



UNIVERSITY  
OF WOLLONGONG  
AUSTRALIA

University of Wollongong  
**Research Online**

---

Faculty of Law, Humanities and the Arts - Papers

Faculty of Law, Humanities and the Arts

---

2015

# The employee's contractual duty of fidelity

Andrew Frazer

*University of Wollongong, [afrazer@uow.edu.au](mailto:afrazer@uow.edu.au)*

---

## Publication Details

A. Frazer, 'The employee's contractual duty of fidelity' (2015) 131 (1) The Law Quarterly Review 53-77.

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library:  
[research-pubs@uow.edu.au](mailto:research-pubs@uow.edu.au)

---

# The employee's contractual duty of fidelity

## Abstract

[not published: supplied by author] Although the implied contractual duty of employees to serve with fidelity and good faith has long been recognised, its origins have been unclear. It is usually dated from a series of cases in the late nineteenth century. It has been contended that this duty is really a transmogrified form of fiduciary duty. This article shows that the duty of fidelity is not only considerably older than usually recognised, but has been formulated by the courts in a consistent manner and relying exclusively on contract principles. Recent decisions which distinguish contractual and fiduciary obligations are not only well-founded in history and doctrine, but reflect the common law's abiding recognition of legitimate interests of both employer and employee.

## Keywords

fidelity, duty, employee, contractual

## Disciplines

Arts and Humanities | Law

## Publication Details

A. Frazer, 'The employee's contractual duty of fidelity' (2015) 131 (1) The Law Quarterly Review 53-77.

## THE EMPLOYEE'S CONTRACTUAL DUTY OF FIDELITY

Andrew Frazer

*Associate Professor, School of Law, University of Wollongong*

This article aims to demonstrate that the current position which prevails in the common law systems of the Commonwealth, that employees are not necessarily fiduciaries, is supported by history, doctrine and policy. The employee's well-established implied contractual duty of fidelity and good faith, while sharing the language and some of the hallmarks of fiduciary duty, is separate from it, although the two will often overlap. It is not necessary or sound to posit the foundations of this implied duty in equitable terms. The implied contractual duty of fidelity was recognised from at least the late eighteenth century, and was developed separately from equitable principles. While it was formulated by some later decisions in ways that allowed its confusion with fiduciary duty, the common law and equitable duties have remained distinct. Explanations of the employee's duty as deriving exclusively from equity ignore the important doctrinal and policy reasons for the contractual foundations of the employment relationship in law. While many, if not most, employees nowadays undoubtedly owe fiduciary obligations to their employer, this is not because their contractual duty of fidelity is an inherently fiduciary one.

In the courts the implied duty of fidelity most often arises in litigation against departing employees amidst claims that they have appropriated business opportunities or confidential information. The duty is wider than this, however, and may be breached when employees disparage their employer or injure its reputation, misuse employer property, compete with their employer, or engage in other activity which harms their employer's business or is otherwise incompatible with their duties as an employee, even when no dishonesty or motive of personal gain is involved.<sup>1</sup> The implied duty was first expressed in its modern form in *Robb v Green* in 1895 as an implied obligation of the servant "to serve his master with good faith and fidelity,"<sup>2</sup> though often since described simply as a duty of good faith, faithfulness or loyalty.<sup>3</sup> Recent

---

<sup>1</sup> F. Batt, *The Law of Master and Servant* (London: Pitman, 1929), at p.122; *Sinclair v Neighbour* [1967] 2 Q.B. 279 CA at 287; *R. v Fuller*; *Ex parte Earles and McKee* [1968] 2 O.R. 564 CA; 70 D.L.R. (2d) 108; *Ticehurst v British Telecommunications Plc* [1992] I.C.R. 383 CA; *New Zealand Airline Pilots' Association v Air New Zealand Ltd* [1992] 2 N.Z.L.R. 656 CA; *Lane v Fasciale* [1993] VicSC 311; 5 V.I.R. 508; *Big Save Furniture Ltd v Bridge* (1993) 2 E.R.N.Z. 779 CA; *Byrnes v Treloar* (1997) 77 I.R. 332 NSWCA.

<sup>2</sup> *Robb v Green* [1895] 2 Q.B. 315 CA at 320 per A.L. Smith L.J.

<sup>3</sup> *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227 at 244 per Megarry V.-C. ("implied obligation to be faithful"); *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch. 117 CA at 135-6; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 at [131] per Leggatt J. (obiter).

judicial expressions have tended to present the term in positive form as a duty “to be loyal to ... and to act in the best interests of” the employer<sup>4</sup> or to serve the employer “faithfully and honestly to the best of his abilities.”<sup>5</sup> There has never been a judicial attempt to reconcile the various expressions of the duty, or indeed to formulate it more precisely. Lord Greene M.R. acknowledged it as a “rather vague duty” whose scope depended on the facts in each case.<sup>6</sup> It is now often regarded as subsumed (to some extent at least) under the implied term of trust and confidence which imposes obligations of good faith on both employer and employee.<sup>7</sup>

Professor Robert Flannigan has argued that the implied contractual duty of fidelity is the result of a misreading of cases which applied established principles of fiduciary accountability to employment.<sup>8</sup> He considers the contractual duty to be but a “linguistic mutation” of conventional fiduciary duty, a long-standing error in need of correction. This analysis is part of a wider project which seeks to establish fiduciary principles as the proper foundation of legal duty in “closed access” situations, which he has particularly applied to employment situations.<sup>9</sup> This paper is not intended to engage directly with Professor Flannigan’s wider formulation of fiduciary duty. But a consideration of the position of employees may illustrate the difficulties of adopting a single approach to multifaceted legal relationships such as employment, particularly where the circumstances in which legal duties may arise and their consequences are far-ranging and unpredictable. While it is important to recognise fiduciary principles in cases involving abuse of trade secrets and other confidential information, the origins of the implied term of fidelity do not lie in equity doctrine and its contents cannot be reduced to fiduciary accountability.

The origins of the duty of fidelity lie in the understanding of the common law courts as expressed in decisions from the eighteenth and nineteenth centuries which built upon the pre-

---

<sup>4</sup> *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 at [26] per Moses L.J.; *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB) at [123]-[125] per Popplewell J.

<sup>5</sup> *Shepherd Investments Ltd v Walters* [2006] EWHC 836 (Ch) at [131] per Etherton J.

<sup>6</sup> *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch. 169 CA at 174.

<sup>7</sup> *Mahmud v Bank of Credit and Commerce International S.A.* [1998] A.C. 20 at 46 per Lord Steyn; *Tisco Ltd v Communication and Energy Workers Union* (1993) 2 E.R.N.Z. 779 CA at 782; *Eastwood v Magnox Electric Plc* [2005] 1 A.C. 503 at 523 per Lord Nicholls. The High Court of Australia has now repudiated the existence of the trust and confidence implied term: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; 88 A.L.J.R. 814; 312 A.L.R. 356.

<sup>8</sup> R. Flannigan, “The [Fiduciary] Duty of Fidelity” (2008) 124 L.Q.R. 274.

<sup>9</sup> R. Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Can. Bar Rev. 35; R. Flannigan, “The Core Nature of Fiduciary Accountability” [2009] N.Z. L. Rev. 375; R. Flannigan, “Access or Expectation: The Test For Fiduciary Accountability” (2010) 89 Can. Bar Rev. 1; R. Flannigan, “The Fiduciary Accountability of Ordinary Employees” (2007) 13 Can. Lab. & Emp. L.J. 283; R. Flannigan, “Child Labor: The Partial Fiduciary Accountability of Parents” (2007) 86 Can. Bar Rev. 293; R. Flannigan, “Fiduciary Mechanics” (2008) 14 Can. Lab. & Emp. L.J. 25; R. Flannigan, “The Fiduciary Duty of Departing Employees” (2008) 14 Can. Lab. & Emp. L.J. 355.

industrial master and servant law and developed it within the doctrinal framework of contract law. The principles which may be derived from these cases were developed in decisions made on common law pleadings for breach of contract or recovery of wages as a form of debt. The range of issues involved has always extended well beyond situations involving employee competition, misappropriation or abuse of confidential information. To limit the scope of inquiry to circumstances of confidential information is to leave out of account the many other situations in which the implied duty becomes important, not least in dismissal where claims to proprietary interests are not involved. The principles of equity may have been an expression of the conventional social norm which proscribed the opportunistic taking of advantage, as Professor Flannigan argues. The common law, however, focused mainly on loss or harm rather than risk of gain. It also recognised other norms — such as promotion of the employer's business by means of employment; as well as the freedom of workers to earn a living, to choose and change their employer, and to improve their situation by acquiring skills and knowledge from their work. It was through the implied term and its limits that such norms were sought to be balanced. The debate concerning the fiduciary status of employees and the scope of the mutual duty of trust and confidence should take note of the range of norms and interests which goes beyond the unitarist approach to employment relations inherent in a purely fiduciary approach to employee duties.

## The Early Common Law

The common law courts up to the twentieth century did not embrace a single category of employer and employee. Many of those we would now recognise as employees would not have been considered in Georgian and Victorian England to have the socially inferior and legally subordinate status of a servant. In fact a separate legal regime applied to servants, workmen and labourers: they were subject to criminal penalties under the Master and Servant Acts for absconding or other misbehaviour under their contract of service, but they were also able to use small claims procedures for recovery of wages before the magistrates.<sup>10</sup> The courts defined the workers covered by this system in terms of being either manual workers or those who had contracted into service rather than for piece-work, but balked at extending the legislation to higher status workers such as clerks and pattern makers.<sup>11</sup> It was only with the repeal of the Acts

---

<sup>10</sup> *Master and Servant Act 1823*, 4 Geo. IV, c.34; *Master and Servant Act 1867*, 30&31 Vict., c.90; see D. Hay, "England, 1562-1875: The Law and Its Uses", Ch.2 in D. Hay and P. Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill NC: University of North Carolina Press, 2004).

<sup>11</sup> *Branwell v Penneck* (1827) 7 B.&C. 536; 108 E.R. 823; M. Lindner, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (New York: Greenwood Press, 1989), at pp. 65-68; R. Steinfeld, *Coercion, Contract, and Free Labour in the Nineteenth Century* (Cambridge: Cambridge University Press, 2001), at p.54.

and the gradual adoption of a single test for the master-servant relationship based on control that a uniform legal relationship of employment began to develop.<sup>12</sup> The creation of a universal relationship of employer and employee did not occur in England until well into the twentieth century, when the courts expanded the traditional category of master and servant and gradually applied it to all workers in the context of new statutory worker welfare regimes.<sup>13</sup> The term “employee” was a late nineteenth-century neologism, one applied to wage- and salary-earners generally only by the 1920s.

