



## Equitable remedies: split election amongst multiple wrongdoers

*Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48 on appeal from *BCEG International (Australia) Pty Ltd v Xiao* [2022] NSWSC 972

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The New South Wales Court of Appeal has considered the application of a concept of ‘split election’ in the context of equitable remedies sought against multiple defendants. While a ‘split election’ cannot be applied in cases of a single defendant, the Court has held that gain-based and compensatory remedies can be the subject of a ‘split election’ in cases where there are multiple wrongdoers.<sup>1</sup> The Court has also reaffirmed that there is no positive duty on a fiduciary to disclose breaches of duty nor a positive duty to obtain informed consent in circumstances where fiduciaries have breached duties.

### Introduction

The first and second appellants, husband and wife, Mr Yu Xiao (Mr Xiao) and Ms Yan Ying Chen (Ms Chen) were ‘the architects of an arrangement’<sup>2</sup> to defraud the respondent, BCEG International (Australia) Pty Ltd (BCEG) a subsidiary of a China-based parent company (BCEG China). Mr Xiao and Ms Chen were the Australian-based directors of BCEG.

BCEG brought proceedings against Mr Xiao and Ms Chen claiming equitable compensation or an account of profits in respect of alleged breach of fiduciary duties owed by the couple as directors of BCEG and a claim for knowing assistance in those breaches and knowing receipt of BCEG’s property by two companies they controlled. A further money claim was also filed against another company controlled by Mr Xiao and Ms Chen.

With Mr Xiao and Ms Chen’s liability established, BCEG claimed an entitlement to ‘make a split election’<sup>3</sup> seeking different remedies from (1) the defaulting fiduciaries and (2) three companies as knowing recipients of the proceeds of the fiduciaries’ breaches of duty.

### The structure of the projects

Between 2010 and 2017, there were three projects in which BCEG and Mr Xiao and Ms Chen were involved. The projects’ financing and profits were the subject of the proceedings.

The first project was the development of the Varsity Lakes

private hospital project undertaken by BCEG on the Gold Coast<sup>4</sup> (the Varsity Lakes project). Monies lent to the Varsity Lakes project from the Export-Import Bank of China were to be used for the sole purpose of the project.<sup>5</sup>

The second was a commercial and residential development undertaken by BCEG in Wagga Wagga, New South Wales<sup>6</sup> (the Wagga project). Mr Xiao and Ms Chen had the controlling interest in the landholder as well as the construction company engaged to design and build the project.

Finally, Mr Xiao and Ms Chen had their own project: a shopping centre and medical centre development in West Wyalong (the West Wyalong project)<sup>7</sup> to be built on land owned by another company controlled by Mr Xiao and Ms Chen.<sup>8</sup>

### The breach of fiduciary duties

Between October 2010 and July 2012, Mr Xiao and Ms Chen created and issued BCEG with false invoices from their construction company. The invoices purported to be for construction costs on the Varsity Lakes project.<sup>9</sup> The payments of these invoices from BCEG were diverted by the couple into their own project, the West Wyalong project. Mr Xiao and Ms Chen also created a series of sham contracts for the Varsity Lakes project purportedly made between their construction company and sub-contractors.

By these invoices and sham contracts, funds were diverted by Mr Xiao and Ms Chen from the Varsity Lake project to their own West Wyalong project.<sup>10</sup>

On 1 July 2012, after the fraud on BCEG (of which it remained unaware) BCEG entered further design and build and construction contracts with companies controlled by Mr Xiao and Ms Chen for the Wagga project.

### The primary judgment

The trial judge, Justice Rees concluded<sup>11</sup> that Mr Xiao and Ms Chen breached their fiduciary duties by creating the sham contracts, fake invoicing and unauthorised payments. Further, the

companies controlled by Mr Xiao and Ms Chen were liable to BCEG as knowing recipients of proceeds flowing from the dishonest breaches by their directors. Finally, her Honour found a causal link between Mr Xiao and Ms Chen's breaches of fiduciary duty and BCEG's entry into further construction contracts for the Wagga project with entities controlled by Mr Xiao and Ms Chen.

