

## Breaches of fiduciary and related obligations

**Warman International v Dwyer (1995) 182 CLR 544**

**Facts:** Warman was a company that had an agency agreement with an Italian manufacturer of gearboxes, Bonfiglioli. Dwyer was general manager at a branch of Warman. Bonfiglioli unsuccessfully approached Warman in August 1986 to set up a joint venture with it. Shortly after, Dwyer informed Bonfiglioli that he planned to leave Warman and set up his own business. He poached Warman's staff to work in his new venture and Bonfiglioli terminated its agency agreement with Warman, entering into a 20 year contract with Dwyer's company to assemble and distribute its gearboxes in Australia.

**Held:**

The trial judge held that there was a clear breach of fiduciary duty by Dwyer, resulting in Warman losing the opportunity to retain the agency agreement. Compensation to cover the loss but the court denied Warman an account of profits.

HIGH COURT HELD: Warman was entitled to elect between equitable compensation and an account of profits

- As account of profits is difficult to calculate, mathematical exactness is not called for, a reasonable approximation is acceptable.
- Liability to account does not depend on detriment to the plaintiff; or dishonesty or lack of bona fides on the part of the defendant.
- It is no defence that the plaintiff was unwilling, unlikely or unable to make the profit itself.
- The fiduciary is usually ordered to account for profits made within the scope and ambit of the fiduciary duty.
- If the loss suffered by the plaintiff exceeds the profit made by the fiduciary, the plaintiff may elect a compensatory remedy against the fiduciary. The plaintiff is entitled to elect which ever remedy reaps the highest return.
- A distinction can be drawn between cases where a fiduciary acquires a specific asset and where the fiduciary establishes and operates a business to exploit an opportunity. In the latter, it may be inappropriate to require the fiduciary to account for the whole of the business profits for an indefinite time, especially where profits can be attributed to its own inputs.
- The defendant bears the burden of showing that it should not account for the whole of the profits.
- As a general rule, a court will not apportion the profit made between fiduciary and the principal; but if it is inequitable for the fiduciary to account for the whole of the profits, the court will make allowance for the fiduciary's skill, effort and expenses.

"Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered injury or loss."

A fiduciary must account for a profit or benefit if it was obtained either

- (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or
- (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position

The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes:

- (1) that the fiduciary must account for what has been acquired at the expense of the trust, and
- (2) to ensure that fiduciaries generally conduct themselves "at a level higher than that trodden by the crowd"

## breach of confidence

**Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109****Facts:**

W, a former member of MI5 had retired, moved to Tasmania and written a book called 'spycatcher' detailing various matters about his time in MI5, including allegations of improper conduct by MI5. The revelations breached his contract with the crown and Official Secrets Act 1911. Therefore there was no possibility of publication in the UK. Instead W attempted to publish in Australia. The Crown commenced proceedings in NSW to try and prevent this, Two UK newspapers (Guardian and Observer) published articles summarising the litigation in NSW including an account of W's allegations. In 1987, the Sunday Times which had bought the serialisation rights, published the first instalment of its serialisation. This was 2 days before the whole book was due to be published in the USA. The AG obtained an interlocutory injunction against the newspapers. All the newspapers appealed to the HL.

**Issue:**

- Could 3rd parties be bound by obligations of confidence that they knew to bind the discloser of information
- Could publication in the public interest extinguish an obligation of confidence
- Did the information lose its 'quality of confidence' by virtue of publication in the USA

**Held:**

Third parties could be bound by an obligation of confidence that they knew W to be under, so as to prevent publications they had been given in breach of confidence, unless the duty was extinguished by the information becoming public knowledge or the public interest justified the publication.

In this case there had been no breach of confidence by the guardian or observer as their articles contained information readily available and caused no further damage

The Sunday Times was in breach of confidence by publishing the first instalment. Imminent publication in the USA did not justify that. Therefore they were liable for an account of profits

However as the publication of the whole book had now occurred there was no justification for an injunction against any newspapers.

### Intellectual property

Legislation provided that account for profits among other remedies are available for breach of intellectual property rights.

#### ***Colbeam Palmer Ltd v Stock Affiliates Pty Ltd [1968] HCA 50***

Windeyer J stated at 34 that 'it lies upon a plaintiff who seeks an account of profits to establish that profits were made by the defendant knowing that he was transgressing the plaintiff's rights'. His Honour further stated at 33 that 'lack of diligence in inquiry does not turn ignorance into knowledge...[d]ishonesty is not to be inferred from lack of care...wilful blindness...describe[s] a deliberate abstaining from inquiry from fear of what inquiry might reveal' and is not to be equated with knowledge.

### Competition and consumer law

- S 236 of the Australian consumer law → action for damages
- S 237, 238, 243 are compensatory in purpose