Nonetheless, from the mid-nineteenth century judges began to refer to contracts for the performance of work or services in return for time-based payment as being for hiring or service, and the parties involved as the “employer” and the “employed” even where the worker involved did not bear the inferior social status and subservience attached to servants.<sup>14</sup> At that time agency was almost invariably described in the same language: agents were *employed* to pursue the business interests of the principal (the *employer*). Non-manual workers such as warehouse managers, commercial travellers, teachers and professionals were all described by judges as “employed”, the hirer being called “employer” rather than master. Such workers were often also identified as agents even when questions of agency law were not involved. Increasingly their duties were derived by resort to general contract, trade usage and the rules of agency rather than specifically from the law of master and servant.<sup>15</sup> As markets for industrial and mercantile services expanded together with the space and scale of business organisations and networks, the use of this term “employed” was extended. The term “employed” was also applied to purely commercial contracts for the performance of work, even in the traditionally independent crafts such as printing.<sup>16</sup> Some of the confusion which has arisen in relation to the duty of fidelity

---

<sup>12</sup> The control test was formulated by Bramwell L.J. in *Yewens v Noakes* (1880) 6 Q.B.D. 530, though a similar approach had been put forward in *Sadler v Henlock* (1855) 4 E.&B. 570; 119 E.R. 209.

<sup>13</sup> S. Deakin, “The Evolution of the Contract of Employment, 1900-1950: The Influence of the Welfare State”, Ch.11 in N. Whiteside and R. Salais (eds), *Governance, Industry and Labour Markets in Britain and France* (London, Routledge, 1998); S. Deakin, “The Contract of Employment: A Study in Legal Evolution” (Working Paper 203, Centre for Business Research, University of Cambridge, 2001).

<sup>14</sup> *Emmens v Elderton* (1853) 4 H.L.C. 624; 10 E.R. 606; see A. Merritt, “The Historical Role of Law in the Regulation of Employment” (1982) 1 *Australian Journal of Law and Society* 56; S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2005), at pp.79, 107.

<sup>15</sup> H. Broom and E. Hadley, *Commentaries on the Laws of England* (London: William Maxwell, 1869), vol. 1 at p.512. Trade usages were “tacitly annexed” unless expressly or impliedly excluded: *Metzner v Bolton* (1854) 9 Ex. 517 at 521 per Parke B.; 156 E.R. 221.

<sup>16</sup> *Tuck & Sons v Priester* (1887) 19 Q.B.D. 629.

stems from the assumption by later judges and writers that all those described as “employed” in the earlier cases were engaged under contracts of service.<sup>17</sup>

Under the common law, those workers classed as servants were employed to serve their master under a contract that was personal in nature and usually exclusive of other employment.<sup>18</sup> The content of a servant's duties was derived from custom and usage, reflecting both the subordinate social status of the servant and the functional nature of the relationship. It is not hard to see how the nature of such personal service would be seen to bring with it moral standards of fidelity which were apt to be recognised in law. According to the common law, servants were under a duty of faithful service: to perform their duties not only skilfully and honestly, but diligently and faithfully with due regard to the interests of the master. The injunction for servants to be “good and faithful” in pursuit of their master's interests had Biblical authority.<sup>19</sup> The common law however was less exacting and applied only to harmful acts, for breach of the duty of faithful service could in practice only be established by proof of actual loss or disobedience: the merely indolent servant could not be dismissed unless he or she had wilfully failed to obey a specific order.<sup>20</sup>

By the end of the eighteenth century it was recognised that a servant at least owed a duty not to act contrary to the master's business interests. The key case in this respect is *Nichol v Martyn* (1799), an action against an ex-servant for poaching the former master's customers. In dismissing the action Lord Kenyon C.J. relied on apparently settled doctrine that “a servant, while engaged in the service of his master, has no right to do any act which may injure his [master's] trade, or undermine his business”.<sup>21</sup> The employee's duty was not absolute, however: Lord Kenyon said it was an “imperfect obligation”, noting that while a servant was under a duty not to harm his master's business, he was free to compete after the service had ended.<sup>22</sup>

This duty not to harm the master's business was invoked consistently in the common law dismissal cases of the nineteenth century, with Lord Kenyon's oft-repeated dictum becoming

---

<sup>17</sup> Eg. *Morison v Thompson* (1874) L.R. 9 Q.B. 480 (commercial broker); *In Re Irish* (1888) 40 Ch.D. 49 (court-appointed receiver).

<sup>18</sup> *Lancaster v Greaves* (1829) 9 B.&C. 628 at 631; 109 E.R. 233; see M. Lindner, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (New York: Greenwood Press, 1989), at p.67.

<sup>19</sup> *Matthew* 25: 21-30 (King James Version).

<sup>20</sup> *Fillieul v Armstrong* (1837) 7 Ad.&E. 557; 112 E.R. 580; *Cussons v Skinner* (1843) 11 M.&W. 161; 152 E.R. 758; *Lomax v Arding* (1855) 10 Ex. 734 at 736; 156 E.R. 636.

<sup>21</sup> *Nichol v Martyn* (1799) 2 Esp. 732 at 733; 170 E.R. 513.

<sup>22</sup> The statement that a servant was free to canvass customers' future trade while still employed was doubted by Hawkins J. in *Robb v Green* [1895] 2 Q.B. 1 at 15, and was disapproved by the Court of Appeal in *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80.

encapsulated in the notion of faithful service or fidelity. While the term “fidelity” was not much used in the early cases,<sup>23</sup> the early textbook writers were in no doubt that a servant was under such a duty at common law. The servant’s duty of fidelity was considered an aspect of the duties both of obedience and of due care. As early as 1768 *Bacon’s Abridgment* had indicated that a servant’s liability to his master normally lay only in a contractual undertaking for “diligence and fidelity.” Any duty of a servant based on an “implied trust or confidence” arose only under an additional obligation:

“Now the first contract, whereby he becomes a servant, implied no more than an undertaking for his care and obedience; and whenever he afterwards intermeddles in the affairs of his master, it is but in consequence of that original contract, and therefore cannot be extended any further; and since when he first contracted, it was an undertaking for no more than his own care and fidelity, whenever he intermeddles with his master's affairs, it is under that general undertaking, and by consequence he cannot be charged but for deficiency, in point of care, or of faithfulness...”<sup>24</sup>

Smith’s 1846 text said that a servant had a duty “to be honest and diligent in his master’s business”, while stating also that habitual negligence or “conduct calculated seriously to injure his master’s business” was a ground for dismissal. Such duty was “implied by law from the relationship of master and servant”.<sup>25</sup> Later works placed the duties of honesty and diligence under a wider duty to serve faithfully. Macdonnell said that a servant was bound to be “reasonably diligent and faithful in his service”, and also “to consult the interests of his master” so as not to cause serious injury thereto. The former duty was described as one of “fidelity” or “faithful service”.<sup>26</sup>

It was really only in those relatively scarce actions for wrongful dismissal that such contractual duties of servants were established judicially. The right of the master to dismiss a servant without notice was recognised early in the nineteenth century, but it was conditional on misconduct.<sup>27</sup> Whether the misconduct justified dismissal was a question of fact determined by a jury. Thus the legal position on the seriousness of misconduct required was neither clear nor systematic at least until the 1830s when the common law judges began to formulate the rationale for allowing summary dismissal. In 1831 Parke J. summarised the position as being that a

<sup>23</sup> See *Tickell v Read* (1774) Lofft 215 at 215 (in argument); 98 E.R. 617: “if the servant owed to the master fidelity and obedience, the master owed to the servant protection and defence”. Hiring for a short term to ascertain a servant’s “diligence and fidelity” was upheld in *R v Inhabitants of Haughton* (1716) Sess. Cas. 40; 93 E.R. 40, thereby denying the servant relief under the old poor laws.

<sup>24</sup> M. Bacon, *A New Abridgment of the Law*, 3rd edn (London: J. Worrall & Co, 1768), vol. 3 at p.564. A variant is quoted in *R. v Bazeley* (1799) 2 Leach. 835; 168 E.R. 517.

<sup>25</sup> C. Smith, *A Treatise on the Law of Master and Servant* (London: Sweet, 1846), at pp.65, 72-3.

<sup>26</sup> J. Macdonnell, *The Law of Master and Servant* (London: Stevens, 1883), at pp.208, 210; see also W. Holdsworth, *The Law of Master and Servant* (London: G. Routledge, 1876), at pp.40, 43.

<sup>27</sup> *Robinson v Hindman* (1800) 3 Esp. 235; 170 E.R. 599; *Brown v Croft* (1828) 6 C.&P. 16n; 172 E.R. 1127n.



contract of service contained an implied term allowing the master to dismiss for “moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect”.<sup>28</sup> The language of implied terms was gradually adopted by the courts, largely on the basis of custom or the nature of the engagement. The categories elucidated by Parke J. variously included the types of misconduct which would later be classified as breaches of the contractual duty of fidelity. Moral misconduct included not only theft, fraud and misappropriation while engaged in duties, but also accusations of impropriety and misuse of information gained during employment to the master's prejudice; while disobedience embraced other conduct injurious to the master's business.<sup>29</sup> As with disobedience generally,<sup>30</sup> a wilful failure to provide faithful service was good ground for dismissal; however mere breach of contract by the servant was not enough: it had to be sufficiently serious as to justify dismissal, or else a failure to perform “amounting to a dissolution of the engagement.”<sup>31</sup>

The master's right to dismiss summarily for injury to the business was well accepted and applied well beyond those traditionally classed as servants. In 1837 it was held that dismissal of a theatre manager (who was engaged on a salary but not described as a servant) would be valid if it were shown that the manager “was so conducting himself as that it would have been injurious to the interests of the theatre to have kept him.”<sup>32</sup> Similarly, a master builder was justified in dismissing a workman carpenter who disobeyed the instructions of the occupier on whose premises the work was being done, because the workman's actions injured the master's business by damaging his reputation.<sup>33</sup> Encouraging an apprentice to leave, conspiring with a competitor to take the master's business away, or arranging to set up in competition with the master, were also grounds for dismissal on the basis of injury to the master's business.<sup>34</sup>

Some “superior” servants were understood to be under a more onerous duty of faithful service. Clerks in particular were considered to owe special duties of confidentiality which

---

<sup>28</sup> *Callo v Brouncker* (1831) 4 C.&P. 518 at 519; 172 E.R. 807. On the recency of the principles, see *Lomax v Arding* (1855) 10 Ex. 737 at 736; 156 E.R. 637.

<sup>29</sup> *Amor v Fearon* (1839) 9 Ad.&E. 548; 112 E.R. 1320; *East Anglian Railway Co v Lythgoe* (1851) 10 C.B. 726; 138 E.R. 287; and see the exchange between Coleridge J. and counsel in *Read v Dunsmore* (1840) 9 C.&P. 587 at 594; 173 E.R. 968.

