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 408 [100], [103], 409-410 [111], 446-447 [326].

regard, it can be seen that the timing of the departure of Woff and Corby from their employment with Lifeplan was geared to the implementation of the sudden strike strategy. Foresters did not seek to prove that the implementation of the sudden strike strategy that was in place before the end of Woff and Corby's employment with Lifeplan did not contribute to funeral directors moving to Foresters in preference to remaining with Lifeplan and FPM. Nor did Foresters seek to prove the likely difference between the value of any migration to Foresters' new business by funeral directors unaffected by the sudden strike and the value of the business connections actually appropriated by Foresters.

20 That requiring Foresters to account for the entirety of the advantage that it obtained by its knowing assistance is not inequitable may be demonstrated by considering the following hypothesis. If, while Woff and Corby remained in the employ of Lifeplan, they had become aware of the same strategy devised by other employees of Lifeplan and FPM, and they were loyal employees undistracted by their self-interest and the assistance in that regard forthcoming from Foresters, they would have moved to ensure that Lifeplan and FPM's business connections were shored up and kept secure against the threat that Foresters posed. It is not to be supposed that such efforts would not have been successful.

21 As to the suggestion that it would be inequitable to require Foresters to disgorge the full value of the business connections it acquired because some of the business connections appropriated from Lifeplan and FPM might in due course return to them, it is to be noted that Foresters did not demonstrate that any of its increased profitability was generated by matters other than the business connections that were appropriated from Lifeplan and FPM[28]. Nor did Foresters make any attempt to prove that any of the business connections appropriated by Foresters expired after the effluxion of five years, or were likely to endure only for a short period thereafter, rather than over the lifetime of the business newly established by its acquisition of these connections. It is noteworthy that nothing in the BCP predicted that these connections, once detached from Lifeplan and FPM and attached to Foresters, would be likely, over time, to return to Lifeplan and FPM. Once again, Woff and Corby's view of the market may be taken to be soundly based given their knowledge and experience of that market. This point is graphically illustrated by Annexure A to these reasons, which shows the decline of the business of Lifeplan and FPM and the corresponding increase in the business of Foresters, closely matching the BCP predictions.

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28 Cf *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561.

22 In all these respects, the present case is readily distinguishable from *Warman International Ltd v Dwyer*, where the profits awarded were limited to the first two years' exploitation of the business opportunity appropriated by the defendants. In that case, the evidence showed that the advantage misappropriated was apt to endure only for a short period, and, even during that period, was of diminishing value[29]. The present case can similarly be distinguished from *Kao Lee & Yip v Koo Hoi Yan*, where Ma J followed *Warman*, finding that the relevant business would have been lost to the principal after a year so that after that time the profits were too remote from the breach of fiduciary duty[30].

The accounting

23 It is well established that a liability to account for profits will include profits that have been made[31]. However, Foresters submitted that this was the limit of the profits for which it could be called to account. In particular, Foresters submitted that the net present value of funeral bond contracts was an assessment of anticipated future profits rather than actual profits, and was therefore irrecoverable.

24 This submission is not consistent with principle or authority. As to principle, to confine the account in this way would sever the process of accounting for, and disgorgement of, profit from its rationale in the principle of ensuring that the wrongdoer should not be permitted to gain from the wrongdoing[32]. As to authority, the liability to account for a profit was described in *Warman* as concerned with "a profit or benefit"[33] in language divorced from a confined conception of benefit as accrued profit in narrow accounting terms. In any event, it is artificial to require disgorgement of realised profits but not to allow unrealised profits that will be realised upon performance of the relevant

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29 (1995) 182 CLR 544 at 550-551, 565-566.

30 [2003] 3 HKLRD 296 at 340 [143], 343-344 [158]. See also Mitchell, "Causation, Remoteness, and Fiduciary Gains", (2006) 17 *King's College Law Journal* 325 at 339.

31 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34; [1968] HCA 50; *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111.

32 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 262.

33 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557. See also at 559 quoting *Chan v Zacharia* (1984) 154 CLR 178 at 204-205; [1984] HCA 36.

contract where there is no reason to expect that performance will not occur. As Millett LJ said in *Potton Ltd v Yorkclose Ltd*[34]:

> "Unrealised profits are actual profits. Profits are made when they are earned, recognised when they are brought into the accounts, and realised when they accrue, that is to say when a legal right arises to receive payment. As a matter of ordinary accounting practice, profits are seldom recognised before they accrue, but this is a matter of prudence only; in a proper case they may be recognised before they accrue. Whether or not recognised, however, they are not profits which could or should have been made or which are merely capable of being made, but profits which have actually been made though not yet realised."

Conclusion

25 Given the facts of the present case, there was no principled basis for requiring Foresters to disgorge anything less than the value of the business connections appropriated by Foresters from its participation in the disloyalty of Woff and Corby. It is unnecessary to consider the scope and effect of s 1317H of the *Corporations Act* 2001 (Cth).

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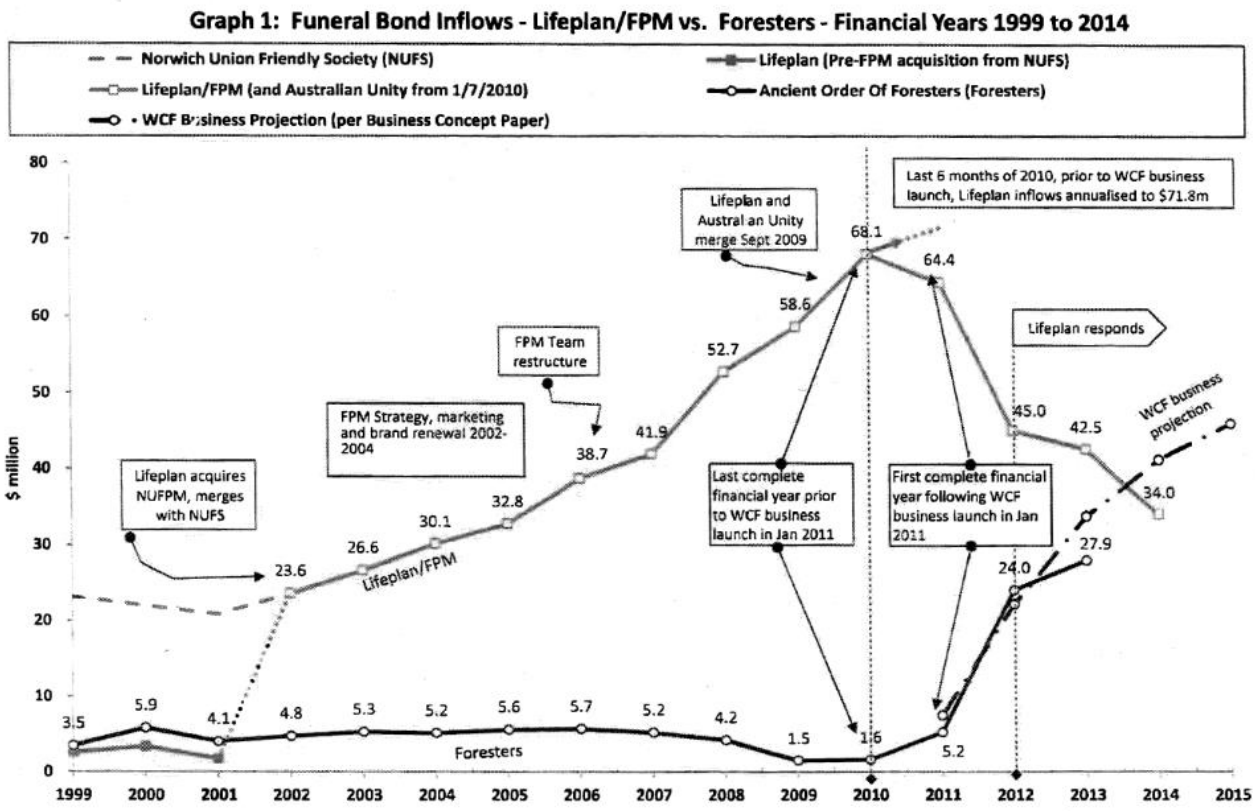
34 [1990] FSR 11 at 15.

ANNEXURE A


Graph 1: Funeral Bond Inflows - Lifeplan/FPM vs. Foresters - Financial Years 1999 to 2014
Norwich Union Friendly Society (NUFS)
Lifeplan (Pre-FPM acquisition from NUFS)
Lifeplan/FPM (and Australian Unity from 1/7/2010)
Ancient Order Of Foresters (Foresters)
WCF Business Projection (per Business Concept Paper)
$ million
Lifeplan acquires NUFPM, merges with NUFS
FPM Strategy, marketing and brand renewal 2002-2004
FPM Team restructure
Lifeplan and Australian Unity merge Sept 2009
Last 6 months of 2010, prior to WCF business launch, Lifeplan inflows annualised to $71.8m
Lifeplan responds
WCF business projection
Last complete financial year prior to WCF business launch in Jan 2011
First complete financial year following WCF business launch in Jan 2011
Lifeplan/FPM
Foresters
23.6
26.6
30.1
32.8
38.7
41.9
52.7
58.6
68.1
64.4
45.0
42.5
34.0
27.9
24.0
3.5
5.9
4.1
4.8
5.3
5.2
5.6
5.7
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26 GAGELER J. This appeal and cross-appeal, from a judgment of the Full Court of the Federal Court[35] on appeal from a judgment of a single judge of the Federal Court[36], provide occasion to restate the principles which govern the ordering of an account of profits against a knowing participant in a dishonest and fraudulent breach of fiduciary duty.

The facts

27 The fiduciaries in question were Mr Woff and Mr Corby. Each was an employee of Lifeplan Australia Friendly Society Ltd ("Lifeplan"). Through its wholly owned subsidiary, Funeral Plan Management Pty Ltd ("FPM"), Lifeplan engaged in the business of providing funeral products – retail investment contracts under which a customer would make payments (sometimes in a lump sum and sometimes in instalments) which were to be managed in a fund for a fee and the capital-guaranteed sum of which was to be paid out on the customer's death to a funeral director to meet the expenses of a pre-arranged funeral. FPM marketed the funeral products through distribution arrangements which it had established with funeral directors throughout Australia. Mr Woff was a senior manager at FPM and had direct oversight of its marketing and distribution arm. Mr Corby was FPM's national sales manager. In 2010, Lifeplan's inflows of funds from funeral products were in the order of $68 million.

28 Ancient Order of Foresters in Victoria Friendly Society Ltd ("Foresters") also engaged in the business of providing funeral products, initially on a scale much smaller than that of Lifeplan. In 2010, Foresters' inflows of funds from funeral products were in the order of only $1.6 million. Foresters' provision of funeral products appears not then to have been generating profit.

29 In July 2010, while still employed by Lifeplan, Mr Woff and Mr Corby surreptitiously proffered to Foresters a proposal to develop Foresters' funeral products business in a way that would capture for Foresters much if not all of the existing business of FPM. The proposal which they proffered involved Foresters employing Mr Woff and Mr Corby, entering into a marketing agreement with a company to be formed by Mr Woff and Mr Corby to be called Funeral Planning Australia Pty Ltd ("FPA"), and through FPA embarking on a systematic course of action to win over funeral directors through whom FPM was then distributing its funeral products.

30 Mr Woff and Mr Corby formalised the proposal in a detailed five-year business concept plan ("the BCP") which they presented to Foresters for

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35 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1.

36 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384.

consideration by its Board of Directors in August 2010. The BCP was fairly characterised by the Full Court as "a comprehensive plan presented by employees of Lifeplan to Lifeplan's actual and prospective competitor, prepared utilising valuable confidential information of their employer (and to a significant degree recognisable as such) that set out a detailed strategy to attack the commercial base of that employer in order to win as many clients as possible from the employer 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 the new prospective employer"[37]. Given the significance of the BCP to the determinative issue in the appeal and the cross-appeal, a summary of some of the most striking features of the BCP is warranted.

31 The introduction to the BCP described it as a document prepared by FPA for the Board of Foresters "to discuss the concept of working together to develop a successful funeral fund operation". The introduction described FPM as "the largest and most successful operator" in the Australian funeral fund industry and described Mr Woff and Mr Corby as "FPM's two key employees". The introduction continued by explaining that Mr Woff and Mr Corby "have now established their own niche marketing company, FPA, which they present to the Board of Foresters as an opportunity to, in a very short timeframe, replicate the success enjoyed by FPM".

32 Appended to the BCP were detailed schedules. One was headed "New Business Acquisition Timeframe". It listed by name the funeral directors to be won over to Foresters. In relation to nearly all of the named funeral directors, it listed figures for the annual inflow of funds and the number of investment contracts generated through that funeral director. It specified the year in which the business of each named funeral director was projected to be won and the annual inflow projected to be generated through that funeral director in that year. Another of the appended schedules was headed "Visitation Plan". It set out in detail a costed program of visits to funeral directors designed to win their business. Another of the appended schedules was headed "Foresters Profit Revenue Model". It set out a financial model which translated the total annual inflows projected to be generated through the funeral directors to be won over to Foresters in each of the five years of the BCP into projected revenue and profit figures for each of those years. The source of revenue was an ongoing management fee fixed as a percentage of the accumulated payments of each customer.

33 Within the body of the BCP, a table headed "Five Year Sales Projections" summarised the projected total annual inflows of funds together with the total number of funeral directors whose business was projected to be won for each of

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37 (2017) 250 FCR 1 at 12 [32].

the five years of the BCP. The projections in the table began with inflows of $10 million from 40 funeral directors in the first year and ended with inflows of $45 million from 300 funeral directors in the final year. Another table within the body of the BCP, headed "Historical Sales Performance", was introduced with the explanation that "[w]ith any projections for a start up entity there are the obvious questions of accuracy" and that "[a]s a means to give validity to what has been presented we submit our historic sales figures which have been achieved in an environment of more players and intensive competition". The table set out annual sales figures for each year from 2000 to 2010.

34 A section of the BCP headed "Strategy for Securing New Business" referred to the "target market" as funeral directors who had a characteristic trait of being loyal to fund managers but also "to individuals with a proven track record and proven service standards". It expressed confidence that the funeral directors to be targeted, as identified in the New Business Acquisition Timeframe, would be won over to Foresters as a result of the latter loyalty prevailing. It recommended that "at the earliest possible stage Foresters establish a new funeral benefit fund" with specified characteristics. It also recommended "marketing collateral" which included tailored product disclosure documents and marketing flyers. The costs to Foresters in the first year of implementation of the plan were specified to be in the order of $700,000 and were explained in some detail.

35 Mr Woff and Mr Corby had prepared the BCP based on what could only be described, as it was by the Full Court, as their "wholesale plundering of the confidential information and business records of Lifeplan"[38]. Not only were the historical sales figures obviously those of FPM, but the figures itemised as the "annual inflows" and numbers of investment contracts in relation to the named funeral directors in respect of whom those figures were given, the planned schedule of visits to funeral directors, and the financial modelling of projected revenue and profit were all unmistakably derived from information of Lifeplan relating to the current business of FPM.

