

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

**ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY (ACN 087 648 842)**

Appellant

and

**LIFEPLAN AUSTRALIA FRIENDLY SOCIETY LIMITED (ACN 087 649 492) & ANOR**  
Respondents

**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I:**

1. This outline of oral submissions is in a form suitable for publication on the internet.

**Part II:**

*Causation*

2. It is clear from LS [29] that the account of profits ordered by the Full Court in the sum of \$6,558,495 turns on Foresters' knowing assistance in Woff's and Corby's breaches of duty relating to the Business Concept Plan (the **BCP Breaches**) (**AB 877**). **FS [11], [19] – [21], FRS [14]**.

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3. The causation question involves three issues. The first concerns the BCP Breaches by Woff and Corby that Foresters had knowingly assisted. At [377] - [379] and [443] the primary judge found the breaches concerned the use by Foresters of confidential information in the BCP as follows: section 4.2 (**AB 877**), section 6.2 (**AB 887**), Appendix B (**AB 897**), Appendix D (**AB 911**) and the geographic spread in section 6.3 (**AB 887**). The BCP also contained other information (eg section 6.1 (**AB 887**) and sections 7 – 16 (**AB 888 – 894**)) that was not the subject of any breach of duty or knowing assistance. But, the Full Court appears to have wrongly treated Foresters' knowing assistance as related to the use of BCP as a whole: FC [52(a)], [66], [69]. **FS [11], [14], [19], [34]; FRS [4]**.

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4. Second, it is necessary to identify precisely what was acquired by Foresters from its knowing assistance in respect of the BCP Breaches: *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (**Warman**) at 565.2. The primary judge's findings on this issue (PJ [324], [443]) were that the confidential information played a part in Foresters' decision to proceed. The Full Court wrongly treated the finding as being that Foresters would not have proceeded without the breach of duty in which it knowingly participated (FC [2],

[66], [67]). Foresters also acquired the confidential information (set out at [3] above) the subject of its knowing assistance. **FS [11], [18]**.

5. Third, it is necessary to then determine whether the profits the subject of the order were made *in breach* of Foresters' obligation not to use what it had acquired from its knowing assistance: *Warman* at 558.5, 562.7, 563.3, and 568.1. The account ordered by the Full Court was not in respect of profits of Foresters made *in breach* of Foresters' obligation not to knowingly assist Woff's and Corby's BCP breaches. The knowing assistance in respect of the BCP breaches also did not materially contribute to the profits the subject of the account ordered: PJ [443]. **FS [43], [62], [66]**.
- 10 6. To the extent that there may be doubt about causation, common law causation principles of scope of liability, remoteness and *novus actus interveniens* can assist by analogy. **FS [45] – [50], [57]**.
7. Full Court wrongly employed policy considerations (preventing infidelity etc.) as causation criteria. **FS [63]-[64]**.
8. The Full Court's acceptance (at [82] and [87]) that its conclusions were not driven by "logical analysis" and were not "a matter of logic alone" suggest it did not properly consider the skill, effort, expertise, resources contributed and risks undertaken by Foresters after 1 January 2011 (cf LS [73]). See Hughes' affidavit [63]-[69] (**AB 755-756**); the Jackson report showing expenditure up to 30 June 2014 of \$3,287,784  
20 (**AB 403**). See also PJ [429]. **FRS [9] – [11]**.

*No ongoing use of Lifeplan's confidential information*

9. It was central to the Full Court's reasoning that there was "ongoing use" for supervision and governance by Foresters of Lifeplan's confidential information after 1 January 2011: see FC [14], [37] - [38], [69]. The Full Court did not identify the confidential information actually used, whether it was confidential information the subject of Foresters' knowing assistance, the occasion of its use or the findings of the primary judge and the evidence upon which it was relying. **FRS [3]**.
10. If those matters had been considered by the Full Court, it would have found that neither  
30 the findings by the primary judge nor the evidence warranted the conclusion at which it had arrived. There was some evidence of use by FPA of information in Appendix B of the BCP in FPA's reports to Foresters' Board in January 2011 (**AB 611**) and March 2011 (**AB 945**), when the business was at its embryonic stage. That evidence was the subject of limited cross-examination: Fleming cross-examination (**AB 186, 187.15, 188.15**); Hughes' cross-examination (**AB 232.40, 235, 236, 237**), which became the

subject of final submissions (final written address [219]-[220], **Appellant's Additional Material, tab 2**; oral address 912.40 (**Appellant's Additional Material, tab 3**)). The primary judge made specific findings to the effect that that was the only subsequent use: PJ [192], [283], [298], [443]. **FRS [4] – [8]**.

11. Mr Fleming's affidavit at [29] (**AB 868**) concerning no ongoing use was not cross-examined upon and was accepted by the primary judge at [298]. Mr Hughes' affidavit at [24] (**AB 746**), which was also not cross-examined upon, to the same effect was also accepted: PJ [310].
- 10 12. A further affidavit of Mr Hughes at [16(b)] (**Appellant's Additional Material tab 4**), which was not cross-examined upon, referred to the monthly board reports upon which Foresters' board relied to manage and monitor the performance of its funeral fund business, which did not contain any confidential information of Lifeplan (eg the April 2013 report at **AB 732**).

*No actual profits*

13. The account of profits was based on Table 1 of the Joint Experts' Report (**AB 639**). As is apparent from the table, Foresters had accumulated losses for each year up to 30 June 2014. The account ordered was in respect of profits that had not yet accrued but to which Foresters would have a future right, if and when they accrued. Cf *Dart Industries v Décor Corp Pty Ltd* (1993) 179 CLR 101 at 111. **FS [68] – [70], [73], [74]**.
- 20 14. Further, the table was based on assumptions (see FS [71]) and also on several of the matters the primary judge had resolved in his reasons at [457] – [480] (see table 2 at **AB 641**), which may or may not eventuate. Thus, the profits the subject of the account may, or may not, accrue. The Full Court erred (at FC [88] and [116]) in treating the amount ordered on its account as an existing capital profit. **FS [71], [75]-[78], FRS [15] – [16]**.
15. In substance, the claim for the profits of Foresters' existing business was akin to a proprietary claim in respect of Foresters' business based on a constructive trust, but the evidence does not support any such claim, which Lifeplan (at LS [20]) in any event abandoned: see PJ [416]. Cf *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 114 – 116. **FS [15], FRS [17]**.

30 *Section 1317H*

16. For the reasons set out in FS [79] – [82], the Full Court erred in applying equitable principles to the grant of relief under s 1317H.

Dated: 12 April 2018

  
Ron Merkel