<sup>30</sup> *Spain v Arnott* (1817) 2 Stark. 256; 171 E.R. 638; *Turner v Mason* (1845) 1 M.&W. 112; 153 E.R. 411. In *Cussons v Skinner* (1843) 11 M.&W. 161 at 171-2; 152 E.R. 758, Parke B. said that disobedience, if not wilful, had to be the cause of loss “to a considerable extent”.

<sup>31</sup> *Fillieul v Armstrong* (1837) 7 Ad.&E. 557 at 563-4; 112 E.R. 580.

<sup>32</sup> *Lacy v Osbaldiston* (1837) 8 C.&P. 80; 173 E.R. 408.

<sup>33</sup> *Read v Dunsmore* (1840) 9 C.&P. 587; 173 E.R. 968.

<sup>34</sup> *Turner v Robinson* (1833) 6 C.&P. 15; 172 E.R. 1126; *Mercer v Whall* (1845) 5 Q.B. 447; 114 E.R. 1318; *Hobson v Cowley* (1858) 27 L.J. Ex. 205.

inherited in the express and implied terms of their contract of service, and by the common law principles of agency.<sup>35</sup> Thus clerks engaged in banking and mercantile houses owed duties to well and truly account for all monies, books and papers entrusted to them. The duty to account was enforced at common law under the common money counts, which was less extensive than the equitable liability to account for fraudulent profits. Their duties to account and to keep secrets were usually contained in substantial monetary bonds which were required to be posted on the servant's behalf to ensure the faithful discharge of their service.<sup>36</sup> The recitals and terms of the clerical bond were treated as evidencing the terms of service.<sup>37</sup> The common terms appear to have found their way into custom. So by 1843 it was said to be clear "that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk".<sup>38</sup> Earlier, Best C.J. thought that misconduct justifying dismissal would include a situation where a clerk had "betrayed the secrets of his employer".<sup>39</sup> So, while the common law of master and servant recognised a duty of confidentiality, it was limited to a particular class of white-collar servants, based firmly in contract and remedied by dismissal or (conceivably) damages. Breach of this duty was one of several kinds of misconduct which the courts recognised as allowing dismissal of non-manual servants, not because of the risk of opportunism, but because it was so inconsistent with the nature and terms of their service that the master was excused the obligation to maintain the relationship.<sup>40</sup>

At the same time as these developments in the common law, equity was also evolving relevant doctrines in the form of fiduciary accountability and the action for breach of confidence. While only one of the cases in these areas involved a servant as such, the circumstances in which

<sup>35</sup> See F. Dowrick, "The Relationship of Principal and Agent" (1954) 17 M.L.R. 24 at 32.

<sup>36</sup> See eg. *Whitnash v George* (1828) 8 B.&C. 556; 108 E.R. 1149; *Anderson v Thornton* (1842) 3 Q.B. 271; 114 E.R. 510; J. Chitty, *The Practice of the Law* (London: Henry Butterworth, 1833), vol. 1, at p.80.

<sup>37</sup> In early cases Lord Mansfield treated the terms of the bond as evidencing the subject-matter of the contract of service: *Bevan v Lucas* (1783) 3 Dougl. 321; 99 E.R. 676; *Barker v Parker* (1786) 1 T.R. 287; 99 E.R. 1098. Express undertakings to serve faithfully and to keep secrets persisted well into the twentieth century: see *Putsman v Taylor* [1927] 1 K.B. 637; *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80 CA.

<sup>38</sup> *Tipping v Clarke* (1843) 2 Hare 393 at 393; 67 E.R. 157 per Wigram V.-C. This case involved a relationship of merchant and factor; the statement was made when considering whether equity would allow discovery if information was obtained from a servant. See also *Gartside v Outram* (1856) 26 L.J. Ch. 113 per Wood V.-C. at 114 for recognition of the clerk's duty of confidentiality in equity.

<sup>39</sup> *Beeston v Collyer* (1827) 2 C.&P. 607 at 609; 172 E.R. 276.

<sup>40</sup> M. Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976), at pp.214-5; see *Ridgway v Hungerford Market Company* (1835) 3 Ad.&E. 171 at 179-80; 111 E.R. 378; *Lacy v Osbaldiston* (1837) 8 C.&P. 80 at 86; 173 E.R. 408; *Edwards v Levy* (1860) 2 F.&F. 94; 175 E.R. 974; *Horton v M'Murtry* (1860) 65 H.&N. 668; 157 E.R. 1347; W. Story, *Treatise on the Law of Contracts*, 4th edn (Boston: Little, Brown, 1856), vol. 2, at p.523.

the equitable duties arose were similar to situations in which clerks and like servants might often be involved. In the nineteenth century a series of cases in the Court of Chancery recognised the availability of an injunction to restrain the commercial use of the contents of documents which had been entrusted to the defendant under contract. In an early and sketchily reported case, a veterinary assistant was restrained from using secret recipes for the composition of medicines which he had obtained surreptitiously. The claim was not based specifically on a master-servant relationship but was founded in breach of confidence and express agreement. The Lord Chancellor granted an injunction for “a breach of trust and confidence” but this language is equally consistent with an obligation based in fiduciary duty or a separate duty of confidentiality in equity or under contract.<sup>41</sup> In *Prince Albert v Strange*<sup>42</sup> a master printer was restrained from reproducing copies of etchings which he had contracted to print, on the basis that such use was “a breach of trust, confidence, or contract” and therefore amenable to Chancery’s original jurisdiction. By the time of *Morison v Moat* in 1851, it was accepted that equity would intervene to prevent the misappropriation of a secret by “breach of faith or of contract” in circumstances of a confidential relation, such as the partnership there at issue.<sup>43</sup>

Servants were, of course, considered agents both in equity and at common law. This was particularly the case when the master’s liability to third parties was concerned, but agency concepts were also relevant to servants’ duties when acting on the master’s behalf in relation to property or transactions. In equity, an agent’s duties derived from a relationship of confidence and were increasingly enforced in Chancery from the beginning of the nineteenth century.<sup>44</sup> The common law courts also enforced duties on agents arising by operation of law, the most important of these being a duty not to make an undisclosed profit from the relationship.<sup>45</sup> Under the common money counts, a master could recover profits obtained by a servant from a third party while performing service; the profits belonged in law to the master on the basis that the servant was using the time which belonged to the master.<sup>46</sup> In equity, the servant entrusted with property of the master was in the same position as an agent and fully liable to account for all

---

<sup>41</sup> *Yovatt v Winyard* (1820) 1 Jac.&W. 394; 37 E.R. 425 (Lord Eldon L.C.); see M. Richardson et al., *Breach of Confidence: Origins and Modern Developments* (Cheltenham: Edward Elgar, 2012), at p.31. The plaintiff was described as an employer, and in a subsequent case the assistant was described as an agent, the injunction being justified on that basis: *Dietrichsen v Cabburn* (1846) 2 Ph. 57; 41 E.R. 861.

<sup>42</sup> *Prince Albert v Strange* (1849) 1 Mac.&G. 25 at 46; 41 E.R. 1171.

<sup>43</sup> *Morison v Moat* (1851) 9 Hare 241 at 263; 68 E.R. 492.

<sup>44</sup> F. Dowrick, “The Relationship of Principal and Agent” (1954) 17 M.L.R. 24 at 28, 31.

<sup>45</sup> Dowrick, “The Relationship of Principal and Agent” (1954) 17 M.L.R. 24 at 32.

<sup>46</sup> *Thompson v Havelock* (1808) 1 Camp. 527; 170 E.R. 1045.

profits obtained from its use.<sup>47</sup> Cases involving servants occasionally came before the Court of Chancery and when they did the strict rules for fiduciary relationships were applied, either on the basis of agency or because of the comprehensive nature of the particular service. It was not difficult for a servant (such as a ship captain) who was “engaged to devote the whole of his time and attention to [the master’s] concerns” to be considered as having fiduciary duties which prohibited any self-interested action during the period of service.<sup>48</sup>

So the duties of servants and similar workers were developed separately by courts of common law and equity and for different purposes. At common law the identification of such duties arose mainly in the course of determining what constituted a sufficiently serious breach of contract to justify dismissal; while in equity such issues arose in actions to recoup profits or to restrain misuse of information obtained in situations of confidence. Prior to Judicature the common law courts strictly speaking could not have regard to equitable principles; while in Chancery it was not necessary to distinguish between servants and (other) agents, or to examine closely the content of their contractual obligations. Such common ground as existed arose from that medium of the nineteenth-century juridical *zeitgeist*, agency.

### **Development of the Employee’s Duty in the Late Nineteenth Century**

The case usually given as first establishing a servant’s duties in fiduciary terms is *Pearce v Foster* in 1886, where a “confidential” clerk for a mercantile firm brought an action for wrongful dismissal. The employing firm defended the dismissal by reason of the servant having become financially exposed by heavy speculative investment in “differences,” or share futures contracts, over a period of years. The plaintiff’s counsel argued, on the basis of the established common law, that the servant had not committed serious misconduct in the course of his service or engaged in behaviour resulting in loss to his employer.<sup>49</sup> This approach was rejected by the Court of Appeal which, in judgments bare of cited precedent, held that the dismissal was justified. By becoming financially enmeshed in share speculation while at the same time he was regularly called on to give investment advice to the firm’s partners, the plaintiff had placed himself in a position where he could no longer be trusted to perform his duties in a faithful manner. Lord Esher M.R. effectively restated the common law when he said that

“where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss

---

<sup>47</sup> *East India Co. v Henchman* (1791) 1 Ves. Jun. 287; 30 E.R. 347; *Shallcross v Oldham* (1862) 2 J.&H. 609; 70 E.R. 1202.

<sup>48</sup> *Thompson v Havelock* (1808) 1 Camp. 526 at 528; 170 E.R. 1045.

<sup>49</sup> *Pearce v Foster* (1886) 17 Q.B.D. 536 CA at 538.

him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him.”<sup>50</sup>

This places the right to dismiss within the common law formula of serious misconduct, self-incapacitation or injury to the master's business. The other judges also considered the plaintiff's investments as incompatible with the faithful performance of his duty, and adverted to the likelihood that news of the servant's speculation would cause harm to the firm's business reputation.

