Fiduciary duties of employees

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Introduction

1. All employees owe contractual duties of loyalty and good faith to their employers. Most employees do not owe fiduciary duties to their employers. The aim of this talk is to examine the circumstances in which the court is prepared to find that employees owe fiduciary duties to their employers, and the significance of such findings in claims against employees.

Fiduciary

2. Before considering the fiduciary duties owed by employees it is necessary to consider the duties owed by ‘fiduciaries’. ‘Fiduciary’ as a noun is generally used to denote someone in a fiduciary relationship with some other party. The main categories of ‘fiduciaries’ (and the parties to whom they owe their duties) are:

   2.1. trustees (and beneficiaries);
   2.2. directors (and their companies);
   2.3. agents (and their principals);
   2.4. solicitors (and their clients);
   2.5. partners (and each other);
   2.6. shadow directors (and their companies);
   2.7. joint venturers (and each other).

3. The nature of the fiduciary duties owed by such people has been defined in many different ways in the authorities. One of the leading definitions,

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1 Referred to generically as ‘principals’ in these notes.
frequently cited in later cases, is that given by Millett LJ in *Bristol & West v Motthew*:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary...

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”

4. The fiduciary duties of directors have been codified in sections 175 to 177 of the Companies Act 2006, but they remain in effect fiduciary duties, not least because the equitable remedies for breach of fiduciary duty apply in the case of breach – see s.170(3) and (4) and s.178.

5. In practice the essential duties of a fiduciary are negative ones:

5.1. not to be subject to a conflict of interest. This is either a conflict between his interests and those of his principal, or between the interests of two separate principals; and

5.2. not to profit from his position.

6. In general a fiduciary will avoid liability for breach of fiduciary duty if he obtains the informed consent of his principal.

7. The importance and seriousness of the fiduciary duties owed by ‘fiduciaries’ is a reflection of the trust which the principal places in the fiduciary and the vulnerability of the principal to any abuse by the fiduciary of his position.

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2 [1998] Ch 1 at 18
This is reflected in the strictness and harshness of the principles applying to breaches of fiduciary duty. For example:

7.1. the fiduciary may be liable for breach of fiduciary duty even if he has acted innocently or honestly or in good faith;

7.2. the fiduciary may be liable for breach of fiduciary duty where a potential conflict of interest arises, rather than an actual conflict;

7.3. the fiduciary will be required to pay to his principal any profits which he has earned from his position as a fiduciary, even if the principal could not have earned those profits (and hence the money is a windfall for him), and even if the fiduciary carried out work or provided services in return for receiving those profits.

8. Arguably the strictness and harshness of these rules may be justified to some extent by the fact that the fiduciary will typically be aware that he is taking on a responsible role and accordingly, even if he is unaware of the expression ‘fiduciary duty’ or the nature of fiduciary duties, he may well appreciate that he has a position of trust and responsibility. He should therefore not be surprised to find that acting disloyally towards his principal may have serious consequences.

9. In addition, there are protections for both trustees and directors as the court has power to relieve them of liability for breach of their fiduciary duties under s.61 of the Trustee Act 1925 and s.1157 of the Companies Act 2006 respectively if they acted honestly and reasonably.

Employees

10. How then are these principles to be applied to employees? If employees do owe fiduciary duties to their employers they are even less likely than directors, partners or other fiduciaries to appreciate that they owe such duties, and therefore the risk of inadvertent breach of fiduciary duty is even greater. Moreover, the employee owes contractual duties of loyalty, good faith, trust and confidence to the employer, and therefore the employer arguably has no need of the protection of fiduciary duties. If the employer cannot prove that he has suffered a loss as a result of a breach of these contractual duties, why should he be rewarded with a windfall of money earned by his employee from another source? The employee also has no relief available under statute.

11. In practice, the courts have been prepared to find that employees may owe fiduciary duties in some circumstances, as the cases below demonstrate. The difficulty for practitioners is to identify a consistent principle in the cases. One particular difficulty is the potential circularity exists between, on the one
hand, identifying the existence of the duty and, on the other, identifying the breach. As a matter of strict logic, a duty has to exist before it can be breached. One should therefore identify the duty before considering whether it has been breached. For fiduciaries this is not an issue because the fact that they are fiduciaries means that they owe fiduciary duties. One can therefore focus on whether the duties have been breached. But that is not the case for employees. There is an understandable temptation for the court to consider whether the employee has acted in a way which looks like a breach of fiduciary duty, and then work back to hold that the employee owes a fiduciary duty.

**University of Nottingham v Fishel**

12. The leading modern decision on the fiduciary duties owed by employees is *University of Nottingham v Fishel*. Many passages of the judgment of Elias J have been cited in subsequent decisions of the Court of Appeal and at first instance. His judgment was described as “masterly” by Lewison LJ in *Ranson v Computer Systems plc LLP*.

