AN EMPLOYEE'S (FIDUCIARY) DUTY OF NON-COMPETITION AND DISCLOSURE

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1. Although labour (employment) law is acquainted with open-textured norms, contrary to (civil) contract law, were norms - such as 'good faith' - bear potential, it distrusts a general use of them. Nonetheless, despite the criticism against their use – criticism related to the problem of vagueness, judicial activism and legal uncertainty – these norms might better acknowledge the dynamic reality of the employment relationship in comparison to labour (employment) law's current concepts. Indeed, given the incomplete and relational nature of employment contracts, 'open norms' offer opportunities to capture the dynamic reality of employment relationships, as the patterns of beliefs and expectations concealed therein, thanks to their open texture and *ad hoc* implementation. Moreover, evolutions on the level of the labour market confront employees and employers with problems that cannot be answered by *a priori* defined rules and agreements - the 'traditional' methods of labour law regulation. Where such rules and agreements fail, the question rises whether labour (employment) law requires a reverification towards a more thorough use of open norms[1].

Thus, it has already been researched to what extent open norms could legally validate the legitimate expectations and psychological perceptions of the employee or employer respectively in comparison to the formal and *a priori* drafted rules that traditionally regulate the employment relationship[2]. Starting from the same question, it has been examined to what extent the duty of reasonable care or the implied obligation of trust and confidence, or - even more challenging - the good faith principle urge the employer to provide the employee with information and advice on the existence and scope of his legal and contractual rights and on the measures needed to protect his economic interests[3].

2. In this paper the attention is shifted to the implied duty of fidelity and good faith of the employee. In doing so, it aims at demonstrating how open-textured concepts, such as that of 'trust and confidence' or 'loyalty', enable the judge to respond to the needs of the employer and to tackle the difficult problems with which existing employment law is confronted in a globalised market context where these cannot be answered 'adequately' with reference to existing employment regulations.

More precisely, the question is whether these open-textured concepts facilitate the determination of the precise content and scope of the employee's obligations of non-competition and disclosure – obligations derived from his general duty of fidelity and good faith – in a way that acknowledges the complex and incomplete nature of the employment relationship and validates its hidden dimensions. Thus, one could wonder whether the employee is in breach with his duty of loyalty if he solicits the clients of his (former) employer or hires away his fellow employees during or after his employment. Similarly, it can be questioned whether the employee's duty of confidence also includes the general skills and business knowledge acquired in the course of his service. And what about the knowledge gained from (sector or firm) specific on-the-job-training, can the employee exploit this knowledge freely once he has left the company, or should he treat it as confidential information? Moreover, does the idea of good faith oblige the employee to disclose his or fellow employees' wrongdoings? Must the employee, for example, inform his employer on his plans to start a competing business, or

[1] Cf. A. Van Bever, 'Open norms and employment law's foundations: a legal examination of hidden patterns in employment relationships' (2012) 3 ELLJ 173, 173-186.
[2] A. Van Bever, 'Open norms and the psychological dimension of employment relationships' (2011) 2 ELLJ 225, 225-268.
[3] A. Van Bever, 'An Employer's Duty to Provide Information and Advice on Economic Risks?' (2013) 42 ILJ 1, 1-34.

must he warn the latter once he is aware of planned team moves or fraudulent acts by colleagues? The answer to these questions is function of the manner and degree in which the 'open concepts' envisaged here take into account the role and contractual obligations of the concrete employee and the employer's related expectations.

1. The (non-)fiduciary nature of the employment relationship

3. Before investigating the concrete content and impact of the obligations of non-competition and disclosure, attention has to be paid to the (non-)fiduciary nature of the employment relationship and the thereto related question in which circumstances the employee can come under fiduciary duties. This question is answered below by summarising findings an earlier research paper that compared the criteria put forward in English, American, Canadian and Australian employment law to identify which employees can be qualified as 'key employees' or 'de facto directors', owing fiduciary duties[4]. Given the importance of this research and the distinction between ordinary and fiduciary employees derived thereof in light of the investigation of the concrete content and scope of the employee's obligations of non-competition and disclosure, this research is summarised below.

4. The employment contract is often described as an example of a relational contract. This is due to its complex and dynamic nature, as well as to the employee's and employer's shared expectation of long-term cooperation, stressing the relational aspects of their dealing and the importance of trust and confidence. Nevertheless, the employment relationship is not a 'classic' fiduciary relationship. Indeed, fiduciary relationships of trust and confidence are characterised by the fact that one party has undertaken to act in the interest of another (beneficiary) party; if necessary at his own expense[5]. The employment relationship, however, does not place the employee in a position in which he owes a duty of single-minded loyalty to the employer[6].

Consequently, there is a difference between on the one hand, an employee's general duty of good faith or fidelity and his implied contractual obligation of trust and confidence and on the other hand, the duty of undivided or utmost loyalty. Contrary to the employee's general duties, the latter duty obliges the fiduciary not only to respect the legitimate expectations and reasonable interests of the beneficiary party, but also to subordinate his own personal interests to those of the beneficiary[7]. Indeed, a fiduciary may not exploit his special position for his exclusive benefit[8]. This implies (at least[9]) that he is prohibited to obtain any unauthorised profit by reason of his fiduciary position or the associated special knowledge, and to pursue interests which (might) conflict with his duties[10]. However, a 'mere employee' must *only* cooperate and do all that is necessary to be done on his part for the carrying out of the employment contract in good faith. He must take his employer's interests into account, but these latter interests must not override his own needs and interests.