36 The primary judge and the Full Court found that that use of Lifeplan's confidential information in the preparation of the BCP must have been apparent to honest and reasonable persons in the position of members of the Board of Foresters[39]. Importantly from the perspective of the Board, and again as fairly characterised by the Full Court, the BCP was a document that enabled the Board "to evaluate the worth of the commercial opportunity against the risk to be undertaken, and to make the commercial decision with the confidence of

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38 (2017) 250 FCR 1 at 4 [8].

39 (2016) 259 IR 384 at 456-457 [378]; (2017) 250 FCR 1 at 15 [41].

knowing that it was privy to the detail of Lifeplan's strategies, financial analyses and up-to-date results"[40].

37 The Board considered the BCP at a meeting in August 2010. Attracted to the proposal, but having some reservations, the Board invited Mr Woff and Mr Corby to speak at its subsequent meeting in September 2010. In his oral remarks at that meeting, Mr Woff stressed that the sales projections in the BCP were realistic provided implementation of the BCP was immediate. Implicitly referring to the impact of his and Mr Corby's imminent departure from Lifeplan and of the implementation of the BCP, Mr Woff told the Board that the ensuing period of six months was a "window" in which "our competitors will be very vulnerable".

38 The Board approved the BCP following the September 2010 meeting. Critically, the primary judge and the Full Court found that Foresters would not have proceeded with the new funeral products business without the BCP and that the information confidential to Lifeplan which the BCP contained was at least material to Foresters' decision to proceed[41].

39 Foresters' Chief Executive Officer, Mr Hughes, wrote to Mr Woff and Mr Corby telling them of the approval soon afterwards. The letter stated that "[i]n measuring the traction of the product the Board will rely heavily upon your predictions of sales/growth that you provided in [the BCP]".

40 Mr Woff and Mr Corby wasted no time in the implementation of the BCP. To the knowledge and with the encouragement of Mr Hughes, Mr Woff and Mr Corby during the following two months and while they remained employees of Lifeplan: revised the rules of the Foresters Funeral Fund to bring them into line with the recommendation made in the BCP; prepared product disclosure documents and marketing flyers for the new business; and approached a number of funeral directors designated to be targeted in the first year of the BCP.

41 In November 2010, Mr Woff and Mr Corby incorporated FPA. Mr Corby resigned from Lifeplan in the same month and commenced employment with Foresters at the beginning of December. Mr Woff did not resign from Lifeplan until the end of December. Two days after he resigned, Foresters entered into a marketing and service agreement with FPA. Four days after that, Mr Woff joined Mr Corby as an employee of Foresters. By the end of January 2011, the necessary revisions to the Foresters Funeral Fund rules had been approved by the Australian Prudential Regulation Authority and the product disclosure documents were in the process of final review.

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40 (2017) 250 FCR 1 at 12 [33].

41 (2016) 259 IR 384 at 446 [324]; (2017) 250 FCR 1 at 21-22 [66].

42 FPA subsequently reported monthly to Foresters in reports prepared in part by reference to the New Business Acquisition Timeframe appended to the BCP. For their part, as foreshadowed in Mr Hughes' letter telling Mr Woff and Mr Corby of their approval of the BCP, Foresters' Board used the sales projection figures in the BCP to benchmark the performance of the Foresters Funeral Fund at least during the first six months of the Fund's operation.

43 The new Foresters Funeral Fund business marketed by FPA proved highly successful. Foresters' inflows and consequent profits from funeral products increased dramatically. Lifeplan's inflows and consequent profits correspondingly declined. Whereas in 2010, as already noted, Foresters' annual inflows had been in the order of $1.6 million and Lifeplan's in the order of $68 million, just two years later Foresters' annual inflows had risen to $24 million and Lifeplan's had fallen to $45 million.

44 In September 2011, Lifeplan's parent company wrote to Foresters complaining that "serious breaches of law and equity" appeared to have been committed by Mr Woff and Mr Corby. The breaches then complained of included Mr Woff and Mr Corby making use of Lifeplan's confidential information in the establishment and operation of FPA.

45 Foresters did not then think that there was anything in the complaint. Nevertheless, Foresters took steps in an attempt to remove the cause of the complaint. Those steps included notifying funeral directors in September 2011 that existing documents should no longer be used and issuing replacement documents at the start of October 2011.

46 Foresters terminated the marketing and service agreement with FPA in March 2013. From that time, Foresters promoted the Foresters Funeral Fund itself. FPA was placed in liquidation in June 2013.

The judgment at first instance

47 Lifeplan and FPM commenced a proceeding in the Federal Court against Mr Woff, Mr Corby and FPA. Foresters was subsequently joined. Lifeplan's and FPM's claims in the proceeding included that Mr Woff and Mr Corby had breached fiduciary duties owed to Lifeplan and FPM and that Foresters had knowingly assisted in those breaches. The claims also included that Mr Woff, as an officer of Lifeplan and of FPM, had contravened provisions of the *Corporations Act* 2001 (Cth) and that Foresters was involved in those contraventions by reason of being knowingly concerned in them.

48 At an early stage in the proceeding, Lifeplan and FPM elected to claim accounts of profits rather than to pursue any claim for damages. In their claim for an account of profits against Foresters, what they sought was the profits earned and to be earned through the operation of Foresters' funeral products

business calculated on a net present value basis by reference to the net profit projected to be made on contracts entered into and projected to be entered into in each year of the operation and projected operation of the Foresters Funeral Fund. Their primary claim was for the net present value of those projected profits on contracts entered into and projected to be entered into in every year of the actual and projected period of the operation of the Fund. That is to say, their primary claim was for the entire value of Foresters' funeral products business. Their alternative claim was for the net present value of those projected profits on contracts entered into and projected to be entered into up to a cut-off date to be determined by the Court.

49 The primary judge (Besanko J) found that, in addition to having breached obligations of confidence to Lifeplan and FPM, Mr Woff and Mr Corby had engaged in a number of breaches of their respective fiduciary duties of loyalty to Lifeplan and FPM[42]. The primary judge found that Foresters had knowingly participated in some but not all of those breaches of fiduciary duties[43].

50 In language drawn from the declaratory orders which the primary judge went on to make and which were not disturbed on appeal, the precise conduct in which the primary judge found Mr Woff and Mr Corby to have engaged in breach of their fiduciary duties of loyalty to Lifeplan and FPM in respect of which he found Foresters to have knowingly participated was that:

- between July and December 2010, without permission, Mr Woff and Mr Corby took, used, disclosed to Foresters and retained Lifeplan's and FPM's confidential and valuable information to prepare and advance the BCP;

- between October and December 2010 in respect of Mr Woff, and between October and November 2010 in respect of Mr Corby, while still employees of Lifeplan, Mr Woff and Mr Corby approached funeral directors for the purpose of soliciting their business; and

- between September and December 2010, while still employed by Lifeplan, Mr Woff and Mr Corby were involved in the changes to be made to the rules governing the Foresters Funeral Fund and the preparation of Foresters' product disclosure documents.

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42 (2016) 259 IR 384 at 456 [377], 458 [384] and [386], 460 [398]-[399], 461 [402]-[403] and [405].

43 (2016) 259 IR 384 at 457 [379], 458-459 [385] and [387]-[388], 460 [398], 461 [402], [404] and [406].

51 The primary judge found that the same conduct on the part of Mr Woff constituted contraventions of obligations which Mr Woff had as an officer of Lifeplan and of FPM under ss 181, 182 and 183 of the *Corporations Act* and that Foresters was involved in the contraventions constituted by the last category of conduct set out above by reason of being "knowingly concerned" in them within the meaning of s 79 of the *Corporations Act*.

52 The primary judge ordered an account of profits in equity against each of Mr Woff and Mr Corby, and under s 1317H of the *Corporations Act* against Mr Woff. Each was ordered to account for the sum of his drawings and distributions from a trust of which FPA was trustee[44].

53 The primary judge declined to order any account of profits against Foresters, either in equity or under s 1317H of the *Corporations Act*. In relation to the use and disclosure to Foresters of Lifeplan's and FPM's confidential information to prepare and advance the BCP, the reason which the primary judge gave for declining to order an account of profits was that the confidential information was not itself "used to generate profits"[45]. In relation to the approaches to funeral directors and preparation for the new business while they remained employees of Lifeplan, the reason which the primary judge gave for declining to order an account of profits related to the capacity of Mr Woff and Mr Corby to have engaged in that conduct after they left Lifeplan. Whilst "the breaches in which Foresters participated might have led to FPA and Foresters being able to establish the proposed business earlier than might have been the case had there been no breaches", those breaches did not for that reason "lead to the profits earned and to be earned in relation to the Foresters Funeral Fund"[46]. His Honour noted that Lifeplan and FPM did not advance a case for an account of profits for a limited period on a "headstart basis"[47].

The judgment on appeal

54 Disavowing any attempt to formulate an exhaustive statement of the causal connection between breach of a fiduciary duty and a benefit obtained by a person who knowingly participated in that breach which is sufficient in equity to justify ordering an account of profits against that person, the Full Court (Allsop CJ, Middleton and Davies JJ) concluded that the primary judge's

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44 (2016) 259 IR 384 at 471 [446].

45 (2016) 259 IR 384 at 470 [443].

46 (2016) 259 IR 384 at 470-471 [444].

47 (2016) 259 IR 384 at 464 [419], 471 [444].

approach to ordering of an account of profits against Foresters was unduly narrow.

55 After emphasising the stringency of a fiduciary duty, the Full Court stated[48]:

> "Here, a central, but not comprehensive, feature of what happened was that Mr Woff and Mr Corby, with the full knowledge of Foresters, dishonestly breached their duty by, amongst other things, utilising confidential information to prepare the BCP for the consideration of the board of Foresters. ... Armed with this information, Mr Woff and Mr Corby were able to persuade Foresters, and, in receipt of the information, Foresters was able to decide, with a degree of business confidence, to employ them and to undertake the business strategy proposed by them. Without the dishonest taking advantage of the information and without the breaches, Mr Woff and Mr Corby would not have been employed by Foresters, and Foresters would not have expanded its business in this segment in the hands of Mr Woff and Mr Corby as it did. Put another way, without the breaches of duty in which Foresters was knowingly involved, without Messrs 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 Messrs Woff and Corby."

The Full Court continued:

> "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."

56 Turning to the precise scope of the profits for which it was appropriate to order Foresters to account to Lifeplan and FPM in equity, the Full Court noted that the breaches of duty by Mr Woff and Mr Corby did not transfer an extant business to Foresters but rather led to Foresters establishing a new business, the establishment of which "necessarily involved the deployment of capital, skill and expertise, and the undertaking of business risk"[49]. The Full Court took the view that the account of profits would be too extreme if it were to extend to the entire

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48 (2017) 250 FCR 1 at 21-22 [66].

49 (2017) 250 FCR 1 at 25 [85].

value of the Foresters Funeral Fund business. Tailoring the order to the circumstances rather required the account of profits to be a proportionate response to the breaches of fiduciary duties by Mr Woff and Mr Corby and to give due recognition to the fact that the breaches did not result in "direct generation of profit"[50]. The order nevertheless needed to fulfil equity's remedial objectives of vindicating the principles of fidelity, trust and honesty which underlay imposition of the fiduciary duties which were breached and of serving "as an encouragement against being swayed to participate for personal gain in the dishonest breaches of others of their duties of fidelity"[51].

57 Having regard to those considerations, the Full Court formed the opinion that the proportionate response in the circumstances was to order that Foresters account to Lifeplan for the net present value of the profits made and projected to be made on contracts entered into by Foresters between the beginning of February 2011 and the end of June 2015. The Full Court explained that its choice of the end point of June 2015 "sets the account within the framework of the five-year business plan, with a modest deduction of six months" and "sets an account for the period of planning for the new business that was the central focus of the behaviour that constituted the breaches and the participation"[52].

58 The Full Court went on to hold that the same order for an account of profits was available and should be made against Foresters under s 1317H of the *Corporations Act*[53].

59 Allowing Lifeplan's and FPM's appeal, the Full Court accordingly supplemented the orders of the primary judge with an order that Foresters account to Lifeplan and to FPM for profits, in equity and under s 1317H of the *Corporations Act*, in the sum of $6,558,495. The precise sum was based on expert evidence to which further reference will need to be made.

The appeal and cross-appeal to this Court

60 Foresters sought special leave to appeal from the judgment of the Full Court. Following a contested hearing[54], special leave to appeal was granted, but was limited to just two of the grounds on which special leave had been sought.

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50 (2017) 250 FCR 1 at 26 [85].

51 (2017) 250 FCR 1 at 26 [87].

52 (2017) 250 FCR 1 at 26 [88].

53 (2017) 250 FCR 1 at 29 [117].

54 [2017] HCATrans 210.

61 The first ground of appeal on which special leave was granted is expressed in terms that the Full Court "erred in concluding that there was a 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" by Mr Woff and Mr Corby (and that constituted its involvement in the contravention of ss 181, 182 and 183 of the *Corporations Act* by Mr 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 that conduct was not the real or effective cause of any profit derived by Foresters". The second ground of appeal is expressed in terms that the Full Court "erred in ordering the account of profits" based on contracts entered into by Foresters in its funeral products business for the period to the end of June 2015 "when no profits were actually made by Foresters from those contracts during that period" and "calculated on the basis of the net present value of future potential profits, which may or may not be made by Foresters from those contracts" after that period.

62 Neither in form nor in substance does either ground of appeal canvass any factual conclusion of the Full Court. The first asserts an error of principle in the reasons given by the Full Court for ordering of an account of profits. The second asserts error in the formulation of the precise order which it made. Foresters' attempt in written and oral submissions to re-characterise the facts is rejected. Foresters' appeal is to remain strictly confined to the two grounds on which special leave was granted.

63 As was procedurally open to them as respondents to Foresters' appeal, Lifeplan and FPM on the hearing of the appeal sought special leave to cross-appeal on a number of grounds. The first and second of those grounds combine to assert error on the part of the Full Court in failing to order Foresters to account for the entire capital value of Foresters' funeral products business. Interpreted as confined to asserting error in the reasoning of the Full Court, those grounds are a reflex of the grounds on which special leave to appeal has been granted in that they turn on the application to the facts of the same principle of equity. They alone are appropriate for the grant of special leave to cross-appeal.

64 The remaining grounds on which Lifeplan and FPM sought special leave to cross-appeal included that the Full Court ought to have found that Foresters was vicariously liable for equitable wrongdoing by Mr Woff and Mr Corby from the respective dates of their employment by Foresters. Vicarious liability for equitable wrongdoing was rejected as a matter of principle by the primary judge[55] and was not addressed in the reasoning of the Full Court[56]. Lifeplan and FPM

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55 (2016) 259 IR 384 at 456 [374].

