

Article Information

Service: Employment & Labour

Ignorance is not always bliss: Employer liable for employees' breach of fiduciary duties to former employer

A recent decision of the Full Court of the Federal Court of Australia has found Ancient Order of Foresters in Victoria Friendly Society Limited (Foresters) liable for knowingly participating in, and profiting from, a breach by two of its employees of their fiduciary duties to their former employer, Lifeplan Australia Friendly Society Ltd (Lifeplan).

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David Ey, Partner and **Irene Nikoloudakis, Law Clerk**, review this decision, and consider its implications for employers.

Case Details

Lifeplan, through its subsidiary Funeral Plan Management Pty Ltd (**FPM**), was engaged in the business of funds management and the provision of investment products, including funeral bonds and pre-paid funeral contracts. Foresters was a friendly society also in the business of funds management, including the provision of funeral products. Two ex-employees of FPM approached Foresters' Board with a business plan they had prepared, which detailed a business strategy of how Foresters could expand one of its business segments. The employees sought to persuade Foresters to employ them and enter into a joint venture with them, by adopting this business plan for their own financial advancement and advantage and that of Foresters. The business plan heavily drew upon Lifeplan's confidential information that the employees had obtained during their employment.

At first instance, Justice Besanko of the Federal Court found that the employees had breached, amongst other things, their fiduciary duties to Lifeplan, by misusing Lifeplan's confidential information and disclosing this information to its competitor (Foresters). The employees were ordered to account for the profits that they had actually earned, which was approximately \$50,000. However, the Court did not hold Foresters liable for the breaches.

The decision was then appealed to the Full Court of the Federal Court. The focus of this appeal was on the liability of Foresters to account for its knowing participation in the employees' breaches of fiduciary duty. The Full Court held Foresters to be liable to account for the profits of the business segment because there was a causal connection between the employees' breach of fiduciary duty and the profits made by Foresters' business segment that was developed by the employees. The Full Court held that without Foresters dishonestly taking advantage of this confidential information and without the employees breaching their fiduciary duty (in which Foresters was knowingly involved and actively participated), the two employees would not have been employed by Foresters and Foresters would not have expanded its business segment as it did. The Full Court thereby considered it appropriate to order Foresters to account for the profits of the business segment, which were over \$6 million. The Full Court considered that this remedy would enforce the importance of the fiduciary duty in question.

Lessons for Employers

This case has important implications for employers seeking to enter into a business venture with former employees of a competitor. In such circumstances, the employer should ensure that any business proposals presented to them do not contain confidential information that was obtained dishonestly. This could be ensured, for example, by carefully examining the origins of any information presented to them.

Employers can also put protections in place to minimise the risk of their employees, including former employees, inappropriately disclosing confidential information to third parties, and particularly to competitors. Where appropriate, employers should include well-drafted restraint of trade and confidentiality provisions in their employees' contracts, and ensure that these provisions are enforceable both during employment and post-employment. Business confidentiality policies can also be introduced and employers should review these with their employees to ensure that their employees clearly understand what information can or cannot be disclosed beyond the business.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.