In a separate supplementary judgment,<sup>12</sup> Rees J ordered Mr Xiao and Ms Chen to pay BCEG equitable compensation. Her Honour also ordered an account of profits from the knowing recipients of the funds diverted from the Varsity Lakes project and from the Wagga project.

### On appeal

The appeal proceedings were heard before Justices Gleeson, Mitchelmore and Griffiths. Gleeson JA gave the judgement with Mitchelmore JA and Griffiths AJA agreeing.

The appeal did not challenge the findings on liability, other than in respect of the causation finding related to the Wagga project.<sup>13</sup> In grounds 1, 2 and 5, the appellants challenged the finding that BCEG was entitled to both equitable compensation from Mr Xiao and Ms Chen and accounts of profits in respect of the West Wyalong project and the Wagga project.

Ground 3 challenged the primary judge's assessment of the account of profits from the West Wyalong project on the basis that appellants were denied procedural fairness.

Ground 4 challenged the causal link between the breaches of fiduciary duty by Mr Xiao and Ms Chen and the loss suffered by BCEG by contracting with the fiduciaries' companies and advancing funds to the Wagga project.<sup>14</sup>

Finally, ground 6 challenged the quantum of loss in respect of the Wagga project. There was no challenge to the quantum of amounts awarded to BCEG in respect of the West Wyalong project.<sup>15</sup>

### Split election of remedies and multiple defendants

By grounds 1, 2 and 5, the appellants contended that permitting BCEG to 'make a "split election", seeking different remedies against different defendants, is wrong in principle'.<sup>16</sup> The argument was put that 'the plaintiff must make the same election against a knowing recipient as the defaulting fiduciary, otherwise the order for compensation ceases to be compensatory, and there is an inconsistency in claiming relief against different defendants'.<sup>17</sup>

The appellants argued that where BCEG elected to obtain equitable compensation from Mr Xiao and Ms Chen, then BCEG could not elect for an account of profits against the company controlled by them. As a necessary corollary, the appellants also argued that seeking an account of profits from their company would necessarily limit BCEG to seeking the same remedy from Mr Xiao and Ms Chen.<sup>18</sup>

Considering the different remedies of equitable compensa-

tion and an account of profits, Gleeson JA noted the general principle that the remedy of an account looks to the gain made by the party and strips that party of such gain, while equitable compensation looks to the loss to the plaintiff and their restoration to the position had there been no breach.<sup>19</sup> Both remedies are discretionary and can be given as alternatives to one another.<sup>20</sup> Where the remedies are inconsistent, the principle of election applies. However, compensatory remedies are also available where the plaintiff's loss exceeds the account of profits.<sup>21</sup>

In this case, the issue was distilled as being 'whether BCEG can obtain cumulative remedies against different defendants'.<sup>22</sup> In the absence of any 'seriously considered dicta' of the High Court in support of split election<sup>23</sup> in respect of multiple defendants, Gleeson JA chose to follow the reasoning in the English case of *Tang Man Sit v Capacious Investments Limited*,<sup>24</sup> accepted by the High Court in *Baxter v Obacelo Pty Limited*.<sup>25</sup>

By this line of authority, the enforcement of cumulative remedies is subject to the limitations that (a) the plaintiff bring forward their whole case against the defendants in one action (b) when fairness requires, actions against multiple parties must be heard at the same time and (c) the plaintiff cannot recover in aggregate from different defendants an amount which exceeds their loss because '[t]he principle of full satisfaction prevents double recovery'.<sup>26</sup>

Recovery of cumulative remedies, is also subject to the principle of full satisfaction of a wrong or liability, namely, that 'a claimant should not receive more than is necessary to compensate him for the wrong or wrongs done to him or in respect of the liability or liabilities owed to him'.<sup>27</sup>

