

LEVEL

TWENTY
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C H A M B E R S



Fiduciary duties: a mystery or not?

1 July 2020

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REMEDIES





Constructive Trust



not so fast...



Bathurst City Council v PWC Properties

(1998) 195 CLR 566, 585



“first decide whether... there are **other means available** to quell the controversy”



“...avoiding a result whereby the plaintiff gains...**an unfair priority** over other equally deserving creditors.”



Giumelli v Giumelli

(1999) 196 CLR 101, 113-114



“first decide whether...there is **an appropriate equitable remedy**...short of the imposition of a trust.”



**John Alexander's Clubs Pty Ltd v White
City Tennis Club Ltd**

(2010) 241 CLR 1, 45-6



“care must be taken to avoid ... relief
which **goes beyond the necessities of
the case ...**”



LAST RESORT



Account of Profits



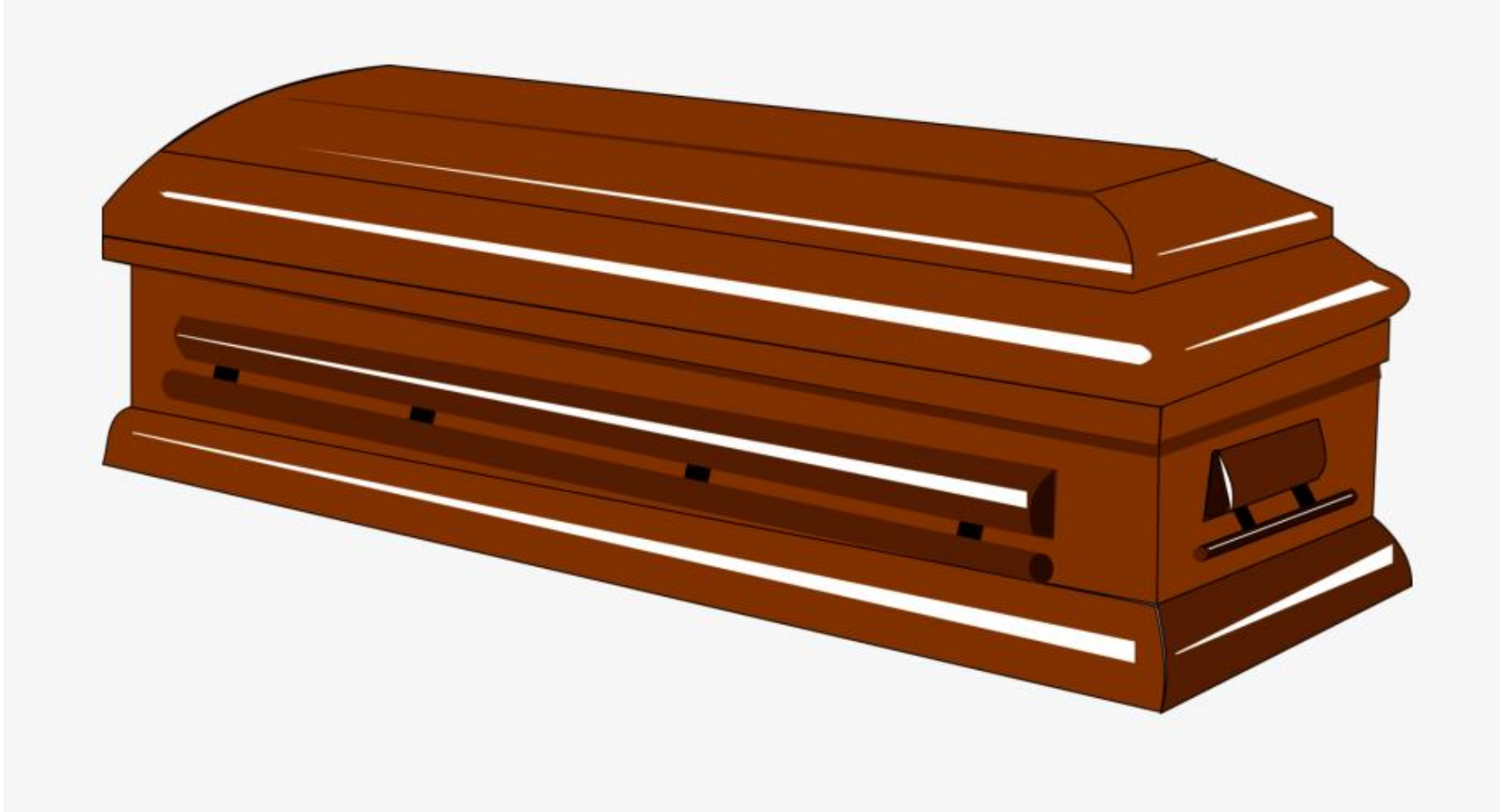
***Ancient Order of Foresters in Victoria
Friendly Society Ltd v Lifeplan Australia
Friendly Society Ltd and anor***