56 See (2017) 250 FCR 1 at 30 [121]-[123].

conceded in argument that to hold Foresters vicariously liable for such wrongdoing as occurred after they had become employees of Foresters could add nothing of significance to Foresters' duty to account on the basis of having knowingly participated in Mr Woff's and Mr Corby's breaches of fiduciary duty when they were still employees of Lifeplan. The cross-appeal in those circumstances presents as an inappropriate vehicle for exploring any question of vicarious liability for equitable wrongdoing.

65 Discrete issue was joined in argument on Foresters' appeal as to whether an order for an account of profits is available to be made under s 1317H of the *Corporations Act*. In the result, that issue of statutory construction need not be determined.

66 For reasons to be explained, Lifeplan's and FPM's cross-appeal is to be allowed. The Full Court's order for an account of profits is on that basis to be set aside and Foresters is to be ordered to account to Lifeplan and to FPM in equity for the total capital value of the business in the sum of $14,838,063. As before the Full Court, no distinction was drawn by the parties to the appeal between the positions of Lifeplan and FPM in relation to the framing of an order to account.

The equitable principles

67 The fiduciary duty that an employee has to an employer within the scope of the relationship of employment, no less than the fiduciary duty that any other person in a fiduciary position has to any other person to whom the fiduciary duty is owed within the scope of the venture or undertaking in respect of which the person in the fiduciary position has undertaken or assumed a responsibility to act in the exclusive interests of that other person[57], is a duty of "absolute and disinterested loyalty"[58]. That duty of loyalty is imposed in equity by means of two overlapping "proscriptive obligations"[59]. Each proscriptive obligation, or

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57 *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569 at 574-575 [11]-[12]. See also *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 407-409; [1929] HCA 24.

58 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 104; [1984] HCA 64, quoting *Phelan v Middle States Oil Corporation* 220 F 2d 593 at 602 (1955). See also *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 344-345 [174].

59 *Friend v Brooker* (2009) 239 CLR 129 at 160 [84]; [2009] HCA 21, citing *Breen v Williams* (1996) 186 CLR 71 at 93-94, 113, 135-137; [1996] HCA 57 and *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 197-198 [74]; [2001] HCA 31.

"theme"[60], is "descriptive of circumstances in which equity will regard conduct of a particular kind as unconscionable and consequently attracting equitable remedies"[61].

68 "The first", often referred to as the "conflict rule", "is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest."[62] The unconscionability which attracts equitable remedies in circumstances where the conflict rule alone is invoked lies not so much in receipt by the fiduciary of the benefit or gain (over which the fiduciary need not have control) as in retention by the fiduciary of the benefit or gain which in conscience ought to be disgorged to the principal[63].

69 "The second", often referred to as the "profit rule", "is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of [the] fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing [the fiduciary's] position for [the fiduciary's] personal advantage."[64] The unconscionability which attracts equitable remedies in such circumstances lies in pursuit by the fiduciary of self-interest, or, more precisely, in pursuit of an interest other than the exclusive interest of the principal.

70 Consistently with the objective of imposing each obligation, in neither case does the benefit or gain to the fiduciary need to be at the expense of the principal[65], though it may be. And in neither case does the fiduciary need to act dishonestly or fraudulently[66], or otherwise than in good

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60 *Chan v Zacharia* (1984) 154 CLR 178 at 198; [1984] HCA 36.

61 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 318 [26]; 176 ALR 693 at 700; [2000] HCA 64, quoting *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 799.

62 *Chan v Zacharia* (1984) 154 CLR 178 at 198.

63 *Chan v Zacharia* (1984) 154 CLR 178 at 199.

64 *Chan v Zacharia* (1984) 154 CLR 178 at 198-199.

65 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 562; [1995] HCA 18.

66 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, discussing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (note) and *Boardman v Phipps* [1967] 2 AC 46.

faith[67], though again the fiduciary may do so. Where a fiduciary does act dishonestly and fraudulently, however, the dishonest and fraudulent character of the breach of fiduciary duty is not without consequence for the intensity of the equitable remedies available against the defaulting fiduciary. More important for present purposes is that the dishonest and fraudulent character of the conduct of the fiduciary gives rise to the potential for similar remedies to be available in equity against another person who might knowingly participate in the fiduciary's breach.

71 Knowing participation by a non-fiduciary in a dishonest and fraudulent breach of fiduciary duty is conduct which is regarded in equity as itself unconscionable and as attracting equitable remedies against the knowing participant of the same kind as those available against the errant fiduciary[68]. Knowing participation in a dishonest and fraudulent breach of fiduciary duty includes knowingly assisting the fiduciary in the execution of a "dishonest and fraudulent design" on the part of the fiduciary to engage in the conduct that is in breach of fiduciary duty[69]. The requisite element of dishonesty and fraud on the part of the fiduciary is met where the conduct which constitutes the breach transgresses ordinary standards of honest behaviour[70]. Correspondingly, the requisite element of knowledge on the part of the participant is met where the participant has knowledge of circumstances which would indicate the fact of the dishonesty on the part of the fiduciary to an honest and reasonable person[71].

72 That is not to say that other participatory conduct by non-fiduciaries in other breaches of fiduciary duty cannot attract equitable remedies[72]. The extent to which such conduct might do so does not now arise for consideration; the conduct of the fiduciaries and the non-fiduciary in the present case was squarely within the accepted paradigm.

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67 *Chan v Zacharia* (1984) 154 CLR 178 at 199.

68 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397-398; [1975] HCA 8; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 164 [179]; [2007] HCA 22.

69 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 159 [160].

70 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609 at 636 [124].

71 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163-164 [174]-[177].

72 Cf *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 356-358 [242]-[248]. See also Gummow, "Knowing Assistance", (2013) 87 *Australian Law Journal* 311.

73 The breaches of fiduciary duty on the part of Mr Woff and Mr Corby consisted of conduct in breach of the profit rule which formed an integral element of a concerted course of conduct to gain part of their existing employer's business for FPA (a company they controlled) and for Foresters (a competitor of their employer). Foresters knowingly participated in those breaches of fiduciary duty by Mr Woff and Mr Corby by choosing to take up and to implement the business plan proposed to Foresters by Mr Woff and Mr Corby in the form of the BCP with knowledge of the conduct which constituted those breaches of fiduciary duty in circumstances which would have indicated the dishonest and fraudulent nature of that conduct to an honest and reasonable person.

74 Those circumstances were sufficient to render Foresters, no less than Mr Woff, Mr Corby and FPA, liable as a "constructive trustee". Traditionally, that label has been ascribed both to a fiduciary in breach of a proscriptive obligation[73] and to a knowing participant in a dishonest and fraudulent breach of a proscriptive obligation imposed on a fiduciary[74]. The label was long ago explained to serve no purpose other than to indicate amenability to the range of remedies traditionally available in equity against a trustee who is in breach of a similar proscriptive obligation[75]. The remedies available against each, at the option of the person to whom the proscriptive obligation is owed by the fiduciary, centrally include an order for equitable compensation and an order to account[76]. Ordinarily, declaration of a constructive trust is warranted only if other equitable orders are not capable of doing complete justice in the circumstances of the case[77].

75 The equitable remedy of account is a personal order. The order operates to require that a defendant pay to a plaintiff the monetary value of a benefit or gain to the defendant. Although commonly referred to as an "account of profits", there is no reason why a benefit or gain to be made the subject of an account must answer the description of a "profit" in conventional accounting terms. Nor is there any reason why that benefit or gain must answer the description of

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73 Eg *Chan v Zacharia* (1984) 154 CLR 178 at 199.

74 Eg *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252.

75 *Rolfe v Gregory* (1865) 4 De G J & S 576 at 579 [46 ER 1042 at 1044]. See also *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 290 [47]-[48]; [2009] HCA 44; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at 404 [141].

76 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 556; *Maguire v Makaronis* (1997) 188 CLR 449 at 468; [1997] HCA 23.

77 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128]; [2010] HCA 19.

"property" or must have sufficient certainty as to be capable of forming the subject matter of a trust. The benefit or gain can be expectant or contingent. Indeed, it is commonplace that a benefit or gain the subject of an account might encompass an ongoing business. And it is commonplace that the benefit or gain to be made the subject of an order to account might extend to the whole of the ongoing business or be limited to a part of the business identified by reference to both a specified scope of commercial activities and a specified period of commercial activities which need not be confined to a past period but may be a period which extends into the future.

76 The amenability of a knowing participant in a dishonest and fraudulent breach of fiduciary duty to a personal order to account for the monetary value of a benefit or gain has sometimes been described as an "accessorial" liability. The description is useful in a case such as the present in highlighting that it is the dishonest and fraudulent breach of fiduciary duty which gives the character of unconscionability to the knowing participation and which exposes the knowing participant to equitable remedies. The description would have the potential to mislead were it to be taken further[78]:

> "The reference to the liability of a knowing assistant as an 'accessorial' liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows ... that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ."

77 More useful, to my mind, is the description of the amenability of a knowing participant in a dishonest and fraudulent breach of fiduciary duty to a personal order to account as an "ancillary liability", emphasising that it is the knowing participation in the dishonest and fraudulent breach by the defaulting fiduciary that renders the participant liable to account "as if" a fiduciary[79].

78 The principles by which a fiduciary is assessed as liable to account for the monetary value of a benefit or gain obtained in circumstances of breach of a fiduciary obligation "express the policy of the law in holding fiduciaries to their

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78 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 457-458 [106]; [2011] HCA 48 (footnote omitted).

79 *Williams v Central Bank of Nigeria* [2014] AC 1189 at 1198 [9].

duty"[80]. Holding the fiduciary to account in circumstances of breach of a fiduciary obligation has been explained to serve two purposes. One is preventing the unjust enrichment of the fiduciary. The other, more general, purpose is removing the incentive for the fiduciary to act other than in the sole interests of the principal[81].

79 Holding the knowing participant in a dishonest and fraudulent breach of duty to account is explicable, and has been explained, as serving precisely the same purposes in precisely the same way[82]:

> "If the maintenance of a very high standard of conduct on the part of fiduciaries is the purpose of the rule it would seem equally necessary to deter other persons from knowingly assisting those in a fiduciary position to violate their duty. If, on the other hand, the rule is to be explained simply because it would be contrary to equitable principles to allow a person to retain a benefit that [the person] had gained from a breach of [the person's] fiduciary duty, it would appear equally inequitable that one who knowingly took part in the breach should retain a benefit that resulted therefrom."

80 The reasons for holding the dishonest and fraudulent fiduciary to account and the reasons for holding the knowing participant to account being the same, there is no reason why the principles by which the knowing participant's liability to account is assessed should be different from those by which the dishonest and fraudulent fiduciary's liability to account is assessed. Notably, no distinction was drawn between the applicable principles in the reasoning of this Court in *Warman International Ltd v Dwyer*[83].

81 The suggestion that a basis of differentiation might be found in the fact that the fiduciary alone has undertaken or assumed a responsibility to act in the interests of the person to whom the fiduciary duty is owed might have some force if and to the extent that an additional reason for ordering an account might be found in equity giving effect to that undertaking or assumption of responsibility by proceeding on the fiction that the undertaking or assumption of responsibility

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80 *Maguire v Makaronis* (1997) 188 CLR 449 at 468.

81 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558. See also *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 409 [413]-[414].

82 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397. See also *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 571 [121]; [2004] HCA 56.

83 (1995) 182 CLR 544.

has been honoured. To explain the liability of the errant fiduciary established by a personal order to account in that way is to treat the liability as equivalent in principle to the liability of a trustee established through the Chancery procedure of an account of administration in common form. That procedure was one by which the trustee could be compelled to provide a verified statement of the affairs of the trust, following which a beneficiary who alleged that the trustee had not in that statement accounted for the monetary value of property which the trustee ought to have got in for the trust estate would by notice "surcharge" the trustee's account with the amount claimed to be omitted. The surcharge, if upheld, would result in the amount which had been omitted by the trustee being treated as part of the trust estate[84]. The explanation of a fiduciary's duty to account in equivalent terms is not without modern adherents[85]. The difficulty is that it has an air of artificiality when sought to be applied to a breach of a proscriptive obligation by a person in a fiduciary position whose undertaking or assumption of responsibility to act in the interests of another person never encompassed the holding of property for the benefit of that other person. Even in those circumstances where the additional explanation of the fiduciary's liability might have credence, the additional reason for holding the errant fiduciary liable seems to me to provide a meagre basis for treating the knowing participant in the fiduciary's dishonest dealings more tenderly than the dishonest fiduciary. Those circumstances, however, were not the circumstances in *Warman*; nor are they the circumstances of the present case.

82 The principles applicable to the assessment of liability to account for a dishonest and fraudulent breach of fiduciary duty, like many principles of equity, "have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case"[86]. Sufficiently for the circumstances of the

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84 See Devonshire, *Account of Profits*, (2013) at 48-49; Stuckey and Irwin, *Parker's Practice in Equity (New South Wales)*, 2nd ed (1949) at 269; Williams and Guthrie-Smith, *Daniell's Chancery Practice*, 8th ed (1914), vol 1 at 369, 420-421, 919.

85 Eg Millett, "Equity's Place in the Law of Commerce", (1998) 114 *Law Quarterly Review* 214 at 225-227; Millett, "The Common Lawyer and the Equity Practitioner", (2015) 6 *UK Supreme Court Yearbook* 193 at 194-195.

86 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 393, quoting *Boardman v Phipps* [1967] 2 AC 46 at 123 and *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 1 WLR 1126 at 1130; [1973] 2 All ER 1222 at 1225. See also *Jenyns v Public Curator (Q)* (1953) 90 CLR 113 at 118-119; [1953] HCA 2.

present case, and consistently with the reasoning in *Warman*, they can be stated as follows.

83 The "cardinal principle of equity" is "that the remedy must be fashioned to fit the nature of the case and the particular facts"[87]. Contrary to approaches which have emerged in some English cases since *Warman*[88], identification of a benefit or gain for which a defendant fiduciary or knowing participant is to be ordered to account is the outcome neither of judicial discretion nor of the determination of a mere factual issue of causation. Identification of the benefit or gain is a matter of judgment informed by equitable principle[89]. However contestable the judgment to be made might be on the facts of a particular case, the judgment to be made is one which admits only of a unique outcome which, once made, falls to be appraised on appeal according to a standard of correctness[90].

84 Equity is not ignorant of questions of causation. What it stresses is that questions of causal nexus in a remedial context must be addressed by reference to the equitable obligation breach of which is to be vindicated by the remedy that is sought[91].

85 The benefit or gain for which a fiduciary or knowing participant is liable to be ordered to account must, as a baseline requirement, have a causal connection to the fiduciary's breach of equitable obligation. The requisite causal connection was explained in *Warman* to exist if the benefit or gain has been obtained "by reason of" the fiduciary position, where the relevant breach is of the conflict rule, or if the benefit or gain has been obtained "by reason of" the

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87 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559. See also *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 278-279 [1]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 402-403 [503].

