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Team Moves, Trade Secrets and Remedies: the latest thinking

**SECRETS AND LIES:
IS THERE A DUTY TO
DISCLOSE AN APPROACH?**

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Secrets and Lies: is there a duty to disclose an approach?

Introduction

1. In a team move situation, the current employer is often left completely in the dark as to the imminent danger faced by its business.
2. Increasingly employers are writing express disclosure clauses into contracts which require an employee to inform his employer when he (or fellow employees) have been approached to move to a competitor.
3. Where no such express clause is contained in an employee's contract, the employer may seek to argue that the employee had an implied contractual and/or a fiduciary duty to disclose such an approach by a competitor.
4. The purpose of this paper is to focus on recent developments in the law of contract in this area. The developments in respect of fiduciary duties are outside the scope of this paper.

Answering questions truthfully¹

5. The duty of good faith and fidelity includes a duty to answer certain questions truthfully. An employer is entitled to a truthful and honest answer to a straight question. But the position is not clear-cut.
6. Examples of scenarios in which other considerations may apply are set out below:
 - (1) An employee is probably entitled to refuse to answer questions about his private life or life outside work. So it is unlikely that an inaccurate or untruthful answer would necessarily be considered a breach of duty but this will depend on the facts and the employee's reasons for telling the lie.
 - (2) Even if the employee tells a lie which amounts to a breach of the duty, it may not be repudiatory where an employee lies without any intention of harming his employer, or concealing his own wrongdoing: *Fulham Football Club v Tigana*².
 - (3) If an employee takes a half day's holiday to attend a job interview, he need not tell his employer the reason for taking the holiday. An employee has an absolute entitlement to look for alternative employment so long as he is not in breach of any covenants or other obligations. However, if the interview is part of a recruitment campaign by a competitor that may involve fellow employees, he may have to disclose that attempted recruitment campaign even if this tends to disclose the fact that he is interested in being recruited. This is more likely the more senior he is.

Express disclosure clauses

¹ See paragraphs 2.172 to 2.129 of *Employee Competition: Covenants, Confidentiality, and Garden Leave* (2nd ed, 2011).

² [2004] All ER (D) 212 (Nov); affirmed [2005] EWCA Civ 895

7. Express disclosure clauses, requiring an employee to report an approach to himself, and sometimes fellow employees, are on the increase.

Restraint of trade?

8. In *Tullett Prebon v BGC Brokers LP*³, Jack J considered the duties of a desk head and found:
 - (1) There is nothing wrong in a desk head responding to an approach to recruit himself (§67);
 - (2) If the desk head's contract⁴ obliges him to report that approach to his employer, he is obliged to do so (§67);
 - (3) Such a provision does not operate in restraint of trade (§67).
9. There was no appeal against this part of the judgment.
10. Although the Judge was only concerned with an express disclosure clause in a desk head's contract, and each case will turn on its own facts, it seems to me that this finding should not be read as restricted to desk heads.
11. Employers would be well-advised to include such clauses in new contracts.

Inducing breach

12. If the new employer has knowledge of an express disclosure clause in his recruit's current employment contract, encouraging that employee not to disclose the approach to his current employer will amount to inducement of breach of contract (Jack J at §142).

Implied duty?

13. Every employment contract contains an implied duty of good faith and fidelity.
14. The general principles to be gleaned from the authorities on whether a (mere) employee⁵ has a duty to disclose misconduct are:
 - (1) an employee does not have an implied contractual duty to disclose his own misconduct which falls short of fraud: *Bell v Lever Brothers*⁶;
 - (2) An employee may have a duty to disclose the misconduct of a superior: *Swain v West (Butchers) Ltd*⁷;
 - (3) An employee may have an implied duty to disclose the misconduct of a subordinate employee even if this discloses his own misconduct: *Sybron v Rochem Ltd*⁸.

³ [2010] IRLR 648

⁴ He appears to have been referring to an express disclosure clause here.

