



DUTIES OF FIDELITY

WHAT IS EXPECTED OF SENIOR MANAGEMENT?

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Introduction

In this short Lecture I intend to address the need for Employment Lawyers to differentiate between the overlapping concepts of Fidelity; Good Faith; and Fiduciary Duties.

The *Competent* Employee

Duty to Exercise Reasonable Skill and Care

in contrast to Duty of Fidelity and Fiduciary Duties, i.e. loyalty; disclosure; non-competition etc.

The *Obedient* Employee

Duty of Fidelity

Robb v Green [1895] 2 QB 315, 317 *per* Lord Esher MR

a stipulation that the servant will act with good faith towards his master

Some judges have used fidelity and fiduciary interchangeably.

At least one academic has suggested that there is no difference between the duty of fidelity and fiduciary duties:

A proper comprehension of the progress of the case law indicates that the introduction of distinct duty of fidelity was nothing more than a mistaken elevation of a synonym into a separate doctrinal construct of redundant content.

(Robert Flannigan, (2015) Journal of Business Law 189)

However that is a revisionist view because: -

The duty of Fidelity arises at common law as an implied term of the employment contract.

In contrast Fiduciary duties have their origins in equity.

As we shall see the Court of Appeal has stated that Fidelity duty does not demand "single-minded loyalty" - much apparently will depend on the term of the contract. I would agree that the distinction does leave us with an essentially a vague and uncertain concept to map out.

Given the express terms the implied duty of Fidelity will be either expanded or constricted by the specific contract.

Take for example *whole time clauses* or express duties to report wrongdoing.

The *Loyal Employee*

Fiduciary Duties

Recognises the exposure to opportunism in certain relationships (**status** basis) or circumstances (**fact** basis) and the ease of those entrusted with responsibilities to extract unauthorised value from their employer's or principal's assets.

There are two Main Duties:

- (1) The No Conflict Rule
- (2) The No Profit Rule

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.

Bristol & West Building Society v Mothew [1998] Ch 1, 18 per Millett LJ

Why The Distinctions Matter?

Less important in the area of unfair dismissal.

However vital in the area of employment related Civil Litigation:-

- Account of Profit - no need to show loss - purpose is to dislodge the benefits.
- Duty to disclose own misconduct
- No need for deliberate breach or negligence.
- Preparatory acts falling short of breach of contract.
- Wide range of Remedies - tracing; accounts; equitable compensation, rescission of contracts made in breach etc.
- Limitation - section 21(3) Limitation Act 1980 - *potentially*

Important!

Note the distinction made by Court of Appeal between *mutual* obligation of trust and confidence and the fiduciary duty *indicia*, which are *not mutual*.

Who is a Fiduciary?

- The reposing of Trust and Confidence
- Demand of single-minded loyalty
- Avoidance of self-interest

Policy:

Limited access undertakings, e.g. partnerships; agency etc. should not be compromised by unauthorised conflicts or benefits.

Distinction between Directors and Other Senior Employees

Directors: A well-recognised class of fiduciary.

The core duties now codified in sections 170-177, Companies Act 2006.

The Companies Act 2006

Section	Description	Comment
170	Introduction- The Scope and Nature of the General Duties- Replace the common law rules and the equitable principles upon which they are based.	
171	Duty to act within Powers	
172	Duty to promote the Success of the Company for the benefit of its Members	
173	Duty to exercise independent judgment i.e. take personal responsibility	
174	Duty to exercise Reasonable Care and Skill	
175	Duty to Avoid Situations of Conflict of Interest.	The No Conflict Rule
176	No acceptance of benefit from Third Parties	The No Profit Rule
177	Duty to declare an interest in proposed transactions.	

Continued Relevance of the Common Law and Equitable Principles and the earlier Caselaw

Note section 1781(1)

The consequences of breach (or threatened breach) of ss. 171 to 177 are the same as would apply if the corresponding common rule or equitable principle applied

Relevant to Remedies e.g. accounts; enquiries; tracing etc.

Who is a Director?

Statutory Directors

De facto Directors:

Section 250, Companies Act 2006-

HMRC v Holland [2010] 1 WLR 2793 (Supreme Court)

Smithson v Naggar [2014] EWCA 939 *per* Arden LJ [33]-[45]

In general, examine the corporate governance structure objectively and in the round so as to decide whether cumulatively in relation to the business of the company the person's acts were directorial in nature.

Shadow Directors:

Section 251, Companies Act 2006 -

A person in accordance with whose directions or instructions the directors are accustomed to act.

- The Overlap with de facto directors.
- Will a fiduciary duty be assumed?

Contrast:

Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 *per* Lewison J -
(Answer: No)

with:

Vivendi SA v Richards [2013] EWHC 3006 *per* Newey J - (Answer: Yes)

Non- Director Employees, as Fiduciaries?

Non-director employees *might* be fiduciaries but there is at present no settled definition or test.

However there has been a tendency to extend certain duties, which are fiduciary in character even when the relationship falls short of being fiduciary.

Status Based?

Attorney-General v Blake [1998] Ch 439

George Blake's employment by British Intelligence gave rise to a fiduciary duty during the course of such employment.

Court of Appeal appeared to be saying that the employment relationship *per se* was a fiduciary relationship.

The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee 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 party without the informed consent of his employer.

per Lord Woolf MR [1998] Ch. 439, 454

House of Lords (in particular Lord Steyn) confirmed employee status fiduciary accountability [2001] 1 AC 268, 292.

The Landmark Decision -

University of Nottingham v Fishel [2000] ICR 1462 *per* Elias J

Key points:-

- Employment Relationship is not a fiduciary one - a significant move away from *A-G v Blake*
- The contract may show that employee has undertaken specific obligations in the performance of which he must act exclusively in his employer's interests.
- Need to identify with care the particular duties undertaken and ask whether in all the circumstances the employee has placed himself in a position where he must act solely in the interests of his employer. Once those duties have been identified it is possible to determine whether any fiduciary duty has been breached.

Contractual terms relating to loyalty; good faith and trust and confidence are all relevant but do not automatically equate with fiduciary obligations.

Fishel endorsement by the Court of Appeal

Helmet Integrated Systems Ltd v Tunnard [2007] IRLR 126 - Moses LJ

Customer Systems plc v Ranson [2012] EWCA 841

In conclusion:-

A. Employees: Current thinking is that relationship not inherently fiduciary - see for example Stafford & Ritchie *Fiduciary Duties* (Second Edition, 2015) Chapter 3.

B. Senior employee is not by analogy equivalent to a director

Customer Systems plc v Ranson [2012] EWCA 841 [20]-[24]

"dangerous to reason by analogy"

per Lewison LJ

C. The contractual duty of fidelity is not equivalent to that of fiduciary duties.

The present case law results in a potential for some confusion between all these principles.

As we have seen it is possible to argue that the duty of fidelity is no more than an expression of the status based fiduciary status, which was acknowledged in *Blake* (cf. *Flannigan* (*ibid.*))

In cases involving springboarding; misuse of information; conflicts of interests; and diversion of opportunities it is vital that the lawyer:-

- (1) **Identifies** the status of the Employee - Is he a Statutory Director; De Facto Director; Shadow Director; Non-Director;
- (2) **Examines** the Contract and the Circumstances for the duties roles and responsibilities;
- (3) **Considers** the potential for branding the Employee as a Fiduciary and the effect that might have on the Remedies and Merits of any Judicial intervention;
- (4) **Pleads** with sufficient care any Statement of Case so as to be able to present a coherent argument before the Court.

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