88 See *Murad v Al-Saraj* [2005] WTLR 1573 (discussed in Devonshire, *Account of Profits*, (2013) at 69-70) and *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 (discussed in Gummow, "Dishonest Assistance and Account of Profits", (2015) 74 *Cambridge Law Journal* 405 and in Turner, "Accountability for Profits Derived from Involvement in Breach of Fiduciary Duty", (2018) 77 *Cambridge Law Journal* 255).

89 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

90 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 567.

91 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 502 [44]; [2003] HCA 15.

fiduciary taking advantage of an opportunity or knowledge derived from the fiduciary position, where the relevant breach is of the profit rule[92].

86 Despite an earlier influential formulation which can be read as indicating to the contrary[93], the causal connection which must exist for a knowing participant to be liable to account for a benefit or gain is not between the benefit or gain and the conduct which constitutes knowing participation. To require a causal connection of that nature would recast knowing participation as a free-standing head of liability divorced from the fiduciary obligations which it is the purpose of equity's imposition of liability on the knowing participant to enhance.

87 Foresters' first ground of appeal therefore proceeds on too narrow an understanding of equitable principle in assuming that a knowing participant cannot be liable to account unless there is a causal connection between the benefit or gain and the conduct which constitutes knowing participation. Foresters' first ground of appeal is equally mistaken insofar as it asserts a requirement for a court to determine the "real or effective cause of any profit derived".

88 A causal connection between a fiduciary's breach of fiduciary obligation and a benefit or gain sufficient for the fiduciary or knowing participant to be liable to the equitable remedy of account will exist if the benefit or gain to the fiduciary or knowing participant would not have been obtained "but for" the breach, in the same way as a causal connection sufficient for the fiduciary to be liable to the equitable remedy of compensation will exist if a loss to the person to whom the fiduciary obligation is owed would not have been sustained but for the breach[94]. Because the concern of equity is to vindicate the equitable obligation that has been breached, the "but for" connection will be sufficient even though other contributing causes might be in play. That the fiduciary's breach of fiduciary obligation is dishonest and fraudulent is also good reason for treating a sufficient causal connection as existing if the dishonest and fraudulent breach can be concluded to have played a material part in contributing to the benefit or gain of the fiduciary or knowing participant even in circumstances where it cannot be

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92 (1995) 182 CLR 544 at 557, 563. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 468.

93 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397.

94 *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 215; *Maguire v Makaronis* (1997) 188 CLR 449 at 469-470; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272-278; *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 588-589 [21], 621-622 [135]; [2000] HCA 65; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 504 [51].

concluded that the benefit or gain would not have been obtained but for the breach.

89 Obviously enough, as with any other question of causation in equity, the causal connection between a fiduciary's breach of fiduciary obligation and a benefit or gain must be judged using common sense and "with the full benefit of hindsight"[95]. And as with other questions of causation in equity[96], the inquiry into causation is not to be constrained by normative limitations imported from the common law. To introduce those limitations would risk confusing distinct legal policies underlying distinct bases of legal liability and limiting equity's capacity to mould equitable relief to the circumstances of the individual case.

90 The impact on equitable relief of other potentially contributing causes, which in the context of determining the scope of compensable damage for breach of a common law obligation might be examined as part of the inquiry into causation through the doctrinal lens of remoteness or of novus actus interveniens, is examined in the context of the equitable remedy of account through another lens and at a subsequent stage of analysis.

91 The reasoning in *Warman* makes explicit that where there is shown to exist a causal connection between a fiduciary's breach of fiduciary obligation and a benefit or gain to the fiduciary or knowing participant, the onus shifts to the defendant to establish that it is inequitable to order that the defendant account for the value of the whole of the identified benefit or gain[97]. The shifting of onus is explicable in part, but only in part, as putting the burden of proof of contested questions of fact on a party who is a proven wrongdoer. The burden on the defendant is not just evidentiary; more fundamentally, it is persuasive. The obligation of the defendant, imposed as an incident of "the fiduciary relation itself", is to "justify" the "private advantage" that has been obtained[98].

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95 Cf *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 556, adopted in *Target Holdings Ltd v Redferns* [1996] AC 421 at 438-439.

96 Eg *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 214-216; *Maguire v Makaronis* (1997) 188 CLR 449 at 469-470, 472; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 500-504 [38]-[50].

97 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-562, citing *Sheldon v Metro-Goldwyn Pictures Corp* 309 US 390 at 408 (1940).

98 *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 398.

92 Putting aside those cases in which equitable relief might be withheld on established discretionary grounds by reference to disentitling conduct of the plaintiff, the defendant needs to demonstrate, in order to establish that it is inequitable to order an account of the value of the whole of the identified benefit or gain, either that the benefit or gain is attributable in part to one or more other contributing causes by reference to which it is "practically just" that the benefit or gain be apportioned or that some allowance be made in favour of the defendant[99], or that there is some other reason why accounting for the whole of the gain would amount to a windfall to the plaintiff of such a nature or to such a degree that the accounting would fail to vindicate the purposes underlying equity's imposition of the fiduciary obligation that has been breached[100].

93 The judgment ultimately to be made by the court from which the order to account is sought is correspondingly not only factual; fundamentally, it is evaluative. The evaluative nature of the judgment was referenced in the "classic case" of *Vyse v Foster*[101], in the context of assessing the extent of the liability of an errant executor to account to a beneficiary of a will for profits earned from running a business using funds of the testator, in the statement that there was "no rule for apportioning the profits according to the respective amounts of the capital, but that the division would be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case".

94 Factors which might bear on the judgment to be made in an individual case cannot be catalogued exhaustively in advance. They will include the relative extent to which other causes which might include the skill and industry of the defendant can be assessed as having contributed to the benefit or gain that is causally connected to the breach of fiduciary obligation. They will also include whether, and if so to what extent, the defendant's gain reflects uncompensated loss on the part of the plaintiff. And although the purpose of the remedy is not to punish, consideration of what is just in the context of the equitable obligation to be vindicated by the remedy cannot exclude consideration of the severity of the breach of the fiduciary obligation and the extent of the

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99 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 407-410 [520]-[531], quoting *Erlanger v New Sombrero Phosphate Company* (1878) 3 App Cas 1218 at 1279. See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 109-110.

100 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-562. See also *Guinness Plc v Saunders* [1990] 2 AC 663 at 701-702, quoted in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 382-383 [332].

101 (1872) LR 8 Ch App 309 at 331. See *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 409 [526], quoting *Scott v Scott* (1963) 109 CLR 649 at 661; [1963] HCA 65.

defendant's own involvement and culpability in it[102]. The judgment to be made must accommodate the stringency of the equitable obligation to be vindicated to the need to ensure that the remedy is not "transformed into a vehicle for the unjust enrichment of the plaintiff"[103].

95 Importantly, it is the outcome of that ultimate evaluative judgment, and not merely the outcome of the initial inquiry into causation, which yields the "true measure" of the benefit or gain to be reflected in the order[104].

96 Where the benefit or gain which has in fact been obtained by the errant fiduciary or knowing participant is the establishment of an ongoing business, the outcome might accordingly be that the fiduciary or knowing participant is liable to account "for the entire business and its profits, due allowance being made for the time, energy, skill and financial contribution that [the fiduciary or knowing participant] has expended or made". Depending on the circumstances, the outcome in the alternative might be that some lesser measure, more favourable to the fiduciary or knowing participant, is judged better to reflect the equities of the case[105].

97 *Warman* itself provides a useful illustration. An Australian distributor of products of a foreign manufacturer informed the foreign manufacturer that it was not interested in entering into a joint venture to assemble and distribute those products in Australia. An employee of the distributor then dishonestly and fraudulently caused companies of which he was the controlling mind to enter into a joint venture with the foreign manufacturer for a twenty-year period. The companies were held liable to account to the Australian distributor for profits made from the joint venture. The account was limited to profits made by the companies during the first two years of the joint venture's operation. Relevant to the decision to hold the companies liable to account for profits made from the joint venture was that the distribution aspect of the joint venture could be seen to have been "carved out" of the business of the Australian distributor[106]. Relevant to the decision to limit the account to profits within that period was the likelihood that the distribution agreement and hence the business of the Australian

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102 *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584 at 596-597.

103 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561.

104 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, citing *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110.

105 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, quoting *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110.

106 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 568.

distributor would have continued for no more than a year, making it appropriate to characterise the companies' profits made and to be made from the joint venture "as built ... upon [the employee's] breach of fiduciary duty but otherwise upon [the foreign manufacturer's] ownership of local goodwill and local assembly rights"[107]. "An account of profits in respect of that period", it was judged, would "clearly cover the whole of the benefits acquired by [the companies] through [the employee's] breach of fiduciary duty."[108] For the two-year period, the order was that the companies account to the Australian distributor "for the entirety of the net profits of [their] businesses before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them"[109].

98 With these principles in mind, it is necessary to return to the facts of the present case.

The principles applied

99 Having found that Foresters would not have expanded its funeral products business but for the dishonest and fraudulent breaches of fiduciary duty by Mr Woff and Mr Corby in which Foresters knowingly participated, the Full Court was correct in principle to proceed to assess the extent of Foresters' liability to account for its funeral products business by seeking to determine that measure of Foresters' profit from the business disgorgement of which to Lifeplan and FPM would constitute a proportionate response to the breaches of fiduciary duty, having due regard to the circumstance that those breaches were not the sole contributors to the success of the business.

100 The question which remains on the appeal and the cross-appeal is whether, in the application of that principle, the Full Court arrived at the correct conclusion. Answering that question needs to begin by noting the nature of Foresters' funeral products business and the methodology applied to its valuation in the expert evidence adduced at trial.

101 Foresters' funeral products were retail investment contracts under which customers made payments into the Foresters Funeral Fund. The capital-guaranteed amount of a customer's payments into the Fund was required by contract to be paid out on the customer's death to a funeral director. Foresters' revenue from the funeral products business came from charging a management fee of two per cent per annum on funds under management in the Foresters Funeral Fund. The management fees which Foresters could expect into the

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107 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 566-567.

108 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 567-568.

109 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 568.

future from funds under management in the Foresters Funeral Fund were calculable by reference to actuarial projections of mortality rates.

102 Foresters' expenses of running its funeral products business in any given financial year fell broadly into two categories. One was marketing expenses, incurred to generate new contracts. The other was operational expenses, incurred in administering existing contracts and in administering the Foresters Funeral Fund.

103 At the time of trial in June 2015, historical data were available on the actual contracts entered into by Foresters from the beginning of January 2011 until the end of June 2014 and on the actual expenses incurred by Foresters in running its funeral products business during that period. The historical data provided a basis for the calculation of past cash flows up to the end of June 2014 and for the projection of future cash flows from the beginning of July 2014.

104 The accounting experts called by the parties agreed that the appropriate method of valuing Foresters' funeral products business was by reference to the net present value of pre-tax future cash flows comprised of actual and projected revenues less actual and projected expenses in each year of actual and projected operation of the business. Application of that methodology permitted two distinct calculations.

105 One calculation was of the net present value of pre-tax cash flows of contracts entered or projected to be entered into by Foresters from the beginning of January 2011 on the assumption that Foresters ceased marketing funeral products at the end of a given financial year, so as thereafter to incur operational expenses for so long as those contracts could be projected to remain in existence but not marketing expenses.

106 The other calculation was of the net present value of pre-tax cash flows for Foresters' funeral products business treated as an ongoing business. That calculation was made by taking historical cash flows for the period from January 2011 until June 2014 and projected cash flows for the period from July 2014 until June 2024 and then adopting a "terminal value" formula to take into account cash flows beyond that point. One basis for the projection of revenue that Foresters could be expected to generate in the future was the revenue historically realised by Lifeplan.

107 To arrive at a net present value, the experts agreed that historical cash flow figures were to be adjusted upwards by applying rates of interest which reflected the time value of money but not risk, and that projected future cash flow figures were to be discounted by applying rates of interest which reflected a component for risk. Disagreements between the experts as to the appropriate

rates of interest were resolved by the primary judge[110]. Further disagreements between the experts as to the allocation of past expenses, and consequently as to the projection of future expenses, were also resolved by the primary judge[111].

108 On the appeal to the Full Court, a joint expert report was adduced in evidence. That report followed from the primary judge's findings in relation to the areas of disagreement between the experts which had existed at trial. The joint report calculated that, as at the end of April 2015, Foresters' funeral products business treated as an ongoing business had a net present value of $14,838,063.

109 The joint expert report also included revised calculations of the net present values of Foresters' funeral products business, again as at the end of April 2015, on successive assumptions that Foresters ceased marketing funeral products first at the end of September 2011 and then afterwards at the end of each financial year from June 2012 to June 2025. The figure shown in the joint report as the net present value of the business on the assumption that Foresters ceased marketing funeral products at the end of September 2011 was negative, indicating that Foresters' funeral products business was not yet then profitable. The figure of $6,558,495, selected by the Full Court as the amount for which Foresters was to be ordered to account, was the figure shown in the joint report as the net present value of the business on the assumption that Foresters ceased marketing funeral products at the end of June 2015.

110 Foresters' second ground of appeal, challenging the account of profits ordered by the Full Court on the basis that it covered profits which had not yet accrued, is therefore shown by the valuation evidence to be misguided. Foresters' funeral products business as expanded by Foresters after the Board's adoption of the BCP in September 2010 was a benefit or gain to Foresters. The net present value methodology adopted by the accounting experts was an appropriate means of determining the value of that benefit or gain.

111 To understand the significance of the calculations of the net present value of Foresters' funeral products business, as ultimately set out in the joint expert report adduced in evidence on the appeal to the Full Court, it is necessary to refer to two features of those calculations. The first is that the calculations allowed for all incurred and projected expenditure as well as all realised and projected revenue. The second is that the discount rate applied to projected cash flows took into account the risk assumed by Foresters in carrying on the business.

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110 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 476 [469]-[470].

111 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 476-480 [471]-[480].

112 In particular, the discount rate determined by the primary judge as appropriate to be applied to arrive at the net present value of Foresters' funeral products business as an ongoing business had a component for risk. The risk component took into account the peculiar circumstances of Foresters as a relatively small operator offering a less diverse range of products than comparable businesses; and that Foresters' marketing of funeral products was through funeral directors, making its ongoing market position vulnerable to adverse operational or financial issues affecting the limited number of funeral directors in Australia. The risk component also specifically took into account the potential for Foresters' projected revenues from new contracts to be adversely affected by the risk that Mr Woff and Mr Corby, on whom Foresters' expert emphasised that Foresters placed significant reliance for the ongoing conduct of the business, would cease to be employed by Foresters in the future.