Central to the judgments was this particular servant's special position of confidence in giving impartial advice: the employers “were entitled to the unfettered use of his mind” and were justified in treating him as no longer able to provide it as a result of his own actions.<sup>51</sup> While the language used – trust, confidence and conflict of interest – is suggestive of fiduciary duty, the reasoning of the court was clearly founded on the servant's contractual duties and his master's justification in considering him incapacitated from performing them. The issue of faithfulness in employment was also raised tangentially later in 1886 when a former clerk was held in contempt for interfering with a court-appointed manager by using a list of his former master's customers to solicit their trade. Bowen L.J. thought it clear that information obtained in confidence could not afterwards be used by a servant “to advance his own business to the injury of his master's interests”; for it was “part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage.”<sup>52</sup>

The other major case of this period, *Boston Deep Sea Fishing and Ice Company v Ansell*,<sup>53</sup> is complicated by the fact that the defendant was the managing director of the employing company and so owed fiduciary duties as a director; he was also an agent of the company, being authorised to act on its behalf in commissioning the building of new fishing smacks. The case revolved on a claim by the company for an account of profits for secret commissions and a cross-claim for wrongful dismissal, but was decided at first instance by Kekewich J. solely on common law principles. The commissions received by Ansell from the shipbuilding company were monies received by an agent while acting as such, and so were legally the property of his principal.<sup>54</sup> However Ansell's conduct was not sufficiently serious to justify his dismissal as a servant for breach of his duty of honesty and diligence.

---

<sup>50</sup> *Pearce v Foster* (1886) 17 Q.B.D. 536 at 539.

<sup>51</sup> *Pearce v Foster* (1886) 17 Q.B.D. 536 at 543 per Lopes L.J.

<sup>52</sup> *Helmore v Smith* (1886) 35 Ch.D. 449 CA at 456.

<sup>53</sup> *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch.D 339 CA.

<sup>54</sup> *Boston* (1888) 39 Ch.D 339 at 345. At common law, secret commissions received by an agent were a debt to the principal and recoverable by an action for money had and received; they could also be recovered in equity for

The decision was reversed on appeal, largely on the basis that Ansell's receipt of the commissions was in breach of his duty of confidence owed as an agent, whether the agency arose from his position as servant, director or by express undertaking. The court held unequivocally that Ansell's act of obtaining a commission from the shipbuilding company was misconduct enough to warrant dismissal. According to Cotton L.J., the dismissal was justified because *any* agent under contract who received an undisclosed commission while acting on behalf of his principal could be terminated because he had shown himself "incompetent of faithfully discharging his duty to his principal."<sup>55</sup> However it was Bowen L.J., a common lawyer,<sup>56</sup> who particularly stressed the connection between the confidential relation of agency and the servant's duty of faithful service. Ansell's secret profits were a breach of "the condition which is implied in every contract of service or agency such as his — the condition that he will faithfully and truly discharge his duty towards his employer".<sup>57</sup> The language used by Bowen L.J. indicates that he regarded the duties of servants and agents in this respect as equivalent: deliberate fraud by a servant was a violation of "the confidential relation or breach of faithful service which the servant is bound to render." Like the other Lord Justices, though, his decision was firmly founded in the duty which Ansell, whether servant or not, owed as an *agent*:

"Now, there can be no question that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuation of confidence between them."<sup>58</sup>

Servants in a position like Ansell's were almost invariably agents as well, but the explanation given by the court suggests that the equitable duty he owed arose from his agency.<sup>59</sup> This position was reiterated several years later in *Lister v Stubbs*, where a foreman who took secret commissions from firms while in the service of his master was liable to account for the payments received in breach of his fiduciary duty which arose by virtue of acting as agent for his master.<sup>60</sup>

---

breach of fiduciary duty but were not the property of the principal until decreed: *Morison v Thompson* (1874) L.R. 9 Q.B. 480; *Lister v Stubbs* (1890) 45 Ch.D. 1 CA.

<sup>55</sup> *Boston* (1888) 39 Ch.D 339 at 357 per Cotton L.J.

<sup>56</sup> [Sir H. Stephen], "Bowen, Charles Synge Christopher" in S. Lee (ed.), *Dictionary of National Biography*, supplement vol. 1 (London: Smith Elder, 1901) at pp 238-9.

<sup>57</sup> *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch.D 339 at 362 per Bowen L.J.

<sup>58</sup> *Boston* (1888) 39 Ch.D 339 at 363 per Bowen L.J.

<sup>59</sup> In *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134 at 155; [1942] 1 All E.R. 378, Lord Wright explained Ansell's fiduciary liability as arising from his agency relationship with the company.

<sup>60</sup> (1890) 45 Ch.D. 1. The application for an interlocutory injunction in that case failed because an order for account had not been made and so the monies were not yet the property of the principal.

Cases like *Pearce* and *Boston* were unusual in involving actions for wrongful dismissal, which placed the issue of implied contractual duties and their breach at the centre of argument. The seriousness of the servant's conduct was increasingly determined by the developing contract law concept of repudiation rather than the more specific formula of misconduct. Somewhat different issues arose in disputes over misuse of trade secrets and confidential information. A series of such cases in the 1890s embraced the idea that the servant's contractual duties imposed obligations equivalent to the equitable duty of confidence. In all these cases the defendant was either a confidential servant or an agent. The question first came before Kekewich J. on an application for an interim injunction to restrain an ex-servant (characterised as a clerk in confidential employment) from using information copied from his former master. Kekewich J. reconciled the authorities, based separately on equitable and contract principles, by suggesting that the courts implied a contractual duty once a confidential relationship was established. The legal issue, as he saw it, concerned the position of a "clerk or servant in the employ of ... a person carrying on a professional or commercial business". By making copies, the servant had abused "a confidence arising out of the mere fact of employment"; the confidence "necessarily arising out of the circumstances" of his relationship.<sup>61</sup> However Kekewich J. said that it was "impossible to lay down a general rule with reference to all trades and professions."<sup>62</sup>

Then came the decision in *Lamb v Evans*<sup>63</sup> involving an application for an interlocutory injunction to restrain a travelling agent, who was paid by commission, from using the advertisements he had collected for his principal in a rival commercial directory. Although the case was subsequently regarded as authority for servants' duties, the relationship between the parties was described exclusively in the judgments as one of principal and agent and not of master and servant. In view of the complete absence of supervision and the clear implication that he was working on his own account, it is doubtful that he would be regarded as an employee even today.<sup>64</sup> The fiduciary duty which the court recognised lay only in relation to specific property: the principal's copyright in the published advertisements and the printing blocks which the advertisers had entrusted to him as agent of the publisher. As in *Boston*, any fiduciary duty

---

<sup>61</sup> *Merryweather v Moore* [1892] 2 Ch. 518 at 524.

<sup>62</sup> *Merryweather* [1892] 2 Ch. 518 at 525. Kekewich J. also expressed his discomfort at having to decide the matter in the absence of evidence of trade usage, and emphasised that the servant was in the position of a clerk.

<sup>63</sup> [1892] 3 Ch. 462 (Chitty J.); [1893] 1 Ch. 218 CA.

<sup>64</sup> The agent concerned was engaged to canvass within an exclusive area on the continent, and was paid exclusively by a percentage commission which he deducted from receipts. For current tests for the existence of an employment relationship and the importance of the "business" test, see *Lane v Shire Roofing Company (Oxford) Ltd* [1995] I.R.L.R. 493 CA; *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157 at [37]; *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 C.L.R. 21.

owed by the defendant arose from agency, whether in the context of a master-servant relationship or not. Thus Lindley L.J. said:

“What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal.”<sup>65</sup>

Bowen L.J. went further and, as in previous cases, cast the “fiduciary relation of principal and agent” before the court in terms of an implied contractual obligation of confidentiality “which can be fairly implied as part of the good faith which is necessary to make the bargain effectual.”<sup>66</sup>

In the pivotal case of *Robb v Green* the defendant was employed in the plaintiff's service as the manager of a game bird farm on an annual salary and described the plaintiff as his master.<sup>67</sup> While still employed, the servant had secretly copied a list of customers from the order book and used it to solicit them for his own business after he left. The action was brought by the ex-master primarily in breach of contract and sought damages on the ground that there was an implied term of confidentiality which arose from the mutual intention of the parties. The plaintiff had been concerned to keep the details of the business secret and stressed this in his discussion with the defendant prior to the commencement of the engagement. Hawkins J. found that an implied term arose from the correspondence between the parties and constituted conditions of the defendant's service as “[i]t would be absurd to suppose that the plaintiff ever intended to forego those requirements of honesty, fidelity, etc.”<sup>68</sup> that had been discussed in the negotiations. In rejecting the defendant's claim that no term could be implied, Hawkins J. went further by positing the existence of a general term implied by law that the servant

“shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interests in respect to matters confided to him in the course of his service.”<sup>69</sup>

This implied duty was expressed in terms on all fours with the older learning with respect to misconduct. While characterising the servant's wrong as a breach of confidence or of trust, the decision was not based in fiduciary doctrine: the cause of action was founded in contract, breach of which lay in the servant's deliberate use of his master's information “to advance his own

---

<sup>65</sup> *Lamb v Evans* [1893] 1 Ch. 218 CA at 226 per Lindley L.J.; at 235 per Kay L.J.

<sup>66</sup> *Lamb* [1893] 1 Ch. 218 at 229, 231 per Bowen L.J.

<sup>67</sup> See the facts as stated in *Robb v Green* [1895] 2 Q.B. 1 at 4, 8.

<sup>68</sup> *Robb* [1895] 2 Q.B. 1 at 10.

<sup>69</sup> *Robb* [1895] 2 Q.B. 1 at 10-11.



interest at the expense of his employer";<sup>70</sup> and not in the taking of profits irrespective of loss, which has long been the hallmark of breach of fiduciary duty.<sup>71</sup>

When the case came before the Court of Appeal, the judges were in no doubt that the servant had committed a breach of confidence which could be restrained in equity. A similar appeal, heard only the day before, allowed an injunction against a servant for appropriating information in breach of the good faith and confidence which as a clerk he owed to his master.<sup>72</sup> The real issue in *Robb* was whether damages could also be awarded in these circumstances for breach of an implied term. The significant step which the Court of Appeal took was to treat the defendant as subject to the same contractual duty of good faith that Bowen L.J. had said in *Lamb v Evans* was owed under a term implied into the contract of agency.<sup>73</sup> The defendant's conduct was undoubtedly a breach of fidelity or faithful service according to the traditional formulation, at least in relation to dismissal. The inclusion of good faith went further in emphasising that confidentiality formed part of the servant's contractual duty, and it was the violation of this confidentiality for dishonest purposes while still employed which constituted the breach sounding in damages.

Although the decision in *Robb* was emphatic, the precise nature of the servant's duty was not altogether clear. The case has been taken as establishing that, as A.L. Smith L.J. memorably put it, "it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity."<sup>74</sup> But there is reason to believe that the judges were not thinking of the duty as one to be universally implied to such an extent.<sup>75</sup> The term was expressed by reference to the pre-contractual negotiations between the parties and the defendant's peculiarly confidential position as manager of the business. In the reasons given by Lord Esher M.R. the term is implied into a contract of service because it is "a thing which must

---

<sup>70</sup> *Robb* [1895] 2 Q.B. 1 at 19.

