

EMPLOYEE COMPETITION

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1. This paper deals with some of the more interesting developments in the sphere of Employee Competition. The principal developments in this area are:
 - 1.1. The continuing clarification of the fiduciary's duty to disclose matters of interest to his employer including his own misconduct;
 - 1.2. The decisions following the controversial decision in *RDF Media* that an employee is not entitled to accept the employer's repudiatory breach of contract when he is himself in repudiatory breach;
 - 1.3. The entitlement of an employer to put an employee on garden leave when there is no express garden leave clause; and
 - 1.4. Issues relating to team moves.

THE RETREAT FROM *FASSIHI*

2. *Bell v Lever Bros* [1932] AC 161 was long thought to have held that neither an employee nor a director was under a duty to disclose his own wrongdoing:

“The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant; and if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase in salary and recover back the extra wages paid? If he gives the cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers.”
3. The position in relation to directors was thought to be the same because both of the two employees in *Bell* were also directors.
4. Recent decisions have served to undermine the reasoning in relation to employees and re-interpret the comments of their Lordships so that the reasoning is of no application in relation to directors.
5. *Sybron Corp v Rochem* [1984] Ch 112. Held: although the employment contract did not usually require disclosure of own misconduct or that of fellow employees, the terms and nature of the employment might be such that there was a contractual

duty to disclose the misconduct of other employees—essentially a fiduciary relationship between senior employee and company; that the position of the defendant as European zone controller was such that he was under a duty to disclose the misconduct of his fellow employees notwithstanding that such disclosure would inevitably disclose his own misconduct.

6. *Van Gestel v Cann* [1987] CL 454, CA Obiters accepted that directors have positive duty to disclose their wrongdoing.
7. *Tesco Stores Ltd v Pook* [2004] IRLR 618. D was a senior manager, just below board level, at Tesco. He was responsible for approving invoices. He falsely approved invoices from a company owned and controlled by himself for £512,236. Furthermore, he accepted £323,750 from a company that did business with Tesco. The day before he was dismissed he sought to exercise share options, but he was prevented from doing so. Tesco sued for both amounts. D counterclaimed against the refusal to let him exercise his share options.
8. The court held that the money received from other company was a bribe. It gave rise to a conflict of interest and secret profit and it was held on trust for Tesco (at [44]-45)).
9. More controversially, the court held that there was an implied term that the share option was not exercisable so long as the employee was in serious breach of contract. Fiduciary obligations could arise in certain limited circumstances, i.e. where a breach of contract has a “fiduciary element”:

“I accept that there is no duty on an employee to disclose breaches of contract, which do not involve a fiduciary element. However, if an employee receives a profit in breach of his duty, he is liable to account. If he receives a bribe he is liable to account for the bribe. It seems to me that this fiduciary obligation to account is different from the authorities in relation to breaches of contract of employment with no fiduciary element. [63] ... I am of the opinion that directors have a positive duty to disclose breaches of their fiduciary duty. I am of the opinion also that senior employees (of the kind identified in *Sybron*) have a similar duty. I do not believe that the finding of such duties is in conflict with the authorities starting with *Bell* and following. There is nothing in any of those authorities which suggests that fiduciary duty to account should be treated differently to any other fiduciary duty.”

10. Therefore Mr Pook owed a duty to disclose the bribes he had taken and was in breach of that duty. The judgment seems to disclose a confusion between the two very different types of fiduciary obligation:
 - 10.1. the fiduciary duty that exists prior to the act complained of such as the broad duty not allow self interest and obligation to conflict; and
 - 10.2. the remedial fiduciary obligation to account that is imposed in cases of fraud, bribery or corruption.
11. By way of diversion, a strenuous attempt was made to persuade Mr Justice Beatson that *Pook* was decided on an incorrect basis in *Plumbly v BeatThatQuote.com Limited* [2009] EWHC 321. The Court expressed a reluctance to so hold, finding for the

Claimant on other grounds and expressing an obiter view that it was unattractive for an employee to argue that he could exercise a valuable share option when he was in serious breach of duty.