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[4] A. Van Bever, 'The Fiduciary Nature of the Employment Relationship' (2013) *not yet published.*

[5] Cf. *Bristol & West Building Society v Mothew* [1998] Ch 1, 18; *AG v Blake* [1998] Ch 439, 454; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963, par. 289.

[6] *University of Nottingham v Fishel* [2000] ICR 1462, 1491.

[7] Ibid, 1494. Cf. *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 437, 448; *Lonmar Global Risks v West* [2011] IRLR 138. 156; *Tullett Prebon plc v BGC Brokers LP* [2011] IRLR 420, par. 66).

[8] P. Finn, 'The Fiduciary Principle' in T. Youdan, *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 83; P. Millett, 'Equity's place in the law of commerce' (1998) 114 LQR 214, 222-223.

[9] Whether the fiduciary principle works 'prescriptively' in that it imposes positive duties on the fiduciary and hence requires action (besides restraint), depends on the particular Anglo-American system (*infra* n 4).

[10] Cf. *Bristol & West Building Society v Mothew* [1998] Ch 1, 18.

5. Nevertheless, there can be circumstances in the context of a concrete employment relationship or arising out of it, which, if they occur, place the employee in a fiduciary position to the employer.

The first situation is that in which the employee has explicitly undertaken to act as the agent of the employer, who becomes his principal[11]. Given that the employer-principal becomes directly liable for the actions of the employee-agent, although he himself did not directly commit these actions, and considering that he hence runs the risk that the employee will misuse his agency powers, it is justified to impose more elevated duties of loyalty on the part of the employee-agent.

The second situation is that in which in view of the actual facts and circumstances, including the terms of the employment contract that regulate the employee's tasks and responsibilities, and his position in the company, the latter is reasonably expected to act as a fiduciary. His fiduciary duties arise then out of the employment relationship, but not merely because there is such a relationship, but rather as a result of the employee's contractual duties[12]. Hence, contractual and fiduciary duties can co-exist, but where a fiduciary relationship exists, it must accommodate itself to the terms of the employment contract. Put differently; in determining the scope of an employee's (fiduciary) duty of loyalty, one must first focus on the nature and scope of his contractual duties.

6. Considering that under certain circumstances an employee stands in a fiduciary relationship to his employer and consequently owes fiduciary duties to the latter – in contrast to a 'mere employee' - this paper examines the practical importance of qualifying an employee as the employer's fiduciary.

This is done, first, by comparing the employee's duty of non-competition and confidence, derived from his 'general' duty of fidelity, with the duty of 'utmost' loyalty of the 'fiduciary employee'. Secondly, attention is paid to the question whether the employee owes his employer a duty to disclose his own or fellow employees' wrongdoings[13]. As the cases discussed reveal, this question especially rises when the employee (prepares to) engage in competition with his (former) employer and approaches the latter's clients and employees. This second question is hence linked to the first.

7. For this examination, this paper discusses landmark rulings in different Anglo-American systems. The paper focuses on the English and the Canadian system - the former being the system which determined the structure of Anglo-American modern law[14] - but broadens its attention to include case law of the Australian and American system. In this context, the English system is particularly relevant, for fiduciary law and fiduciary duties have always appeared related to the law of trusts, which grew up outside the English common law in a specialised court of chancery[15]. This is because the trustee's duties were imposed by analogy on people in situations where there was no trust[16].

[1111] In America, the Restatement (Third) of agency (2006), Section 7 (7) describes an employee as "an agent".

[12] *University of Nottingham v Fishel* [2000] ICR 1462, 1491

[13] In principle, the employment contract is, however, not regarded as a 'contract *uberrimae fidei*' requiring full disclosure to the other party (*Sybron v Rochem* [1983] ICR 801, 811).

[14] D. Seipp, 'Trust and fiduciary duty in the early common law' (2011) 91 B.U.L.Rev. 1011.

[15] Ibid, 1012.

[16] This resulted in the recognition of "trust-like" positions and "trustee-like" duties. Cf. D. DeMott, 'Beyond metaphor: An analysis of fiduciary obligation' (1988) 37 Duke L.J. 879-924; L. Sealy, 'Fiduciary relationships' (1962) 69 CLJ 72.

However, throughout time the Anglo-American systems have addressed fiduciary duties rather differently[17]. The Supreme Court of Canada, for example, adopts a proactive position to the imposition of fiduciary duties[18] and the acceptance of fiduciary liability in "non-traditional areas"[19]. The English and Australian approach towards the fiduciary principle is, however, more conservative. The English and Australian systems appear reluctant to import fiduciary principles in commercial cases. This is certainly true for the Australian system, which hesitates to impose positive fiduciary duties and applies the fiduciary principle only proscriptively. Finally, the American approach seems positioned between the proactive Canadian and the more orthodox English and Australian stance[20]. These divergent approaches are an invitation to conduct this examination from a comparative view by focussing on the relevant case law in the systems under consideration.

2. An employee's duty of non-competition and confidence

8. To describe the (fiduciary) employee's duty of non-competition and confidence, the Canadian case of *Imperial Sheet Metal Ltd v Landry and Gray Metal Products Inc*[21] is taken as a starting point. This case is interesting, not only for its discussion of the criteria to qualify an employee as a 'key (fiduciary) employee', but also for its review of the principles related to competitive activities and the disclosure of 'confidential' information by (former) employees[22].