<sup>71</sup> *Keech v Sanford* (1726) Sel. Cas. Ch. 61; 25 E.R. 223.

<sup>72</sup> *Louis v Smellie* (1895) 11 T.L.R. 515 CA at 516 per Lindley L.J. The judgment does not explain the source of the duty, but Kekewich J. had earlier awarded damages for breach of an implied term: *Louis v Smellie* (1895) 11 T.L.R. 336 at 337.

<sup>73</sup> This elision may have been aided by Anson's use of the term "contract of employment" to include both mercantile agents and servants: W. Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract*, 6th edn (Oxford: Clarendon Press, 1891).

<sup>74</sup> *Robb v Green* [1895] 2 Q.B. 315 at 320 per A.L. Smith L.J. In the unauthorised reports Smith L.J. is quoted as saying that the implied term was "that the servant shall act with fidelity towards his master" and that the question was whether "the defendant has acted in good faith": (1895) 64 L.J.Q.B. 593 at 605; 73 L.T. 15 at 17.

<sup>75</sup> In the unauthorised reports Lord Esher M.R. is quoted as saying that a duty to act in good faith "is to be implied in every contract of service where there ought to be such faithful service", while A.L. Smith L.J. refers to the duty of fidelity owed by the defendant in the circumstances of "that contract": *Robb v Green* (1895) 64 L.J.Q.B. 593 at 603; 73 L.T. 15 at 16.

necessarily have been in view of both parties when they entered into the contract.” He then explained that it was “impossible to suppose that a master would have put a servant into a confidential position *of this kind*” unless the servant were bound to observe good faith.<sup>76</sup> At this time the courts did not purport to distinguish between terms implied in fact and those implied by law, there being no strong distinction between the implication of terms from “the presumed intention of the parties” and those arising by necessary implication from the nature of the engagement.<sup>77</sup>

That it was not clear that every servant was a fiduciary, even as late as 1910, is illustrated by a decision from Victoria where the Court of Appeal considered that the English cases had not gone so far as to establish that a servant was one of the definite classes of fiduciary. When, however, general equitable principles were applied to the facts the servant was found subject to a fiduciary duty because he had undertaken to act on behalf of his master in the sale of a business, and not simply by virtue of his status.<sup>78</sup> To like effect, in *Amber Size*<sup>79</sup> the argument turned on whether the employee had been employed on a confidential basis, under an express or implied contractual obligation which did not apply in the case of an ordinary employment. Astbury J. summarised the authorities as establishing that an ex-servant could be restrained from divulging information communicated in confidence or under contract, or from making improper use of information “obtained in the course of confidential employment”.<sup>80</sup> As a category determined by the nature of the duties, confidential employment was much narrower than Professor Flannigan’s closed access arrangements which would apply to all employees in most situations. It is true that members of the Court of Appeal in *Re Coomber* said that a fiduciary relation subsisted between servant and master, and that a fiduciary duty is owed by an errand boy “who is bound to bring me back my change”; but that was a comment made in passing to illustrate the wide variety of fiduciary duties which may arise.<sup>81</sup> The errand boy’s duty would arise by agency and apply whether he was a servant or not.

So a close analysis of the older cases which are used to support the existence of congruent contractual and fiduciary duties indicates that there was no conflation of the two. Where a

---

<sup>76</sup> *Robb v Green* [1895] 2 Q.B. 315 at 317 per Lord Esher M.R. (emphasis added).

<sup>77</sup> *The Moorcock* (1889) 14 P.D. 64 CA at 68 per Bowen L.J.; *Hamlyn v Wood* [1891] 2 Q.B. 488 CA at 491 per Lord Esher M.R.; see G. Williams, “Language and the Law IV” (1945) 61 L.Q.R. 384 at 402-3; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555 at 594 per Lord Tucker.

<sup>78</sup> *Prebble v Reeves* [1910] V.L.R. 88 FC at 101, 104 per Madden C.J.; at 108-9 per Hood J.

<sup>79</sup> *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch. 239.

<sup>80</sup> *Menzel* [1913] 2 Ch. 239 at 245, citing *Tuck & Sons v Priester* (1887) 19 Q.B.D. 629.

<sup>81</sup> *Re Coomber*; *Coomber v Coomber* [1911] 1 Ch. 723 CA at 728, 730.

fiduciary duty was held to exist in the case of employees who were not directors, it was based on an actual agency relationship. Otherwise a contractual duty might be implied in a specific relationship of confidentiality. Breach of this duty could be restrained by injunction while resulting at common law in loss-based damages or the right to terminate for incompatibility (repudiation). In *Pearce* the dismissal was justified by the employee's self-incapacitating misconduct, although the language used was of a conflict between interest and duty. In *Boston* the manager used the company's property as if it were his own; as agent and director he could scarcely escape liability for fiduciary breach on entirely conventional grounds. His dismissal from employment was justified by reference to common law misconduct or repudiation of contract rather than by breach of any equitable duty. In *Lamb*, the defendant appropriated intellectual property while discharging his duties as an agent and not by virtue of any status as a servant.<sup>82</sup> In *Robb* the manager, like the servant in *Pearce*, was engaged in a confidential position and there was a strong basis for implying a term in fact, although it was said to apply to all such contracts of service. Confusion arose because confidential master-servant relationships gave rise to both a contractual duty not to act contrary to the master's interests by misuse of position, and a related but separate equitable duty to keep confidential information. Only in *Robb* did the two duties coincide. Apart from Bowen L.J.'s dictum in *Lamb* (and his Lordship seems to have been predisposed towards doctrinal fusion by means of implied terms)<sup>83</sup> the contractual and equitable obligations remained distinct, and the old common law principles retained.

## The Contractual Duty in the Twentieth Century

In wrongful dismissal cases, the question whether the employee had breached an implied term of the contract became strictly unnecessary once it became accepted in the early twentieth century that the right to terminate was founded on repudiation of the contract rather than violation of a specific term.<sup>84</sup> Thenceforth it was mainly in relation to confidential information or post-employment competition (where express clauses became increasingly common) that the employee's duties arose and the implied duty of fidelity was not central to such issues. A distinction continued to be drawn between breach of confidence and breach of the implied term

---

<sup>82</sup> See A. Stafford and S. Ritchie, *Fiduciary Duties: Directors and Employees* (Bristol: Jordans Publishing, 2008), at p.135.

<sup>83</sup> P. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977), at p.267 n.6 refers to "those many judgments of Bowen L.J. where His Lordship attempts to express equitable obligations in terms of implied contracts."

<sup>84</sup> *General Billposting Co. Ltd v Atkinson* [1909] A.C. 118; *Rubel Bronze and Metal Co. Ltd v Vos* [1918] 1 K.B. 315; *Adami v Maison de Luxe Ltd* (1924) 35 C.L.R. 143; and see *Tullett Prebon Plc v B.G.C. Brokers L.P.* [2011] EWCA Civ 131 at [20]. *Clouston & Co. Ltd v Corry* [1906] A.C. 122 appears to be a late expression of the older test for misconduct based on breach of express or implied conditions.

by use of information to the master's detriment.<sup>85</sup> A question apparently remained whether the duty was a term implied into every contract of service,<sup>86</sup> and it was only some time later in *Wessex Dairies* that the duty of fidelity was affirmed as a term generally implied by law. The duty was also cast in positive form such that "during the continuance of his employment [the servant] will act in his employers' interests and not use the time for which he is paid by the employers in furthering his own interests."<sup>87</sup> It is from this case that the modern duty of fidelity derives.

Subsequent decisions followed *Wessex Dairies*, drawing the employee's duty in positive terms and *sometimes* adopting the language of conflict of interest.<sup>88</sup> In the process the confidentiality element stressed by Hawkins J. at first instance in *Robb*, that the servant was under a duty "to protect his master's interests in respect to matters confided to him in the course of his service"<sup>89</sup> was shorn of its specific context and a wider implied contractual duty to serve with good faith and fidelity preferred.<sup>90</sup> It may be that this reformulation was the result of thinking that, with the spread of employee discretion and access to information which flowed from increasingly corporate business operations, "[t]he relation between master and servant is always confidential, though in differing degrees"<sup>91</sup> and so the rules which previously adhered to particular classes of servant now applied all employees. But this does not mean that the legal and equitable duties were the same, and still less does it show that the contractual duty was based in fiduciary status.

In this regard *Hivac*,<sup>92</sup> often regarded as problematic for its apparent limitation on after-hours work by employees on an apparently fiduciary basis, actually resounds in the older common law standard which focused on harm to the employer's business interests. The employees were

---

<sup>85</sup> *Amber Size and Chemical Company Ltd v Menzel* [1913] 2 Ch. 239 at 245. In *Putsmen v Taylor* [1927] 1 K.B. 637 the degree of confidentiality in the service was treated as a factor in determining the validity of an express post-employment restraint.

<sup>86</sup> In *Measures Brothers Ltd v Measures* [1910] 2 Ch. 248 CA at 255, Buckley L.J. said that "In every contract of service is implied a condition that if faithful service is not rendered the master may elect to determine the contract." Cf. *Kirchner & Co. v Gruban* [1909] 1 Ch. 413 where the implied term was treated as one of fact to be determined by examination of the particular contract.

<sup>87</sup> *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80 CA at 84 per Greer L.J.

<sup>88</sup> For example, *Sanders v Parry* [1967] 1 W.L.R. 753; [1967] 2 All E.R. 803; cf. *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555 at 594, where Lord Tucker recognised as separate the duty to be honest and diligent and the duty not to abuse the master's confidence, the latter being based on *Robb v Green* [1895] 2 Q.B. 315.

<sup>89</sup> *Robb v Green* [1895] 2 Q.B. 1 at 10 per Hawkins J.

<sup>90</sup> *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80 at 88 per Maugham L.J.

<sup>91</sup> *Putsmen v Taylor* [1927] 1 K.B. 637 at 641 per Salter J.

<sup>92</sup> *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch. 169 CA.

skilled manual workers who had been “moonlighting” for a competitor of their employer, but there was no evidence that they had misused confidential information or reaped any profits. The case therefore resolved on whether the employees were in breach of the implied terms of their employment contracts. An injunction was granted to enforce the contractual duty because the employees’ after-hours activities “would inflict great harm on his employer’s business” by advancing the market position of a direct competitor.<sup>93</sup> It is significant that the decision was based solidly on *Nichol v Martyn*, through which *Robb v Green* was interpreted. Breach of the implied duty of fidelity was found, not in conflict of interest, but in the employees deliberately doing an act which they must have known would “inevitably result in damage” to the employer.<sup>94</sup> The novelty of the case lay simply in the principle that the implied duty of fidelity extended beyond the employees’ actual working hours to the whole period of their employment. Indeed, in an earlier case Lord Greene M.R. had declared that the employee’s duty of good faith referred only to a contractual obligation, and denied that use of such language meant “that some equitable principle is introduced.”<sup>95</sup> In both *Wessex Dairies* and *Hivac*, decisions on fiduciary duty were not forgotten or ignored as Professor Flannigan suggests;<sup>96</sup> they were simply unnecessary because the common law position was well-established and answered the issues in dispute.

