

Hiring new executive employees? Beware what they bring

Lifepan Australia Friendly Society Ltd v Woff and Ors [2016] FCA 248

Stephen Teale & Grace Turner-Mobbs | May 2016 | Commercial Disputes & Transactions

Summary

Employers must be mindful and wary of prospective employees providing business plans or proposals which contain a third party's confidential or valuable information and using that party's confidential or valuable information in their business.

Background

Mr Woff (Mr W) and Mr Corby (Mr C) were employees of Lifepan Australia Friendly Society Ltd (Lifepan), in Lifepan's funeral bonds business. In late 2010, they left the employ of Lifepan and became employees of the Ancient Order of Foresters in Victoria Friendly Society Limited (Foresters). Mr W and Mr C took confidential and commercially valuable information belonging to Lifepan, used this information to create a business concept plan to present to Foresters prior to leaving Lifepan, and later used this confidential and commercially valuable information in the running of Foresters' funeral bond business.

Lifepan claimed that this appropriation of information constituted a breach of Mr W and Mr C's employment contracts, breach of their equitable duties owed to Lifepan as their employer, and breach of various sections of the *Corporations Act 2001*, dealing with duties of officers and employees. Lifepan further claimed that Foresters induced Mr W and Mr C to breach their contracts, was knowingly involved and vicariously liable for Mr W and Mr C's breach of fiduciary duties and duty of confidence, and was involved in Mr W's breaches of the *Corporations Act 2001*.

The principal remedies Lifepan sought were an account of profits from Foresters and Mr W and Mr C, declarations in respect of the contravening conduct in respect of both Foresters and Mr W and Mr C, delivery up of documents, injunctions and costs.

Decision

The Honourable Justice Besanko found that:

- Mr W and Mr C breached the fiduciary duties and duty of confidence they owed to Lifepan as their employer;^{1,2}
- Mr W and Mr C breached their employment contracts with Lifepan;³
- Mr W contravened sections 181,⁴ 182 and 183 of the *Corporations Act*; ⁵
- Mr W and Foresters did not induce Mr C to breach his employment contract with Lifepan;⁶
- Mr W did not fail to disclose a business opportunity to Lifepan;⁷
- Foresters was not vicariously liable for the equitable wrong doing of Mr W and Mr C;⁸
- Foresters had knowingly assisted Mr W and Mr C's breach of their equitable duties;⁹
- Pursuant to section 79 of the *Corporations Act*, Foresters was not involved¹⁰ in Mr W's contravention of the *Corporations Act*;¹¹
- Foresters induced Mr W and Mr C to breach their employment contracts with Lifepan;¹²
- Lifepan was not entitled to its claim for passing off;¹³
- Lifepan was not entitled to an account of profits from Foresters as a consequence of the breaches it participated in;¹⁴
- Lifepan was entitled to an account of profits from Mr W and Mr C.¹⁵

Justice Besanko made declarations against Mr W and Mr C detailing the breaches of the duties and obligations they owed to Lifepan and made the following orders: ¹⁶

- Each of Mr W, Mr C, and Foresters be permanently restrained from using or publishing the documents concerned and deliver up and destroy all copies of the documents;
- Mr W account to Lifeplan in the sum of \$24,238, and Mr C account in the sum of \$24,198 and pay interest;
- Lifeplan pay Foresters' costs of the proceeding on a party and party basis and Foresters' trial costs on an indemnity basis;
- Costs orders as between Mr W and Mr C and Lifeplan.

Foresters was represented by TurksLegal. The case is now subject to an appeal by Lifeplan.

Comment

The case highlights difficulties prospective employers can face when they seek to entice potential employees to join their workforce. Whilst employees are able to take certain steps in establishing a new business venture or preparing for future employment whilst still employed, the taking of their employer's confidential or valuable information for purposes of advancing their own and their prospective employer's business interests or the soliciting of their clients, can give rise to breaches of employment contracts and breaches of confidence and fiduciary duty. Employers should be careful not to encourage prospective employees to do anything that could be construed as assisting them to breach fiduciary or other duties owed to their existing employer.

Employers, might in certain circumstances, be liable to a competitor for an account for profits earned in their business which are attributable to their participation in the breaches of their employees' duties owed to their former employers.

¹ *Lifeplan Australia Friendly Society v Woff* [2016] FCA 248 at [377], [384], [386], [398], [402], [403] and [405].

² *Ibid* at [377] and [405].

³ *Ibid* at [384], [386], [398], [402], [403] and [405].

⁴ *Ibid* at [384], [386] and [402].

⁵ *Ibid* at [377] and [398].

⁶ *Ibid* at [392].

⁷ *Ibid* at [395].

⁸ *Ibid* at [374] and [402].

⁹ *Ibid* at [379] and [387]-[388].

¹⁰ Corporations Act, s 79.

¹¹ *Ibid* at [381].

¹² *Ibid* at [402].

¹³ *Ibid* at [413].

¹⁴ *Ibid* at [448].

¹⁵ *Ibid*.

¹⁶ *Lifeplan Australia Friendly Society Ltd v Woff & Ors* [2016] FCA 364 at [1]-[11].

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