Indeed, Robertson JA resumes that during his employment a 'mere' (non-fiduciary) employee owes the employer a 'general' duty of fidelity and good faith. This duty translates into a duty not to compete with the employer[23] and not to disclose trade secrets or other confidential information[24]. First, the duty not to compete includes a prohibition to solicit the employer's customers or to hire away fellow employees while employed. Nevertheless, "merely planning to establish a competing business does not *ipso facto* violate the duty [of fidelity of the employee]"[25]. This first negative duty

[17] For a comparison of the Canadian and Australian approach: S. Dorsett, 'Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after Breen v William' (1996) 8 Bond LR 158-184; A. Duggan, 'Fiduciary Obligations in the Supreme Court of Canada: A Retrospective' (2011) 50 Can Bus LJ 453, 460-461.

[18] By not only imposing negative, but also positive fiduciary duties. Cf. *J(LA) v J(H)* (1993) 102 D.L.R. (4th) 177.

[19] See, however, Sopinka J's warning in *Norberg v Wynrib* ((1992) 92 DLR (4th) 449, 481) and *LAC Minerals Ltd v International Corona Resources Ltd* ([1989] 2 SCR 574, 596).

[20] The different American and English approach towards a director's duties illustrates this. Where American courts rapidly agreed that a director not only owes fiduciary duties to the company, but also to the shareholders (E. Dodd, 'For whom are corporate managers trustees?' (1932) 45 Harv.L.Rev. 1145, 1147, fn. 6), English law doubts to broaden a director's fiduciary liability accordingly (L. Sealy and S. Worthington, *Sealy's cases and materials in company law* (Oxford: OUP, 2010) 635).

[21] *Imperial Sheet Metal Ltd v Landry and Gray Metal Products Inc* 2007 NBCA 51.

[22] See also earlier Canadian cases: *W.J. Christie & Co v Greer* (1981) 121 DLR (3d) 472, 477; *White Oaks Welding Supplies v Tapp* (1983) 149 DLR (3d) 159, par. 15; *Monarch Messenger Services Ltd v Houlding* (1984) 5 CCEL 219, par. 14-15; *Tree Savers International Ltd v Savoy* (1991) 81 Alta LR (2d) 325, par. 13; *Barton Insurance Brokers Ltd v Irwin*, 1999 BCCA 73, par. 18, 22, 25, 35 and 39; *Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd* (1996) 39 Alta LR (3d) 411, par. 25.

[23] Cf. *State Vacuum Stores of Canada Ltd v Phillips* [1954] 3 DLR 621; *Corporate Classic Caterers v Dynapro Systems* (1997) 33 CCEL (2d) 58; *Billows v Canarc Forest Products Ltd* 2003 BCSC 1352; *Restauronics Services Ltd v Forster* 2004 BCCA 130; *Cinema Internet Networks v Porter* 2006 BCSC 184; *Knowlan v Trailmobile Parts & Services Canada Ltd* 2006 BCSC 337; *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2007 BCCA 22; *Corso v NEBS Business Products Ltd* 2009 CanLII 11215.

[24] Cf. *Quantum Management Services Ltd v Hann* (1993) 11 OR (3d) 639; *C.H.S. Air Conditioning Ltd v Environmental Air Systems Inc* (1996) 20 CCEL (2d) 123; *Edward Jones v Klassen* 2006 ABQB 41; *Doore v Siksika Nation* [2007] CLAD No 424; *Death v Canadian Imperial Bank of Commerce* [2006] CLAD No 342; *Stonetile (Canada) Ltd v Castcon Ltd* 2010 ABQB 392.

[25] "(U)nless the employee has already determined to abuse the employer's confidential information or trade secrets in his future business or has already begun to canvass the employer's customers or entice fellow employees of the employer to join him in the new business" (P. Neumann and J. Sack, *Employment Law in Canada* (Markham: LexisNexis, 2005) par. 11.137). Cf. *Fleming v Calyniuk Restaurants Inc* 2005 SKQB 237; *McMahon v TCG International Inc* (2007) 59 CCEL (3d) 131.

remains in effect as long as the employment relationship endures - even during the notice period[26]. The second negative duty of non-disclosure, on the contrary, continues after the employment relationship has been terminated. However, it does not include the general skills and knowledge acquired while working for the former employer, for these are not considered 'confidential'. To qualify as confidential, the information must be 'special' and 'unique', or 'peculiar' to the employer. This is if it renders the latter more vulnerable to competition at the hands of his ex-employee than he otherwise would be[27]. Thus, information may be confidential "if the whole result is not known, though its separate features or ingredients are capable of being ascertained by actual inspection by any member of the public[28]" and if it reflects in some considerable degree the independent efforts of the employee[29]. The finding that an employee's accumulated knowledge about running a business has economic value, is however, not sufficient to make this general knowledge confidential[30]. Consequently, following termination of the employment relationship an employee is free to exploit for his own benefit any skill and general business knowledge, gained during his employment, and bring these skills and general information to the business of a competitor of his former employer so long as it is "committed to memory and not dependent on the employer's documentation"[31]. Employees who, however, depart with suitcases of documents or computer files are in breach of their post-employment obligations and their actions would amount to unfair competition[32]. Moreover, once the employment relationship has ended and the employee is allowed to engage in fair competition with his ex-employer, he can solicit the latter's customers whose contact details he has learned during his service. Indeed, employers cannot claim a monopoly over their customers[33]. Nevertheless, when soliciting the latter's customers, the employee may not use printed information, such as customer lists. Finally, an employee can approach his former colleagues and entice them to accept employment with a competitor of his former employer, including employment with himself[34]. Indeed, "the general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances"[35].