Other English cases continued to apply the conventional common law approach elaborated over the previous century. In the *ASLEF* case, involving a work-to-rule campaign organised by a union, the Court of Appeal was prepared to hold that such action was a breach of each employee’s implied duty of fidelity. This was, in Lord Denning M.R.’s view, because the action wilfully and in bad faith obstructed the employer’s business; or (according to Buckley L.J.) because the implied duty required the employee to “serve the employer faithfully with a view to promoting those commercial interests for which he is employed.”<sup>97</sup> The servant in *Reading*’s case, a serving army sergeant who obtained substantial bribes while in uniform, was considered to be in a fiduciary relation with his master, the Crown. It was not necessary to find that he was a fiduciary, since the bribes were clearly recoverable on a restitutionary basis as money had and received, but the Court of Appeal thought that the money was also recoverable as a breach of

---

<sup>93</sup> *Hivac* [1946] 1 Ch. 169 at 178 per Lord Greene M.R. Morton L.J. (at 182) also raised the harm that improvements in the employer’s manufacturing processes would “almost inevitably” flow to the trade competitor.

<sup>94</sup> *Hivac* [1946] 1 Ch. 169 CA at 181 per Morton L.J.; at 179 per Lord Greene M.R.

<sup>95</sup> *Vokes Ltd v Heather* (1945) 62 R.P.C. 135 CA at 141-2.

<sup>96</sup> R. Flannigan, “The [Fiduciary] Duty of Fidelity” (2008) 124 L.Q.R. 274 at 285.

<sup>97</sup> *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 Q.B. 455 CA at 491-2 per Denning M.R.; at 498 per Buckley L.J. See also *Ticehurst v British Telecommunications Plc* [1992] I.C.R. 383 at 398 (withdrawal of good will by employee).

fiduciary duty. A fiduciary relation was constituted by his being entrusted with a uniform, the property of the employer, which carried with it special authority which the soldier was required to use only for his employer's benefit.<sup>98</sup> On further appeal two Law Lords agreed that by abusing his position the soldier was in breach of his fiduciary duty as a servant.<sup>99</sup> *Reading* is best regarded as involving an *ad hoc* fiduciary relation established by the trust and confidence inherent in a position of authority as well as the employer's vulnerability due to the difficulty of constant supervision while the soldier was in uniform. In the "*Oranje*" case the Privy Council said that while fiduciary obligations apply "in principle" in cases of master and servant, "the precise scope of it must be moulded according to the nature of the relationship."<sup>100</sup> In that case, the defendant was regarded as an (unpaid) employee with special duties of trust and confidence, but the arrangements with his employer showed that he was not to be regarded as under fiduciary obligations for all his activities.<sup>101</sup>

The High Court of Australia indirectly addressed the duty of fidelity in the course of its classic statements on grounds for dismissal in *Blyth Chemicals v Bushnell*. The case involved the dismissal of a general manager who had taken up a directorship with a potential competitor while still employed. His position was accepted to be one of special confidence. Dixon and McTiernan JJ., building on an earlier agency (not employment) case,<sup>102</sup> declared that:

"Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal."<sup>103</sup>

While the judges adopted the language of conflict of interest, which often signifies a fiduciary relationship, it must be remembered that the case turned on whether the dismissal was in breach of contract. The Court made it clear that there had to be an actual conflict between personal interest and duty to justify dismissal, rather than possible conflict which is the traditional

---

<sup>98</sup> *Reading v The King* [1949] 2 K.B. 232 at 236 and 238. The use of the term "fiduciary relation" in such situations was described as being "used in a very loose, or at all events a very comprehensive, sense."

<sup>99</sup> *Reading v Attorney-General* [1951] A.C. 507 at 516 per Lord Porter; at 517 per Lord Normand.

<sup>100</sup> *New Zealand Netherlands Society "Oranje" Inc. v Kuys* [1973] 1 W.L.R. 1126 PC at 1130; [1973] 2 All E.R. 1222 at 1225.

<sup>101</sup> *Oranje* [1973] 1 W.L.R. 1126 at 1129.

<sup>102</sup> *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 C.L.R. 359. The earlier decision of *English & Australian Copper Co. Ltd v Johnson* (1911) 13 C.L.R. 490 upheld the dismissal of an employee for conduct which was highly likely to cause detriment to the employer's interests and is therefore consistent with the older common law decisions.

<sup>103</sup> *Blyth Chemicals Ltd v Bushnell* (1933) 49 C.L.R. 66 at 81, citing *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch.D 339.

standard for fiduciaries.<sup>104</sup> In terms more in keeping with the old common law, Starke and Evatt JJ. said that the employee, as manager of the business, was in a confidential relation and might be dismissed summarily “if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the confidential relation between himself and the appellant.”<sup>105</sup>

Subsequently, members of the Australian High Court have on several occasions included employees in the list of status fiduciaries.<sup>106</sup> Of these cases only one actually involved an employment relationship, and the misconduct of the employee (using employer property and resources for private purposes without permission) on any view of employee duties amounted to a breach justifying dismissal.<sup>107</sup> It was not necessary to hold that the employee was a fiduciary. In their passing comments, though, all but one judge assumed that the duty of fidelity was a contractual importation of fiduciary duty.<sup>108</sup> Based on the statement in *Concut*, subsequent Australian decisions have tended to regard the contractual duty of fidelity as importing equitable obligations or even to assume that an employee's contractual duty is identical to a fiduciary one.<sup>109</sup> This is in contrast to earlier decisions where Australian courts confined fiduciary responsibility to *de facto* directors and very senior managers.<sup>110</sup> Some recent Australian decisions have continued to adopt the approach that employees do not automatically owe

<sup>104</sup> *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq. 461 at 471 per Lord Cranworth L.C.; *Boardman v Phipps* [1967] 2 A.C. 46 at 124 per Lord Upjohn (“real sensible possibility”); *Breen v Williams* (1996) 186 C.L.R. 71 at 135 per Gummow J.; *Bhullar v Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711.

<sup>105</sup> *Blyth Chemicals Ltd v Bushnell* (1933) 49 C.L.R. 66 at 72, citing *Pearce v Foster* (1886) 17 Q.B.D. 536.

<sup>106</sup> *Keith Henry & Co. Pty Ltd v Stuart Walker & Co. Pty Ltd* (1958) 100 C.L.R. 342 at 350; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 C.L.R. 41 at 68, 96, 141; *Breen v Williams* (1996) 186 C.L.R. 71 at 92, 107; *Concut Pty Ltd v Worrell* [2000] HCA 64; 176 A.L.R. 693 at [17].

<sup>107</sup> *Concut Pty Ltd v Worrell* [2000] HCA 64; 176 A.L.R. 693 at [17] per Gleeson C.J., Gaudron and Gummow JJ. Kirby J. (concurring) based his decision on a breach of duty of fidelity and mutual trust which was not founded in equity: at [51].

<sup>108</sup> *Concut Pty Ltd v Worrell* [2000] HCA 64; 176 A.L.R. 693 at [26], quoting P. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977), at p.267.

<sup>109</sup> *Digital Pulse Pty Ltd v Harris* [2002] NSWSC 33; 166 F.L.R. 421 at [20]; *Mainland Holdings Ltd v Szady* [2002] NSWSC 699 at [66]; *Downer EDI Ltd v Gillies* [2012] NSWCA 333; 92 A.S.C.R. 373 at [83]; *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* [2011] FCA 1154; 213 I.R. 55; *Blackmagic Design Pty Ltd v Overliese* [2011] FCAFC 24; 191 F.C.R. 1 at [118]; *Labelmakers Group Pty Ltd v LL Force Pty Ltd* [2012] FCA 512 at [102]; *Hodgson v Amcor Ltd* [2012] VSC 94; 264 F.L.R. 1 at [1346], [1359] (although the employees concerned were senior managers).

<sup>110</sup> *Consul Development Pty Ltd v D.P.C. Estates Pty Ltd* (1975) 132 C.L.R. 373 at 394 per Gibbs J.; *Co-Ordinated Industries Pty Ltd v Elliott* (1998) 43 N.S.W.L.R. 282 at 288; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* NSW Supreme Court, O’Keefe C.J. at C.L., 14 September 1994; (1995) 37 A.I.L.R. 5-018. In two frequently cited cases the existence of fiduciary duties was not contested: *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 N.S.W.L.R. 488; *Green and Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] W.A.R. 1 CA.

fiduciary obligations, the judges preferring to determine the issue by examination of the nature of the employee's duties and the circumstances in which they were performed.<sup>111</sup>

In Canada, a fact-based approach has predominated. In *Canaero* the Supreme Court of Canada held that two senior managers owed a fiduciary duty equivalent to that of directors because they "were 'top management' and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists."<sup>112</sup> As the effective heads of their corporate employer, authorised to act generally on its behalf and enjoying a high degree of operational autonomy with limited scrutiny, the position of the defendant employees "charged them with initiatives and with responsibilities far removed from the obedient role of servants."<sup>113</sup> The Canadian approach largely restricts fiduciary duty to employees who are closely involved in the employer's business operations or decision-making at the highest level, as well as other "key employees" whose position and knowledge renders their employer especially vulnerable to abuse of power. Under the *Canaero* doctrine, departing fiduciary employees are prevented from taking up emerging business opportunities to which they had access while still employed. They may also be restrained from soliciting former clients or poaching former staff for a reasonable period after the employment has ended.<sup>114</sup> But so-called "ordinary" employees, even those with substantial managerial responsibilities, are not normally subject to fiduciary duties, although this does not preclude the finding of a fiduciary duty owed by employees in specific circumstances demanding a high level of trust.<sup>115</sup>

The Canadian approach is notable for maintaining a strong distinction between contractual and equitable duties. The existence and content of any fiduciary obligations owed by an employee are determined by the substance of their relationship with the employer as gauged by their contractual and other voluntary undertakings as well as their position of power and

---

<sup>111</sup> *Stoelwinder v Southern Health* [2001] FCA 115 at [40]; *Victoria University of Technology v Wilson* [2004] VSC 33; 60 I.P.R. 392 at [145]; *Woolworths Ltd v Olson* [2004] NSWSC 849; 184 F.L.R. 121 at [217]; see also *University of Western Australia v Gray* [2009] FCAFC 116; 179 F.C.R. 346 at [55], [214].

