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REFLECTIONS ON THE HIGH COURT'S DECISION IN *ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY LIMITED v LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED* (2018) 360 ALR 1

INTRODUCTION

Many of you who are commercial litigators will be familiar with the principle that equitable remedies are fashioned according to the facts and circumstances of the particular case so as to do what is "practically just" between the parties.[1] Today I'm going to explore the recent decision of the High Court of Australia in *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited*;[2] in particular how the Court fashioned the remedy of account of profits against a knowing assistant and how the Court's approach compares with the approach taken by the Court of Appeal in England.

At the outset, I should disclose my involvement in the case as one of the senior counsel for the plaintiff, Lifeplan. I hope this puts me in a good position to describe a number of issues arising from the High Court's decision, including the test for causation when determining an account of profits against a knowing participant, and the normative basis for the account, as well as quantification of the account and possible room for common law rules.

Stated simply, the Court in a decision 4-1, required the knowing assistant, Foresters, to account for the full value of the benefit it had obtained. Although the plurality (comprised of Kiefel CJ, Keane and Edelman JJ) said that the issues in the case could be resolved "without the need for any revision of principle",[3] the decision does provide a clear restatement of the potential scope of liability of a party who knowingly participates in a breach of fiduciary duty. It also offers some lessons to litigators on how to prepare a case where equitable remedies and quantum are likely to be the "killing ground", rather than liability.

[1] *Maguire v Makronis* (1997) 188 CLR 449 at 496, where the Court held: "[Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties. The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched".
[2] (2018) 360 ALR 1 (***Foresters***).
[3] *Foresters* at [1].

FACTS

Foresters and Lifeplan were two competing companies offering funeral insurance products. Those products are typically marketed through funeral directors and involve a customer making payments that go into a fund that meets the expenses of a funeral. Before the events in question, Lifeplan's business, operated through a company referred to as "FPM", was a very profitable one whereas Foresters' equivalent business was insignificant.

Woff and Corby, two of the original respondents, were employed by Lifeplan in senior management positions at FPM. They approached Foresters with a proposal to divert Lifeplan's existing funeral products business to Foresters via a new business which they would incorporate, called Funeral Planning Australia Pty Ltd or "FPA". Critically, the proposal was pitched to the Board of Foresters by way of a Business Concept Paper (**BCP**) which Woff and Corby had prepared using Lifeplan's confidential information and business records. The two also actively solicited the business of funeral directors on behalf of FPA and Foresters and copied large amounts of confidential material from Lifeplan to be used in the new business, all whilst still employed at Lifeplan.

The proposal in the BCP was accepted by Foresters, and Woff and Corby left Lifeplan to work for Foresters. Once the plan was implemented, Foresters' profit increased enormously whereas Lifeplan suffered an almost identical loss of profit over the same period. Lifeplan and FPM commenced proceedings against Woff, Corby and FPA for breaches of fiduciary duties, as well as contraventions of the *Corporations Act 2001* (Cth). (The *Corporations Act* contravention largely fell away when the case reached the High Court.) Foresters was joined to the action on the basis that it had knowingly assisted in those breaches, with Lifeplan and FPM electing to claim an account of profits for the entire value of Foresters' funeral products business, rather than damages. Specifically, the plaintiffs sought an account based on the net present value of the business and expert evidence was adduced on that subject matter.

DECISIONS BELOW

The trial judge found Woff and Corby had breached their fiduciary and statutory duties and that Foresters had knowingly assisted in some of those breaches. In particular, the judge found that Foresters had participated in the preparation and use of the BCP which contained Lifeplan's confidential information. The Board of Foresters had also relied on the BCP in making its decision to proceed with Woff and Corby's proposal. However, the judge was not prepared to hold that Foresters was liable to account for any of the profits that followed once

the new business had been established. He held that although Lifeplan's confidential information had been used to prepare the BCP, the information was not *itself* "used to generate profits". In other words: there was no *direct* causal link between the use of the information and the profits that were made. In relation to the approaches to funeral directors and preparation for the new business while they remained employees of Lifeplan, the judge held that these actions could have been undertaken by Woff, Corby and FPA after they left Lifeplan, and therefore those breaches were also not causally connected to the profits earned by Foresters. The judge awarded an account of profits against Woff and Corby, but not against Foresters.

The Full Court allowed Lifeplan's appeal on the basis that the judge's formulation of the causal nexus required was unduly narrow, although they were at pains to say that the difference of opinion was as to application of the principle rather than its expression.[4] However, the Court held that not all of the profits from Foresters' business should be disgorged. The Court took the view that this would be disproportionate and might result in the unjust enrichment of Lifeplan. Instead, it should account to Lifeplan for the net present value of the present and anticipated profits to be made for four and a half years (totalling $6,558,495).