113 The benefit or gain which Foresters obtained by reason of the breaches of fiduciary duty by Mr Woff and Mr Corby was the expansion of its funeral products business from a business which was so small that it appears not to have been generating profit in 2011 to an ongoing business which by April 2015, making full allowance in the method of calculation for Foresters' past and future expenses and for the risks which Foresters assumed in the future operation of that business, had a net present value of $14,838,063.

114 That calculation of the net present value of the business, it must be acknowledged, made no allowance for risks which Foresters had already assumed in establishing and operating the business until the time of the trial. But Foresters is hardly to be compensated for the risks it assumed in doing the very thing which constituted its participation in Mr Woff's and Mr Corby's dishonest and fraudulent breaches of fiduciary duty.

115 Further, to require Foresters to account to Lifeplan for the entirety of that net present value could hardly be described as a windfall to Lifeplan. Lifeplan's own funeral products business, which could be expected to have continued along its previous trajectory had Foresters' business not expanded, was shown by the evidence to have been decimated. The upward trajectory of the inflow of funds to Foresters from the marketing of its funeral products correlated to the downward trajectory of the inflow of funds to Lifeplan from FPM's marketing of funeral products. Apart from the expansion of Foresters' business through implementation of the BCP, no change in market conditions was suggested by the evidence to explain that downward trajectory.

116 Foresters' gain was accordingly Lifeplan's loss. Although Mr Woff and Mr Corby would have been free to compete with FPM after the termination of their employment with Lifeplan, there is no suggestion in the evidence that they had the wherewithal to do so on their own. Mr Woff in his oral testimony denied it. And although Foresters was found by the primary judge to have had the resources to have invested in expanding its funeral products business without

Mr Woff and Mr Corby, the critical finding remains that Foresters would not have done so had it not been presented with the BCP by Mr Woff and Mr Corby.

117 That the BCP was a plan which had a five-year time horizon provides an inadequate foundation for limiting Foresters' liability to account to what would have been the net present value of the business if Foresters had ceased marketing funeral products at the end of June 2015. Foresters did not plan to cease marketing funeral products at the end of June 2015, and that was not what Mr Woff or Mr Corby or Foresters intended to occur when, in August 2010, Mr Woff and Mr Corby proffered the BCP to Foresters and when, in September 2010, Foresters decided to implement the BCP.

118 The BCP was a plan for the establishment and development of a new funeral products business which was to continue indefinitely. The business developed on the basis of the BCP was an ongoing one. As an ongoing business, it had a capital value. That capital value could be, and was in the expert evidence, determined as at the time of trial with some precision by reference to the net present value of its expected net cash flows over the ensuing ten-year period. Such risks as could then be identified as facing Foresters in realising those net cash flows over that period could be, and were, fully taken into account in the discount rate that was used.

119 To sum up, what Foresters obtained by reason of the breaches of fiduciary duty by Mr Woff and Mr Corby in which Foresters knowingly participated was a business. Foresters obtained that business to the cost of the business which Lifeplan operated through FPM. Foresters' business can be, and has been, appropriately valued in a manner which duly allows for all of Foresters' expenses and for all of Foresters' ongoing business risks. Foresters has failed to establish any reason for considering that an order that it account for the entirety of the business as so valued is inequitable.

Orders

120 Foresters' appeal is to be dismissed. Lifeplan and FPM are to be granted special leave to appeal limited to the first two grounds identified in their proposed notice of cross-appeal. The cross-appeal is to be allowed. The Full Court's order for an account of profits is to be set aside. In place of that order, it is to be ordered that Foresters account to Lifeplan and FPM in equity for the total capital value of the business in the sum of $14,838,063. Foresters must pay Lifeplan's and FPM's costs of the appeal and of the cross-appeal.

121 NETTLE J. The principal issue in this matter is whether the Full Court of the Federal Court of Australia erred in holding that the appellant, Ancient Order of Foresters in Victoria Friendly Society Limited ("Foresters"), was liable to account to the first respondent, Lifeplan Australia Friendly Society Limited ("Lifeplan"), and the second respondent, Funeral Plan Management Pty Ltd ("FPM"), for profits derived from funeral bond contracts written by Foresters during the financial years ended 30 June 2011 to 30 June 2015[112]. Foresters contends that the Full Court should have held, as the primary judge held[113], that Foresters was not liable to account for any of the profits of its funeral bond business. By way of cross-appeal, Lifeplan and FPM contend to the contrary that the Full Court should have held that Foresters was liable to account not just for the profits derived from contracts written up to 30 June 2015 but for the total capital value of Foresters' funeral bond business. For the reasons which follow, the Full Court did not err in ordering as they did. The appeal and the cross-appeal should be dismissed.

The facts

122 A funeral bond is a funeral investment product offered through an investment fund. Its purpose is to enable a person to set aside funds during his or her life to meet the costs of the person's funeral expenses. Lifeplan is an Australian specialist fund manager and supplier of investment products, including funeral bonds. FPM is a wholly owned subsidiary of Lifeplan and, at relevant times, promoted, marketed and distributed Lifeplan's funeral products, and recruited and maintained relationships with funeral directors for that purpose. As at 2010, Lifeplan, in conjunction with its FPM business, enjoyed an approximately 70 per cent share of the funeral bond market in Australia, and its annual inflows from pre-paid funeral products were in the order of $68 million.

123 Foresters is a friendly society that markets and manages investment and insurance products, including funeral bonds. It manages a number of funeral funds, including the fund that is the subject of this proceeding ("the Foresters Funeral Fund"). In 2010, its annual inflows from pre-paid funeral products were around $1.6 million.

124 For a number of years up to and including 2010, Noel Jeffrey Woff ("Woff") and Richard John Corby ("Corby") were employed by Lifeplan in management roles in FPM. Woff was the senior manager of FPM charged with responsibility for creating and maintaining relationships with funeral directors.

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112 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 22 [67], 30 [124].

113 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 470-471 [442]-[445].

He made and participated in the making of decisions that affected the whole, or a substantial part, of the business of FPM, and was an officer of FPM within the meaning of s 9 of the *Corporations Act* 2001 (Cth). Corby was the national sales manager of FPM and reported to Woff. He was responsible for overseeing the sales performance of the business unit and thus for servicing existing clients and recruiting new ones. Both men had "a good understanding of how the [funeral bond] market worked and how to generate new business", and they were good at what they did[114].

125 Unbeknownst to Lifeplan, during 2010 Woff and Corby took a number of steps with the knowledge and encouragement of Foresters directed to establishing a new funeral bond business within Foresters and in effect diverting as much as possible of Lifeplan's existing funeral bond business to Foresters. Towards the end of 2010, Woff and Corby arranged for the incorporation of a private company, Funeral Planning Australia Pty Ltd ("FPA"), to provide promotional and marketing services to Foresters in connexion with the sale of Foresters funeral bonds.

126 Kerry Allan Hughes ("Hughes") had been the chief executive officer of Foresters since October 2000. He and Woff had known each other for many years and Hughes had attempted to persuade Woff to leave Lifeplan and work for Foresters on a number of occasions. In February 2010, Woff told Hughes that he was interested in leaving Lifeplan if the offer were right. It appears that Woff had become unhappy at Lifeplan following its merger with Australian Unity Investments Ltd ("Australian Unity") in August 2009. On 15 February 2010, Woff sent an email from his Lifeplan email address to an external email address attaching two reports that had been prepared by an external market research consultant exclusively for Lifeplan.

127 On 14 July 2010, Woff met Hughes to discuss the possibility of Woff joining Foresters. Hughes asked Woff to put together a proposed business model for Foresters' consideration and to include in the proposal details of how much business Foresters would be likely to generate and how much profit Foresters would be likely to make. Hughes also told Woff that, if the discussions progressed and Woff joined Foresters, Foresters may consider employing additional staff, and he asked Woff if he knew of anyone who would be suitable for a new sales team. Woff mentioned Corby, and Hughes asked Woff to inquire of Corby whether he would be interested in joining Foresters.

128 On or about 23 July 2010, Woff and Corby sent a four page letter to Hughes in which they presented their preliminary proposal by outlining "a viable, sustainable and profitable product and distribution option for Foresters Friendly

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114 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 466-467 [429].

Society". Annexed to the letter was a document entitled "2010/2011 Travel, Accom & Entertainment Expense Budget" which was similar in layout and form to a Lifeplan document[115]. In the letter, Woff and Corby recommended that Foresters concentrate on the market for funeral bonds sold via funeral firms and that it should engage Woff and Corby as two experienced funeral fund development managers to conduct that business. The letter stated that "FPM has the lion's share of the market writing $55M in gross inflows in 2009/10 purely through its distribution network of funeral firms" and provided the following estimates of the volume of business which Woff and Corby believed that they would be able to secure for Foresters over a five year period:

Year	**Annual Inflows Year End**	**Nos of Funeral Firms**
1	$10,000,000	40
2	$25,000,000	125
3	$35,000,000	170
4	$40,000,000	220
5	$45,000,000	300

129 On 5 August 2010, after briefly speaking to Hughes, Woff sent an email to Hughes with an attachment entitled "Foresters Profit Revenue Model". The "Foresters Profit Revenue Model" was similar in layout and form to a Lifeplan document and it was based on the annual inflows set out in the letter from Woff and Corby to Hughes dated 23 July 2010. Also attached to the email was a copy of the "2010/2011 Travel, Accom & Entertainment Expense Budget" document that had been annexed to the letter of 23 July 2010, and a document entitled "Projected Stationary [sic] and Promotional Item Costs 2010/2011". The latter document was very similar in layout and form to a Lifeplan document bearing the same title. The email ended with an expression of hope that the attached information would be of some help to Foresters' accountant.

130 In addition to those communications with Hughes, from July 2010 onwards Woff sent emails and attachments containing information confidential to Lifeplan from his Lifeplan email address to his private email address. The

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115 In the proceedings below, no clear distinction was drawn between documents belonging to Lifeplan and documents belonging to FPM. For simplicity, any document belonging to either Lifeplan or FPM will be referred to as a "Lifeplan document".

details of those emails and attachments were canvassed thoroughly by the primary judge[116]. Suffice it to say for present purposes that between 19 July 2010 and 25 August 2010, Woff sent at least 10 such emails attaching numerous confidential Lifeplan documents, including business plans and strategies, financial projections, spreadsheets of sales figures, spreadsheets of claim histories and internal training manuals.

131 In August 2010, Theodore Fleming ("Fleming"), the non-executive Chairman of the Board of Foresters, and Hughes met to discuss the preliminary proposal by Woff and Corby in their letter dated 23 July 2010 and Woff's subsequent email on 5 August 2010. Fleming and Hughes were of the view that the proposal offered "a tremendous opportunity [for Foresters] to move seriously into the Funeral Bond business and fill the position previously occupied by Lifeplan"[117]. Fleming asked Woff to put together a formal submission for presentation to the Board of Foresters at the Board meeting planned for 30 August 2010.

132 In response to that request, Woff and Corby prepared a 36 page paper in the name of FPA entitled "Funeral Fund Business Concept" ("the BCP"). The BCP was dated 25 August 2010 and Corby submitted it to Hughes on that date for presentation to the Board of Foresters. As is evident from the reasons of the primary judge[118], several parts of the BCP were based on the confidential information gathered by Woff in his numerous emails to himself.

133 Section 1 of the BCP, entitled "Introduction", contained the following statements:

> "This paper has been prepared for the Board Members of the Foresters Friendly Society ('Foresters') by Funeral Planning Australia ('FPA') to discuss the concept of working together to develop a successful funeral fund operation.
>
> The funeral industry provides two products:
>
> 1. At Need – where the deceased is either buried or cremated
>
> 2. Pre-need – when a person organizes his or her funeral in advance

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116 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 410-415 [117]-[142].

117 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 417 [152].

118 See in particular *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 424 [191].

Compared to overseas experience the Australian pre-need market is both under developed and under serviced. With the exception of the highly costly life products there are very limited suppliers of funeral fund products in an obviously aging demographic.

We believe that a window of opportunity exists to introduce a viable and credible alternative to distribute an accumulation product through funeral directors.

In the Australian funeral fund industry a company called Funeral Plan Management ('FPM') is recognised as the largest and most successful operator. FPM's two key employees are Noel Woff and Richard Corby. Through FPM they have established a market lead position based on performance and innovation through product, marketing capability, technical advice and service standards.

Richard and Noel have now established their own niche marketing company, FPA, which they present to the Board of Foresters as an opportunity to, in a very short timeframe, replicate the success enjoyed by FPM."

134 Section 2, entitled "Executive Summary", stated:

"Foresters have an internal objective to increase its current level of new business inflows.

In order to meet this objective it is recommend [sic] that Foresters give consideration to marketing a funeral fund product Australia wide through a sales channel of established funeral firms.

As an adjunct to this it is additionally recommended that consideration be given to engaging the services of FPA, a newly created specialist pre-need funeral marketing firm. FPA is the creation of two experienced funeral fund development managers Messrs Richard Corby and Noel Woff.

With this in mind, FPA have identified the following areas for further discussion:

Five Years Sales Budget

Strategies to achieve the sales projections

Projected first year costs

Projected profit

Conclusion and Next Steps".

135 Section 4 of the BCP addressed the size of the funeral bond market. Under the subheading "Funeral Directors", it contained a table of 37 funeral firms which were said to be the largest firms in the Australian funeral industry set out in descending order of estimated annual sales rounded to the nearest $10,000. The table stated the location of the operations of each firm and was introduced with the following statement:

> "The following table outlines the main participants in the Australian funeral industry together with their annual sales and current fund managers (*non FPM firm's sales figures are estimated*)." (emphasis added)

136 The table was based on a confidential Lifeplan document setting out top performing funeral directors that Woff had emailed to his private email address on 17 August 2010[119]. The emphasised words in the introductory statement indicated that the figures in the table were, in respect of Lifeplan clients, actual figures taken from the confidential Lifeplan document[120].

137 Section 5 of the BCP contained a statement in tabular form of strengths, weaknesses, opportunities and threats of and for FPA and Foresters. By way of example, it stated as a strength "[w]ill offer professional marketing collateral", as a weakness "[a]dmin service levels may be tested due to lack of resources", and as opportunities "[Australian Unity] will be slow to react and will be reticent to invest marketing dollars", "[Australian Unity] have a very poor track record in terms of support and service" and "[Australian Unity]/Lifeplan merger created market uncertainty – FPA staff will capitalise on this". Some of the analysis in Section 5 was adapted from Lifeplan documents containing confidential information that Woff had emailed to his private email address on 17 August 2010[121].

138 Section 6, entitled "Foresters – Projected New Business", contained the opinion of Woff and Corby as to projected annual new business inflows for the first five years. It began as follows:

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119 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 414 [137], 423-424 [185], [191].

120 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 446 [322].

121 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 424 [188], [191].

"6.1 Five Year Sales Projections

The following table summarises the projected new business inflows we can expect to secure over the next 5 years.