<sup>112</sup> *Canadian Aero Service Ltd v O'Malley* [1974] S.C.R. 592 at 606.

<sup>113</sup> *Canadian Aero Service Ltd v O'Malley* [1974] S.C.R. 592 at 606.

<sup>114</sup> *W.J. Christie & Co. v Greer* (1981) 121 D.L.R. (3d) 472 Manitoba CA; *CRC-Evans Canada Ltd v Pettifer* [1997] CanLII 14943; 197 A.R. 24; affirmed [1998] ABCA 191.

<sup>115</sup> *Imperial Sheet Metal Ltd v Landry* [2007] NBCA 51; 315 N.B.R. (2d) 328. For an example of "ordinary" employee fiduciary duty, see *581257 Alberta Ltd v. Aujla* [2013] ABCA 16; 542 A.R. 123 (handling of money by employee left alone "with keys to the till.")



influence. The implied duty of fidelity is not relevant to this process.<sup>116</sup> Similarly, under Canadian common law (like common law elsewhere) breach of equitable duty does not justify dismissal unless the conduct amounts to repudiation of the contract.<sup>117</sup> The Canadian courts have been expressly concerned to limit fiduciary accountability of less senior employees in order to maintain their freedom to change their employment and to earn a living, a weighty consideration when fiduciary obligations have been held to continue after the employment contract has ended.<sup>118</sup>

## Recent Decisions: Differentiating Contractual and Equitable Duties

With few exceptions, the approach adopted in recent decisions of the English and Scottish courts is entirely consonant with the older tradition I have outlined. The weight of judicial authority has been to reaffirm the separateness of employees' contractual and equitable duties, recognising the abiding concern of the law not to fetter unduly the legitimate interests of employees both during and after their employment. The view that all employees are fiduciaries was taken in two English decisions, *Blake* and *Neary*. In the Court of Appeal in *Blake*, Lord Woolfe M.R. said that the employment relationship involves fiduciary obligations of loyalty and good faith on the employee's part arising from their undertaking to act in the employer's interest, although no breach of duty was found.<sup>119</sup> This statement was used in *Neary*, along with the implied duty of fidelity, to ascribe fiduciary obligations to employees as a class. Ultimately, though, it was the employee's special position of integrity and trust which warranted holding him to a high standard of conduct for the purposes of dismissal. The standard applied was similar to that expected of a fiduciary, but did not depend on the employee owing fiduciary duties.<sup>120</sup>

More recent English decisions have followed Millett L.J.'s restatement of fiduciary duty in *Mothew*: that its distinguishing feature is an obligation of "single-minded loyalty"; that "not

---

<sup>116</sup> *Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd* [1996] ABCA 169; 39 Alta L.R. (3d) 41 at [17], [25]; *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* [2008] SCC 54; [2008] 3 S.C.R. 79 at [50]–[52] per Abella J.

<sup>117</sup> Conflict of interest is ground for summary termination only if it creates a substantial risk of serious harm or seriously impairs the employer's confidence and trust: *Canadian Imperial Bank of Commerce v Boisvert* [1986] 2 F.C. 43 CA; *Fleming v Calyniuk* [2007] SKCA 85; 302 Sask. R. 131; *Payne v Bank of Montreal* [2013] FCA 33; 443 N.R. 253 at [58]; and see *McKinley v BC Tel* [2001] SCC 38; [2001] 2 S.C.R. 161 at [48].

<sup>118</sup> *Barton Insurance Brokers Ltd v Irwin* (1999) 63 B.C.L.R. (3d) 215 CA at [39]; *Imperial Sheet Metal Ltd v Landry* [2007] NBCA 51; 315 N.B.R. (2d) 328 at [37]; *Carson International Inc v Biggar* [2010] MBQB 198 at [53].

<sup>119</sup> *Attorney-General v Blake* [1998] Ch. 439 CA at 454. The claim of fiduciary breach was not pursued before the House of Lords: *Attorney-General v Blake* [2001] A.C. 268.

<sup>120</sup> *Neary v Dean of Westminster* [1998] I.R.L.R. 288 at [18] and [73] per Lord Jauncey of Tullichettle (Special Commissioner). The petitioner occupied a senior salaried lay office at Westminster Abbey.

every breach of duty by a fiduciary is a breach of fiduciary duty”; and that caution must be exercised in equating apparently similar legal and equitable duties.<sup>121</sup> The recent employment law decisions affirm the corollary that contractual duties of loyalty and good faith are not inherently fiduciary in nature. The problem is that similarity of language is apt to mislead. It is not always the case that a duty of loyalty is that strict and single-minded loyalty demanded of a fiduciary.

It was in this vein that the stance taken in *Blake* and *Neary*, that all employees are fiduciaries, was resolutely repudiated by Elias J. in *University of Nottingham v Fishel*.<sup>122</sup> It is a decision which has consistently received judicial approval, indeed admiration. It has twice been strongly approved by the Court of Appeal, first in *Helmet Integrated* and most recently in 2012 in *Ranson*.<sup>123</sup> Under the model established in *Fishel* and applied subsequently, an employee will only have fiduciary obligations if there is a particular contractual obligation which requires the employee to act solely in the interests of the employer.<sup>124</sup> Both the appellate decisions clearly show that any fiduciary duty owed by an employee is strictly circumscribed by and supportive of the employees' contractual duties, which supports Professor Conaglen's thesis that fiduciary duties are subsidiary and prophylactic.<sup>125</sup> Furthermore, the implied duty of fidelity cannot be used to derive the existence of employee fiduciary obligations as the two are different in nature. Both cases also demonstrate the established position that the freedom of an employee to take preliminary steps in preparation to compete with their employer after the relationship has ended will be strongly upheld as being in the public interest in a free market society.<sup>126</sup> The inclusion of vague clauses requiring the employee to act in the best interests of the employer will not take the restriction on employee freedom any further, although more specific clauses will be relevant to the scope of the duty.<sup>127</sup>

<sup>121</sup> *Bristol and West Building Society v Mothew* [1998] Ch. 1 CA at 16, 18; see also P. Millett, “Equity's Place in the Law of Commerce”, (1998) 114 L.Q.R. 214 at 222; J. Getzler, “Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies” in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co, 2005), at p.251.

<sup>122</sup> [2000] I.C.R. 1462; [2000] I.R.L.R. 471.

<sup>123</sup> *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; [2007] F.S.R. 16; *Ranson v Customer Systems Plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [28] per Lewison L.J.; see also *Generics (UK) Ltd v Yeda Research and Development Co Ltd* [2012] EWCA Civ 726 at [73] per Etherton L.J.

<sup>124</sup> *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB) at [152].

<sup>125</sup> Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford, Hart, 2010), at p.4.

<sup>126</sup> *Balston Ltd v Headline Filters Ltd* [1990] F.S.R. 385. For a summary of the complex principles regarding preparatory activities, see P. Goulding (ed.), *Employee Competition: Covenants, Confidentiality, and Garden Leave*, 2nd edn (Oxford: Oxford University Press, 2011), at pp.341-4.

<sup>127</sup> *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB); [2013] I.R.L.R. 344 at [135] per Popplewell J.

In *Fishel*, Elias J. drew on recent authorities to identify the key attributes which will attract fiduciary obligations. Relevantly, these involve situations where a person undertakes to act on behalf of another: (1) in a relationship of trust and confidence where “single-minded loyalty” is expected; and (2) in exercise of powers with considerable autonomy beyond the control of the beneficiary. It was the absence of any such feature among employees as a class which indicated that they were not fiduciaries:

“the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers.”<sup>128</sup>

Elias J. recognised that employees may often be placed in situations where they owe fiduciary obligations; but, while such obligations may arise from a particular employment relationship, they are “not inherent in the nature of the relationship itself.” Rather, they will occur only where “there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations.”<sup>129</sup> He noted that while terms like loyalty, good faith, and trust and confidence, are often used to describe the employee's implied duty, they are not applied in the same way as when used to identify fiduciary duties. The bedrock of Elias J.'s approach is the distinction between situations where a person is required to act in the sole interest of another, and where (as in the employment relationship) “a party merely has to take into consideration the interests of another, but does not have to act in the interests of that other.”<sup>130</sup>

The issue whether an employee owed fiduciary duties was first raised recently at an appellate level in *Item Software v Fassihi*, but the case was decided on the basis that the employee in question was also a director and in that capacity owed a fiduciary duty to disclose his active steps to enter into competition.<sup>131</sup> In *Helmet Integrated Systems Ltd v Tunnard* the Court of Appeal held that the employee who had invented and was taking steps to develop a product that

---

<sup>128</sup> *University of Nottingham v Fishel* [2000] I.C.R. 1463 at 1491.

<sup>129</sup> *Fishel* [2000] I.C.R. 1463 at 1491.

<sup>130</sup> *Fishel* [2000] I.C.R. 1463 at 1492. In support of such an approach see P. Finn, “The Fiduciary Principle”, Ch.1 in T. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989); R. Nolan and M. Conaglen, “Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?”, Ch.14 in E. Bant and M. Harding (eds), *Exploring Private Law* (Cambridge: Cambridge University Press, 2010).

<sup>131</sup> *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244; [2005] I.C.R. 450 at [34].

would be in competition with his employer, was not under a fiduciary duty. Moses L.J. (with whom Lloyd and May LJJ. agreed) made it clear that fiduciary duties were distinct from and did not flow automatically from an employee's implied contractual duties:

"It is commonplace to observe that not every employee owes obligations as a fiduciary to his employer. An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty."<sup>132</sup>

Moses L.J. both approved and applied Elias J.'s approach taken in *Fishel* that an employee owes fiduciary obligations only when, on careful analysis of the employee's particular contractual duties, the employee in all the circumstances is placed in a position which requires them to act solely in the employer's interests. In view of his express contractual obligation to report on competitors, the defendant employee in *Helmet Integrated* would have been under a fiduciary duty to report on such development if undertaken by a third party competitor. This was so because the employer would not have been in a position to control his acquired knowledge and would therefore have been in a position of vulnerability, a defining characteristic of a fiduciary relationship.<sup>133</sup> But he was not under any contractual duty to report his own steps towards competition. And because he was employed to sell, not to invent, his activity was not in breach of contract so there was accordingly no fiduciary duty. In short, the court took the approach that any fiduciary obligations of an employee arose only consequentially upon their contractual duties.

In more recent decisions, fiduciary duties have been found to arise on the facts where the employee held a position with high levels of responsibility and autonomy and obtained profits in circumstances where they were carrying out specific duties under the terms of their employment contract.<sup>134</sup> Conversely, a fiduciary obligation has been held not to arise where an employee was in a senior managerial position but acted under close supervision and did not owe any specific contractual duties which placed him in the position of a fiduciary.<sup>135</sup> The issue whether fiduciary duties are owed by an employee has actually become more significant since *Item Software*,

---

<sup>132</sup> *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; [2007] F.S.R. 16 at [36].