However, if the employee is seen as a 'fiduciary', he owes more exacting duties to the employer. First of all, his duty not to make any unauthorised profit prevents him from making profits or commissions from the employment relationship, given with the view of inducing the employee to act in favour of a competitor, without informing the employer[36]. Moreover, a fiduciary employee owes a

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[26] Cf. *Restauronics Services v Forster* (2004) 239 DLR (4th) 98, par. 41-44; *McMahon v TCG International* (2007) 59 CCEL (3d) 131, par. 67-68.

[27] Cf. *Physique Health Club v Carlsen Inc* (1996) 141 DLR (4th) 64. Examples are special knowledge about the employer's customers or policies that make it possible to undercut the employer and to obtain an advantage over unknown competitors, including customer lists (*1259695 Ontario Inc v Guinchard* 2005 CanLII 17920, par. 59). Also knowledge and information gained from (sector or firm) specific on-the-job-training are likely to qualify as 'confidential' information.

[28] *Ansell Rubber Co Pty Ltd v Allied Rubber Ind Pty* [1967] VR 37, 49; *Schauenburg Ind Ltd v Borowski* (1979) 101 DLR (3d) 701, par. 19).

[29] *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41, 47; *Zesta Engineering Ltd v Cloutier* 2010 ONSC 5810.

[30] I *Physique Health Club v Carlsen Inc* (1996) 141 DLR (4th) 64.

[31] *Imperial Sheet Metal Ltd v Landry and Gray Metal Products Inc* 2007 NBCA 51, par. 33-34. Cf. *Apotex Fermentation Inc v Novopharm Ltd* (1995) 128 DLR (4th) 277; *Axiom Services Ltd v Weigert and Pelletreau* 2005 BCSC 665.

[32] Ibid, par. 34.

[33] Ibid, par. 34. Cf. *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2007 BCCA 22.

[34] Ibid, par. 35.

[35] *Barton Insurance Brokers Ltd v Irwin* 1999 BCCA 73, par. 39.

[36] Cf. *McCormick Delisle & Thompson Inc v Ballantyne* (2001) 12 BLR (3d) 257; *Rupert v Greater Victoria School District No 61* 2001 BCSC 700 and 2003 BCCA 706; *Kirby v Amalgamated Income Ltd Partnership* (2009) 75 CCEL (3d) 186; *Procon Mining & Tunnelling Ltd v McNeil* 2010 BCSC 487; *GasTOPS Ltd v Forsyth* 2012 ONCA 134.

continuing duty to keep confidences and to act in his former employer's interest. Nevertheless, the law permits him to compete with the latter, provided he does not actively solicit his clients or entice his ex-colleagues to quit their jobs for a reasonable period of time after he has left the employer[37]. So long as this reasonable period has not ended, the fiduciary employee is, however, prevented from actively approaching his former employer's customers and employees[38]. However, mere planning to set up a competing venture will not render the employee liable for breach of his fiduciary duty[39]. Finally, where a fiduciary employee knows of threatened team moves and does not warn his (former) employer or, more seriously, where the employee himself, without notifying the employer, encourages his (former) colleagues to leave the latter, he breaches his fiduciary duty[40]. This latter, prescriptive duty is linked to the employee's duty to disclose wrongdoings, discussed below.

9. These principles are not only applicable in Canada, but also in other Anglo-American systems[41]. The English case *Helmet Integrated Systems Ltd v Tunnard* lists the implications of the 'general' duty of fidelity with respect to questions of (post)contractual competition and then compares it with the duty of non-competition and confidence of a 'fiduciary employee'[42].

Moses LJ stressed that, one the one hand, the duty of fidelity requires the employee to be loyal to and to act with good faith towards his employer[43]. This implies, amongst other things, that he obeys his employer's orders and devotes his time and talent to the latter's business. The duty of fidelity hence prohibits him to compete with his employer whilst employed[44] - even in his spare time[45]. However, it does not inhibit his competing against his employer once his employment is ended. Hence, the employee can prepare for future competition[46] and inform others of his plans in this

[37] 2007 NBCA 51, par. 43. Cf. *W.J. Christie & Co v Greer* (1981) 14 BLR 146, 154; *Hawboldt Ind Ltd v Chester Basin Hydraulics & Machines Ltd* (1983) 57 NSR (2d) 413, par. 51; *Quantum Management Services Ltd v Hann* (1989) 43 BLR 93, par. 36-37, 45 and 47; *Sure-Grip Fasteners Ltd v Allgrade Bolt & Chain Inc* (1993) 46 CPR (3d) 443, 458; *Canadian Industrial Distributors Inc v Dargue* (1994) 20 OR (3d) 574, 583; *Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd* (1996) 39 Alta LR (3d) 411, par. 31-35; *Physique Health Club v Carlsen Inc* (1996) 141 DLR (4th) 64, par. 44; *KJA Consultants Inc v Soberman* (2002) 17 CCEL (3d) 261, par. 2-3 and 10; (2003) 29 CCEL (3d) 47 and (2004) 39 CCEL (3d) 13; *Alberta Care-A-Child Ltd v Payne* (2005) 9 BLR (4th) 117, par. 53, 90-94; *Reservoir Group Partnership v 1304613 Ontario Ltd and Timothy Lychy* (2007) 84 OR (3d) 180, par. 63 and [2009] OJ No 1332; *Adler Firestopping Ltd v Rea* 2008 ABQB 95; *GasTOPS Ltd v Forsyth* [2009] OJ No 3969, par. 113 and 2012 ONCA 134; *Aquafor Beech v Whyte* [2010] OJ No 2011; *Evans v The Sports Corp* 2011 ABQB 244. Departing from what would be a 'reasonable notice' if the employer ends the employment relationship without cause, Courts generally accept that post-employment fiduciary duties last for something in the vicinity of a year (cf. *CRC-Evans Canada Ltd v Pettifer* (1997) 26 CCEL (2d) 294 and [1998] AJ No 629, par. 65-69).