These figures are supported in Attachment B to this report which itemises at funeral director level the new business planned to be secured over the next five years."

139 There followed a table of annual inflows that was in substance identical to the one included in the letter from Woff and Corby to Hughes dated 23 July 2010 and attached to the email from Woff to Hughes of 5 August 2010[122]. Appendix B to the BCP (described in Section 6.1 as "Attachment B") was entitled "New Business Acquisition Timeframe". It set out funeral firms who might be persuaded to join the Foresters Funeral Fund, and estimates of the point in time over a five year period in which that might occur. Appendix B was prepared using two confidential Lifeplan spreadsheets which Woff had emailed to his private email address on 19 July 2010 and 17 August 2010 and which contained Lifeplan sales figures for the financial year ended 30 June 2010[123].

140 Section 6.2 of the BCP was in the following terms:

"6.2 Historical Sales Performance

With any projections for a start up entity there are the obvious questions of accuracy. As a means to give validity to what has been presented we submit *our historic sales figures* which have been achieved in an environment of more players and intensive competition." (emphasis added)

141 There followed a table of figures:

Year	Annual Sales
2000/1	$21.3M
2001/2	$22.5M
2002/3	$27.7M

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122 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 419 [161].

123 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 423-424 [183], [191].

2003/4	$28.5M
2004/5	$32.8M
2005/6	$39.3M
2006/7	$41.8M
2007/8	$51.0M
2008/9	$55.0M
2009/10	$55.8M

142 The reference to "our historic sales figures" was a reference to Lifeplan's historical sales figures[124]. Woff had taken those figures directly from a confidential Lifeplan document showing historical new business inflows which he had emailed to his personal email address on 17 August 2010[125].

143 Section 6.3, entitled "Geographical Spread", contained an estimate of the percentage inflows to be attributed to each State. Again, the source of the information in that section was a confidential Lifeplan document[126].

144 Section 11 was in the following terms:

> "11. Market Reaction of [Australian Unity]
>
> The reaction of Australian Unity to the loss of its entire funeral fund sales team (the other two members have indicated their intention to resign) is unpredictable. However, all indications suggest that they will do nothing as their eyes seem to be clearly fixed on developing other market segments and so they are more likely to simply sit back and take heart at the short term expense savings they will now enjoy."

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124 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 420 [162].

125 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 423-424 [184], [191].

126 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 424 [187], [191].

145 Appendix C, entitled "Visitation Plan", was a reproduction of the "2010/2011 Travel, Accom & Entertainment Expense Budget" attachment to Woff and Corby's email to Hughes of 5 August 2010, which, as already mentioned, was very similar in layout and form to a Lifeplan document bearing the same title[127].

146 Appendix D, entitled "Bonus Rate Comparison ('Untaxed') – Funeral Plan Management ('FPM')", was a schedule of returns of various funeral funds. It set out the bonus rate earned on 11 different funds involving seven different fund managers for each year from 1996 to 2009. Tellingly, the heading contained a reference to FPM, not FPA. Woff prepared Appendix D by using a confidential Lifeplan document with the same heading that he had emailed to his private email address on 17 August 2010[128].

147 Appendix E was entitled "Foresters Profit Revenue Model" and was similar in layout and form to the document of the same description which Woff sent to Hughes on 5 August 2010, which, as already mentioned, was similar in layout and form to a Lifeplan document[129].

148 Hughes submitted the BCP to the Foresters Board meeting held on 30 August 2010. The Board considered that the proposal was attractive and resolved to invite Woff and Corby to present the proposal to the Board at a subsequent meeting. The Board also directed Hughes to ascertain whether Woff and Corby were constrained under their employment contracts with Lifeplan by any covenant preventing or restricting them from accepting positions as employees of Foresters in competition with Lifeplan. The minutes of the meeting of 30 August 2010 recorded the following:

> "6.10 *Funeral fund proposal*:
>
> > The CEO [Hughes] confirmed he had been in discussions with Noel Woff the General Manager of Funeral Plan Management concerning the possibility of he and his Sales Manager pursuing a Funeral Bond initiative with Foresters. The CEO told the Board that he was suggesting they consider the proposal and if interested get Noel and his associate in to review and discuss matters of

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127 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 420 [165], 424 [191].

128 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 420 [166], 424 [190]-[191].

129 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 420 [167], 424 [191].

> interest. After discussions it was agreed that a meeting be convened with Noel Woff and his associate Richard Corby but that the CEO should [first] address the following matters with them:
>
> (a) Are there any restrictions in them setting up the proposed structure in opposition to Funeral Plan Management in their current employment contracts;
>
> (b) How long they anticipate Foresters continuing to remunerate them; and
>
> (c) Is it necessary for the commission payment to be channelled through a separate company."

149 Hughes made inquiries of Woff and Corby and was advised that there was no contractual limitation which prevented either of them from accepting employment with Foresters. He invited Woff and Corby to make a formal presentation to the Board at a Board meeting planned for 13 September 2010.

150 From 30 August 2010, Woff continued to send emails from his Lifeplan email address to his private email address attaching numerous confidential Lifeplan documents. They are essayed in the primary judge's reasons[130]. On 7 September 2010, Woff sent from his Lifeplan email address to his private email address an email of which the subject was "Recipe". It was comprised of speaking notes for the meeting with the Board of Foresters and notes of questions which Woff expected the Board might ask together with his proposed answers to those questions. The "Recipe" recorded that "competitors" in the market would be "very vulnerable" between October 2010 and March 2011 and that there would be confusion in the market when the new business was established. It is apparent from the following section of the "Recipe" that the "competitors" were Lifeplan and FPM:

> "There will be firms that follow and fill in stationery order forms simply because they wont [sic] know any better.
>
> But there will also be firms that will fill in our documentation and then mistakenly deposit the funds with the wrong entity. We can expect a lot of that to happen.
>
> *So we need to capitalise on the confusion.*" (emphasis in original)

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130 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 410-412 [118]-[127], 415 [141]-[142].

151 Later in the "Recipe", in a list headed "Why will firms come to us?", the following statement appeared:

> "There will be confusion in the market after we leave and lines of demarcation between fund management firms will be blurred (and to be honest we may at times let this happen)".

152 There was also a statement to the effect that the biggest challenge for those pursuing the proposal would be in securing one of Lifeplan's major clients at the time, Tobin Brothers Funerals ("Tobins"), in year one.

153 On 9 September 2010, Woff and Corby wrote to their accountant who was dealing with the incorporation of FPA and the establishment of a trust enclosing a copy of their proposal to Foresters. The letter stated that:

> "This information is extremely confidential given it contains figures relating to funeral industry participants. For the sake of good order could you please read the attached confidentiality deed that we can sign at our initial meeting."

154 A special Board meeting of Foresters was convened for 13 September 2010 for the purpose of receiving and considering Woff and Corby's proposal. Woff made his presentation supported by Corby. The minutes of the meeting recorded that Woff and Corby's proposal involved them promoting a Foresters funeral bond through funeral directors in a similar manner to their work with FPM. They also recorded that the proposal involved Woff and Corby becoming employees of Foresters and establishing a marketing company and receiving a commission through that company. The Board directed Hughes to write to Woff and Corby advising them that Foresters was interested in "moving discussions forward", although there remained a number of matters to be resolved.

155 On 20 September 2010, Hughes wrote to Woff and Corby, saying, among other things:

> "Please accept this letter as Foresters Friendly Society's expression of interest in moving forward with your proposed Funeral Fund venture. This expression of interest is absolutely conditional on there being no employment restrictions on either Noel Woff or Richard Corby under employment arrangements with their current employer.
>
> You will appreciate that Foresters do not wish to engage in litigation with your current employer regarding employment issues or intellectual property matters.
>
> …

> *In measuring the traction of the product the Board will rely heavily upon your predictions of sales/growth that you provided in your written proposal document*.
>
> …
>
> We ask that you review this proposal and come back to us with your comments and recommendations. We trust the proposed arrangement is reasonably in line with your expectations and will be happy to discuss any problems you may have, we are confident that we can come to [a] mutually suitable arrangement and can develop a satisfactory basis to move the joint venture forward." (emphasis added)

156 The emphasised paragraph was included at Fleming's direction and the reference in it to "your written proposal document" was a reference to the BCP. Woff and Corby responded by letter dated 27 September 2010 that, subject to the resolution of matters they identified, they were ready to proceed.

157 In October and November 2010, Woff and Corby, while still employed by Lifeplan, undertook a review of the rules and disclosure documents of the Foresters Funeral Fund. During this period, Woff suggested amendments to the Fund rules and created new disclosure documents for the Fund, which he sent to Hughes. One of the new disclosure documents contained in excess of 25 sentences or paragraphs that had been copied from a Lifeplan document. Other documents prepared by Woff for Foresters during this period which were prepared using Lifeplan documents included stationery request forms, funeral benefit claim forms, marketing flyers and pre-paid funeral contracts.

158 Corby handed in his resignation from Lifeplan on 28 October 2010. His resignation was effective on 25 November 2010, and he commenced employment with Foresters on 6 December 2010. Woff resigned from his employment with Lifeplan on 1 December 2010. His resignation was effective on 29 December 2010, and he commenced employment with Foresters on 4 January 2011. From the time Woff and Corby became employees of Foresters, the Foresters Funeral Fund grew substantially and Lifeplan's funeral bond business diminished. At 30 June 2010, the balance of the Foresters Funeral Fund was $13,238,399; by 30 June 2013, it had grown to $62,940,608. For funeral bonds written from 2011 onwards, Foresters earned a 2 per cent management fee calculated by reference to the amounts in the Fund.

The primary judge's findings

159 As already intimated, the primary judge found that the BCP was extensively based on confidential Lifeplan information. In summary[131]:

(1) Section 3 of the BCP copied phraseology in a confidential Lifeplan document that Woff had sent to his private email address on 17 August 2010;

(2) Section 4.1 of the BCP was prepared using reports that had been written by an external consultant engaged to undertake research exclusively for Lifeplan that Woff had sent to an external email address on 15 February 2010;

(3) the table in Section 4.2 of the BCP was prepared using a confidential Lifeplan spreadsheet that Woff had sent to his private email address on 17 August 2010;

(4) the strengths, weaknesses, opportunities and threats analysis in Section 5 of the BCP was prepared, at least in part, by reference to confidential Lifeplan documents that Woff had sent to his private email address on 17 August 2010;

(5) the historical sales figures in Section 6.2 of the BCP and the geographical spread figures in Section 6.3 were prepared using confidential Lifeplan documents that Woff had sent to his private email address on 17 August 2010;

(6) Appendix B to the BCP was prepared using information from two confidential Lifeplan spreadsheets that Woff had sent to his private email address on 19 July 2010 and 17 August 2010;

(7) Appendix C to the BCP was prepared using information from a Lifeplan document;

(8) Appendix D to the BCP was prepared using a confidential Lifeplan document that Woff had sent to his private email address on 17 August 2010; and

(9) the structure and form of Appendix E to the BCP followed the structure and form of a Lifeplan document.

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131 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 424 [191].

160 The primary judge found[132] that Woff and Corby had acted in breach of the fiduciary duties they owed to Lifeplan and FPM by preparing the BCP using the above information. The primary judge also found[133] that Foresters was aware of circumstances which would indicate to any honest and reasonable person that the BCP was based on confidential information. As his Honour observed, the annual inflows and contract numbers in Appendix B were sufficient to found that conclusion, as were the words and table in Section 4.2, the table in Section 6.2 and the heading to Appendix D. His Honour therefore concluded that Foresters knowingly assisted[134] Woff and Corby in their breaches of fiduciary duty with respect to the BCP.

161 The primary judge found[135], too, that Foresters was aware that Woff and Corby, while still employed by Lifeplan, approached Lifeplan funeral director clients to solicit their business for Foresters and FPA. This was a breach of fiduciary duty by Woff and Corby which Foresters knowingly assisted. Woff and Corby had also committed breaches of fiduciary duty by attempting to solicit for Foresters the business of Tobins, and making disparaging remarks regarding Lifeplan and FPM in the course of doing so[136]. On the evidence, however, the primary judge did not think that Foresters had the requisite knowledge to have knowingly assisted those breaches of fiduciary duty[137].

162 The primary judge found[138] that Woff and Corby's involvement in reviewing and preparing rules and disclosure documents for the Foresters Funeral Fund while they were still employed by Lifeplan "went well beyond the conduct a current employee may permissibly undertake" and amounted to a breach of their fiduciary duties. Foresters, through Hughes, played an active role in this conduct and thus knowingly assisted those breaches.

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132 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 456 [377].

133 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 456-457 [378].

134 See *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 per Lord Selborne LC; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163-164 [174]-[178]; [2007] HCA 22.

135 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 446-447 [326], 458-459 [386]-[388].

136 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 458 [384].

137 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 458 [385].

138 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 461 [402].

163 The primary judge also determined[139] that the Lifeplan confidential information included in Appendix B to the BCP had the potential to influence and did in fact influence Foresters in at least two ways: (1) by giving Foresters confidence that the annual sales targets set out elsewhere in the BCP were achievable, or might be achieved; and (2) at a more general level, by giving Foresters confidence that Woff and Corby knew what they were talking about. It played a real and non-peripheral part in Foresters' decision to proceed. His Honour concluded[140] that Foresters would not have proceeded in the absence of the BCP.

164 The primary judge further found[141], however, that the only subsequent use of the Lifeplan confidential information contained in the BCP (*scil* after the Board meeting of 13 September 2010) was the use of the annual sales figures of funeral directors in Appendix B to the BCP. At least some of those figures appeared in reports by FPA to the Board of Foresters in January 2011 and March 2011.

165 In the result, the primary judge held[142] that Lifeplan and FPM were not entitled to an account of the profits generated by Foresters in relation to the Foresters Funeral Fund in 2011 and subsequent financial years, because:

> "The confidential information was not used to generate any of these profits. There is nothing to suggest that the information in Appendix B, the table in section 4.2, the information as to geographical spread or Appendix D were used to generate profits. The use of some of the information in Appendix B by FPA in its Board Reports in early 2011 is not a use that generated profits. The fact that the proposed business would not have gone ahead without the BCP and that the confidential information with respect to which I have found Foresters had knowledge within the relevant legal test, played a part in Foresters' decision to proceed, is not sufficient to conclude that the profits claimed were attributable to those matters."

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139 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 446 [324].

140 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 446 [324], 470 [443].

141 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 424 [192], 440 [283].

142 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 470 [443].