13. Dr Fishel was a distinguished scientist (a clinical embryologist) with an international reputation, employed by the University. He was not head of his department but he was the ‘scientific director’ of an infertility unit which generated revenue for the University, although he was not a member of the board which oversaw the unit. For many years before and during his employment by the University he worked at private clinics abroad and had been paid for this work. The work abroad was beneficial to his work at the University (and hence to the University) because the research was less restricted abroad. His employment contract required him to obtain prior consent from the University before undertaking outside work. Dr Fishel did not obtain consent for this work, but the University was aware of his outside work and did not seek to stop it. Dr Fishel also used other University staff to assist him in this work abroad. He paid the staff from the fees that he received from the clinics.

14. The University claimed that he had breached fiduciary duties by working abroad for other clinics and also by using University staff for these purposes. It claimed an account of the profits which he had made. The University could not prove that it had suffered any loss as a result of his work, and hence it could not recover damages for breach of contract. It was therefore necessary for the University to establish that Dr Fishel owed (and had breached) fiduciary duties.

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3 [2000] ICR 1462
4 [2012 EWCA Civ 841]
15. The judge held that Dr Fishel honestly believed that the University benefited from his work abroad, and that the University did in fact benefit. The judge was “conscious that the financial rewards to Dr Fishel were such that there was a real risk that he might, even in good faith, wrongly deceive himself into believing that work which was in truth simply treatment runs without any, or any significant, research or development value, was potentially beneficial to the university... However .. the university has not satisfied me that Dr Fishel did in fact succumb to that self-deception such that he was subverted from his duty to the university”. The judge also found that the trips abroad had not prejudiced the operation of the unit, that Dr Fishel had not sought to deceive the University about the trips, that the University had known about and encouraged Dr Fishel to work abroad, and that the University had also known that some of its staff had accompanied Dr Fishel on these trips. The University was aware that Dr Fishel and the staff were probably being paid for these trips, but it was unaware of the details. The foreign clinics had engaged Dr Fishel because of his own reputation, and not because of his links with the University.

16. The judge examined the principles governing when fiduciary duties arise. He noted that one situation where fiduciary duties arose was where a person was entrusted with confidential information, but, whilst this might happen in the course of employment, the employment relationship was incidental to the imposition of that fiduciary duty. The judge quoted Millett LJ (as above) and continued:

“86 Employees as fiduciaries

It is important to recognise that the mere fact that Dr Fishel is an employee does not mean that he owes the range of fiduciary duties referred to above. It is true that in [AG v] Blake Lord Woolf, giving judgment for the Court of Appeal, said that the employer-employee relationship is a fiduciary one. But plainly the court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion, the court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary. In Blake itself, as I have indicated, it was the receipt of confidential information. There are other examples. Thus every employee is subject to the principle that he should not accept a bribe and he will have to account for it (and possibly any profits derived from it) to

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5 para 81
his employer. Again, as Fletcher-Moulton LJ observed in *Coomber v Coomber* [1911] 1 Ch 723 at 728, even an errand boy is obliged to bring back my change, and is in fiduciary relations with me. But his fiduciary obligations are limited and arise out of the particular circumstances, namely that he is put in a position where he is obliged to account to me for the change he has received. In that case the obligation arises out of the employment relationship but it is not inherent in the nature of the relationship itself.

87 As these examples all illustrate, simply labelling the relationship as fiduciary tell us nothing about which particular fiduciary duties will arise. As Lord Browne-Wilkinson has recently observed:

‘... the phrase “fiduciary duties” is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case’ (*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206).

88 This is particularly true in the employment context.

89 **The employment relationship is obviously not a fiduciary relationship in the classic sense.** It is to be contrasted with a number of other relationships which can readily and universally be recognised as ‘fiduciary relationships’ because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr Finn, in his seminal work on fiduciaries, has termed ‘fiduciary offices’... As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act; and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.

90 By contrast, **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.
91 This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship 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. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken...

92 The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee’s obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee’s duty of good faith, or loyalty, or the mutual duty of trust and confidence – concepts which tend to shade into one another. As I have already indicated, Lord Millett has used precisely this language when describing the characteristic features which trigger fiduciary obligations. But he was not using the concepts in quite the same sense as they tend to be used in the employment field. Lord Millett was applying the concepts of loyalty and good faith to circumstances where a person undertakes to act solely in the interests of another. Unfortunately, these concepts are frequently used in the employment context to describe situations where a party merely has to take into consideration the interests of another, but does not have to act in the interests of that other. This narrower concept of good faith is graphically demonstrated by the decision of Sir Nicolas Browne-Wilkinson VC as he was, in Imperial Group Trust v Imperial Ltd [1991] IRLR 66. The case concerned the nature of the employer’s power in a pension scheme to give or withhold consent to proposed pension increases. The Vice-Chancellor expressly agreed with the concession that this was not a fiduciary power, observing that:

‘... If this were a fiduciary power the company would have to decide whether or not to consent by reference only to the interests of the members, disregarding its own interests. This plainly was not the intention’ (p.596).