On appeal, Foresters argued that the causal principles applied by the Full Federal Court were too broad, and that it should be required to disgorge only those profits which were a direct result of its assistance. Foresters also argued that it should not be made to disgorge anticipated profits. Lifeplan cross-appealed and contended that it should be entitled to the total capital value of Foresters' funeral business (totalling $14,838,063).

CAUSATION

Two main issues arose on the High Court appeal: causation and quantification.

Before turning to the Court's reasons on causation, it might be helpful to start with the premise (rightly enunciated by the Full Court), that "[t]he correct approach to questions of causal connection in Equity between an equity and a relevant remedy depends upon the nature and character of the relevant rule of responsibility and of the remedy sought."[5] It is commonly observed that a major source of fiduciary law and of the distinct equitable causal rules attached to the law is a policy of "prophylaxis" or deterrence. This underlying norm explains why there is no need for the plaintiff to have suffered loss, nor to have lost an opportunity. Disgorgement

[4] *Lifeplan Australia Friendly Society Limited v Ancient Order of Foresters in Victoria Friendly Society Limited* [2017] FCAFC 74 at [3].
[5] *Lifeplan Australia Friendly Society Limited v Ancient Order of Foresters in Victoria Friendly Society Limited* [2017] FCAFC 74 at [62].

is not concerned with compensation for loss. In *Foresters*, each judgment emphasised the deterrent aim of making an assistant liable, citing the remarks of Gibbs J in *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.*

Deterrence is particularly important in this context because the conduct of the accessory is calculated *ex ante*. A conscious decision is taken by the accessory so there is clearly the opportunity to deter the accessory from becoming "involved" in the breach in the first place.[6] And if a third party is deterred from providing assistance, this may impede opportunities for a fiduciary to commit the breach.

The High Court in *Foresters* confirmed that this is the rationale for the rule and the causal test, at least under Australian law.[7] The plurality commenced with the dictum in *Consul Development* where Gibbs J said:

> *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****. [emphasis added]*

But, of course, to say that a benefit has been received "as a result of" the defendant's participation does not really tell one what test to apply. And it has been noted that there are various formulae throughout the judgments in *Foresters* which tend to obscure the precise test of causation. For example: the plurality speak of benefits received "as a result of" participation (at [7]) or reasonably connected with wrongdoing (at [15]) while Gageler J quoted *Warman International v Dwyer*[8] where the formula "by reason of" was employed. As one commentator has recognised, these formulae are not themselves tests of causation and simply indicate the *presence* of a causal connection.[9]

The guiding principle is to be found in the following passage of the plurality judgment (at [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 equity is a question of*

[6] Paul S Davies, "Accessory Liability for Assisting Torts" (2011) 70 *Cambridge Law Journal* 353, 361.
[7] See plurality at [9]: "… the deterrent effect of an order for disgorgement 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'".
[8] (1995) 182 CLR 544.
[9] Peter Devonshire, "Dishonest Assistance, Causation and Account of Profits" (2019) 135 *LQR* 214, 216.

> *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. The equitable disgorgement principle with which we are concerned is a "prophylactic rather than a restitutionary principle".* ***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.* [emphasis added]

Subsequent decisions of lower courts have applied this as the ratio of the Court.[10]

The plurality held that Foresters could not escape or limit its liability to disgorge by claiming that only limited profits were caused by *particular acts of knowing assistance*. Rather, the focus should be on the "overall effect of Foresters' wrongful conduct".[11] Foresters had provided the commercial vehicle by which it would acquire and exploit the business connections to be appropriated from Lifeplan and FPM and the vehicle was necessary to enable Woff and Corby to implement the strategy they had devised to despoil Lifeplan and FPM.[12] Foresters was therefore to be held liable for the full value of the enhancement of its business obtained as a result.

Gageler J (and Nettle J dissenting) also accepted that the "but for" test would be sufficient. However, unlike the plurality, Gageler J said that the causal connection must be between the profits and the breach.[13] Gibbs J in *Consul Development* had spoken of the connection between the defendant's benefit and its *participation* in the breach, rather than the breach itself.[14] Gageler J thought this formulation would cast knowing participation as a free-standing head of

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[10] Subsequent decisions of lower courts have applied this as the ratio of the Court. See eg *Aucare Dairy (Aust) Pty Ltd v Huang (No 3)* [2019] FCA 412 at [103]: "In the present case, but for the dishonest and fraudulent breaches of fiduciary duty by Ms Huang and Mr Guo and the knowing participation in those breaches by the other respondents, the plant and equipment would not have been removed from the Dandenong South premises and APD would have been the entity with the operational control of the manufacturing business. Plainly, Ms Huang and the other respondents have benefited as a result of Ms Huang's and Mr Guo's breaches of duty and the other respondents' knowing participation in those breaches."