The Full Court's reasons

166 The Full Court took a different view of the matter. As their Honours conceived of Woff and Corby's breaches of fiduciary duty, they comprised a wholesale plundering of Lifeplan's confidential information and business records as part of an orchestrated plan to take as many of Lifeplan's clients as quickly as possible into a new venture with Foresters; the use by Woff and Corby of crucial Lifeplan confidential information for the preparation of the BCP; and the later utilisation of that information to structure and conduct operations in the new venture with Foresters, with the knowing involvement of Foresters[143]. It followed, the Full Court held[144], that, because equity requires a person knowingly involved in a breach of fiduciary duty to account for the profits thereby gained, Foresters was required to account to Lifeplan for the profits generated in the new venture:

> "Without the dishonest taking advantage of the information and without the breaches, Mr Woff and Mr Corby would not have been employed by Foresters, and Foresters would not have expanded its business in this segment in the hands of Mr Woff and Mr Corby as it did. Put another way, without the breaches of duty in which Foresters was knowingly involved, without Messrs 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 Messrs Woff and Corby. 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."

167 The Full Court considered[145], however, that in the circumstances of this matter, it would carry the remedy of account to extremes to require Foresters to account to Lifeplan for all of the profits generated by Foresters in the new venture. Proportionality demanded due recognition of the fact that, although

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143 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 4 [8].

144 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 21-22 [66].

145 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 25-26 [85].

Foresters would not have entered into the new venture were it not for its knowing involvement in Woff and Corby's breaches of fiduciary duty, none of the breaches of duty resulted directly in the generation of any profits. It was the setting up and conduct of the new venture which had that effect and that dictated that the account of profits be limited accordingly.

168 The Full Court further observed that[146], in those circumstances, the extent of the required limitation was not entirely susceptible to logical analysis. What appeared to be critical was that Woff and Corby's breaches of fiduciary duty, and Foresters' knowing involvement in them, delivered to Foresters the plan for the first five years of the new venture. Thus, the Full Court concluded that limiting the account to the net present value of funeral bond contracts written up to 30 June 2015 would ensure that Foresters accounted for the benefit it derived from the five year plan while recognising the reality of the contribution of factors unrelated to the breaches of duty. As the Full Court expressed it[147]:

> "The BCP and the considerations in relation to commencing the business contemplated a five-year plan. Terminating the valuation of the contracts at 30 June 2015 would adequately and proportionately account for sufficient capital profits to fulfil the above objectives. They are capital profits that would not have been made had the breaches in which the participation occurred not been committed. But the limitation to that date gives due recognition to the other factors to which we have made mention and which affect an assessment of the proportionate consequences of the breaches and participation therein. The setting of the date at 30 June 2015 sets the account within the framework of the five-year business plan, with a modest deduction of six months. It sets an account for the period of planning for the new business that was the central focus of the behaviour that constituted the breaches and the participation.
>
> The consequence of applying this measure of profit to 30 June 2015 with a valuation date of 30 April 2015 was agreed in the supplementary joint report to be $6,558,495."

169 The Full Court ordered accordingly that Foresters account to Lifeplan and FPM in the sum of $6,558,495.

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146 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 26 [87].

147 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 26 [88]-[89].

Alleged factual errors

170 Counsel for Foresters contended that the Full Court erred in finding[148] that Foresters knowingly assisted Woff and Corby's breaches of fiduciary duty in respect of their preparation of "other documents" for Foresters, meaning thereby stationery request forms, funeral benefit claim forms, marketing flyers and pre-paid funeral contracts.

171 That contention should be rejected. It is true that the primary judge did not find in terms that Foresters knowingly assisted Woff and Corby in misappropriating those documents. But as the Full Court stated[149], consistently with the findings of the primary judge[150], the facts were as follows:

> "In October and November [2010], Mr Woff and Mr Corby were preparing documentation for the new business, including disclosure documents and marketing flyers and communicated with Mr Hughes about these. The preparation of the suite of documents to give to prospective funeral funds was important. The easier and more seamless the task of signing up to the new business was made, the greater the likelihood of attracting business. Mr Hughes was consulted by Mr Woff about this in November. The disclosure documents, stationery request forms, funeral benefit claim forms, marketing flyers and pre-paid funeral contracts were created from Lifeplan's documents."

172 Those being the facts, it is accurate to say that Foresters knowingly assisted Woff and Corby in the preparation of the "other documents".

173 Counsel for Foresters contended that the Full Court erred in characterising the BCP "as a body of information to be used by the [Foresters] board to measure the success of the venture" and in stating that "[t]he BCP … was to play an important role … in the implementation of the decision [to go ahead with the new venture]"[151]. In counsel's submission, that went well beyond, and ran counter to, the primary judge's finding that the significance of the confidential

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148 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 5 [11].

149 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 16 [43].

150 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 430-433 [230]-[245].

151 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 14 [38].

information in the BCP was that it gave the Board of Foresters confidence that the sales targets in the BCP were achievable and that Woff and Corby knew what they were talking about.

174 That submission should also be rejected. Reference has already been made to the large quantity of Lifeplan confidential documents and information misappropriated by Woff and Corby and used to prepare the BCP. On any reasonable view of the matter, the BCP is aptly described as a body of information to be used by the Board of Foresters to measure the success of the new venture and which played an important role in the implementation of the Board's decision to go ahead with the new business. More accurately, as the Full Court put it[152]:

> "[The BCP] was a document based on confidential information taken in dishonest breach of fiduciary obligation. It was a document that enabled the Foresters' board to evaluate the worth of the commercial opportunity against the risk to be undertaken, and to make the commercial decision with the confidence of knowing that it was privy to the detail of Lifeplan's strategies, financial analyses and up-to-date results."

175 Counsel for Foresters contended that the Full Court erred in finding[153] that Foresters was guilty of "active participation in a dishonest breach of fiduciary duty" in relation to the BCP, by going well beyond the finding of the primary judge[154] that Foresters assisted in the breach of fiduciary duty "because it was open to it, through Mr Hughes and Mr Fleming, to require Mr Woff and Mr Corby to remove [Lifeplan's] information from the BCP before it was presented to the Board of Foresters".

176 That contention should also be rejected. In terms, what the Full Court found was that[155]:

> "Looking at the contents of the BCP, it discloses detailed information, some of which expressly, and plainly, came from Lifeplan's records. The information throughout the document was of such detailed

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152 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 12 [33].

153 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 16 [41].

154 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 457 [379].

155 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 15-16 [41].

> 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. This was not mere knowledge gained in a role of spectator to another's wrong. The members of the board of Foresters, not just its chairman and CEO (Messrs Fleming and Hughes, respectively) knew or should be taken to have known (by the standards of honest and reasonable people) that they were being supplied with confidential business information of a competitor by the competitor's current employees, in order to have them make a decision to enter into a business relationship with the current employees of the competitor to the likely commercial disadvantage of the competitor, and the likely and intended commercial advantage of their company and the employees. This was not mere knowledge; this was active participation in a dishonest breach of fiduciary duty."

177 Regardless of whether that finding goes beyond the primary judge's characterisation of Foresters' participation as comprised of its failure to require Woff and Corby to remove Lifeplan's confidential information from the BCP, the finding is correct. Woff and Corby's taking of Lifeplan's confidential information and use of it in preparing the BCP was, as the Full Court said, a wholesale plundering of the confidential information of Lifeplan of which Foresters, by the standards of an honest and reasonable person, undoubtedly should have been aware.

The obligation to account

178 As Gibbs J observed in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[156], if the strict rule of equity that forbids a person in a fiduciary position to profit from his or her position is to be seen as designed to deter fiduciaries from being swayed by interests other than duty – "a rule to protect directors, trustees, and others against the fallibility of human nature"[157] – it logically applies equally to other persons to deter them from knowingly assisting fiduciaries to violate their duty. Thus[158]:

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156 (1975) 132 CLR 373 at 397; [1975] HCA 8. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558; [1995] HCA 18.

157 *Costa Rica Railway Co Ltd v Forwood* [1901] 1 Ch 746 at 761 per Vaughan Williams LJ.

158 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397.

> "a 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 [or she] has received as a result of such participation."

179 As was later observed in *Warman International Ltd v Dwyer*[159], the assessment of the profit derived as a result of a breach of fiduciary duty or knowing involvement in a breach of fiduciary duty is often difficult in practice. Frequently, the matter does not permit of mathematical exactness but only of reasonable approximation. The aim, however, is to determine as accurately as possible the true measure of the profit or benefit obtained as a result of the breach of fiduciary duty[160]. That necessitates application of what is in effect, if not in name, an equitable conception of causation of whether the breach of fiduciary duty has materially contributed to the profit the subject of account[161], as opposed to legal tests of causation and remoteness[162]. To that end, it is necessary to draw a distinction between cases where the breach of duty or knowing involvement results in the acquisition of a specific asset and cases where the breach of duty or knowing involvement results in the acquisition of a business opportunity.

180 As *Warman* demonstrates, where what is obtained as a result of a breach of fiduciary duty is a business opportunity, as opposed to a specific asset, the circumstances may dictate that the period of time over which profits are awarded should be limited. Thus, in *Warman*[163], profits were awarded for a limited period of the first two years of operation of the relevant businesses, because those businesses were built in part on a third party's ownership of local goodwill and local assembly rights and only in part on the breach of fiduciary duty. Similarly, in *Kao Lee & Yip v Koo Hoi Yan*[164], where in breach of fiduciary duty a partner at

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159 (1995) 182 CLR 544 at 558.

160 See also *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111 per Mason CJ, Deane, Dawson and Toohey JJ; [1993] HCA 54. See and compare Devonshire, "Account of Profits for Breach of Fiduciary Duty", (2010) 32 *Sydney Law Review* 389 at 401-402; McInnes, "Account of Profits for Breach of Fiduciary Duty", (2006) 122 *Law Quarterly Review* 11 at 14.

161 See and compare Gummow, "Dishonest Assistance and Account of Profits", (2015) 74 *Cambridge Law Journal* 405 at 409.

162 See Lee, "Causation and Account of Profits for Breach of Fiduciary Duty", [2006] *Singapore Journal of Legal Studies* 488. Cf *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at 500 [39]; [2003] HCA 15.

163 (1995) 182 CLR 544 at 566-567.

164 [2003] 3 HKLRD 296 at 343-344 [158]-[159].

the plaintiff law firm had set up a rival law firm to which he had diverted work that would otherwise have flowed to the plaintiff firm, an account of profits of the rival firm was limited to a one year period.

181 Where what is obtained as a result of a breach of fiduciary duty is a business opportunity, it is also necessary to make a choice between awarding all of the profits of the business (whether over the whole of the life of the business or, as in *Warman*, for a limited time) or a percentage of the profits proportionate to the extent to which the breach of fiduciary duty has contributed to the business. As Mason J observed[165] in *Hospital Products Ltd v United States Surgical Corporation*, referring to the judgment of Upjohn J in *In re Jarvis, decd*[166]:

> "One approach, more favourable to the fiduciary, is that he [or she] should be held liable to account as constructive trustee not of the entire business but of the particular benefits which flowed to him [or her] in breach of his [or her] duty. Another approach, less favourable to the fiduciary, is that he [or she] should be held accountable for the entire business and its profits, due allowance being made for the time, energy, skill and financial contribution that he [or she] has expended or made. … In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his [or her] duty."

182 In *Warman*[167], the Court considered the second approach (of awarding the entirety of the net profits of the businesses for a period of two years) to be appropriate, because the businesses operated by the errant fiduciary and the third party had been carved out of the plaintiff's business. The Court had earlier remarked[168] that, as a general rule, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing. A further possibility, as Mason J remarked in *Hospital Products*, is for a court to make an allowance for the errant fiduciary or knowing assistant's skill, expertise and expenses. The onus is on the defendant to establish that an account of profits should be reduced in this way[169].

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165 (1984) 156 CLR 41 at 110; [1984] HCA 64.

166 [1958] 1 WLR 815 at 820; [1958] 2 All ER 336 at 340.

167 (1995) 182 CLR 544 at 568.

168 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 562.

169 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 561-562.

183 Consistently with those considerations, it was open to the Full Court to order an account of the profits derived by Foresters from funeral bond contracts written up to 30 June 2015, a period equating roughly to the first five years of the new venture (with a modest deduction of six months)[170]. As is explained in what follows, if the Full Court had awarded anything less than that, it would have risked enabling Foresters to benefit from its knowing involvement in Woff and Corby's breaches of fiduciary duty. By contrast, to award Lifeplan and FPM the entire value of the Foresters Funeral Fund business, as contended for by them, would require Foresters to account for profits to which the breaches of fiduciary duty had not materially contributed and, to that extent, would make the exercise one of unwarranted punishment of Foresters and a vehicle for the unjust enrichment of Lifeplan and FPM[171].

184 As the Full Court observed in substance, the BCP and the other information provided by Woff and Corby to Foresters and received by Foresters in knowing involvement in Woff and Corby's breaches of fiduciary duty included the knowhow, client information, client goodwill, logistical systems and financial projections necessary for the conduct of the proposed new business for the first five years of its operations. Together they afforded Foresters an opportunity to commence and conduct the first five years of operations according to a five year plan and with a degree of confidence in the plan which would have been impossible in the absence of Woff and Corby's breaches of duty. It was, therefore, for the benefit of that opportunity that Foresters was liable to account, and the most logical and realistic measure of that benefit was the net present value of those profits derived from that initial period of operations.

185 It is true, as the primary judge held, that there was no evidence of Foresters making direct use of the BCP after March 2011, at least in the sense of comparing actual performance to date with BCP projected sales figures to that date. But that is not to say that Foresters did not continue to benefit from the BCP throughout the first five years after commencing its new venture with Woff and Corby. On the evidence, the BCP was not only the basis on which Foresters determined to proceed with Woff and Corby's proposal but also the basis on which the business was in fact planned and structured. In the absence of evidence to the contrary, it is naturally to be inferred that the business was

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170 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 26 [88].

171 See *Vyse v Foster* (1872) LR 8 Ch App 309 at 333; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 109 per Mason J; *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111, 114 per Mason CJ, Deane, Dawson and Toohey JJ, 123 per McHugh J; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557, 561.

structured and conducted accordingly. And inasmuch as the BCP was not only the basis on which Foresters determined to proceed with the new business but also the basis on which the new business was planned and structured, here, as in *Warman*, it was appropriate to take as the starting point for the account of profits the entirety of Foresters' funeral bond business rather than attempt to apportion the profits to reflect the particular benefits which flowed to Foresters due to its knowing assistance of Woff and Corby's breaches of fiduciary duty.