93 However, he then went on to consider the nature of the term and analysed it as follows:

‘In every contract of employment there is an implied term:
“... that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee,’ ...

‘I will call this implied term “the implied obligation of good faith”.’

94 His Lordship held that whilst it was legitimate for the company to look after its own interests in the operation of the scheme, it could not do so for a collateral purpose detrimental to the employees.

95 It is plain that here the implied duty of good faith is being used in circumstances where no fiduciary obligation arises at all. Similarly, in Malik v Bank of Credit and Commerce International [1997] IRLR 462 the House of Lords confirmed the existence of the term relied upon by the Vice-Chancellor although describing it as the duty of trust and confidence. In that particular context it was held to be a breach of the term for an employer to conduct a dishonest business. Clearly, however, the employer does not have to run his business solely by reference to the interests of the employees. Indeed, as Lord Steyn commented, the origin of the term is probably the duty of cooperation between the contracting parties. This is consistent with the recognition that the duty is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other. **The duty of trust and confidence limits the employer's powers, but it does not require him to act as a fiduciary. It is a contractual but not a fiduciary obligation.**

96 Accordingly, in analysing the employment cases in this field, **care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations.** Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical...

97 Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is **necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer.** It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached...
98 It follows that fiduciary duties may be engaged in respect of only part of the employment relationship...

17. Applying the law to the facts, the judge found that Dr Fishel had not owed any fiduciary duties in relation to the work which he himself carried out abroad, notwithstanding his seniority and his title as ‘scientific director’. His position was that of a senior employee with the title ‘director’, and not equivalent to an executive director. The crucial point was that:

“He was under no contractual obligation to seek to obtain work abroad of this nature on behalf of the university, nor in my opinion could he have been contractually obliged to do the work abroad that he did. It was recognised that he would be building up the international reputation of Nurture, but he could have achieved this with far less international involvement than he in fact had. The fact that the university approved of and benefited from the work (as opposed to the payment) cannot in my view create the fiduciary obligation. If Dr Fishel had done work of this kind in his spare time, I doubt whether the university either would, or could, have alleged that he was infringing any duty, not even the contractual duty not to compete, since these clinics abroad were not competitors”.6

18. Similarly, Dr Fishel did not owe a fiduciary duty merely because the work carried out abroad fell within the scope of the work carried out for the University: “The employee does not in general promise to give his employer the benefit of every opportunity falling within the scope of its business.”7

19. Dr Fishel had also not used his position at the University to make a secret profit. He did not use his links with the University to receive benefits which he would not otherwise have obtained.

20. However, Dr Fishel did owe (and breach) a fiduciary duty by deploying University staff to carry out work for the foreign clinics:

“It was his duty to direct the other embryologists what to do and where to do it. By accepting work for them from which he was directly benefiting, he was in my view clearly putting himself where there was a potential conflict between his specific duty to the university to direct the embryologists to work in the interests of the university, and his own financial interest in directing them abroad. The fact that he did not in fact act contrary to the interests of the university is irrelevant: it is trite law that the potential conflict is enough.

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6 at para 108, and contrasting the position of Dr Fishel with that of the managing director in IDC v Cooley [1973] 1 WLR 433
7 at para 109
116 I also consider that in respect of this element of the work, Dr Fishel did use his position to further his own interests. It was only by virtue of his position that he was able to have access to a ready supply of embryologists to assist him in the work. Moreover, even if he could have obtained a supply of embryologists elsewhere, the fact is that he did not do so. He did in fact use his position to secure their services abroad.”

21. Dr Fishel was therefore held liable to account for the profits he had made by using the University’s staff.

22. The following points may be made about this decision:

22.1. the decision was highly fact-specific, turning on the history of Dr Fishel’s dealings with the University in the context of his work for outside clinics;

22.2. even though Dr Fishel was very senior, he was not treated as owing the extensive fiduciary duties which would have attached to, say, a director;

22.3. however, the judge indicated that the position might have been different if he had profited secretly from his position at the University, i.e. if the clinics had engaged him because of his links with the University. It therefore might more accurate to say that, although Dr Fishel owed a fiduciary duty not to make a secret profit from his position at the University, he did not breach that duty;

22.4. Dr Fishel was liable for the profits made from the use of the staff essentially, it seems, because they were a resource of the University for which he was responsible and also because their deployment created the possibility of conflict. It did not matter that Dr Fishel had acted honestly or that the work did not create an actual conflict.

*Helmet Integrated Systems v Tunnard* 8

23. Mr Tunnard was employed as a senior salesman by a company which manufactured firemen’s helmets. In his spare time he designed a new helmet and obtained funding for it. He eventually resigned from his job in order to develop the new product in competition with the products sold by his former employer. He was sued for breach of his contractual duty of fidelity by secretly developing a competing product in his spare time, and for breach of fiduciary duty in not having disclosed his activities. Both claims failed at first instance. The employer appealed.