Gleeson JA found that following from *Tang Man Sit* and *Baxter*, once a right to cumulative remedies is established, 'the rule or principle of double satisfaction is no reason to refuse to enter separate judgments against Mr Xiao and Ms Chen for compensation and against WWM for profits'.<sup>28</sup>

Further, Gleeson JA found that providing BCEG with different remedies for two distinct wrongs, namely, the wrongs of the fiduciaries, Mr Xiao and Ms Chen and of the knowing recipient, WWM, did not amount to double satisfaction or overcompensation. Each of the fiduciaries and the knowing recipients are liable for their own wrongs and BCEG was entitled to cumulative remedies against them.<sup>29</sup> The case is distinguishable from the 'same' loss cases<sup>30</sup> on the basis that it 'involved cumulative remedies for separate and distinct wrongs being the loss suffered by BCEG and the profit derived by the knowing recipient'.<sup>31</sup>

The 'acting in concert' and 'alter ego' exceptions to the several liability of a knowing recipient were not pleaded in this case. Gleeson JA noted that were the exception arguments run, the appellants would have had to 'confront the contrary view that the liability of the fiduciary and the corporate accessory controlled by the fiduciary are distinct'.<sup>32</sup>

## The liability of knowing recipients

In determining the scope of liability of ‘knowing recipients’, the scope of ‘accessorial liability’ of ‘knowing assistants’ was considered. Gleeson JA rejected the proposition that the liability of a knowing assistant was confined by the extent of a defaulting fiduciary’s liability.

Gleeson JA stated that the High Court case of *Wilson*<sup>33</sup> ‘makes plain that a plaintiff is entitled to cumulative remedies being a compensatory remedy against the fiduciary (who made no profit from the default) and a gain-based remedy of an account of profits against the knowing assistant (who profited from his or her own misconduct)’.<sup>34</sup>

His Honour noted that with several liability of a knowing assistant established by *Wilson*, there was no reason to distinguish between the liability of knowing assistants and knowing recipients.<sup>35</sup>

Gleeson JA also considered whether the appellants’ submission that granting a gain-based remedy against a knowing recipient was tantamount to a beneficiary condoning a breach of trust by a fiduciary. This line of argument was rejected on the basis of the differing liabilities of fiduciaries and knowing recipients.<sup>36</sup>

‘As against the fiduciary, a plaintiff does not condone the fiduciary’s breach of duty by seeking a gain-based remedy of an account of profits from the knowing recipient (who profited from its own misconduct by the increased value in the property received or income from such property). The liability of the knowing recipient is different in nature and extent to the liability of the fiduciary, including that the knowing recipient does not owe a duty of loyalty to the principal. A gain-based remedy against the knowing recipient is not inconsistent with a compensation remedy against the defaulting fiduciary (who made no profit from the default).’ (citations omitted).

For those reasons, the appeal on grounds 1, 2 and 5 failed.

## Denial of procedural fairness

By ground 3, the appellants submitted that the trial judge should not have undertaken an account of profits on the contention that (1) the trial had been conducted on the basis an inquiry would be held if an account of profits was sought and (2) no assessment had been sought prior to trial.<sup>37</sup> The appellants also advanced that they had not had the benefit of calling evidence and making submissions to discharge their onus of proving why the profits of the knowing recipients ought not be disgorged.<sup>38</sup>

The Court dismissed this ground of appeal given that by the issues raised in the pleadings, the appellants were on fair notice of the case. The ‘forensic choice not to contest BCEG’s case by service of evidence’ was taken by BCEG without complaint and in this circumstance no ground of denial of procedural fairness could be maintained.<sup>39</sup>

## Fiduciary duties and causation of loss

The appellants challenged the trial judge’s finding on causation in respect of the losses claimed related to the Wagga project. They submitted that her Honour had erred in attributing an additional duty of a positive nature on Mr Xiao and Ms Chen to disclose their breaches of fiduciary duty to BCEG.<sup>40</sup>