12. *Item Software (UK) Ltd v Fassihi and others* [2004] EWCA Civ 1244 contains the modern enunciation of the duty to disclose wrongdoing. Arden LJ stated:

“For my part, I do not consider that it is correct to infer from the cases to which I have referred that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it. So to hold would lead to a proliferation of duties and arguments about their breadth. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. This duty of loyalty is the “time-honoured” rule: per Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies.”

13. The Court went on to hold that a fiduciary in general owed a duty to disclose his own wrongdoing. The court drew an apparent distinction between fiduciaries and ordinary employees, constrained as it was by the decision of the House of Lords in *Bell*.

14. The two most difficult questions raised by Arden LJ’s judgment are:

14.1. The need for a distinction between the duty of disclosure applying to fiduciaries and the duty of disclosure owed by employees is far from clear. Will *Bell* be overruled in due course?

14.2. To what extent does the obligation enunciated by Arden LJ extend beyond misconduct to anything that may prove useful for the employer to know?

15. As to the first issue, the trend seems to be running back in favour of *Bell*. The “well established usage of mankind” that was identified in *Bell* seems to be back in favour, brought into stark relief by the many cases touching upon the issue. This seems to be achieved in two separate ways:

15.1. Limiting the scope of any fiduciary duties such that any self-interested act falls outside the scope of the fiduciary duties owed by the employee; and

15.2. Finding that even a fiduciary’s obligations are limited.

16. The leading case on identifying when fiduciary duties are owed by a senior employee who is not a statutory director is *Nottingham University v Fishel* [2000] ICR 1462. In short, Elias J held that one must analyse the contractual duties owed by such an employee to see if, exceptionally, it is appropriate to overlay fiduciary duties.

17. The best example of such a process being undertaken is contained in the judgment of the Court of Appeal in *Helmet Integrated Systems v Tunnard* [2007] IRLR 126. In that case, Mr Tunnard worked as a senior salesman for Helmet, which, perhaps unsurprisingly, designed and sold helmets. One of his express contractual obligations was to advise on competitor activity.
18. Whilst working for Helmet, Mr Tunnard came up with a design for a new helmet. He obtained a grant for funding its development, he instructed a designer to produce models of it and discussed it with a former colleague who worked for a competitor company. Once satisfied that it could be successful, he resigned on notice to move the design into production.
19. Helmet argued that he was not entitled to do so because of his duty of fidelity and a fiduciary duty owed as a senior salesman.
20. The Court of Appeal made much of the freedom of the employee to prepare to compete:

“This freedom to compete, once an employee has left, unrestrained by any enforceable covenant, carries with it a freedom to prepare for future activities, which the employee plans to undertake, once he has left”.
21. The Court of Appeal approved the judgments of the High Court in *Shepherd Investments v Walters* [2007] IRLR 10 and *British Midland Tool* [2003] 2 BCLC 523, each of which seemed to make it much harder for employees to prepare to compete after employment prior to terminating that employment. Taken together those cases are authority for the propositions that:
 - 21.1. Preparations to compete that fall short of actual competition may be in breach of both the contractual duty of fidelity and the fiduciary duty of loyalty; and
 - 21.2. Preparatory steps made pursuant to an irrevocable intention to compete will amount to breach of a fiduciary duty of loyalty if one exists.
22. Given that the Court, and it would seem Helmet’s counsel, accepted that a breach of the contractual duty of fidelity would offer no useful remedy (because of the absence of any obligation to disclose such a breach of contract), the case focussed on breach of fiduciary duty.
23. The Court held that if Mr Tunnard had become aware of any competitor that planned to compete in the manner in which he himself intended to compete, he would have had to reveal that because that was within the scope of his fiduciary duty.
24. However, somewhat surprisingly, the Court held that he was “entitled to take preparatory steps prior to leaving in order to assess the viability of any competitive activity once he had left or whether it was sensible for him to leave at all”.
25. Given this, he owed no fiduciary duty in relation to such matters.