[11] *Foresters* at [4].

[12] *Foresters* at [10].

[13] *Foresters* at [86].

[14] As have other cases: In *United States Surgical Corporation v Hospital Products International Pty Ltd* at 817, McLelland J held that that "... a person who knowingly participates in a breach of fiduciary duty by another may be both (i) liable to account to the beneficiary for any benefit he has received *as a result of such participation* …" while Mason J stated the inquiry in *Hospital Products* at 110 as being: "What is the profit or benefit which the fiduciary or *third party* has made in consequence of their breach of fiduciary duty or *knowing participation*?" (emphasis added).

liability divorced from the fiduciary obligation. Perhaps the difference is more apparent than real since, practically speaking, some connection will always exist between the breach and the assistance. But it is trite to say that the third party participant does not owe the plaintiff any fiduciary duties. The participant's liability arises because the law considers its dishonest assistance to be wrong and it is wrong because the law protects fiduciary relationships and wishes to deter those who might corrupt them.[15] Similarly, former Justice Gummow has written extra-judicially that the liability of the participant is fault-based, in the sense of responding to what is in the eye of a court of equity unconscientious conduct.[16] The focus on the participation rather than the breach seems justified when considered this way.

QUANTIFICATION OF PROFITS

Once liability and disgorgement were found to be justified, the Court turned to quantification. In this regard it is to be remembered that even in the case of the errant fiduciary, liability is constrained to actual profits or losses.[17] And, of course, the very nature of an "account" means that legitimate expenses are always deducted – both sides of the ledger are taken into account.

All members of the Court stated, consistently with *Warman International Ltd v Dwyer*[18] (1995) 182 (at 561), that once causation is established, the onus is on the defendant to show that he or she should not account for the full value of the benefit.[19] The plurality said there were **two ways** in which the wrongdoer might discharge that onus:[20]

> *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.*

I interpose there to say that this was not in issue because it was accepted that the expenses included in the net present value methodology allowed for incurred and projected expenditure and included an amount for the work and effort of Woff and Corby.

The second way of discharging the onus identified by the plurality was by "demonstrating that the benefit or advantage is beyond the scope of the liability for which the wrongdoer should

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[15] See eg Pauline Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 *LQR* 445, 446.
[16] The Hon William Gummow AC, "Knowing Assistance" (2013) 87 ALJ 311 at 319.
[17] *Maguire v Makronis* (1997) 188 CLR 449 at 496: "[Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties. The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched".
[18] (1995) 182 CLR 544. In that case, profits awarded were limited to the first two years' exploitation of the business opportunity appropriated by the defendants because 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.
[19] *Foresters* at [13] (plurality), [91] (Gageler J) ad [186] (Nettle J).
[20] *Foresters* at [14].

account for profits".[21] However, their Honours declined to state with any precision what is required other than to say that "All of the circumstances must be considered, including the nature of the conduct."[22] It was relevant on the facts that the profits were derived from deliberate and dishonest conduct and were intended to be achieved. The benefit to Foresters was in essence the business connections appropriated from Lifeplan and FPM and the advantage conferred by those connections was not shown to be limited to the five-year period identified in the BCP.[23] There was no justification in principle or in authority to limit the account of profits to *realised* profits: unrealised profits were still profits.[24] The account of profits, despite its name, is not limited by conventional accounting methods. Accordingly, the proper quantification of profits extended to the entire net present value (or capital value) of Foresters' funeral bonds business, valued at $14.8M.

Some have criticised the outcome in *Foresters* as being punitive in that it appears to require the dishonest assistant to account for profits it has not enjoyed. But why should a plaintiff have to wait for the profits to be enjoyed – particularly if a limitation period might be problematic? Future risks and chances are capable of present-day evaluation.[25] And the Courts are familiar with the task of doing their best to assess the worth of those chances with the benefit of expert evidence.

Most crucial to the outcome, it seems, was the conclusion that Foresters had made no attempt to prove that an increase in the profitability of its business was due to acts apart from the success of the dishonest strategy of Woff and Corby. For example, Foresters had not sought to prove that any of the new business connections would have expired or endured for only a short period after the five year period foreshadowed in the BCP.[26] In other words, Foresters did not discharge the onus cast on it. The case is a cautionary tale for litigators on the importance of adducing evidence in case the worst case scenario should eventuate (namely, that one's client fails at the liability hurdle).