[38] The employee does, however, not breach his fiduciary duty if it is the customer that seeks out the employee and the latter accepts the unsolicited business (cf. *Imperial Sheet Metal v Landry and Gray Metal Products* 2007 NBCA 51, par. 43). Mere acceptance of an invitation, even quickly after the fiduciary's departure, is not equivalent to soliciting customers (cf. *GasTOPS Ltd v Forsyth* [2009] OJ No 3969, par. 113).

[39] Cf. *Sure-Grip Fasteners Ltd v Allgrade Bolt & Chain Inc* (1993) 46 CPR (3d) 443; *Fleming v Calyniuk* 2007 SKCA 85; *Aquafor Beech Ltd v Whyte* 2010 ONSC 2733, par. 43-46. Contra: *Fraser v ProScience Inc* 2005 CanLII 21549.

[40] Cf. *Paul Wurth Ltd v Siemens VAI Metals Technologies Ltd* [2008] EWCA Civ 596; *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] IRLR 965.

[41] For example, on the legitimacy of an employee's preparatory activities to enter into business for him in Australian law: *Independent Management Resources Pty Ltd v Brown* [1987] VR 605.

[42] [2007] FSR 437, 445-449.

[43] Cf. *Lamb v Evans* [1893] 1 Ch 218; *Robb v Green* [1895] 2 QB 315, 317.

[44] Cf. *Marshall v Industrial Systems* & *Control Ltd* [1992] IRLR 294.

[45] Cf. *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] All ER 350.

[46] Provided he does not actually undertake these activities before he has left (cf. *Laughton & Hawley v Bapp Industrial Supplies Ltd* [1986] ICR 634; *Balston Ltd v Headline Filters Ltd (No2)* [1990] FSR 385, 413; *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 437, 445-446. The question how to distinguish legitimate preparations for future competition from competitive activities undertaken before the employee has left, is however difficult, especially when the preparatory steps are taken in pursuance of an irrevocable intention to compete (cf. *Shepherds Investments Ltd v Walters* [2006] EWHC 836, par. 108. In *Ward Evans Financial Services v Fox* ([2002] IRLR 120), for example, some employees were held in breach of

respect[47]. Despite the presence of restrictive covenants, there is also nothing in the law to prevent a number of employees *in concert* deciding to leave the employer to set up a competing business[48]. Nevertheless, employees have a duty of confidence prohibiting them to disclose trade secrets or other information that is considered 'confidential'[49]. However, given that information concerning the employer which is not unusual or of particular value and hence is too trivial to be protectable[50], as well as the general skills and knowledge gained by the employee during his employment are not 'confidential', a departing employee can apply these for his benefit, even if this involves competing against his ex-employer. Similarly, he can use the knowledge and information which he gained, provided he does not disclose confidential information and information qualified as trade secret[51].

A 'fiduciary employee', on the other hand, has a duty to act solely in the interests of his employer, so that it will be easier for the latter to establish that the activities in preparation for competition are as such in breach of a fiduciary duty[52]. Moreover, once he has an irrevocable intention to compete, a fiduciary employee should disclose his plans to the employer in order to avoid a conflict of interest and to comply with his duty to account for opportunities received in the performance of his duty[53].

10. Although the above principles generally apply in the American system, under the law of agency this system considers the employee's duties of non-competition and non-disclosure (or confidence) as a (part of his) fiduciary duty of loyalty to the employer[54]. Consequently, also in the American system, an employee may not engage in actual competition against his employer. As a rule, he may not solicit the latter's customers or hire away his colleagues until his employment has been ended[55]. He may not use or reveal his employer's trade secrets as long as these remain confidential, either during his employment or after its termination[56]. Preparatory activities are, however, allowed. Employees can undertake steps to set up a competing business while being employed, arrange

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contract by forming a competing company, although it did not trade until their contract was ended, because their contract prevented them from holding an interest in another company if this would obstruct them to act in the employer's interest.

[47] Cf. *Tither Barn v Hubbard* (EAT/532/89, unreported, 7 November 1991).

[48] *G D Searle & Co Ltd v Celltech* [1982] FSR 92. This conclusion has to be put in perspective in light of the recent cases of *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] EWHC 1974; *Kynixa Ltd v Hynes & Ors* [2008] EWHC 1495 and *Tullett Prebon PLC & Ors v BGC Brokers LP & Ors* [2010] EWHC 484.

[49] Cf. *Robb v Green* [1895] 2 QB 315; *Sanders v Parry* [1967] All ER 803*; Faccenda Chicken Ltd v Fowler* [1986] 1 Ch 117.