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8 [2007] IRLR 126
The Court of Appeal dismissed the appeal. Moses LJ gave the leading judgment. He proceeded on the basis that Mr Tunnard had not breached his contractual duty of fidelity because it was not a breach of that duty to carry out preparatory work for future competition with his employer, and he was not in breach of any restrictive covenant, nor did he use any confidential information or other resources of the employer or carry out the preparatory work during his working hours. The case turned on whether Mr Tunnard owed a fiduciary duty to inform his employer of his preparation for future competition. The employer sought to argue that an employee owed a fiduciary duty to report such information by analogy with the decision in Item Software (UK) Ltd v Fassihi\(^9\) where a director was held to have breached a fiduciary duty in failing to report his own wrongdoing, the setting up of a company and diversion of a contract from the claimant to that company,

Moses LJ expressly endorsed the approach taken by Elias J in Fishel, and commented\(^10\):

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

The claim for breach of fiduciary duty failed because the employer could not identify any basis for a fiduciary obligation that he should disclose what he was doing outside working hours. Moses LJ held (albeit diffidently) that Mr Tunnard did have a fiduciary duty to pass on information which he came across about the intentions of competitors to compete with his employer. He was under an express contractual duty to disclose this information. This gave rise to a fiduciary duty because the employer:

“\(\text{would have no control over how Mr Tunnard deployed what he had learned as a salesman, and would be dependent upon him to pass on the information. Were it not so, the employee could pick or choose what he did or did not pass on. Thus HISL would be vulnerable to any misuse of such information, the dissemination of which was outside the employer's control. Such vulnerability is what Lord Millett described .. as a 'defining characteristic' of a fiduciary relationship. To obtain and then divert the}\)\(^\)"

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\(^9\) [2003] IRLR 769 and [2004] IRLR 928 (Court of Appeal)
\(^10\) at para 36
benefits of such information seems to me closely analogous to the condemned activities of the director, Fassihi”.

27. By contrast, Mr Tunnard was under no contractual duty to inform his employer about his own intentions or preparation to compete in due course.

“Secondly, no relevant fiduciary obligation can be identified. Mr Tunnard owed no fiduciary obligations in relation to the development of a preliminary concept for a new helmet; he was not in breach of any such obligation by seeking to raise funds for such a project while still in employment. The only identifiable fiduciary obligation might have arisen in relation to the deployment of information about similar preparatory development by a competitor. That is not this case. Mr Tunnard was working in his own time; the concept developed on his behalf belonged to him.”

28. The following points are to be noted:

28.1. it was held that Mr Tunnard did owe some fiduciary duties as an employee, but not ones relevant to the claim;

28.2. it might seem illogical that Mr Tunnard was under a fiduciary duty to disclose the activities of all competitors, including potential competitors, apart from himself. The justification for this distinction appears to turn on the terms of his contract\(^\text{11}\);

28.3. ‘vulnerability’ was the touchstone for a fiduciary duty. But vulnerability is a pretty flexible concept.

**National Grid v McKenzie**

29. In *National Grid v McKenzie* Norris J held that the defendant employee was “undoubtedly a fiduciary in the loose or comprehensive sense that that word is used in connection with bribery”\(^\text{12}\). The defendant was a project engineer, initially employed at a salary of £27,500, who reported to a project team leader and also to procurement team leaders and who could not place orders for his employer without at least obtaining a counter-signature\(^\text{13}\). National Grid brought various claims against Mr McKenzie including claims for bribery, secret commission and secret profit.

30. Norris J held that:

\(^{11}\) For a cogent criticism of Moses LJ’s reasoning, see Fiduciary Duties: Directors and Employees 2\(^{nd}\) Edition by Stafford and Ritchie at para 3.115 – 3.120 where the authors point out that the judge had assumed that Mr Tunnard had a right to prepare for competition whereas this, on the face of it, would be inconsistent with his express contractual obligation to report on competitor activity.

\(^{12}\) [2009] EWHC 1817 (Ch) at [55]

\(^{13}\) see [20, 21]
Great care needs to be taken with the attachment of fiduciary duties to a contract of employment, especially where the employment contract itself is so comprehensive: see Nottingham University v Fischel [2000] ICR 1461. I will without hesitation accept that an employee of Mr McKenzie’s rank owed a duty to act honestly and faithfully (“in good faith”) towards National Grid in the performance of his principal contractual duties, a duty not to place himself in a position in which his personal interests conflicted with the contractual and “good faith” duties that he owed to National Grid, and a duty not to make any secret profit by virtue of his position. These duties arose not from the mere fact of his employment, but from the context in which certain of his duties (in particular the negotiation of contracts for services to be rendered to National Grid and the approval of charges made) as employee fell to be discharged. The correct description of Mr McKenzie is that he was an employee who (in certain limited respects) owed fiduciary duties: it is a mis-description to call him “a fiduciary” and an error to treat him as a trustee.14