Gageler J agreed with the plurality that the whole of the capital value should be disgorged, although the judge added that the task was ultimately "*evaluative*"[27] and included:[28]

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[21] *Foresters* at [15].
[22] *Foresters* at [16].
[23] See *Foresters* at [16] (plurality) and [119] (Gageler J).
[24] *Foresters* at [24].
[25] *Chaplin v Hicks* [1911] 2 KB 786
[26] *Foresters* at [21], [18]-[19].
[27] *Foresters* at [93], [95].
[28] *Foresters* at [94].

> *consideration of what is **just** in the context of the equitable obligation to be vindicated by the remedy [and] 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'. [emphasis added]*

Lastly, it is worth touching briefly on the dissenting judgment of Nettle J. The judge would have upheld the decision of the Full Federal Court, noting that the account involved a "judicial estimation of the available indications rather than mathematical precision, and is a matter on which reasonable minds may differ"[29] (at [197]). However, having seemingly rejected mathematical precision, his Honour went on to conclude that it was open to the Full Court to order an account limited to five years with a deduction of six months. The judge held that it would be unrealistic to conclude that the value of the advantage to Foresters endured beyond the first five years of operations.[30] This might be said to shift the onus of proof onto Lifeplan to show why the advantages did *not* cease. In addition, it seems "unrealistic" to say that the fruits of Foresters' acts of participation were limited to a defined period merely because the BCP documented a five-year strategy. As a practical matter, the benefits to the business would have endured subject to any evidence to the contrary.[31] Foresters did not proffer any such evidence.

NOVOSHIP COMPARED

I turn now to consider how the High Court's reasoning contrasts with that of the Court of Appeal in the *Novoship* decision.[32] One of Novoship's officers (Mikhaylyuk) was in charge of negotiating charters of its ships who entered the company into a number of transactions in exchange for bribes. The first set of charters involved bribes paid to a company which was controlled by the relevant defendant participant, Nikitin, who knew that Mikhaylyuk had acquired the bribes as the price of chartering the vessels. In the second set of transactions, the fiduciary arranged for charters to another company of Nikitin's, although in this transaction Nikitin spent his own money on the venture and paid around market rates for the head charters before going on to arrange profitable sub-charters. Importantly, Nikitin's profit was largely due

[29] *Foresters* at [197].
[30] *Foresters* at [195].
[31] See eg P.G. Turner, "Accountability for profits derived from involvement in breach of fiduciary duty" (2018) *Cambridge Law Journal* 255 at 258.
[32] *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 (*Novoship*).

to the extraordinary rise in the market and Novoship was content to lay off the risk and had actively foregone the opportunity. Although Novoship would not have chartered the vessels to Nikitin had it known of the wrongdoing, it would have certainly contracted with someone else.

The Court of Appeal held that Nikitin's gain should not be disgorged since "there was an insufficient direct causal connection between entry into the … charters [or transaction] and the resulting profits".[33] The Court of Appeal found that "the real and effective cause" of the profits was the unexpected change in the market.[34] While it was true that Nikitin's gain could not have been made "but for" the participation in the breaches of fiduciary duty (ie he would not have been able to secure the head charters), the Court of Appeal held that the profit was "effectively" caused by the shipping market's rise, rather than the wrongdoing. In addition, the Court of Appeal held that the remedy of account was discretionary and would have been disproportionate in the circumstances.

It is curious that the Court of Appeal adopted an approach that was so generous to the participant given that it endorsed the deterrence rationale set out by Gibbs J in *Consul Development* elsewhere in the judgment.[35] The key to the divergence between the Court of Appeal and the High Court lies in the emphasis of the Court of Appeal on the fact that the participant is not a fiduciary and owes no personal duties to the plaintiff, but is sued because he has committed an equitable wrong.[36] But even if this is the normative basis for the participant's liability, this does not seem to provide a good reason to be lenient. As one commentator has remarked, the accessory bears some responsibility for the violation of the victim's rights and the narrow mental element for the cause of action means that the scope of liability is not so broad as to catch innocent parties.[37] To use the words of former Justice Gummow, when one recalls that the third party must have been dishonest, in assessing what is sufficient connection between the profits derived and that dishonesty, why should tenderness be shown to the rogue?[38]

Some commentators have expressed the view that the "but for" test alone would cast liability *too* wide and that further limits on the scope of liability of a dishonest assistant must exist.[39]

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[33] *Novoship* at [115].
[34] *Novoship* at [114].
[35] *Novoship* at [76]-[77].
[36] *Novoship* at [107] and see also at [104].
[37] Paul S Davies, "Accessory Liability for Assisting Torts" (2011) 70 *Cambridge Law Journal* 353, 357-358
[38] The Hon William Gummow, "Dishonest Assistance and Account of Profits" (2015) *Cambridge Law Journal* 405 at 408.
[39] Peter Devonshire, "Dishonest Assistance, Causation and Account of Profits" (2019) 135 *LQR* 214, 219.