⁵ Who is not a director or in a fiduciary position

⁶ [1932] AC 161, HL

⁷ [1936] 1 All E.R. 224

15. None of the above cases was in the field of employee competition.
16. The extent to which these principles apply in a team move scenario is considered below by reference to some recent cases, all of which are first instance decisions of the High Court.

British Midland Tool Ltd v Midland International Tooling Ltd & Others⁹

Facts

17. The claimant sought damages for conspiracy and other breaches of duty. Three of the four individual defendants had all been directors of the claimant. To the knowledge of three of the six members of the claimant's board, a determined attempt was being made by a potential competitor to poach the claimant's workforce. These three, at best, did nothing to discourage, and at worst actively promoted the success of this process (§90).

Judgment of Hart J

18. Hart J found:
 - (1) This was a plain breach of their duties as directors. Those duties required them to take active steps to thwart the process. Active steps should have included alerting their fellow directors to what was going on (§90).
 - (2) That conclusion rendered it unnecessary for him to consider whether such conduct amounted to a breach of their employment contracts. The same analysis would not apply. The employee's duty of fidelity is by no means identical to the director's fiduciary duty to the company (§94).
 - (3) He did not disagree with the statement of Cumming-Bruce LJ in *GD Searle & Co Ltd v Celltech Ltd*¹⁰ that:

‘The law has always looked with favour upon the efforts of employees to advance themselves, provided they do not use or steal the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him’.
 - (4) But the behaviour of the three senior management employees during the period when a poaching exercise was being conducted was such that he thought it:

‘impossible to hold that their conduct was consistent with their duty of fidelity to their employer’ (§95)).

⁸ [1984] Ch 112

⁹ [2003] 2 BCLC 523

¹⁰ [1982] FSR 92

Kynixa v Hynes¹¹

Facts

19. The claimant was a specialist provider of rehabilitation and case management services for persons who have suffered injury, usually as a consequence of an accident at work or on the road. The claimant sought relief against three of its former employees, Martin Hynes (Chief Operating Officer and a director), Sarah Preston (Head of Business Development) and Heather Smith (Relationship Manager) for breach of contract and breach of fiduciary duties in respect of their move to Scion Management Limited (which was not a defendant to the litigation). Both the first and second defendants were senior employees. The first defendant was a director. The second defendant was not a director but conceded that she became subject to a fiduciary duty. The third defendant was an employee and not a director.
20. According to Wynn William J's summary of the facts:

'At no time did the Defendants inform the Claimant that they intended to work for Scion and at no time after their departure from the Claimant did they volunteer the fact that they had gone to Scion' (§54).
21. He considered the real issue before him to be:

'What each should have disclosed to the Claimant once it had become clear to them that there was a real possibility that each would join [Scion]' (§221);

'What the Defendants should have said or done once each was aware of the approach not just to himself/herself but to the other Defendants' (§222).
22. The Judge's findings of fact included:
 - (1) **D1**: 'What is strikingly obvious, however, is that from a date very soon after the First Defendant first indicated his intention to resign he was in active discussion with Mr Roberts about employment with Scion and he did not disclose that those discussions were occurring or had occurred. Rather it seems that the First Defendant **positively misled** the Claimant as to his true intentions in the period early December 2006 to 16 March 2007' (§235).
 - (2) **D2**: 'At no stage after her appointment as chair of the [Business Continuity Committee] did she disclose to the Claimant the fact that she had already signed a contract of employment with Scion and that she intended to take up a post with Scion shortly after leaving the Claimant at the end of April 2007' (§251). 'There is no dispute but that the Second Defendant **either lied to [the Claimant] or misled them** at all times when she spoke of her future intentions after the approach by Mr Roberts in early January 2007 (§275).

¹¹ [2008] EWHC 1495 (QB)

- (3) **D3**: ‘...in my judgment, such information as the Third Defendant gave to [the Claimant] as to her reasons for resigning and future intentions were, clearly, **highly misleading**’ (§253).