31. Norris J held that the defendant was liable in relation to a particular bribe or secret profit which concerned the letting of a sub-contract and the division of the ensuing profit between various parties, even though “the work was done and it was done well”, “the arrangements .. occasioned no actual loss to National Grid”, “it cannot be submitted that the work was unnecessary”, and “National Grid has not established that it could in reality have obtained the work for anything less than it actually paid”. The bribe or secret profit itself was the payment to the defendant of his share of the profit.15

32. Norris J also held that the defendant was liable to account for profits made by a joint venture in which he was involved where a contract placed by National Grid with a head contractor in accordance with a framework of standard rates was sub-contracted to a particular company. The defendant had helped the sub-contractor to put together a winning bid. This was a breach of his employment contract. “He should not have become engaged in a joint-venture concerning the profits derived from work of this sort when his position as project engineer would require him to assess the quality of the work undertaken and the performance by Eve [the head contractor] of the main contract.” The defendant was to receive a share of the profits made by the sub-contractor. National Grid could not show that this had

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14 at [28]
15 at [105, 110, 111]
16 at [108(g), 113]
caused it to suffer a loss. Nonetheless the defendant was order to render an account of the profit derived from the transaction\textsuperscript{17}.

33. The notable thing about \textit{National Grid} is the finding that a relatively junior employee, one without the power unilaterally to award or enter into contracts on behalf of his employer, owed fiduciary duties to his employer.

\textbf{Ranson v Computer Systems}

34. In \textit{Ranson v Computer Systems}\textsuperscript{18} the Court of Appeal overturned the decision at first instance that a senior employee had breached fiduciary duties in failing to disclose his preparations to establish a competing company. Lewison LJ expressly cited the decisions in \textit{Fishel} and \textit{Tunnard}, and drew a distinction between the fiduciary duties owed by directors and those sometimes owed by employees. Commenting on the implied contractual duty of mutual trust and confidence, he explained:

\begin{quote}
\textit{40 \ Since the alleged duty is an incident of every contract of employment, and it is clear that not every contract of employment gives rise to a fiduciary relationship, it is equally clear that reliance on the duty cannot of itself give rise to fiduciary obligations. It is, perhaps, unfortunate that the label given to the duty is so closely aligned with the label commonly applied to relationships that do give rise to fiduciary obligations; but conceptually it is quite different. The scope of the duty is a matter of contract, not of the law of fiduciary obligations.}
\end{quote}

\textit{41 The difference between the contractual duty of fidelity and the duties of a fiduciary}

As Elias J pointed out in \textit{Fishel} the hallmark of a fiduciary is a single-minded duty of loyalty. The duty of loyalty in that context has a precise meaning: “namely the duty to act in the interests of another”. As mentioned, this is not a feature of an employment relationship. In the employment context the duty of loyalty, although given the same label, “\textit{is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other.}” Again it is, perhaps, unfortunate that conceptually different things have been given the same label.”

\begin{flushleft}
\textsuperscript{17} at [119 – 142] \\
\textsuperscript{18} see above
\end{flushleft}
35. Lewison LJ also explained that an employee would not generally have an obligation to disclose his own wrongdoing to his employer, unless the obligation arose out of the terms of his employment contract\textsuperscript{19}.

\textit{Airbus Operations Ltd v Withey}\textsuperscript{20}

36. \textit{Airbus} was a claim for bribery, secret commission, conspiracy against Mr Withey, an employee in Airbus’ IT procurement department. Mr Withey had joined Airbus in 2002 as a junior manager, and had steadily worked his way up the managerial tree to the ranks of middle management. He was ambitious and good at his job.

37. In about 2002 Airbus had re-organised its procurement process so that it would only buy services from a limited number of large companies, known as tier one suppliers. Airbus entered into contracts with companies for different categories of service, with the effect that that each tier one supplier had a monopoly for providing the services of a particular type. It could sub-contract those services if it so wished, although Airbus had the right to approve or reject the sub-contractors chosen. The prices charged by the sub-contractor for the services were largely fixed under an agreed tariff of prices, and therefore the choice of sub-contractor rarely would have any effect on the price paid by Airbus. One such tier one supplier was T-Systems.

38. At around the time that Mr Withey joined Airbus, a friend and former colleague of his, Mr Wells, joined T-Systems. Mr Wells worked on the Airbus account, and rose to become account manager. In his role, Mr Withey was involved in procuring services provided by T-Systems. He therefore dealt with Mr Wells.

39. Prior to the re-organisation of Airbus’ procurement process, Mr Bohana had provided IT services to Airbus through his company, BTL. This continued after the re-organisation, albeit BTL supplied its services to T-Systems, and T-Systems supplied those services to Airbus. Mr Bohana dealt with both Mr Withey and Mr Wells. All three had been friends before Mr Withey and Mr Wells had joined Airbus and T-Systems respectively, and they remained friends thereafter.