186 Of course, Foresters incurred costs and expenses, including the cost of capital, and Foresters was required to engage managers and salespersons to provide the skills necessary to conduct the new business. But those costs were taken into account in the calculation of the net present value of the funeral bond contracts entered into in the first five years of the new venture. Hence, in financial terms, the net present value of the profits from contracts entered into in the first five years was a relatively accurate reflex of the net benefit to Foresters of its knowing involvement in Woff and Corby's breaches of fiduciary duty. Perhaps the calculation would have been even more accurate if, in addition to deducting the costs and expenses of generating the profits, there had also been deducted such if any proportion of the profits as was shown to be referable solely to the sales and management skills of the persons engaged in the business, as opposed to the benefit of Foresters being able to plan, structure and conduct the first five years of operations in accordance with the BCP. But beyond the identification of the costs and expenses incurred, Foresters did not attempt the task of identifying a share of profits which should be seen as properly attributable to its or its employees' sales and management skills alone. And, as was stated in *Warman*[172], it is for a defendant to establish that it is inequitable to order an account of the entire profits:

> "If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own." (footnotes omitted)

187 Plainly enough, however, the position changed at the end of year five because whatever business plan was followed after that date could not have been the BCP. Possibly, the planning and practices for year six and thereafter drew on experience that Foresters acquired in operating the business during years one to five, and, to that extent, it might be that the profits derived in year six and beyond also derived from the BCP. But the extent to which they might have done so could not have been at all significant. On the available evidence, the very large

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172 (1995) 182 CLR 544 at 561-562.

share of the funeral bond market which Lifeplan enjoyed prior to Woff and Corby's departure was at least partly due to Woff and Corby's personal sales and management skills, and, as employees unconstrained by contrary covenants[173], Woff and Corby were always free to leave Lifeplan, taking their personal sales and management skills with them, and set up in competition with Lifeplan.

188 To say so is not to doubt the benefit to Foresters of the BCP and other confidential information which Woff and Corby took in breach of their fiduciary duties, nor the advantage which Foresters derived by reason of Woff and Corby's solicitation of Lifeplan clients while still employed by Lifeplan. Had Woff and Corby left Lifeplan lawfully and set up with Foresters without breach of fiduciary duty, they could not have made any use of Lifeplan confidential information and they would have been prohibited from soliciting Lifeplan clients as long as they remained at Lifeplan. But there was also material in the BCP, such as the business strategies set out in Section 7, that was known to Woff and Corby as part of their personal sales and management skills and experience, and of which, therefore, they would have been lawfully entitled to make use after leaving Lifeplan. Nor would it likely have taken overly long for Woff and Corby after leaving Lifeplan lawfully to solicit the clients which they unlawfully solicited before leaving Lifeplan. Granted, there was a good deal of evidence at trial about items of Lifeplan proprietary stationery such as pre-paid funeral pads, produced by an external supplier, which Woff and Corby copied and used when at Foresters, and a Lifeplan funeral director mailing list which Woff and Corby used to send out marketing material on behalf of Foresters[174]. But Lifeplan and FPM accepted at trial that Foresters could not be directly liable, as a knowing assistant or otherwise, in respect of that conduct by Woff and Corby[175]. Furthermore, the various forms of stationery were not confidential since they were in use in the market place, where they could be seen and emulated with relative ease[176]; and, although the client list was confidential, the clients were not[177]. Given that Lifeplan's clients were in business as funeral directors, and presumably listed as such in publicly available sources, Lifeplan was always at risk of losing them to the lawful blandishments of its competitors.

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173 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 470 [444].

174 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 435-439 [261]-[281].

175 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 453 [363].

176 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 437 [266].

177 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 439 [281].

189 That is not to overlook that, by the end of year five, Foresters' business had increased dramatically and Lifeplan's business had reduced correspondingly. Nor is it to gainsay that, but for the breaches of fiduciary duty that informed the BCP, and hence Foresters' decision to embrace Woff and Corby's initiative, Lifeplan's relative position at the end of year five might conceivably have remained as it was at the beginning of year one. As against that, however, it is apparent that after its merger with Australian Unity, Lifeplan had already determined not to devote the same effort to marketing funeral bonds in future that it had in the past[178]. It is also significant, as the primary judge found[179], that there was a perception among at least some funeral directors as at 2010 that one of Lifeplan's funeral benefit funds, "Funeral Benefits Fund No 2", had performed poorly and that the reasons that funeral directors may transfer from one fund to another – in this case from Lifeplan to Foresters – included the quality of the investment returns and the extent of the personal relationship with the salespersons representing the fund. Lifeplan's chances of retaining its previous market share were problematic even before Woff and Corby decided to jump ship.

190 Of course, Lifeplan and FPM's claim was not for what they lost by reason of Foresters' knowing participation in Woff and Corby's breaches of fiduciary duty but for an account of the profits which Foresters had gained. Still, as was held in *Warman*[180], when accounting for profits, the amount of what has been lost by the plaintiff may in some situations be relevant to what has been gained by the errant fiduciary or knowing assistant. And here that was the case. It was not suggested that, but for Woff and Corby's breaches of fiduciary duty or Foresters' access to the confidential information which informed the BCP, it would have been impossible or impracticable for Foresters over time lawfully to build the level of funeral bond business which it did[181]. Nor is there reason to suppose that it could not have done so. Woff had become dissatisfied at Lifeplan after its merger with Australian Unity and Foresters was already in the funeral bond business when Woff and Corby came over from Lifeplan. Given Woff and Corby's innate sales and management skills and experience, there can be no doubt that with sufficient time, effort and resources they could have lawfully assisted Foresters to achieve the same results as were in fact achieved.

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178 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 396-397 [30].

179 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 397 [32], 401 [57].

180 (1995) 182 CLR 544 at 565.

181 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 397 [30].

191 While such a consideration does not enable Foresters to escape liability to account for the profits it received by reason of its knowing assistance of Woff and Corby's breaches of fiduciary duty[182], it does have a bearing on the quantum of the account. That is because, as was stated in *Warman*[183], the object of the exercise is to determine as accurately as possible the true measure of the profit or benefit obtained as a result of the breach of fiduciary duty and, as has been stated, that necessitates a decision as to the extent to which the breach of fiduciary duty has materially contributed to the profit for which it is sought to make the fiduciary or knowing assistant liable to account.

192 The position in England, at least with respect to fiduciaries as opposed to knowing assistants[184], may now be different. In *Murad v Al-Saraj*[185], the majority of the Court of Appeal of England and Wales held that it did not lie in the mouth of an errant fiduciary to protest that it would have been possible without breach of fiduciary duty to make a profit in fact made in breach of fiduciary duty. The majority ordered the defendant fiduciary to disgorge all his profits from entering into a joint venture with the claimants, notwithstanding the primary judge's finding that if the defendant had not breached his fiduciary duty and had properly disclosed certain information to the claimants they would have gone ahead with the venture and simply demanded a higher profit share. Arden LJ stated[186]:

> "The fact that the fiduciary can show that [the claimant] would not have made a loss [as a result of the breach of fiduciary duty] is, on the authority of [*Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134], an irrelevant consideration so far as an account of profits is concerned. Likewise, it follows in my judgment from the *Regal* case that it is no defence for a fiduciary to say that he [or she] would have made the profit even if there had been no breach of fiduciary duty."

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182 Cf *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 at 672.

183 (1995) 182 CLR 544 at 558.

184 See generally *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499.

185 [2005] WTLR 1573.

186 [2005] WTLR 1573 at 1591 [67].

193 Jonathan Parker LJ agreed[187], and observed that that was the effect of authorities such as *Regal (Hastings) Ltd v Gulliver*[188], *Boardman v Phipps*[189], *Brickenden v London Loan & Savings Co*[190] and *Gwembe Valley Development Co Ltd v Koshy*[191]. By contrast, Clarke LJ held that[192]:

> "if the matter were free from authority I would hold that a person who makes a profit in the course of a fiduciary relationship must account for the profits he [or she] makes, that *prima facie* he [or she] must account for all the profits but that it should be open to him [or her] to show that it was always intended that he [or she] would make a profit from the transaction and to persuade the court if he [or she] can that, in the exercise of its equitable jurisdiction to order an account, in the circumstances of the particular case, he [or she] should not be ordered to account for the whole of the profits. Thus I would hold that, while the question what the claimant would have done if told the true facts, is irrelevant to the question whether the fiduciary should be ordered to account, it is or may be relevant to the extent of the account."

194 As Clarke LJ further observed[193], with respect correctly, his Lordship's approach accords with this Court's approach in *Warman*.

195 The point for present purposes, however, remains that, despite the significance of the advantage which Foresters gained by reason of its knowing participation in Woff and Corby's breaches of fiduciary duty, in essence that advantage was limited to the availability of a readymade plan in the form of the BCP for the first five years of operations and the advantage of winning over Lifeplan's clients more quickly than they otherwise could have been won over. In the market circumstances already mentioned, it would be unrealistic to conclude that the value of that kind of advantage endured beyond the first five years of operations.

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187 [2005] WTLR 1573 at 1599-1605 [96], [99]-[123].

188 [1967] 2 AC 134.

189 [1967] 2 AC 46.

190 [1934] 3 DLR 465.

191 [2004] 1 BCLC 131.

192 [2005] WTLR 1573 at 1611 [141].

193 [2005] WTLR 1573 at 1613-1616 [148]-[158].

196 The primary judge eschewed[194] ordering an account of the profits deriving from that advantage because Lifeplan and FPM had not advanced a case on a headstart basis and because it was not "the traditional way in which profits for a limited period would be assessed". But as the Full Court appreciated, the strength of Lifeplan and FPM's case was that Foresters' new venture would not have gone ahead without the breaches of fiduciary duty by Woff and Corby in which Foresters knowingly participated[195]. In that sense, the conclusion was ineluctable that Foresters derived the net profits of its expanded funeral bond business by reason of its knowing participation in Woff and Corby's breaches of duty. On that basis, one possibility would have been to order an account of all of the profits of the business for an indefinite period. But, as *Warman* made clear, and the Full Court rightly appreciated, an account of profits must be tailored to make it as much as possible a true measure of the profit or benefit obtained as a result of the breach of fiduciary duty and thereby to avoid its becoming an arbitrary punishment or a vehicle for unjust enrichment. For that reason, it was incumbent on the Full Court to gauge the extent to which Foresters' knowing involvement in Woff and Corby's breaches of fiduciary duty materially contributed to the profits of Foresters' business[196].

197 Of necessity, that exercise involved a "judicial estimation of the available indications"[197], not mathematical precision, and thus was one about which reasonable minds might differ. But, as the Full Court reasoned[198], a five year cut-off logically gave recognition to the contribution to profits of factors other than the breaches of fiduciary duty and, at the same time, supported the underlying principles of fidelity, trust and honesty which the obligation to account is calculated to achieve. As such, it was a choice of the most accurate means of estimation of the profits that Foresters derived as a result of its knowing assistance of Woff and Corby's breaches of fiduciary duty and so represented a principled exercise of equitable discretion. It should not be altered merely because other reasonable minds might have chosen differently.

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194 *Lifeplan Australia Friendly Society Ltd v Woff* (2016) 259 IR 384 at 471 [444].

195 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 25 [81].

196 See also *Kao Lee & Yip v Koo Hoi Yan* [2003] 3 HKLRD 296 at 342-343 [156]-[158].

197 *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 at 826 per Lord Wilberforce; [1975] 2 All ER 173 at 179. See also *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 567.

198 *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* (2017) 250 FCR 1 at 26 [87]-[88].

198 Nor is it of concern that the Full Court's award of the net present value of the funeral bond contracts written up to 30 June 2015 was not "the traditional way in which profits for a limited period would be assessed". For, as was further emphasised in *Warman*[199], "[i]t is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts". And as has been explained, the adoption of the net present value of contracts entered into in what was roughly the first five years of Foresters' new venture was, in financial terms, an accurate reflex of the net benefit to Foresters of its knowing involvement in Woff and Corby's breaches of fiduciary duty.

Actual or anticipated profits

199 Counsel for Foresters contended that, as a matter of authority, an account of profits may be ordered only in respect of profits which have accrued, and for that reason that the Full Court erred by bringing to account the net present value not just of profits which had accrued to Foresters but also of profits which it was projected would accrue to Foresters. To understand that submission, a brief explanation of the calculation of profits relied upon by the Full Court is required. As mentioned, Foresters' profits with respect to funeral bond contracts derived from management fees that it charged under those contracts. For any particular contract, those fees would continue to be earned until the client's death, upon which the contract would be terminated. In calculating the net present value of contracts written up to 30 June 2015, the joint expert report upon which the Full Court relied included projected cash flows associated with those contracts. Foresters' submission was that projected income of this kind cannot form the basis of an account of profits.

200 The authority relied upon by Foresters in support of that submission was the following statement of the plurality in *Dart Industries Inc v Decor Corporation Pty Ltd*[200]:

> "As Windeyer J pointed out in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*, even now an account of profits retains its equitable characteristics in that a defendant is made to account for, and is then stripped of, profits which it has dishonestly made by the infringement and which it would be unconscionable for it to retain. An account of profits is confined to profits actually made, its purpose being not to punish the defendant but to prevent its unjust enrichment." (footnotes omitted)

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199 (1995) 182 CLR 544 at 559.

200 (1993) 179 CLR 101 at 111 per Mason CJ, Deane, Dawson and Toohey JJ.

201 Counsel submitted that the fact that the reference to profit which the defendant has dishonestly made was expressed in the present perfect tense dictated that profits must have come in before they may be brought to account. Counsel also contended that, although the Full Court had purported to treat Foresters' capacity to generate future profits as a capital asset capable of valuation by reference to the net present value of the projected stream of future profits, it was clear according to accounting convention and the authority of this Court's decision in *Federal Commissioner of Taxation v Myer Emporium Ltd*[201] that future profits are not a capital asset.

202 Up to a point, those submissions may be accepted. Ordinarily, what is conceived of as an account of profits is an account of profits which have come in. That is what was ordered by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*[202] and also by this Court in *Dart Industries*. It is also correct that, for the kind of accounting and taxation purposes considered in *Myer Emporium*, a projected future stream of interest payments payable on a loan is not a presently existing asset. But that said, it does not mean that it is impermissible or inappropriate to assess the benefit derived by reason of a knowing involvement in a breach of fiduciary duty as being the net present value of profits likely to be derived by reason of the knowing involvement in the breach of fiduciary duty.

203 The context in which Windeyer J wrote in *Colbeam* was one of accounting for profits in respect of the unauthorised use of intellectual property during a particular period that had expired[203]. And the context in which his Honour's remarks were adopted in *Dart Industries* was one in which this Court was called upon to decide whether general overhead costs should be allowed as a deduction when determining an account of profits. In neither case was there any need to consider future profits. Thus, the fact that their Honours spoke only of past profits in those contexts says nothing as to the appropriate way of accounting for the benefit of a business opportunity that is projected to generate profits into the future. And equally, the fact that, according to generally accepted accounting standards, the right of a borrower to receive a future stream of interest payments is not brought to account as a capital asset, or, therefore, characterised as such for fiscal purposes, says nothing as to the propriety of assessing the benefit of a business opportunity derived in breach of fiduciary duty by reference to the net present value of the future profits of the business.

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201 (1987) 163 CLR 199 at 217; [1987] HCA 18.

202 (1968) 122 CLR 25 at 34; [1968] HCA 50.

203 (1968) 122 CLR 25 at 36.

Conclusion

204 The appeal and the cross-appeal should both be dismissed with costs.