<sup>133</sup> *Helmet* [2006] EWCA Civ 1735; [2007] F.S.R. 16 at [45].

<sup>134</sup> *Cobbetts L.L.P. v Hodge* [2009] EWHC 786 (Ch); *Samsung Semiconductor Europe Ltd v Docherty* [2011] ScotCS CSOH 32; 2011 S.L.T. 806. In *Shepherd Investments Ltd v Walters* [2006] EWHC 836 (Ch) the employee was held to owe fiduciary obligations by virtue of acting as a *de facto* director.

<sup>135</sup> *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB) at [113].

which has been interpreted as requiring a fiduciary to observe a positive obligation to disclose their own wrongdoing to their principal.<sup>136</sup>

In the most recent exploration of the issue at appellate level, *Ranson v Customer Systems*, the defendant employee was responsible for implementing a software product for a limited number of clients. He decided to go out on his own and, while still employed, took preliminary steps to set up his own consultancy business. He did not seek to appropriate existing work from his employer, and his explorations were confined to finding new work. The trial judge held that his position did not in general attract fiduciary duties because he was closely supervised and had limited discretion in dealings with clients. However he was held to have breached both contractual and fiduciary obligations by not disclosing to his employer an opportunity for new contracting work because it came to him by virtue of his employment, even though it was directed to Ranson personally and was not likely to have been secured by his employer.<sup>137</sup>

In overturning these rulings, the Court of Appeal emphasised the need for care in distinguishing between fiduciary and contractual duties, which the judge had apparently treated as coterminous. The proper starting point, as established in *Fishel* and *Helmet Integrated*, is that whether an employee owes any fiduciary duties is to be determined by close analysis of the terms of the employment contract and the nature and scope of the employee's duties actually performed under it. So is the extent of the employee's duty of fidelity or loyalty, which is "no more than an obligation loyally to carry out the job that the employee agreed to do."<sup>138</sup> But the existence of fiduciary duties is not to be derived from the implied contractual duties, nor from matters presumed from a general description of the employee's position. What is required is examination of the work duties actually performed by the employee under the contract. The trial judge said Ranson was in a managerial sales position and therefore under a fiduciary duty to report on new sales opportunities; but the scope of his duties (his "patch") was in practice very limited and did not include finding new clients. There was therefore no specific contractual duty upon which a fiduciary duty could be "hung"; nor were there factual grounds for finding one arising from the employer's potential vulnerability, since the employee had little autonomy in practice.<sup>139</sup> Lewison L.J. echoed Elias J. in *Fishel* that the contractual duty of fidelity, while often described as a duty of loyalty, did not require the employee to act exclusively in the

---

<sup>136</sup> See eg *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch); *ODL Securities Ltd v McGrath* [2013] EWHC 1865 (Comm) at [17].

<sup>137</sup> *Customer Systems Plc v Ranson* [2011] EWHC 3304 (QB) at [71], [74]-[77] (Jack J.).

<sup>138</sup> *Ranson v Customer Systems Plc* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [43].

<sup>139</sup> *Ranson* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [68].

interests of the employer; it only required the employer to have regard to the employer's interests. He said that "it is, perhaps, unfortunate that conceptually different things have been given the same label."<sup>140</sup> In the event, Ranson was found not to have breached his implied contractual duties or to have owed any relevant fiduciary obligations. The decision and its predecessors do not however immunise employees, particularly those in senior positions with extensive discretion and autonomy, from being found to have fiduciary duties. The Australian cases and those recent English decisions where fiduciary duties have been found to exist<sup>141</sup> indicate that in such situations equity judges are drawn to finding the existence of fiduciary duties apart from the contractual duty of fidelity.

## Conclusion

The employee's duty of fidelity, like so much in the law of employment, can be traced back over two centuries to the law of master and servant. Its content is captured by Lord Steyn in *Mahmud* as an implied obligation "to serve his employer loyally and not to act contrary to his employer's interests."<sup>142</sup> That is so, provided it is recognised that the obligation is limited by the scope and purposes of the employment contract, for the employee is not bound to observe absolute and undivided loyalty, nor is the contractual duty so wide as to prohibit all activities which might be harmful to the employer.<sup>143</sup> The common law duty embraces norms of honesty, faithfulness, good faith, confidentiality and trust as befitting the personal nature of the relationship — but always with regard to the nature and purposes of the engagement and the interests of both parties to it. Such norms are not confined to fiduciary duties and have increasingly been recognised in other aspects of the employment contract.<sup>144</sup> The recent development by the courts of an implied term of mutual trust and confidence, which may include

---

<sup>140</sup> *Ranson* [2012] EWCA Civ 841; [2012] I.R.L.R. 769 at [41].

<sup>141</sup> *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd* [2007] EWHC 1599 (Ch); *Crowson Fabrics Ltd v Rider* [2007] EWHC 2942 (Ch); [2008] I.R.L.R. 288; *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB); [2012] I.R.L.R. 458; *ODL Securities Ltd v McGrath* [2013] EWHC 1865 (Comm).

<sup>142</sup> *Mahmud v Bank of Credit and Commerce International S.A.* [1998] AC 20 at 46.

<sup>143</sup> *Electrolux Ltd v Hudson* [1977] F.S.R. 312 at 326. As stated by Buckley L.J. in *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 Q.B. 455 at 498, the duty is "to serve the employer faithfully within the limits of the contract."

<sup>144</sup> *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 W.L.R. 589 at 596 per Browne-Wilkinson V.-C.; *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2008] NSWCA 217; 72 N.S.W.L.R. 559 at [32]; Kevin Banks, "Progress and Paradox: The Remarkable Yet Limited Advance of Employer Good Faith Duties in Canadian Common Law" (2011) 32 Comparative Labor Law and Policy Journal 547; Joellen Riley, "Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts" (2012) 36 Melbourne University Law Review 521; D. Brodie, "Fair Dealing and the World of Work" (2014) 43 I.L.J. 29.

the employee's duty of fidelity, is simply a further step in the recognition of these norms in the performance of contracts.

The *sole* purpose of fiduciary accountability may be understood as being to control the risk of opportunism by imposing a strict standard requiring abnegation of self-regard unless disclosed to the beneficiary.<sup>145</sup> Fiduciary obligations are absolute: they do not involve reconciling or balancing interests but insist in the paramountcy of one party's interests. At the same time, though, fiduciary obligations are limited: they are generally proscriptive in nature, and do not set behavioural standards where a potential conflict of interest is not in issue.<sup>146</sup> The contractual duty of fidelity, like fiduciary duty, operates to protect the employer against predatory or opportunistic acts by employees who abuse their privileged position. As an implied contractual term, however, its primary purpose is to promote the mutual intentions of the parties within the framework of the agreed bargain. Its specific functions are to secure trust and co-operation, as well as pursuit of the employer's business objectives. Unlike fiduciary duty, the contractual duty applies to acts by employees which may harm the employer but do not accrue profits to the employee or violate the confidentiality of information, such as damaging the employer's reputation and obstructive behaviour. Such conduct may be a breach of the duty of fidelity even where no meaningful personal interest is involved. The implied duty protects the employer's interests mainly by means of the "self-help" remedy of dismissal and by the denial of performance-related benefits<sup>147</sup> when relevant express terms are absent or incomplete. It also allows employers to claim compensatory damages, while not precluding the alternative of restitutionary claims. The implied duty of fidelity is one of the valuable benefits that an employer obtains by engaging labour on an employment basis. It complements the other implied employee duties of obedience and care. It also provides a basis for behavioural standards and the introduction of conduct policies by employers directed at employee actions which impede the employer's organisational goals and values.<sup>148</sup>

In promoting the parties' mutual intentions, the duty of fidelity recognises that the employee's subordination is limited to the purposes of the contract and that employees have legitimate interests, long recognised in the common law, to develop their skills and otherwise better

---

<sup>145</sup> *Bray v Ford* [1896] A.C. 44 at 51 per Lord Herschell; R. Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 Can. Bar Rev. 35; R. Flannigan, "Access or Expectation: The Test For Fiduciary Accountability" (2010) 89 Can. Bar Rev. 1 at 1, 4, 11.

<sup>146</sup> P. Finn, "Contract and the Fiduciary Principle" (1989) 12 U.N.S.W.L.J. 76 at 84.

<sup>147</sup> Eg. *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB); [2013] I.R.L.R. 344.

<sup>148</sup> For a similar argument in relation to employer duties, see L. Barmes, "Common Law Implied Terms and Behavioural Standards at Work" (2007) 36 I.L.J. 35.

themselves by improving their prospects of future employment or self-employment once their current engagement has ended. In common with other areas of the law regarding work relationships (notably restraint of trade), the common law purports to balance the often competing economic interests of employer and employed. In this regard, as Professor Freedland has noted, decisions such as *Fishel* which limit the application of fiduciary doctrine in employment are significant in asserting a pluralist approach to the employment relationship which aims “to hold a balance between the obligations of the worker as adherent to an employing entity and the freedom of the worker to function as an autonomous economic actor.”<sup>149</sup> As the United Kingdom Supreme Court has recently declared in a related context, “the law should not discourage former employees from benefitting society and advancing themselves by imposing unfair potential difficulties on their honest attempts to compete with their former employers.”<sup>150</sup>

This concern has become much more important with trends associated with the development of notions of human capital and the rise of an entrepreneurial approach to labour which requires workers to look after their own longer-term interests.<sup>151</sup> The implied duty is especially important in high-performance workplaces which require increasing levels of commitment, initiative, discretion, teamwork and self-management. Under such a model of work organisation, the values of trust, cooperation and flexibility are crucial.<sup>152</sup> The implied term promotes these values by emphasising employee accountability across the full range of work-related activities (even after hours), by aligning performance with the employer's goals, by placing constraints on the use of information while the employment contract subsists, and by requiring that employee discretion be exercised in promotion of the employer's business. But also, the implied term recognises another increasingly important aspect of the developing workplace: the employee's interest in developing their own human capital for future employability.

---

<sup>149</sup> M. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003), at pp.176-7.

<sup>150</sup> *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31; [2013] 1 W.L.R. 1556 at [44].

<sup>151</sup> K. Klare, “Horizons of Transformative Labour Law”, Ch.1 in J. Conaghan, R. Fischl and K. Klare (eds), *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002), at pp.16-17.

<sup>152</sup> H. Collins, “Regulating the Employment Relation for Competitiveness” (2001) 30 I.L.J. 17 at 35, 37; K. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004), Ch.5; J. Riley, *Employee Protection at Common Law* (Sydney: Federation Press, 2005), Ch.2.