40. The services provided by BTL to Airbus (via T-Systems) steadily expanded.

41. In about 2008, following a tip-off suggesting that backhanders were being paid within its IT department, Airbus launched an investigation into the dealings of Messrs Withey, Wells and Bohana. It discovered that Mr Withey

\textsuperscript{19} at [55]

\textsuperscript{20} [2014] EWHC (QB) 1126
and Mr Wells had each been paid “dividends” totalling over £500,000 by Mr Bohana/BTL. The payments were made to companies set up by Mr Withey and Mr Wells in 2002. Airbus confronted the three men. Mr Withey and Mr Wells initially admitted that the payments had been a share of profits, but denied that they had done anything wrong.

42. Airbus issued the claim against the three men and their companies. However, there was no evidence that the activities of the three men had caused any loss to Airbus. The work done by BTL was work required by Airbus and it had been done properly. There was no evidence that Airbus could have had the work done more cheaply by other parties, not least because its own contract was with T-Systems and the prices payable to T-Systems were largely governed by the agreed tariffs.

43. As it could not demonstrate a loss, Airbus needed to establish that the payments received by Mr Withey’s company were a form of bribe or secret commission (which are the same thing, in civil law) paid by BTL (on behalf of Mr Bohana) because both the payer and the recipient of a bribe or secret commission are liable to pay that sum to the principal of the recipient, regardless of whether the principal has suffered any loss. However, for the payment to be a bribe or secret commission it is necessary for there to be a fiduciary relationship between recipient and principal.

44. The judge found, amongst other things, that:

44.1. the payments to the companies of Mr Withey and Mr Wells did represent roughly one third shares of the profits made by Mr Bohana/BTL from the supply of services to Airbus (via T-Systems);

44.2. Mr Withey and, to a lesser extent, Mr Wells had provided services to BTL, albeit not services for which one would expect to pay £500,000. The services had been provided outside office hours;

44.3. Mr Withey had genuinely thought that his activities were not harming Airbus.

45. Much of the trial centred on whether Mr Withey had owed fiduciary duties to Airbus. Mr Withey argued that he had not because he was a very junior manager, far removed from the board of directors, and that he had not had authority to place contracts (or relevant contracts) on Airbus’ behalf. He had also had no influence over where T-Systems placed the sub-contracts. Either it was simply a matter for T-Systems or else, where Airbus expressed a preference for a particular sub-contractor, he simply passed on the requirements of other people within Airbus. In other words, he had a largely administrative function.
46. Airbus argued that Mr Withey had sufficient seniority and influence to owe fiduciary duties. Even if he was not in a position to make or place contracts on Airbus’ behalf, he was nonetheless in a position to influence the making or placing of those contracts, for example by making comments or requests to his superiors or to T-Systems. He also had responsibilities for reviewing the work done by sub-contractors, which again gave him influence relevant to the decision about which sub-contractor to use. The receipt of the money from BTL placed him in a conflict of interest because it was in his interests for work to go to BTL because he would share in the profits from such work.

47. The judge concluded that Mr Withey did owe relevant fiduciary duties, giving his reasons as follows:

“410. Mr Pearce-Smith submitted that the court should be astute to find a fiduciary duty in the wide and loose sense described in Reading v The King where money has been shown to have been paid to an employee which placed him in a position of potential conflict between his personal interest and the duty he owed to his employer. In other words, the court should be ready to impute a fiduciary obligation in a case where all the other ingredients of a case of bribery or secret commission are present. Mr Pearce-Smith argued that this approach held good for all employees, a fortiori, those of management rank.

411. As a general proposition, I think this is too broad. The readiness with which the court will impute a fiduciary duty depends on the circumstances. An employee in a lowly position will be held to owe a fiduciary duty with regard to money entrusted to him by his employer. An employee of non-managerial rank who receives a payment in circumstances which plainly involve dishonesty, where all the other ingredients of a case of bribery are present, may well be someone in respect of whom a fiduciary obligation will very readily be implied. Where, however, the dishonesty is not obvious, a determination of whether the employee stood in a fiduciary relation to his employer will depend on a more clinical inquiry into his status and the functions he was required to perform as part of his job.