26. Perhaps the most significant feature of this case is that it demonstrates that those who are not directors will not be subject to the broad range of fiduciary duties and will thus have much greater freedom to prepare for competition.
27. The obligations of a senior employee in relation to personal intentions to compete remain in a state of some confusion. The non-fiduciary may make substantial preparations for competition in the manner of Mr Tunnard.
28. The fiduciary is obliged to resign as soon as he has reached an irrevocable intention to compete and is obliged to disclose what he knows of:
 - 28.1. His own misconduct;
 - 28.2. The competitive intentions of others; and
 - 28.3. The misconduct of others.
29. Adopting those principles, it could be said that a fiduciary would be placed in severe difficulties if he were to attend a job interview with a competitor. He would thereby gain knowledge of the intentions of the competition and the potential damage to his current employer. How could it be said that it would not be in the best interests of his employer to know that a competitor was seeking to recruit him?
30. Set against that, the approach of the Court of Appeal in *Helmet* suggests that the Court will be reluctant to impede the freedom of employees to seek alternative employment with competitors.
31. More recently, Wyn Williams J, in *Kynixa v Hynes, Preston & Smith* [2008] EWHC 1495 reiterated the earlier approach of strict loyalty. In that case, three of the senior employees of a company left to join a competitor. The two most senior employees were found to have acted in breach of fiduciary duty by reason of the failure to disclose the competitor's approaches.
32. The third employee was too junior to owe fiduciary duties but still had a duty to disclose the approaches of the competitor by reason of her duty of fidelity.
33. Attempts to resolve the apparent contradictions in approach, and indeed the tensions in the underlying policies of unfettered freedom to compete and maintenance of the strict loyalty of senior employees, are perhaps easier on a case specific and pragmatic basis than by adopting too principled an approach – see e.g. *Foster Bryant v Bryant* [2007] IRLR 425 in which Rix LJ made specific reference to the adoption of “pragmatic solutions based on a common-sense and merits-based approach”.

RDF AND MUTUAL MISBEHAVIOUR

34. The field of employee competition regularly raises cases of wrongdoing by both employee and employer. Once an employer realises that an employee has or intends to transfer loyalties to a competitor, retaliation is not uncommon. In these circumstances mutual trust and confidence in the employment relationship, if it

exists at all, cannot long survive. In *RDF Media Group Plc v Clements* [2008] IRLR 207 (“*RDF*”), the High Court considered the rights of parties to the relationship in one such case of mutual misbehaviour.

The issue

35. *RDF* concerned an application for injunctions by a former employer to require a former employee to abide by restrictive covenants in his service agreement and in a share purchase agreement pursuant to which he had sold his stake in the business. The former employee in this case was a Mr Clements, a well-known television producer and the husband of television presenter Kirsty Wark.
36. The restrictive covenant contained a three year non-competition clause operating in effect from the date of execution of the agreement. Pursuant to the terms of the covenant, the relevant restriction would apply only for a period of two years, however, if Mr Clements could show that his employment had been terminated otherwise than as a result of “voluntary unilateral resignation” or by virtue of a lawful “summary dismissal”. The main issue at trial was to categorise the circumstances of the termination of employment, and to determine whether Mr Clements had been constructively dismissed.

The facts

37. During the course of his employment, Mr Clements had entered into negotiations with a direct competitor of his employer in anticipation of recruitment in circumstances which the judge found showed that “a transfer of loyalties had taken place” [137]. He gave notice of his intention to resign and to join that competitor, apparently without having regard to the restrictive covenant. His employer put him on garden leave, and thereafter issued a briefing to the press in relation to his departure which the judge described as a “serious attack on Mr Clements’s character” [132]. Upon taking legal advice, and no doubt being informed of the restrictions imposed by the covenant, Mr Clements wrote to his employer asserting that its conduct had breached the implied condition of trust and confidence and that he had now been constructively dismissed.

The arguments

38. At trial Mr Clements claimed that the statements his employer had made at the press briefing constituted a breach of the implied term of trust and confidence, and a repudiation of his employment contract, which repudiation he had accepted by means of his letter.
39. His employer argued, to the contrary, that:
 - 39.1. Mr Clements had terminated his employment by means of voluntary unilateral resignation, and that if he had been constructively dismissed this was irrelevant as it only brought forward the date of the termination of his employment;
 - 39.2. Alternatively, there had been no breach of the implied term of trust and confidence since the test for breach was severe, especially in circumstances

where an employee was on garden leave and where mutual trust and confidence had already degraded; and

- 39.3. In the further and final alternative, Mr Clements had himself breached the implied term of trust and confidence as a result of his disloyalty, and had done so before the press briefing took place. In those circumstances he was not entitled to accept any breach of the implied term of trust and confidence by his employer.