BCEG countered that rather than imputing a positive duty of disclosure on the fiduciaries, her Honour’s finding was attributable to Mr Xiao and Ms Chen’s ‘continuing deception’ creating an adequate or sufficient connection between the breaches of fiduciary duty and the loss suffered by BCEG committing to the Wagga project.<sup>41</sup> Counsel for BCEG argued that the BCEG directors’ lack of awareness of the deceit was integral to the breach.<sup>42</sup>

‘Far from being a matter divorced from breach and requiring a positive duty to disclose a wrongdoing, the wrongdoing is intimately bound up with the failure to disclose. The breach occurred, in part at least, because of that failure.’

On appeal, Gleeson JA distinguished cases of single transactions where there was a breach of fiduciary duty from the continuation of the wrongful act and loss arising therefrom. The fact that the breach of duty in respect of the Varsity Lakes project and the transactions in relation to the Wagga project were ‘separate subsequent and otherwise unimpeached’<sup>43</sup> broke any causation established by ‘continuing deception’.

The contention by BCEG that Mr Xiao and Ms Chen had to obtain the informed consent of BCEG to dissipation of the monies from the Varsity Lakes project to the West Wyalong project was rejected by the Court. Any such informed consent does not form ‘a mainspring of equitable liability’.<sup>44</sup> The Court held that where a fiduciary sought to escape a finding of breach of duty, disclosure or the obtaining of informed consent ‘is simply a means of avoiding a breach, not a duty’.<sup>45</sup>

In respect to the specific issue of causation and any obligation to disclose, Gleeson JA cited the judgment of Besanko J in *Blackmagic* where he said:<sup>46</sup>

‘... The duty here was a duty to avoid a conflict of interest and duty. The breach was the failure to comply with that duty. An award of equitable compensation involves a comparison between no breach (that is, no conflict of interest and duty) and breach (a conflict of interest and duty). Compliance with the duty does not involve disclosure; rather, it involves avoiding a conflict of interest and duty.’

As disclosure by a fiduciary of a conflict of interest is not a positive duty but ‘rather a defence to what otherwise would be a breach of duty’,<sup>47</sup> Gleeson JA found that her Honour’s causation finding could not be sustained.<sup>48</sup> Upholding ground 4, his Honour said:

‘The finding which should be made is that if the breach of duty by Mr Xiao and Ms Chen in relation to the dissipation of monies from the Varsity Lakes facility had not occurred, BCEG would still have entered into the Wagga project which was ultimately loss making.’

## Quantum

With the appellants succeeding on ground 4, ground 6 which contended that BCEG had failed to prove the quantum of loss on the Wagga project, did not arise.<sup>49</sup> However, Gleeson JA found that if it had arisen, ground 6 would have been rejected on the basis that her Honour's reliance on the financial statements of BCEG as 'best evidence' was sound and accorded with s69 of the Evidence Act 2005 (NSW) and s1305(1) of the Corporations Act 2001 (Cth).<sup>50</sup>

Submissions about her Honour's rejection of the appellants' argument regarding the setting off of 'income' against non-current liabilities recorded in the books of BCEG were also rejected. The appellant's contention conflated items recorded on different balances sheets and was also inconsistent with the application of standard double-entry accounting applied by her Honour.<sup>51</sup> Finally, the appellants had failed to lead evidence of the inaccuracy of any figures contained in the profit and loss statements of BCEG.<sup>52</sup>

## Summary

In the absence of 'seriously considered dicta' from the High Court on the issue of split election between multiple defendants, the Court of Appeal approached the issue through first identifying whether the plaintiff had cumulative remedies against the defendant.

Where a plaintiff has a right to cumulative remedies (as set out in the English case of *Tang Man Sit*) the distinction between gain-based and compensatory remedies does not necessarily apply. It is the plaintiff's ability to identify separate wrongs that enable it to make 'split election' between remedies from multiple defendants. The identification of separate wrongs leads to an attribution of a separate liability.