412. The defendants emphasised the strictures in recent cases against blurring the distinction between an employee’s common law duties of fidelity, good faith and trust and confidence with the elevated duty of loyalty and good faith owed by someone in a fiduciary position. They pointed out that in all the cases cited where the defendant was found to have owed a fiduciary duty he was either a director of the claimant company, or akin to a director, of the claimant or was responsible for negotiating or approving contracts on the claimant’s behalf or held a position of decision-making autonomy. Thus in National Grid v McKenzie, Mr McKenzie owed a fiduciary
duty to National Grid because he was responsible for negotiating contracts for services and for approving the charges made for those services (see para. 26). In University of Nottingham v Fishel, Dr Fishel was held to have owed a fiduciary duty to the University in directing the embryologists in the team for which he had an autonomous responsibility. In Helmet Integrated Systems Ltd v Tunnard, it was accepted that Mr Tunnard owed a fiduciary duty to his employer to report any competitor activity he learned about in the course of his employment as a salesman and to use such information only for his employer’s benefit. This was for two reasons: (1) there was an express obligation in his contract of employment to report competitor activity and (2) his employer had no control over what information came his way and was vulnerable if he misused that information. By contrast, there was no restriction in his contract of employment as to what he did outside office hours. So Mr Tunnard owed no duty not to develop his own fireman’s helmet in his spare time, even if it was a product which could potentially compete with that of his employer. In Ranson v Customer Systems plc, Mr Ranson’s job involved nurturing other clients (“farming”) and looking for new ones (“foraging”) within a limited field. But there were no contractual obligations on him to report to his employer on encounters with potential clients outside his patch and therefore no basis for implying a fiduciary duty to report on such matters. In Axel Threlfall v ECD Insight Ltd & Another, it is clear that Mr Threlfall, although a senior employee nominally with managerial responsibilities, had very little independent executive authority in practice because Mr Whitney, the owner of the company and its sole director, was not willing to cede power to him. For this reason no fiduciary duty was owed to the company where otherwise it might have been.

413. The defendants’ case was that Mr Withey was not in a position of executive control. He never attained more than junior managerial rank. He worked within a line of management where the final decisions about who obtained what work at what price rested with other departments or with others above him in the hierarchy. Moreover there was nothing in his contract of employment which controlled what he could do out of office hours.

414. The defendants acknowledged that Mr Withey had influence, but maintained that influence was not enough for the imposition of a fiduciary duty. As Mr Sims put it in his opening skeleton argument: “What matters is not whether PW had a voice or influence within Airbus. Clearly he did. A butterfly flapping its wings in Brazil has an influence on the weather in the UK. What matters is whether PW’s role was such that he played a critical and autonomous role in negotiating contracts and approving the prices for work. Clearly he did not do so at any stage or to any material degree.”
415. Mr Bohana went so far as to say that the system of procurement in Airbus UK “ran on rails”. He said that Mr Withey and Mr Wells were only involved “downstream” from the important decisions about the commissioning of work or projects. In other words, Mr Withey and Mr Wells were simply responsible for implementing decisions made by others.

416. I cannot accept these arguments. First, I think the defendants have set the bar too high. In my judgment, an employee who holds a post in which he is able to influence, in the sense of materially affect, the course of business between his employer and the donor of a secret payment is someone to whom a court would be justified in attributing a fiduciary obligation. In the law of bribery and secret commission, the employees most exposed to temptation and whose loyalty matters most to the employer are those able to change the outcome in business transacted between the employer and third parties. That does not necessarily mean that such employees are autonomous decision-makers or that they are unsupervised. It is manifest from the emails that Mr Withey had considerable influence in the procurement process which on occasions he used to ensure that work was given to BTL where otherwise it might not have been or there would at least have been a process of competitive tendering, or to ensure that work which had been done by BTL in the past stayed with BTL.

417. Second, even if wrong in holding that influence which can materially affect the course of business may be a sufficient basis for implying a fiduciary duty, I find that Mr Withey had a degree of autonomy and independent decision-making authority which justifies the conclusion that he owed fiduciary obligations to Airbus UK.

418. Only so much assistance can be derived from reading the runes of other cases, because the factual context in each case is different. But it is noteworthy that in National Grid v McKenzie, Mr McKenzie was not unsupervised. He worked within a Project Management Team under the line management of a Project Team Leader, with a Procurement Team with its own management working alongside. It is also significant that the one respect in which Dr Fishel was held to owe a fiduciary obligation to Nottingham University was the leadership of his team.

419. The evidence in this case plainly demonstrates that Mr Withey could, and did, decide when certain work should be done as a project, whether a PO should be issued with a named resource, and whether a quotation or cost was acceptable. There were occasions when he allocated work to BTL. The fact that BTL was the obvious candidate is beside the point. So too, is the fact that choosing BTL in preference to another subcontractor, such as
Phoenix, was in the best interests of Airbus UK. Mr Withey was in a position to decide differently and to adopt a different solution. He was of a seniority where his interventions could and did alter the outcome. I find that if it had not been for Mr Withey’s conduct in maintaining the status quo i.e. in using his position to decide that work which had previously been done by BTL remained with BTL, or to endorse decisions taken by others to that effect, more standard and non-standard IT work would have been awarded to Phoenix earlier than it was...

420. The defendants asserted that no work for Airbus UK was diverted to BTL by the actions of Mr Withey or Mr Wells. To the extent I have just indicated, I disagree. But there is a wider point. It is that, by virtue of the assistance Mr Withey and Mr Wells gave to BTL, BTL was able to compete for more work from Airbus UK than it would otherwise have been able to handle. As a result, BTL was able to take on the underlap and was able to perform PC Refresh and other work within Desktop services which would have gone to another subcontractor.