To my mind, the High Court was right to cast the scope of liability as a matter going more to quantification. The Court of Appeal might have called this a "remoteness" inquiry, since it expressly favoured the adoption of common law rules.[40] Although the Court of Appeal did not purport to apply a "remoteness test" in *Novoship*, its analysis partakes of a similar approach in that the gains were seen as too removed from the participant's wrongful conduct.

Reasonable minds can differ on what gains are remote and those which are not, just as they may differ about when something is reasonably foreseeable or not. Ultimately, to draw on the language of Gageler J, inquiries of this type – whether framed as questions of causation or questions of remoteness – are necessarily *evaluative* and will be informed by the facts and circumstances of the case.

Insofar as common law rules might be relevant, in *Novoship*, as I have mentioned, the Court of Appeal said that there was no reason why the common law rules of causation, remoteness and measure of damages should not be applied by analogy.[41] In his analysis of the *Novoship* decision, former Justice Gummow has noted that the common law rules would appear to be those associated with the tort of negligence, where damage is the gist of the action, whereas against the third party the remedy is for equitable compensation or an account of profits.[42] Perhaps the debate is artificial given the High Court effectively adopted a "but for" test in *Foresters* – a rule of causation familiar to all common lawyers. To that observation I would add that one of the attractions of equitable principle is the necessarily flexible manner in which it can be deployed.

One final point about the High Court decision concerns vicarious liability. One of the grounds on which Lifeplan sought leave to cross-appeal was that the Full Court ought to have found that Foresters was vicariously liable for the equitable wrongdoing of Woff and Corby once they were its employees. The judge had rejected this as a matter of principle and it was left alone by the Full Court. In the High Court, the plurality concluded that it was unnecessary to decide the issue but did note that "there is no novelty in equity attributing to one person the wrongful acts of another".[43] Gageler J held that a finding of vicarious liability would add nothing of significance to Foresters' duty to account, the cross-appeal was an inappropriate vehicle for

[40] *Novoship* at [107].
[41] *Novoship* at 533.
[42] The Hon William Gummow, "Dishonest Assistance and Account of Profits" (2015) *Cambridge Law Journal* 405 at 407.
[43] *Foresters* at [5].

exploring the issue. The question of vicarious liability for equitable wrongdoing therefore remains open under Australian law.

CONCLUSION

In conclusion, perhaps the outcomes in *Foresters* and *Novoship* are best explained by one of the fundamental principles in equity, namely: that the remedy must be fashioned to fit the nature of the case and the particular facts.[44] Foresters' culpability in the pillaging of Lifeplan's business was so closely intertwined with the profits Foresters went on to make – and would have continued to make – and these largely reflected equivalent damage done to Lifeplan's business and profits.[45] By comparison, in *Novoship*, the assistant Nikitin in Novoship had used his own endeavours to make the profits made there, largely off the back of an extraordinary rise in the shipping market. One can see how each Court arrived at their respective decisions on the facts.

But the Court of Appeal's test, with respect, has the risk of being too generous to wrongdoers. This is particularly so having regard to the commercial transactions in which knowing assistance can occur. Typically, the participant will engage themselves in an enterprise separate from the fiduciary's breach and the preparatory acts of assistance so that the "real or effective cause" of profits can usually be attributed to the participant's immediately-preceding efforts, rather than the acts further down the chain. The Court of Appeal's approach essentially leaves a windfall with the rogue defendant – something they would not have earned if it were not for their wrongdoing. A cynical and shrewd participant may take the calculated risk that "the game is worth the candle".

The Court of Appeal's approach also has a fair degree of uncertainty for litigants because of the Court's ultimate discretion to disallow the remedy. In some cases there may be little difference in outcome between the two approaches. Much will turn on the individual facts. But the *Foresters* case has left Australian lawyers with a brighter line to guide how commercial parties should conduct themselves. When one considers equity's increasing intervention and prominence in commercial disputes, this can only be a good thing.

[44] *Warman* (1995) 182 CLR 544.at 559.
[45] Eg: Foresters' trading figures for the first two years increased from $1.6M to $24M, whereas Lifeplan's revenues declined from $68M to $45M over the same period.

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