(2018) 350 ALR 1





>> **Lifeplan...**



>> Mr Woff and Mr Corby



>> Funeral director referrals...





“...what could only be described as their
**wholesale plundering of the
confidential information and business
records of Lifeplan...**”



“...the use of Lifeplan’s confidential information...**must have been apparent to honest and reasonable persons in the position of...Foresters**”

>> Lifespan



>> Foresters



>> **First instance (FCA) - Besanko J**

- Woff and Corby breached obligations of confidence and fiduciary duties of loyalty (including Corporations Act)
- Foresters knowingly participated

>> **First instance (FCA) - Besanko J**

- Ordered an account of profits against Woff and Corby, but not Foresters
- Each ordered to account for sum of his drawings and distributions

>> Appeal (FCAFC) - Allsop CJ, Middleton & Davies JJ

“...primary judge’s approach to Foresters was **too narrow**...”

>> Appeal (FCAFC) - Allsop CJ, Middleton & Davies JJ

‘...did not transfer an extant business...but rather led to...a new business...which “**necessarily involved the deployment of capital, skill and expertise**” ...’

>> Appeal (FCAFC) - Allsop CJ, Middleton & Davies JJ

“...the account of profits would be **too extreme if it were to extend to the entire value** of the Foresters Funeral Fund business.”

>> Appeal (FCAFC) - Allsop CJ, Middleton & Davies JJ

“Tailoring the order to the circumstances rather required...**a proportionate response**...to fulfil equity’s remedial objectives...”

>> Appeal (FCAFC) - Allsop CJ, Middleton & Davies JJ

“...proportionate response in the circumstances was to order Foresters to account to Lifeplan for the **net present value of profits made and projected**...between...February 2011 and...June 2015.”

>> HCA

“...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...”

>> HCA – majority (Kiefel CJ, Keane & Edelman JJ)

‘the liability to account...encompasses
“any benefit” received by the knowing
participant in a breach of fiduciary
duty...’

>> HCA – majority (Kiefel CJ, Keane & Edelman JJ)

“The equitable disgorgement principle...is **prophylactic rather than a restitutionary** principle.”

>> **HCA – majority (Kiefel CJ, Keane & Edelman JJ)**



>> HCA – majority (Kiefel CJ, Keane & Edelman JJ)

“there was **no principled basis** for requiring Foresters to disgorge anything less than the value of the business connections...”



Onus

>> TAKE-AWAYS

- 1. Constructive trust = last resort**
- 2. Account of profits = “any benefit”**
- 3. Wrongdoer bears shifted onus**



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Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, **unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees:** (1874) LR 9 Ch App 244, 251–2.



182 Use of position—civil obligations

Use of position—directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

>> 79 Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.



*“Consequently, **Mr King might have been knowingly concerned in MFSIM’s contravention by some conduct on his part although it was not causative of the contravention**, in the sense that the contravention would not have occurred but for his conduct. More specifically, it was unnecessary for ASIC to prove that the contravention occurred because Mr King approved or authorised it. It was sufficient that there was some conduct which implicated or involved him in the contravention.”*

King v ASIC [2018] QCA 352 [168]



1317H Compensation orders—corporation/scheme civil penalty provisions

Compensation for damage suffered

(1) A Court may order a person to compensate a corporation, registered scheme or notified foreign passport fund for damage suffered by the corporation, scheme or fund if:

- (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation, scheme or fund; and
- (b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

(2) In determining the damage suffered by the corporation, scheme or fund for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

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