The decision on constructive dismissal

40. The judge rejected the argument based on voluntary resignation and considered whether there had been a breach of the implied obligation of mutual trust and confidence. He found that Mr Clements had been in breach as a result of his disloyalty [132-3]. Despite accepting that the fact of being on garden leave altered “the nature and content of the implied obligation of trust and confidence” [106] he also concluded that the employer had been in subsequent breach as a result of the comments made at the press briefing [137].
41. It therefore fell for the judge to decide whether Mr Clements could claim to have accepted a repudiatory breach of contract by the employer. The judge found as follows [139-41]:

“139. The question is not easy to resolve. I have been referred to some authority and ordinary contractual principles do not seem to provide a clear answer...the breach by Mr Clements preceded the breach by RDF...[Mr Clements] argues that the proper analysis is that the contract did indeed continue, it was terminated by Mr Clements accepting RDF’s repudiatory breach; the anterior breach by Mr Clements is not forgiven and forgotten, it remains but sounds only in damages. Where, as here damages is not the essence of either party’s claim for relief, *I do not accept that such a result is either a satisfactory or equitable solution.*

140. *In these circumstances, I am inclined to accept the formulation of Mr Croxford who argues, on the basis of the authority of Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp [1981] AC 909 at 986B-D, 987G, Paal Wilson v Partenreederei Hannah Blumenthal [1983] 1 AC 854 at 909C-D, that where as here the defendant is himself in repudiatory breach of a mutual obligation he is not entitled to accept any repudiation by RDF by reason of his own breaches.*

141. The alternative way of looking at it is by application of the consideration set out in paragraph 120 above. The point is that if one looks objectively at the relationship between RDF and Mr Clements, that relationship had already been seriously damaged or destroyed by misconduct on his part which went to the root of the relationship. The point is one of causation as well as equity. As a matter of causation I would hold that the relationship was destroyed not by RDF but by Mr Clements as a result of his anterior breach of the mutual obligation. It would also be inequitable for Mr Clements if he were able to claim that RDF caused serious damage to the relationship where the

relationship in question was already seriously damaged or destroyed by his own conduct.” [Our emphasis]

42. The learned judge concluded that Mr Clements had not been constructively dismissed.

The reasoning

43. The reasoning in *RDF* is shortly expressed and very much reflects the special circumstances of that case. On the basis of the evidence heard, the judge was unwilling to accept as satisfactory or equitable that the law would allow Mr Clements to claim to have been constructively dismissed. It may be significant that the trial judge had found Mr Clements to be an untrustworthy witness and had concluded that he had attempted to abuse the process of the court by asking an employee of the employer to access private emails on his behalf for the purposes of the litigation.

44. It was only in those circumstances, that the judge acceded to the final alternative argument of the employer and accepted that:

44.1. a party in repudiatory breach of contract could not itself accept a repudiatory breach by the other party to the contract; and

44.2. it would be inequitable or wrong as a matter of causation to allow Mr Clements to argue that the employer had caused serious damage to the employment relationship where such damage had already been inflicted by his own conduct.

Analysis

45. The decision in *RDF*, and in particular the primary basis on which it was justified, is difficult to reconcile with orthodox contractual principles governing constructive dismissal.

Constructive dismissal

46. It is trite law that only certain breaches of contract will be sufficiently serious to constitute repudiatory breaches. Further, where one party to a contract is in repudiatory breach of contract, the other party has an election. He can either affirm the contract and treat it as continuing, or accept the repudiation and thereby terminate the contract. The contract is not terminated unless and until a repudiatory breach is accepted, and until then it continues for the benefit of both parties: see *Fercometal S.A.R.L v Mediterranean Shipping Co SA* [1989] AC 788.

47. These principles apply in the employment context in relation to constructive dismissal. There is a term implied by law in all contracts of employment such that a party to the contract must not “without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”: *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL), per Lord Steyn at [45]. A breach of the duty of trust and confidence is a repudiatory breach of contract: *Morrow v Safeway Stores plc* [2002] IRLR 9. Where such a breach is committed by the

employer, the employee can accept the breach, terminating the employment contract in consequence, and thereby claim to have been constructively dismissed. It is also open to an employee to affirm the contract, though a court will usually require very little to show that an employee has accepted a repudiatory breach.