The decision also makes clear that the principle that 'full satisfaction prevents double recovery' is not offended where remedies are granted against different defendants for different wrongs.

The decision also clarifies that there is no meaningful distinction to be made between knowing assistants and knowing recipients and the liability of such entities is not confined to the extent of a fiduciary's liability.

In considering the interaction between a breach by a fiduciary and seeking profits from a knowing assistant or recipient, the breach by the fiduciary is not condoned or ratified through making a split election. The case distinguishes circumstances where a beneficiary condones the breach of a fiduciary.

The case also affirms that a breach of fiduciary duty does not create any positive obligation on a fiduciary to disclose that breach nor obtain any informed consent to future transactions. A fiduciary's 'continuing deception' does not establish the necessary causation where there has been a breach and transactions entered into are 'separate subsequent and otherwise unimpeached'.

The decision is instructive in terms of the framing of prayers for equitable relief where there are multiple defendants. Focus on the identification of different wrongs by different defendants and identification of the right to cumulative remedies which follow from those wrongs can create possibilities for split election of remedies.

Where split election of remedies is pleaded, following this decision, it is prudent that parties defending an order for both equitable compensation and an account of profits, should deal with issues of evidence for accounts for profits at the trial stage. This includes any evidence of why profits ought not be disgorged. Alternatively, orders could be sought for a 'split trial' to deal separately with any inquiry into an account of profits. This could ensure that all evidential matters are dealt with.



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**1** *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48 at [1].

**2** *Ibid* [20].

**3** *Ibid* [8].

**4** *Ibid* [2], [4].

**5** *Ibid* [4].

**6** *Ibid* [2], [5].

**7** *Ibid* [2], [6].

**8** *Ibid* [3].

**9** *Ibid* [20].

**10** *Ibid* [6].

**11** *Xiao v BCEG International (Australia) Pty Ltd* [2022] NSWSC 972, *ibid* [9].

**12** *Xiao v BCEG International (Australia) Pty Ltd (No 2)* [2022] NSWSC 1102 as summarised, *ibid* [10].

**13** *Ibid* at n 1, [18].

**14** *Ibid* [14].

**15** *Ibid* [13].

**16** *Ibid* [12].

**17** *Ibid* [32].

**18** *Ibid* [35].

**19** *Ibid* [40].

**20** *Ibid* [42]-[43].

**21** *Ibid* [44].

**22** *Ibid* [34].

**23** *Ibid* [47].

**24** [1996] AC 514.

**25** (2001) 205 CLR 635; [2001] HCA 66.

**26** *Ibid* cited in *Xiao v BCEG International (Australia) Pty Ltd* [2023] NSWCA 48, [48].

**27** *Jameson v Central Electricity Generating Board* [1998] QB 323 at 338 cited *Ibid* [50].

**28** *Ibid* at n 1, *Ibid* [51].

- 29** Ibid [74].
- 30** Ibid [77].
- 31** Ibid [79].
- 32** Ibid [67].
- 33** *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427;  
[2011] HCA 48, [106] (Gummow ACJ, Hayne, Crennan and Bell JJ).
- 34** Ibid at n1, [60].
- 35** Ibid [61]-[62].
- 36** Ibid [69].
- 37** Ibid [90].
- 38** Ibid [91].
- 39** Ibid [103].
- 40** Ibid [115].
- 41** Ibid [117].
- 42** Ibid [118].
- 43** Ibid [125].
- 44** Ibid [127], citing *Breen v Williams* (1996) 186 CLR 71;  
[1996] HCA 57, 125 (Gummow J).
- 45** Ibid [131].
- 46** Ibid [134] citing *Blackmagic Design Pty Ltd v Overliese*  
[2011] FCAFC 24; (2011) 276 ALR 646, [109] (Besanko J).
- 47** Ibid [144].
- 48** Ibid.
- 49** Ibid [148].
- 50** Ibid [151].
- 51** Ibid [156].
- 52** Ibid [157].