

Account of Profits

- An account of profits (AoP) is a personal remedy usually granted in the context of a BOFD (*Warman*) or BOC
- The aim is to strip the wrongdoer of any profit, but not to punish
 - It has a prophylactic purpose to prevent temptation
- P must elect between compensation and AoP b/c they are inconsistent (*Warman*)
- Account of profits may be ordered notwithstanding good faith on the part of the defendant, an unintentional breach or the fact the P was unable to seize the opportunity themselves and is better off because of the breach (*Boardman*)
- AoP can be secured by equitable charge (*Warman*)
- Where a fiduciary breaches their duty by appropriating an opportunity/information rather than property and then adds some of their own capital, labour and skill there are two approaches to an AoP:
 1. Fully account but Court will give you a liberal award to compensate for your time and effort and expertise (*Boardman*) – akin to a professional fee; OR
 2. Some of your profit is referable to the breach and some to your own expertise and endeavors and you need only account for the former (*Warman*)
- If there are multiple parties and third parties (KAs or KRs) involved in the breach principal can get everyone's profit who is involved in BOFD because they are all independent profits which flow from the breach – there is no inconsistent remedies or doubling up (*Michael Wilson*)
 - However pursuing compensation from fiduciary and 3P would double up

Steps in a AoP analysis:

1. When and for what purpose is an account of profits available in cases of BOFD?
 - The purpose of an AoP is to disgorge the wrongdoer of any profit which they made by reason of the breach (*Warman*)
2. What reasons exist for refusing to award an AoP?
 - Election of compensation (*Warman*)
 - Might be unconscientious for P to assert AoP in the circumstances (*Chan per Deane J*)
 - Delay: If P delays because they see D is doing good job profiting and wants profit to rack up before claiming they may be denied (*Warman*)
3. What general principles apply to calculations?
 - The 'cardinal principle' is that the remedy must be fashioned to fit the circumstances of the case (*Warman*)
 - Consider:
 - Nature of the property taken
 - Relevant powers and obligations of the fiduciary – factors which went to existence question
 - Relationship between duties/obligations and the profit that was made
4. How do you actually calculate it?
 - Approach 1: Give a full account of profit and then an offset to compensate the D for their capital, skill, labour, etc (*Boardman*)
 - Approach 2: How much of the profits generated by P were referable to the breach? (*Warman*)
 - Go through the profits which flowed from or which were derived from the breach

- E.g. In *Warman* the agency had 1 year to run at Warman so one years worth of profits were referable to the breach. Dwyer also used contacts from his fiduciary position to set up the operation and the value of this was another year of profits. Thus, AoP was 2 years of profits.

Warman International Ltd v Dwyer (1995) 182 CLR 544

Facts:

- Warman was an Australian company which manufactured and sold components in automobiles
- Dwyer was the Queensland branch manager
- One of the smaller parts of Warman's business was distributing gearboxes for Bonfiglioli, an Italian manufacturer
- Queensland was a smaller market for Warman
- Warman rejected an offer from Bonfiglioli to manufacture the gearboxes in Australia as a JV whereupon Dwyer told Warman he was considering leaving and setting up his own business
- Warman suggested that Dwyer purchase the Queensland agency and he declined
- Dwyer then negotiated with Bonfiglioli and created two companies to run JV business with Bonfiglioli
- Bonfiglioli then ends distributorship agreement with Warman and Dwyer quits
- The JV is very successful and they make EBIT of 1.6 million in first four years
- Trial judge held that Dwyer acted in breach of his fiduciary duty as a senior employee and awarded an AoP. He also awarded compensation for the loss of goodwill and business and said Warman needed to elect between these remedies.
- COA upheld everything but said there was no entitlement to compensation.

Issue: How would the AoP be calculated?

Judgment:

- HCA called the AoP 'ancient and notoriously difficult in practice'
- HCA stated that when awarding an AoP the starting point was the 'cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts'
- On the facts the appropriate remedy was an AoP in accordance with Deane J's judgment in *Chan* which stated that an errant fiduciary must account for profits made in situations of conflict or those gained from a breach of the profit rule
- Dwyer tried to argue that Warman was intending to terminate the distributorship and would not have made these profits on its own anyway but this does not excuse a BOFD
- HCA stated 'In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced

and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources.' → Thus, profit that is referable to the breach is subject of AoP

- 'Assessment will often be extremely difficult in practice but what is necessary is to determine as accurately as possible the true measure of the profit obtained by the fiduciary in breach of their duty'

How was the AoP calculated on the facts?

- Dwyer clearly appropriated the QL agency without paying. However, the agency itself was underperforming and there was a 3-month break clause. Finding of fact that it was likely to dwindle and run out in one year.
- Another complication on facts in calculating was Bonfigioli was a shareholder in one of Dwyer's companies so they cannot be made to account for their profits. Further, a CT over all the shares in the company Dwyer set up is not available here because half shares are owned by Bonfigioli (third party).
 - Knowing assistance was not an argument run on the facts
- Thus the starting point is that Dwyer must account for 1 years worth of profits because the agency would have run another year with Warman.
- Further, Dwyer used the contacts he had by virtue of his fiduciary position in Warman to set up the JV and thus the profit derived from the use of his contacts is referable to the breach too – this amounted to another years worth of profits
- Accordingly, Dwyer should account 2 years worth of profits to Dwyer as this is what was referable to the breach – the remainder of the profits were referable to his own skill, labour, enterprise, etc
- Warman is given choice to elect between compensation and this 2 year AoP
- HCA say the AoP can be secured by a equitable charge over assets of the company.

Principles: 1. AoP should be referable to breach; 2. AoP should be fashioned to facts; 3. Must elect; 4. Equitable charge

Michael Wilson & Partners Ltd v Nicholls [2011] HCA 48; (2011) 224 CLR 427

Facts:

- A foreign corporation alleged that a former director and shareholder and two former employees had conspired to divert clients and business opportunities away from it to their own benefit.
- This was a BOFD

Issue: What remedial consequences flowed?

Judgment:

- Courts of equity will prevent double recovery