

HOT TOPICS IN COMMERCIAL LITIGATION



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**REFLECTIONS ON THE HIGH COURT'S DECISION IN
*ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY
LTD v LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LTD***

PETER COLLINSON QC, VICTORIAN BAR

FACTS

- Lifeplan and Foresters were competitors offering funeral insurance products.
- Two of Lifeplan's employees (Woff and Corby) approached Foresters with a plan.
- The plan was pitched to the Board of Foresters via a Business Concept Paper, prepared using Lifeplan's confidential information.
- Woff and Corby left Lifeplan to work for the new business at Foresters.
- Foresters profit increased... Lifeplan's decreased.
- Lifeplan commenced proceedings in the Federal Court of Australia.

PROCEDURAL HISTORY



- The trial judge found that Woff and Corby had breached their duties and Foresters had knowingly assisted.
- Foresters not liable to account for profits because Lifeplan's confidential information not itself used to generate profits (ie no direct link).
- The Full Court on appeal found the trial judge's formulation of causation was unduly narrow.
- Yet the Full Court held that not all of the profits should be disgorged.

RATIONALE OF THE RULE



- Starting point: the underlying rationale for the rule is deterrence (“prophylaxis”).
- Gibbs J, *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397:

“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.”
- The causal link also stated by Gibbs J in *Consul*:

“... 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.” [emphasis added]

➤ Plurality (Kiefel CJ, Keane and Edelman JJ):

“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, 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. 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...” [emphasis added]

- Connection between the participant's benefit and the breach of fiduciary duty vs the participation.
- Participant did not owe fiduciary duties.
- Liability is fault-based: former Justice Gummow.

QUANTIFICATION

- Once causation is established, onus shifts to the defendant to show they should not account for full value of the benefit.
- Plurality: two ways to shift the onus.
- All of the circumstances are considered.

QUANTIFICATION CONT.

- The benefit to Foresters of the business connections was not limited to five years.
- Future or unrealised profits are still profits.
- Foresters did not discharge the onus of proof: cautionary tale for litigators.

QUANTIFICATION: GAGELER J



➤ The task is ultimately “evaluative” (at [95]):

“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 defendant’s own involvement and culpability in it. 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’ ...”

NETTLE J DISSENTING



- Would have upheld the Full Federal Court’s decision:

“Of necessity, that exercise involved a ‘judicial estimation of the available indications’, not mathematical precision, and thus was one about which reasonable minds might differ. But, as the Full Court reasoned, 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.”

NOVOSHIP (UK) LTD V MIKHAYLYUK



- Facts: officer in charged of negotiating charters took bribes for same. Nikitin, the dishonest assistant, profited from the charters.
- The Court of Appeal held that there was an “*insufficient direct causal connection*” between the charters and the resulting profits.

COURT OF APPEAL'S REASONING



- Focused on the fact that the participant is not a fiduciary.
- But why should tenderness be shown to the rogue?
- Would the “but for” test cast the scope of liability too widely?
- Court of Appeal receptive to common law rules including remoteness.

VICARIOUS LIABILITY

- Should Foresters have been held vicariously liable for the equitable wrongs of Woff and Corby?
- Not necessary to be determined by the High Court.
- To be decided.

CONCLUDING REMARKS

- The remedy must be fashioned to fit the nature of the case and the particular facts.
- The Court of Appeal's approach is perhaps too generous to wrongdoers?
- *Foresters* provides a measure of certainty for commercial litigators and their clients.

WORLDWIDE FREEZING ORDERS

Jane Anderson QC, New Zealand



What is a freezing order?

- An order restraining a person from moving, dealing with or otherwise diminishing the value of his or her assets.
- When a proceeding is prospective, pending or after judgment.
- Designed to prevent a defendant from defeating the interests of the claimant and frustrating the court's process by exhausting or concealing assets, leaving little or nothing to meet the judgment sum.



The problem



Changes in the economy, in technology and in public policy, notably the easing of exchange controls, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden. In many cases, all that is now needed is the click of a mouse.

— Hon JJ Spigelman AC “Freezing Orders in International Commercial Litigation” (2010) 22 SAclJ 490.

The Solutions

Two forms of freezing order to address this problem:

- 1) An order by the court with jurisdiction over the substantive proceeding freezing the defendant's assets inside the jurisdiction and worldwide (“worldwide freezing order”).
- 2) An order by the court in the jurisdiction where assets are located freezing those assets in support of substantive proceedings in another jurisdiction.



Enforcement

Freezing orders are made and enforced *in personam*.

Breach is a contempt of court punishable by imprisonment, fine or seizure of assets.

Third parties with notice of the order are bound, and can be held in contempt if they act inconsistently with the order, or aid the respondent to breach it.

HOWEVER, this only applies to third parties who are subject to the jurisdiction of the court handling the substantive proceedings. It does **not** apply to third parties in possession or control of assets in other jurisdictions.



Third parties outside the jurisdiction



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Babanaft International Co SA v Bassatne [1990] Ch 13 (CA):

It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim and altogether exorbitant, extraterritorial jurisdiction.



Standard form proviso



16 Persons outside Australia

- (a) Except as provided in subparagraph (b) below, the terms of this order do not affect or concern anyone outside Australia.
- (b) The terms of this order will affect the following outside Australia —
 - (i) you and your directors, officers, employees and agents (except banks and financial institutions);
 - (ii) any person (including a bank or financial institution) who:
 - (A) is subject to the jurisdiction of this Court; and
 - (B) has been given written notice of this order, or has actual knowledge of the substance of the order and of its requirements; and
 - (C) is able to prevent or impede acts or omissions outside Australia which constitute or assist in a disobedience of the terms of this order; and
 - (iii) any other person (including a bank or financial institution), **only to the extent that this order is declared enforceable by or is enforced by a court in a country or state that has jurisdiction over that person or over any of that person's assets.**

[Australia, New Zealand, England and Singapore equivalent standard from]:

So how do you enforce against third parties in other jurisdictions?



- Generally reciprocal enforcement regimes only apply to final/money judgments.
- The court does not simply declare the worldwide freezing order is enforceable against third parties locally —must make a fresh application for a freezing order under the local rules.
- But, will likely place weight on the fact that the court with substantive jurisdiction granted an order.

Orders against third party trusts and companies

Available in support of foreign proceeding in aid of prospective enforcement

Court may make an order (paraphrased) where:

- there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because of the third party's possession or control over the defendant's assets or powers of disposition over them
- Where in consequence of the judgment the plaintiff may be in a position to exercise the rights of the defendant over the third party for example, by appointment of a liquidator, trustee in bankruptcy, or receiver



Strategy



- Where are the assets?
- Are orders against a local defendant likely to be effective?
- Are there reputable third parties such as banks, independent trustees in or outside jurisdiction?
- Resources available-time/money
- In order to enforce against overseas third parties you will likely have to make fresh applications for orders in the local courts.

ANTI-SUIT INJUNCTIONS

Peter Dunning QC, Queensland Bar