Double repudiation

48. The position is more complicated if both parties to a contract are in repudiatory breach, one after another. Can the party in prior repudiatory breach (“party A”) accept a subsequent repudiatory breach of the other party to the contract (“party B”), assuming that during the period between the breaches the contract has continued for the benefit of both parties? Prior to *RDF* the Courts recognised two possible classes of case in which party A might be prevented from accepting such breach and thereby terminating the contract.

Sequential breaches of contract

49. In *State Trading Corp of India v M Golodetz Ltd* [1989] 2 Lloyd’s Rep 277 (CA) (“*Golodetz*”), Kerr LJ found that party A may be debarred from terminating the contract, if party A’s prior breach was of an obligation in the nature of a condition precedent to party B’s performance. He stated as follows [p.286]:

“If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A’s past breaches of contract, whatever their nature. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract and if the effect of A’s subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words B would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B’s breach as a repudiation.”

50. The true analysis here appears to be that if party B’s breach is in relation to an obligation that depended to some extent on party A’s prior performance, and that breach had not been remedied, it would be difficult for party A to show that party B’s breach is in fact such as to constitute a *repudiatory* breach. *Golodetz* merely indicates the effect that prior breaches can have on the nature of subsequent breaches; it does not establish a principle whereunder a party is prevented from accepting a repudiatory breach of contract if that breach is in fact repudiatory.

Simultaneous and continuing repudiatory breaches of contract

51. The second line of case law is that which was relied upon in *RDF*. In *Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 (HL) (“*Bremer Vulcan*”) and *Paal Wilson v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 (HL) (“*Paal Wilson*”), the House of Lords was considering the obligations of parties to an arbitration agreement. In *Bremer Vulcan*, which was applied in *Paal Wilson*, it was held that both parties to an arbitration agreement were under an obligation to apply to an arbitrator to prevent delay in the prosecution of an arbitration. Since both parties were in continuing breach of that obligation, as neither had done so, neither party could point to the breach of the other party as giving grounds to terminate the agreement. As Lord Diplock put it, “Respondents

in private arbitrations are not entitled to let sleeping dogs lie and then complain that they did not bark”[p.988].

52. The reasoning in *Bremer Vulcan* seems difficult to apply to the facts of *RDF*. The former apparently concerned a mutual positive obligation in respect of which there was a mutual continuing breach by each party. This obligation was also said to arise in the special context of arbitration agreements. The latter concerned a mutual negative obligation, namely one not to conduct oneself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and in respect of which, on the judge’s factual findings, there were sequential breaches. Leaving aside the correctness of the proposition advanced in *RDF*, it is difficult to see why *Bremer Vulcan* was authority for it.

Conclusion

53. If *RDF* is correct, then as Cranston J has recognised in *SG&R Valuation Service Co LLC v Boudrais* [2008] IRLR 770 (HC), it is liable to have troubling consequences:

“I would be concerned about the situation where, if the employee was in repudiatory breach, the employer could take whatever repudiatory breach it wished and the employee could not accept the employer’s repudiation as bringing the employment relationship to an end. That could lead to some very undesirable scenarios in the employment relationship. I understand the *RDF* case is on appeal” [27-28]

54. Indeed, one might go further and envisage employer and employee bound by a contractual relationship in which neither had trust or confidence and the existence of which served only to encourage further attempts to undermine the relationship.
55. *RDF* was appealed but was settled shortly before the appeal was to be heard on terms that were close to the Court’s order at first instance. The decision in *RDF* has not yet been subjected to the scrutiny of the appeal courts.
56. In consequence, litigants have relied upon and even sought to expand upon the ambitious proposition advanced in *RDF*. Thus, in *Wilf Gilbert (Staffs) Limited v Mr P Bunn* 17 June 2008 UKEAT/0547/07/ZT (EAT), the appellant sought to rely upon *RDF* to maintain that an employee in fundamental breach of his employment contract was not only prevented from terminating the contract, but was also disentitled from any remedy for a breach of contract by his employer. In that case it was raised as a justification for not paying an employee contractual remuneration. The submission was, unsurprisingly, rejected.
57. Nonetheless, it seems clear that until *RDF* is revisited it will continue to generate argument in the field of employee competition, in cases of mutual misbehaviour.
58. However, it should be remembered that there was an alternative argument in *RDF* that was also accepted that provides a similar result in most cases and was much more orthodox in terms of contractual theory:
- 58.1. the extent and scope of the duty of trust and confidence varies according to the context. Thus the misbehaviour of one party may make it harder to

destroy or seriously damage the remaining relationship of trust and confidence. It may also be affected by, for example, the commencement of garden leave;