The claim

23. The Judge summarised the claim in this way:

‘The central theme of the Claimant’s case is that the three Defendants acted together (colluded) in hiding from the Claimant the approaches by Mr Roberts and their decision to take up employment with Scion. The Claimant’s case is that by so doing the First and Second Defendants were in breach of their fiduciary duty to the Claimant and also the implied duty of fidelity which they owed to the Claimant under their contract of employment. As I have said it is not alleged that the Third Defendant owed to the Claimant a fiduciary duty but it is alleged that her conduct was a breach of her implied duty of fidelity’ (§255).

24. He then went on to consider the position of each of the Defendants separately:

- (1) **D1**: The Judge found it was likely that the first and second defendants discussed the approach to the second defendant and concluded that: ‘At that point in time, in my judgment, the First Defendant’s fiduciary duty to the Claimant obliged him to disclose the fact of his discussions with Mr Roberts and the fact of an approach by Mr Roberts to the Second Defendant’ (§262). ‘Once the First Defendant’s breach of duty began it continued throughout the remainder of the period that he remained a director and an employee of the Claimant...’ (§269). ‘I do not consider it necessary to consider in detail whether the First Defendant was also in breach of the implied duty of fidelity as a consequence of his failures as discussed above. It seems to me, however, that it is an inevitable conclusion that he was’.
- (2) **D2**: ‘On each occasion that [the Second Defendant lied or misled the Claimant], in my judgment, she was in breach of her fiduciary duty’. I simply do not see how any other conclusion is possible given what she knew of her own intentions, the approaches to the First Defendant and, as from late January at the latest the approaches to the Third Defendant’. ‘As with the First Defendant the conduct of the Second Defendant was a continuing breach from either early or late January 2007 and it was also a breach of her implied duty of fidelity’.
- (3) **D3**: The Judge concluded in respect of the third defendant (who was not a fiduciary): ‘I am quite satisfied, however, that once she knew of the fact that approaches had been made to the other Defendants as well as herself her duty of fidelity was such that she should have informed the Claimant of the approaches. Her failure to do so was, in my judgment a breach of her duty. **A crucial aspect of the implied duty of fidelity is the concept of loyalty. The Third Defendant’s actions were not consistent with that concept. I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility**’ (§283).

Comment

25. Thus the Judge found there to have been:
- (1) Breach of fiduciary duty by the first defendant in failing to disclose approaches, and by the second defendant in lying/misleading the Claimant;
 - (2) Breach of the implied duty of fidelity by the third defendant both in: failing to disclose approaches, and positively misleading the Claimant.
26. The Judge seems to have been prepared to assume that the implied duty of fidelity would have led to the same result as the fiduciary duty as far as the first and second defendants were concerned but did not analyse the position in any detail.
27. In setting out the facts the Judge seems to have proceeded on the basis that there is a duty on an employee to disclose an approach to himself and other employees.
28. The Judge was not concerned with the scenario where an employee did not know of approaches to others and thus whether such an employee had an obligation to disclose an approach to himself.
29. The Judge did not expressly consider whether there was, in law, a difference between a duty to disclose an approach (i.e. a duty to take a positive step) and a duty not to positively mislead the employer (i.e. a duty to refrain from doing something).
30. Each of the judges who gave judgment in the two most recent team move judgments (*Tullett Prebon* and *Lonmar Global Risks*) concluded that *Kynixa* was a case which turned on its own facts, as set out below.

Tullett Prebon

31. In considering the duties of a desk head, Jack J found:
- (1) The desk head's obligation in law is to act in the interest of his employer and not of the desk (§68);
 - (2) The employer's interest is to prevent the recruitment of the desk (§68);
 - (3) The desk head is obliged to inform his employer that the rival company is seeking to recruit the desk (§68).
32. Jack J referred to the decision in *Kynixa* in the following terms:
- 'In *Kynixa v Hynes*...it was held that a particular employee was obliged in the circumstances to report to her employers that she and other employees were moving to a competitor. I refer to paragraph 283 of the judgment of Wynn Williams J. That was a decision on its particular facts and it is of no particular assistance in considering the position of a desk head who knows that a rival company seeks to recruit his desk. But in my view the duty of a desk head in this situation is plain (§68)'.