421. I have come to the clear conclusion that Mr Withey’s managerial responsibilities as Head of Request Management and PC Services from November 2005 were such that he owed a fiduciary duty of undivided loyalty and good faith to Airbus UK in a number of respects. He owed a fiduciary duty in directing the work of the teams under him... He owed a fiduciary duty in administering the CAPEX budget for Request Management and the OPEX budget for PC Services. This included giving his approval of quotations for work within the work packages within his remit. He also owed a fiduciary duty in respect of any intervention he made in the procurement process which determined or influenced (in the sense that the decision might have been different without his intervention) what work was awarded to whom at what cost. In the light of these findings, I have looked again at clause 13 of Mr Withey’s contract of employment and the provision about Outside Business Interests in the Airbus Employee Handbook. I consider that the contractual duty imposed by these provisions was also a fiduciary duty, namely, that Mr Withey should not to be engaged in any capacity in another business in any way which might conflict with the best interests of Airbus UK, unless approval was given. In my judgment this imported an obligation to disclose any such engagement.

422. I have carefully considered whether a distinction should be drawn between the period after November 2005 and the period between February 2004 and October 2005 when Mr Withey’s remit was narrower... the evidence reviewed in paras 228-245 of this judgment contains examples in this earlier period of precisely the kind of autonomous decision-making in the context of procurement which in my judgment justifies imputing a
fiduciary relationship between Mr Withey and Airbus UK. My conclusion, therefore, is that Mr Withey owed a similar fiduciary duty in respect of the interventions he made in the procurement process before November 2005.”

48. The significance of the decision in Airbus is that it shows that even a relatively junior manager, without an autonomous decision-making role, may be held to owe relevant fiduciary duties. On the facts of this case, the relevant factor was that Mr Withey was in a position of influence. The wider point, it is submitted, is that he was held to owe fiduciary duties in respect of matters that were entrusted to him as part of his employment contract.

49. It is arguable that the concept of fiduciary duty is slightly different in bribery/secret commission cases than in other cases in the sense that the court is readier to find that a fiduciary duty exists where a payment is made which has the appearance of a bribe. The logical implication of this is that the court might find that such a duty which does exist for the purposes of a bribery claim does not exist for the purpose of some other form of claim for breach of fiduciary duty. It also suggests a circularity of reasoning, i.e. a payment may be deemed to be a bribe before it is established whether the recipient owed a relevant fiduciary duty, even though such a duty is needed for the payment to be a bribe; once deemed to be a bribe, the court may then find the existence of the necessary fiduciary duty.

50. This point derives from comments of Asquith LJ in Reading v The King21 where he said:

“These are cases in which the servant or agent has realized a secret profit, commission or bribe in the course of his employment; and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a ‘fiduciary relation’ existed between himself and the defendant and that the defendant acted in breach of this relation. But the term ‘fiduciary relation’ in this connexion is used in a very loose, or at all events a very comprehensive, sense”.

51. The judge in Airbus was rightly resistant to the argument that the existence of a fiduciary duty should be ‘reverse-engineered’ from the fact that the payment was, on the face of it, a bribe or secret commission (despite the best efforts of the author to persuade him otherwise!). It is submitted that a consistent approach should be adopted to the question of whether a fiduciary duty is owed.

21 [1949] 2 KB 232 at 236-237
52. *Airbus* also demonstrates the strictness of the sanctions which apply in the event that an employee is found to have breached his fiduciary duty. Mr Withey was held liable to pay the full amount of the money received by his company from BTL even though:

52.1. Mr Withey had believed that he was acting in the best interests of Airbus and not against the interests of Airbus;

52.2. Mr Withey had honestly believed that he was not doing anything wrong;

52.3. Mr Withey had (arguably) only placed himself in a potential conflict of interest, rather than an actual conflict with the interests of Airbus;

52.4. Airbus had not suffered any loss;

52.5. Airbus could not have earned this money itself;

52.6. Mr Withey had provided valuable services to BTL, for which he was rewarded by the payment of this money.

53. As the judge explained, one of the purposes of these rules was to serve as a deterrent to those who owe fiduciary duties.

**Conclusion**

54. These cases demonstrate the variety of different situations in which employees may be held to owe fiduciary duties, but they also show the difficulty in trying to pin down precisely what gives rise to the duty and what the scope of the duty is. The duty has to be consistent with the contractual duties owed by the employee, but the mere existence of contractual duties does not give rise to fiduciary duties. It is submitted that the theme which appears to link the cases is that the employer placed trust in the employee in some respect so that it was vulnerable if the employee abused that trust. However, in many situations it can be argued that the employer has placed trust in the employee, even a relatively junior employee, and therefore there will often be scope for argument about whether the employee owes a relevant fiduciary duty and, if so, the scope of that duty.

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