

practice & procedure



with Andrew Lyons

exemplary damages for breach of fiduciary duty

Fortunately for legal practitioners, the bad guys are alive and well.

Breaches of fiduciary duty are common place. For example, a solicitor planning to leave a partnership solicits the firm's clients before leaving the firm, or company directors, without appropriate disclosure and consent, lend company money to themselves or family members.

Frequently these breaches are dishonest: They are deliberate, for monetary gain and without even a veneer of honest belief that the person was entitled to do what they are doing. To take the first example given above, a solicitor engaging in such conduct would have great difficulty in maintaining that he or she did not realise they were breaching their duties.

In **Harris v Digital Pulse Pty Ltd**, the NSW Court of Appeal was asked, for the first time, to award exemplary, as well as compensatory, damages against defendants who had deliberately breached such duties..

In 1998 the plaintiff employed the defendants upon terms that included a promise they would not compete with the plaintiff during the term of their employment. Both defendants were found to owe a fiduciary duty of loyalty to the plaintiff. While working for the plaintiff, they secretly set up their own competing business and diverted projects for existing and potential clients of the plaintiff to their own business.

By a 2-1 majority the Court refused to award exemplary damages holding that there was no power in equity to award such damages for breach of fiduciary duty by an employee.

Although confined to breaches by an employee, the reasons for the decision are not so limited and the case will be read as persuasive authority for the wider proposition that exemplary damages are not available for a breach of fiduciary duty.

This is not a case of hard facts making bad law. The findings were heavily in favour of the plaintiff: The employees were found to have acted with conscious dishonesty, in breach of positions of trust and responsibility and in a manner calculated to produce harm to their employer and profit to themselves. Yet even on these findings, exemplary damages were denied.

Until the matter is tested before the High Court, this means that in Australia exemplary damages are available in tort or where expressly permitted by statute but not in contract or equity for breaches of fiduciary duty.

Practitioners must therefore recognise the importance of assisting plaintiffs to identify and plead tort claims, in addition to contract and equity claims, so as to lay the foundation for a claim for exemplary damages.

Another practical implication for practitioners is the importance of remembering that even if equity will not award exemplary damages, equity does aid the plaintiff by having pro-plaintiff rules on liability, causation and remoteness.

The case raises the broader issue of whether, if this decision does represent the law in Australia, there ought to be a change in the law to confer a jurisdiction to award exemplary damages in equity.

While such breaches may, in many cases, also be a breach of the criminal law or the Corporations Act, proceedings under those provisions are often not pursued. There is a clear argument that the award of compensatory damages or an account for profits is not sufficient as a general deterrent against breaches of fiduciary duty.

The facts of Harris demonstrate this. After a trial and appeal, the plaintiff recovered \$13,119 as an account of profits and \$11,000 in respect of misappropriated confidential information. Those sums would have

not have covered the difference between solicitor/own client and party costs.

Some fiduciaries will calculate the worth taking the risk and breach duties.

The UK Law Reform Commission said that there is no reason of principle or practicality for excluding equitable wrongs from any rational statutory expansion of the law of exemplary

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