33. However, in considering the claims in conspiracy and breach of contract, Jack J said:

‘Concealment of approaches is not in itself unlawful, but it may be the first step towards an early exit strategy of an accumulation of recruits. Further, where as here, the recruit’s contract with his employer requires him to report an approach, encouraging the employee not to do so in knowledge of the term, will be inducing a breach of contract and tortious...’ (§142(d)).

Comment

34. The following observations can be made:

- (1) Jack J does not expressly identify the legal source of the duty which he says is plainly owed by the desk head, and in particular whether it arises out of the implied duty of fidelity or because the desk head is in a fiduciary position;
- (2) At §66 he distinguishes between these different duties and appears to say that he is not concerned with fiduciary duties. That seems to suggest that the source of the duty on the desk head which he is referring to is the implied duty of fidelity;
- (3) Yet his statement that ‘concealment of approaches is not in itself unlawful’ suggests that it is not part of the duty of fidelity to disclose approaches.
- (4) It is suggested that Jack J was of the view that in the absence of an express disclosure clause, an employee has no implied duty to report an approach to himself, but may have an implied duty to disclose an approach which he knows is part of a team move.

Lonmar Global Risks Ltd v West¹²

Facts

35. The claimant was a Lloyd's insurance and reinsurance broker. It acted as a registered intermediary for international brokers or agents who wished to access the Lloyd's insurance market in London. Its work required salesmen or “producers”, who were able to obtain and retain business from international brokers. The first and second defendants, Mr Niel Mee and Mr West were two such producers employed by the claimant. The third defendant was a broker. The fourth defendant was Tyser & Co Ltd, a direct competitor of the claimant.

The claims

36. It is the claims made against the first and second defendants that are material for present purposes. The claimant claimed that the first and second defendants had breached their contractual implied duties of fidelity and/or their fiduciary duties in failing to seek to persuade customers and employees to stay with the claimant and failing to disclose to the claimant that employees, clients and business opportunities were moving to Tyser.

¹² [2010] EWHC 2878 (QB)

Judgment of Hickinbottom J

37. The Judge considered the difference in the legal basis of the implied duty of fidelity and the fiduciary duty (§§148-150).
38. He summarised the relevant legal principles as follows:
- (1) Some relationships require the imposition of fiduciary duties because the essence of the relationship is such that one party is obliged to act for the benefit of the other (§150);
 - (2) The employment relationship does not, in itself, require an employee to pursue his employer's interests at the expense of his own (§§150-151);
 - (3) Generally an employee is under no obligation to report to his employer:
 - a. his own misconduct (*Bell v Lever Brothers*); or
 - b. the misconduct of his fellow employees (*Sybron v Rochem*) (§151);
 - (4) Nor is an employee under a restraint from:
 - a. legitimate preparation for himself engaging in future competition with his employer (*Helmet Integrated Systems v Tunnard*¹³), or
 - b. informing another employee of his plans to do so and offering him a potential job in that competitor in the future (*Tithebarn v Hubbard*¹⁴) (§148).
39. Applying those principles, the Judge held:
- (1) If it is not unlawful for an employee to inform a fellow employee of plans to set up in competition and (without inciting him to breach his contract with his current employer) offer him a job in the future, then the employee to whom such matters are confided cannot sensibly be under a general obligation to inform his employer of those plans or job offer (§151);
 - (2) The particular functions of an employee may require him to pursue the interests of his employer to the exclusion of other interests, including his own (§152);
 - (3) The hallmark of a fiduciary obligation in an employment context is therefore a particular contractual obligation which requires the law to impose a duty positively to act in the best interests of an employer (§152);
 - (4) Care must be taken not to equate the duty of good faith and loyalty owed by every employee with a fiduciary obligation (§152);
 - (5) Fiduciary obligations are onerous and will not be imposed lightly, not least because of the equitable remedies that flow from the finding of breach (§152);