[50] Cf. *Cray Valley Ltd v Deltech Europe Ltd* [2003] EWHC 728*; Fibrenetix Storage Ltd v Davis* [2004] EWHC 1359.

[51] Cf. *Printers & Finishers Ltd v Holloway* [1965] RPC 239, 253; *Faccenda Chicken Ltd v Fowler* [1986] 1 Ch 117, 136

[52] *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 437, 448-449. Cf. *Crowson Fabrics v Rider* [2008] IRLR 288, par. 82. A fiduciary employee would hence encounter more difficulties in justifying his behaviour if he would attend a job interview organised by a competing company during his employment.

[53] A similar reasoning applies to company directors. Thus, in *British Midland Tool Ltd v Midland International Tooling Ltd* ([2003] 2 BCLC. 523, par. 89) Hart J decided that, until a director has put an end to his fiduciary duty to the company by resigning his directorship, preparatory steps taken by him in pursuance of a fixed intention to compete would imply a breach of his fiduciary duty, without the director being able to rely on the public interest in favouring competing business. Also in *Shepherds Investments v Walters* ([2006] EWHC 836, par. 108) it was held that when ex-directors and employees set up a competing business, diverting business opportunities and misusing confidential data, they breach their fiduciary duties *and* their duty of fidelity. Cf. *Item Software (UK) Ltd v Fassihi* [2003] BCC 858, 872 and [2004] ICR 450, 459, 462.

[54] Cf. T. O'Neill, 'Employees' duty of loyalty and the corporate constituency debate' (1993) 25 Conn.L.Rev. 681, 694-706; Restatement (Third) of Agency (2006), Section 7 (7).

[55] Cf. *Ritterspusch v Lithographic Plate Serv* 119 A.2d 392, 393 (Md. 1956); *Community Counselling Sere Inc v Reilly*, 317 F.2d 239, 244 (4th Cir. 1963); *Bancroft-Whitney Co v Glen*, 411 P.2d 921, 935-37 (Cal. 1966); *Cross Wood Prods Inc v Suter*, 422 NE2d 953, 956-57 (Il. App. Ct. 1981); *ABC Trans Nat'l Transp Inc v Aeronautics Forwarders Inc*, 379 NE2d 1228, 1237 (IllA.p p. CL 1978); *Hill v Names & Addresses Inc*, 571 NE2d 1085, 1094 (IllA.p p. CL 1991).

[56] Cf. *American Bldgs Co v Pascoe Bldg Sys Inc*, 392 SE2d 860 (Ga. 1990); *Tie Sys Inc v Telcom Midwest Inc*, 560 NE2d 1080 (III. App. Ct. 1990); *Gonzales v Zamora*, 791 S.W.2d 258 (Tex. Ct. App. 1990).

financing for it or advertise their new start, and this in principle, all without telling his employer[57]. Prior notice is not required[58]. However, when the departure of the employee can severely harm the employer's ability to continue in business, the employee must disclose his competition plans[59]. Thus, in *C-E-I-R Inc v Computer Dynamics Corp*[60] it was decided that when 'key employees' prepare a competing bid for a customer's business before their resignation, they owe their employer a duty to disclose their competition plans. Moreover, in *Lowndes Prods Inc v Brower*[61], the court held that, once he came to know that several 'key employees' were planning to start a competing business, it was the plant manager's duty to notify the employer that these employees prepared to leave him, since their departure would throw the latter's business operation into a state of confusion.

3. An employee's duty of disclosure

11.The finding that under certain circumstances the employee must inform his employer on his plan to undertake competitive activities (and even disclose the competition plans of fellow employees) leads to a second aspect discussed in relation to the qualification of the employee as a 'fiduciary': his duty to disclose wrongdoings to the employer. In this respect, a distinction is made between the duty to confess one's own misconduct and the obligation to report fellow employees' wrongdoings.

3.1. Disclosure of own wrongdoings

12.There are several leading cases in English employment law with respect to the employee's duty to confess his own misconduct.

A first case worth to be discussed is *Bell v Lever Bross Ltd*[62]. This case is important for it establishes the principle that an employee is generally not obliged to confess his own wrongdoings to the employer. In this case two employees were sued by the employer, Lever Bross, for the return of large payments which had been made to them by way of compensation for terminating their service agreements. The facts were such that, owing to certain previous transactions by these employees unknown to the employer, the agreements could have been terminated without these compensation payments. Upon discovering this, the employer claimed damages for conspiracy or fraudulent concealment, breach of duty and breach of contract. Nothing was said about such things as a duty to disclose or the existence of a fiduciary relation or contract *uberrimae fidei.* On appeal, the Lords Justices took the view that - although in no way pleaded - the appellant employees during the negotiation with their employer for the agreements for settlement were under a duty to disclose their offending transactions of months before, even if these transactions had at that time passed from their minds. Thus, the Court of Appeal held that the agreements of settlement had to be set aside on the ground of mistake and, thus, that the employees had to return the sums paid thereunder by the employer. Nevertheless, the House of Lords held that the alleged misconduct was

[57] Cf. *Fish v Adams*. 401 So. 2d 843, 845 (Fla. Dist. CL App. 1981); *Aug Inc v Aegis Inc*, 565 NE2d 415, 419 (Mass. 1991); *McCallister Co v Kastella*, 825 P.2d 980, 984 (Ariz. Ct. App. 1992).
[58] Cf. *Maryland Metals Inc v Metzner*, 382 A.2d 564, 573 (Md. 1978); *Allied Supply Co v Brown*, 585 So. 2d 33, 35 (Ala. 1991). Contra: *DSG Corp v Anderson*, 754 F.2d 678, 682 (6th Cir. 1985).
[59] Cf. T. O'Neill, 'Employees' duty of loyalty' (n. 54), 704.
[60] 183 A.2d 374, 380 (Md. 1962).
[61] 191 SE2d 761, 768 (SC 1972).
[62] [1932] AC 161.

not essential so that the fact that the agreements might have been terminated without compensation was only a side issue[63].