- 58.2. breach of the duty of trust and confidence is to be viewed objectively and does not depend upon knowledge of the innocent party that it has been breached. In the *BCCI* cases, the employees had no idea that the bank had been run in a fraudulent manner and yet the duty was said to have been breached; and
- 58.3. on this basis, misconduct by one party that is unknown to the other may alter the scope of the duty of trust and confidence such that later conduct that would otherwise have amounted to a breach of duty does not amount to a breach because of the prior unknown conduct of the first party.

GARDEN LEAVE

59. For over a decade, since the Court of Appeal decided *William Hill v Tucker* [1999] ICR 291 [1998] IRLR 313, the orthodox position has been that an employer needs an express garden leave clause in the contract of employment in order to send an employee on garden leave.

60. What the Court actually said was this:-

“in practice, an employer will need to stipulate for an express power to send his employee home on full pay, i.e., on garden leave, in all cases in which the contract of employment imposes on the employer an obligation to permit the employee to do the work contracted for.”

61. The contract is likely to include such an obligation (ie, an implied right to work) in most cases in which the employee is important enough for the employer to wish to place him or her on garden leave.

62. In *SG&R Valuation Service Co LLC v Boudrais* [2008] IRLR 771 Cranston J granted garden leave injunctions despite the absence of express garden leave clauses in the relevant contracts, and despite accepting that the employees had an implied right to work.

63. The key holding on the law was as follows:-

“Employees who have a right to work have that right subject to the qualification that they have not, as a result of some prior breach of contract or other duty, demonstrated in a serious way that they are not ready or willing to work, or, to put it another way, that they have not rendered it impossible or reasonably impracticable for the employer to provide work. The breach of contract or other duty must constitute wrongdoing, by reason of which they will profit or potentially profit. In such circumstances, there is no obligation on the employer to provide work, although the contract of employment is ongoing. This is not an implied term in the employment contract but is a qualification to the legal construct, the right to work.”

64. This decision reflects the approach of a Judge who is not an employment specialist to a difficult question posed by some stark facts. The employer appeared to have strong merits on its side. The employees had set out to harm the employer, misuse its information etc, but *William Hill* appeared to stand in the way of a just outcome.
65. The Judge worked around this by noting that, in *William Hill*, the submission which underlay the contention that there was a right to work included the element that the employee must be ready and willing to work. In effect, Cranston J interpreted this as meaning “ready and willingly to work properly (ie loyally)”. He bolstered his “ready and willing” point by reference to a House of Lords’ observation about employee actions for contractual pay in *Miles v Wakefield MBC* [1987] AC 539. With more neat footwork, he brought in the concept of work not being unreasonably withheld, citing a mid-70s closed shop case (*Langston v AUEW* [1974] ICR 180) In addition, he qualified the right to work by reference to whether the employer can reasonably provide work. The employer cannot do so when the employee has committed wrongdoing from which he aims to profit.
66. Cranston J’s decision is principled and makes a lot of practical sense, particularly where employees have committed serious wrongdoing. Arguably, however, it sits uneasily with the higher authority of *William Hill*. It is notable that the precise formulation of the implied obligation which the Court accepted in that case was as follows:-
- “the work is there to be done and it is the obligation of the employer to permit Mr Tucker to do it unless, which there is not, there is a provision in the contract absolving the employer from that obligation”
67. In addition, the Court said that express garden leave provision is required in *all cases* where there is a right to work. Cranston J’s qualification of the right to work is a new development. The CA did not have to consider such a qualification in *William Hill*.
68. Cranston J says that “the right to work” is a legal construct. If by that he means that it is an implied term, he is correct, but it is unclear why he suggests that his qualification of the right to work is a “legal construct” which does not involve creating (or, rather, redefining) an implied term.
69. Note that Cranston J was invited by the employer to rely on *RDF*, but the Judge chose not to base his decision on that case (although superficially the two cases appear to be about similar ideas: misconduct depriving an employee of what would otherwise be a contractual right, they are based on different reasoning). He was not persuaded that this was a situation where there was a mutuality of breach (ie, the employer breached the contract by imposing garden leave, but only in response to the employees’ breaches, and so they could not treat the employer’s breach as repudiatory), and sensibly warned, as noted above, that such a concept could lead to difficult situations in employment contracts.
70. *Boudrais* offers an opportunity to employers relying on strong facts to obtain garden leave protection despite no express entitlement thereto. Employers can be expected to try to expand the categories of employee wrongdoing which will form a basis for garden leave. On the employee side, it is open to employees to argue at first