¹³ [2007] IRLR 126

¹⁴ EAT (Wood J), unreported 7 November 1991)

- (6) The relationship of employer/employee does not give rise to fiduciary duties per se (§155);
- (7) The contractual duty of fidelity does not as a general rule incorporate an obligation to report to an employer wrongdoing of employees, let alone conduct falling short of wrongdoing which may nevertheless not be in the best interests of the employer (§155).

40. The Judge said of *Kynixa*:

‘To the extent that [Counsel for Lonmar Global] submitted that *Kynixa*... is authority for the proposition that there is a broad implied duty in a contract of employment requiring an employee who owes no fiduciary obligation and who is not acting in concert with others or otherwise unlawfully, to disclose to an employer that fellow employee are being recruited by a competitor, I do not agree. It seems to me that the decision in *Kynixa* was particularly fact specific: and the comments at paragraph 283 appear to be obiter, as the relevant defendant had positively misled the employer about the intentions of her and her fellow employees (rather than merely non-disclose) which might give rise to a fiduciary obligation on a different basis. To the extent that the comments suggest such an implied duty, I would not be minded to follow them. Such a proposition runs contrary to *Fishel*¹⁵ and other well-established authority. In my respectful judgment, it falls foul of the warning in *Fishel* in eliding the duty of fidelity and fiduciary obligations’ (§156).

‘Therefore, generally, in my judgment, the better legal analysis for an employee having an obligation of reporting or persuasion is by way of fiduciary duties, as indicated in *Fishel* as approved in *Tunnard*¹⁶, for the reasons given in those cases: and that these duties do not arise by way of implied term, in circumstances in which a fiduciary duty does not arise... (§157)’.

41. The Judge concluded that neither the first nor the second defendant were fiduciaries. They were both salesmen with no management responsibilities (§§ 191 and 215). He said (of the first defendant):

‘It is true that he was a salesman, who was exposed to Global Risks’ clients largely unsupervised – but that alone is not sufficient to impose upon him the onerous duties of a fiduciary. There is no evidence that he deliberately misled Global Risks as to the matters they allege he failed to disclose’ (§191).

Comment

42. The Judge appears to exclude the possibility of the existence of an implied duty of fidelity where an employee did not also owe a fiduciary duty to his employer. That seems to be a step too far in favour of employees, particularly in light of the judgment of the Court of Appeal in *Item Software (UK) Ltd v Fassihi*¹⁷ which left open the possibility of such a contractual duty on employees, and *Tullett Prebon*, in which Jack J appears to have

¹⁵ *Nottingham University v Fishel* [2000] ICR 1462, Elias J

¹⁶ *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126, CA

¹⁷ [2005] ICR 450

found that such a contractual duty gave rise to a duty on a desk head to disclose an approach to the desk.

Conclusion

43. It seems therefore that on the current state of the authorities:

- (1) An employee may owe a contractual duty to his employer to report that other employees have been approached by a competitor (e.g. *Sybron v Rochem* and *Tullett*);
- (2) The implied duty of fidelity does not necessarily require a mere employee to report on that he has received an approach from a competitor (*Bell v Lever Brothers* and *Lonmar Global Risks*) but *obiter dicta* in *British Midland Tool* and *Kynixa*, suggest that it might do in a particular case.

44. The Court of Appeal in *Tullett* did not consider the issue of the existence or scope of a duty to disclose an approach.

45. An application for permission to appeal in *Lonmar Global Risks* was dismissed earlier this month.

46. This is a fluid area of the law and further developments are likely.

Diya Sen Gupta

24 March 2011