More important is the principle, expressed by Lord Atkin, that it could not be reasonably expected that an employee would confess his (previous) wrongdoings - a principle corresponding to the right not to incriminate oneself[64]. Lord Atkin reasoned that there are certain contracts (*uberrimae fidei*), such as contracts for partnership and contracts of insurance, which are expressed by the law to be contracts of 'utmost' good faith where material facts must be disclosed in order not to be voidable. 'Ordinary' contracts of employment (or service) are, however, not within this limited category[65]. According to Lord Atkin the duty of the employee (servant) to protect the property of his employer (master) may involve the duty to report a fellow employee whom he knows to be wrongfully dealing with that property, but it does not imply a duty to confess one's own misconduct. Such a duty would be to create obligations entirely outside the parties' normal contemplation, for the employer takes the risk and can protect him by questioning his employees. In other words, *caveat emptor* applies[66]. To support this reasoning Lord Atkin referred to *Healey v Société Anonyme Française Rubastic*[67] in which it was debated whether or not the employee's undisclosed wrongdoings precluded him from recovering arrears of salary. According to Avory J this was not the case, because he could not accept that "the omission to confess or disclose his own wrongdoing was in itself a breach of contract"[68]. Lord Atkin hence seems to accept some obligation to disclose another employee's wrongdoings, but at the same time rejects that the employee is (contractually) obliged to report his own misconduct.

This reasoning has been confirmed with regard to a director's duty of disclosure in *Van Gestel v Can.* There, May LJ ruled that "it is only where the contract being entered into is one *uberrimae fidei*, or where a fiduciary or similar special relationship exists between the contracting parties, that the duty to disclose a fraud or a secret profit arises"[69]. Nevertheless, this reasoning could be criticised. Indeed, fraudulent concealment by the employee as part of a cover-up implies a breach of the duty of fidelity. This criticism seems to be acknowledged in *Bell* itself, where Lord Thankerton expressed that "in the absence of fraud (…) neither a servant nor a director of a company is legally bound forthwith to disclose any breach of the obligations arising out of the relationship so as to give the master or the company the opportunity of dismissal", yet continued by saying that "there may well be case where the concealment of the misconduct amounts to a fraud on the master or company"[70].

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[63] Common mistakes do not lead to a void contract unless the mistake is fundamental to the identity of the contract.
[64] *Bell v Lever Brothers Ltd* [1932] AC 161, 227-228.
[65] According to Lord Atkin the employees had an 'ordinary' contract of service. They were not directors, nor in a fiduciary relationship to the shareholders of Lever Bros. Moreover, they were acting for themselves as principals and not as agents.
[66] Cf. M. Freedland, 'High Trust, Pensions and the Contract of Employment' (1984) 13 ILJ 25, 33.
[67] [1917] 1 KB 946.
[68] Ibid, 947.
[69] [1987] CL 454. In the earlier case *Horcal Ltd v Gatland* ([1983] BCLC 60) Glidewell J had already held that directors of a company had a positive duty to disclose breaches of their fiduciary duty to the company. Moreover, also in the recent case *Item Software (UK) Ltd v Fassihi* ([2004] ICR 450), Arden J ruled that a director's duty to disclose his misconduct is part of his general (fiduciary) duty to act in good faith in the company's interests. Arden J (par. 53) finds it hard to see how a director who is making a profit by appropriating the company's contract for himself would not be urged to disclose what he had done, not least as part of his duty to account for secret profits (cf. *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134). However, an independent duty to confess was denied, as this would "lead to a proliferation of duties and arguments about their breadth" (par. 41) (cf. C. Wynn-Evans, 'Self Incrimination in English Employment law' (2005) 34 ILJ 178, 180).
[70] *Bell v Lever Brothers Ltd* [1932] AC 161, 231.

13. Anyway, despite the strength of Lord Atkin's arguments, the *Bell*-case did not establish an overriding rule that an employee could never be under a duty to report his own wrongdoings[71]. Indeed, the situation seems different where the employee finds himself in a position of trust and hence is bound by a duty to report his own misdeeds. This duty can be seen as a positive obligation derived from a fiduciary's negative duty not to make any profit and to avoid any conflict of interest.