instance that the decision cannot stand with *William Hill*, it will not be surprising if the validity of the decision is at some point challenged in the Court of Appeal.

TEAM MOVES

71. The principal recent development in relation to team moves relates to the use and abuse of the springboard doctrine.
72. The modern orthodoxy in relation to springboard injunctions in an employment context comes from the Court of Appeal judgment in *Roger Bullivant v Ellis* [1987] ICR 464. In that case the defendant had taken a card index of his employer's client details which was asserted to be confidential. He had contacted the clients on the card index for the purpose of competing. Falconer J granted an injunction prohibiting the defendant from entering into or fulfilling contracts with any persons whose names appeared on the card index.
73. The Court of Appeal upheld the original grant of a springboard injunction but held that it should have been limited to a year following the termination of employment. The requirements for the grant of a classic springboard injunction have long been thought to be:
 - 73.1. misuse of confidential information;
 - 73.2. giving rise to an unfair springboard or headstart;
 - 73.3. that can only be nullified by the grant of an injunction.
74. Over the years, the orthodox view has become that a springboard injunction can be granted where there has been a breach of duty other than breach of confidence, including breach of fiduciary duty and probably even breach of contract – see in particular *Midas IT Services v Opus Portfolio* (1999, unreported) and *UBS Wealth Management (UK) Limited v Vestra Wealth LLP* [2008] EWHC 1974.
75. The intriguing development has been that springboard injunctions seem to be granted more readily so as to prohibit the new employer from continuing to deal with clients or employing other employees.
76. A perfect example of this trend is the recent case of *Tullett Prebon v BGC* [2009] EWHC 819 in which the evidence suggested that BGC had procured Tullett's employees to act as its recruiting sergeants in cynical disregard of their duties of fidelity. For that reason BGC were prohibited from inviting an employee of Tullett to terminate his contract on notice and join BGC when lawfully permitted to do so.
77. This in turn raises questions about the proper scope of a springboard injunction. Many of the reported cases refer to the need to avoid putting the wronged party in a better position than he would have been in had there been no unlawful behaviour – see e.g. *Universal Thermosensors v Hibben* [1992] 1 WLR 840, 855. This is perhaps easier to identify in a confidential information case where that information consists of a customer list. In a case of breach of the duty of fidelity resulting in a team move, it can be very hard to identify whether the breaches of fidelity were truly

causative of the team move, merely accelerative or had a trivial effect despite making it easier for the new employer.

78. In a case such as *Tullett*, the employer was, arguably put in a much better position than it would have been had there been no wrongdoing – in the small world of inter-dealer brokers, it obtained complete protection in the UK against poaching from April through till the end of trial (which is due to commence shortly).
79. There is also a related theme that one should be very careful not to grant too long a springboard injunction. A classic example of the latter is *Sun Valley Foods v Vincent* [2000] FSR 825, in which Jonathan Parker J exhibited a very cautious approach to the acceptance of the employer's assertions as to the springboard advantage obtained by the breach. In that case, the nefarious behaviour was identified at a very early stage and despite it being of dramatic scope, the Court was of the view that it had been effectively nipped in the bud.
80. Most interestingly, Arnold J has recently launched an intellectual assault against the springboard jurisdiction, emphasising the extreme caution which ought to be adopted before granting such an injunction and suggesting that such an injunction can only be granted on an interim basis and that there is simply no jurisdiction to grant it on a final basis– *Vestergaard Frandsen v Bestnet Europe* [2009] EWHC 1456. If he is right, the justification for such relief at an interim stage may be thinner than is often supposed.

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