Thus, in *Neary and another v Dean of Westminster*[72] Lord Jauncy of Tullichettle reiterated that, as between master and servant, it was settled that there existed a fiduciary relationship of trust and confidence[73], obliging the employee to act in good faith and not make a profit out of his trust[74]. Moreover, he emphasised that the extent of the so-called (fiduciary) 'duty of fidelity' depends on the facts of each case, including the character of the institutional employer, the employee's role in that institution and the degree of trust required of the concrete employee towards the employer. In this case, it therefore had to be taken into account that the employer, the Abbey of Westminster, was a religious collegiate institution which implied that its 'senior' members were entitled to expect a degree of openness and integrity differing from the degree expected in a commercial organisation. For this reason, the fact that Neary, organist and choir master of the Abbey, and his wife, who was appointed as secretary, had received extra fees paid by external promoters without disclosing this to the Abbey, and had set up a separate bank account to receive these fees and so to avoid the special tax on these payments above their salary, justified their summary dismissal for gross misconduct[75]. Indeed, the finding that Neary and his wife had derived secret profits in the form of fees on special events fatally undermined the band of trust and confidence which should have subsisted between them and the Abbey and was clearly in breach of their (fiduciary) duty of fidelity owed to the latter. This case hence supports the recognition of a duty of disclosure with respect to the employee's own misconduct, including the taking of unauthorised payments, provided the employee finds himself in a particular position of trust, e.g. due to the special character of the institutional employer.

A similar conclusion can be drawn from the case *Tesco Stores Ltd v Pook*[76]. Here, the employee had received secret money after blackmailing his employer's supplier. According to the employee this money - in the form of invoice payments – had been made to him for consultancy services. Nevertheless, he used it to buy a property for himself. Given this conflict of interest, the employee was held liable to account for the money which he was said to hold on trust for his employer[77]. Besides, considering that he had been employed at senior level, the employee was found to be under a duty to disclose breaches of trust by his fellow employees, as well as his own wrongdoing[78]. It would indeed be odd if the employee had to disclose a breach of duty by other employees, but would not be under a duty to disclose his own contract breaches. However, Smith J limited the scope

[71] *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 437, 450.
[72] [1999] IRLR 288.
[73] Here, Lord Jauncy seems to (mis)use the notions of 'trust' and 'confidence' to qualify the relationship between Neary and the Dean of Westminster as fiduciary (cf. R. Flannigan, 'The (Fiduciary) Duty of Fidelity' (2008) 24 LQR 274, 275).
[74] Cf. *Hivac v Park Royal Scientific Instruments* [1946] All ER 350; *Reading v AG* [1951] AC 507; *AG v Blake* [1998] Ch 439.
[75] Summary dismissal is (only) justified if the employee has behaved in a manner as inconsistent with the employment as to undermine the fundamental duty of trust and confidence (cf. *Lewis v Motorworld Garages Ltd* [1986] ICR 157).
[76] [2004] IRLR 618.
[77] Ibid, par. 63 and 69. Also in *AG of Hong Kong v Reid* ([1994] 1 AC 324) it was held that a fiduciary may not benefit from a bribe accepted in breach of his duties, but should account for it as soon as he receives it.
[78] Ibid, par. 60 and 65-66. Cf. *Sybron Corp v Rochem Ltd* [1983] ICR 801.

of this duty to the disclosure of contract breaches that involve a fiduciary element. Thus, if, like here, an employee receives a profit or bribe in breach of his fiduciary duty, he is liable to account for it[79].

14. An analogous reasoning is applied with regard to a 'fiduciary employee's' preparatory activities to the employer in the course of his employment that conflict with his duty of 'utmost' loyalty. Although these preparatory activities do not put the 'mere employee' in breach of any duty[80], a 'fiduciary employee' can be held to be in breach of his fiduciary duty of loyalty if he embarks on a new competing venture without telling his employer, *a fortiori* where other employees are involved. It was already noted earlier that once a fiduciary employee has an irrevocable intention to compete, he should disclose his plans to the employer[81].

Thus, in *Helmet Integrated Systems Ltd v Tunnard*, the Court of Appeal accepted that if the employer could sustain that Tunnard, who worked for him as a sales person with responsibility for fire helmet products within the civil market, was under a fiduciary duty to report to him on competitor activity, then Tunnard could have only pursued his project to design a fire helmet himself by resigning first[82]. In the employer's view Tunnard's job specification imposed such a duty, because it identified a duty "to advise on competitor activity"[83]. This duty was necessarily to be fulfilled when Tunnard was working on his own, out of office, where the employer could not control Tunnard and consequently had to rely completely on Tunnard to identify and report information possibly of interest to him. Considering that Tunnard had explicitly undertaken a duty to report and that the employer stood in vulnerable position as regards the fulfilment of this duty, the employer believed Tunnard to be in a situation where equity imposes rigorous duties on top of the contractual duties. Although Moses LJ argued that there was no overriding rule that an employee could never be under a duty to report his own misconduct[84], and although he agreed that Tunnard's activities would have amounted to competitor activity if undertaken by a competitor [85], Moses LJ denied Tunnard had any (fiduciary or other) duty to inform the employer of his activities undertaken on his own behalf for two reasons[86]. First, given that Tunnard was employed as a salesman and not as a designer, the words of his job description could not enlarge the meaning of 'competitor activity' to cover his preparatory activities, undertaken in the exercise of his freedom to compete with his ex-employer. Secondly, Tunnard owed no fiduciary duties in relation to the creation of a preliminary concept for a new helmet and

[79] Cf. C. Wynn-Evans, 'Self Incrimination' (n. 69), 179.

[80] Cf. *Laughton & Hawley v Bapp Industrial Supplies Ltd* [1986] ICR 634; *Balston Ltd v Headline Filters Ltd (No2)* [1990] FSR 385, 413; *Helmet Integrated Systems Ltd v Tunnard* [2007] FSR 437, 445-446.

[81] Or, he should put an end to his fiduciary duty to the company by resigning his directorship (*supra,* fn. 53). In *Balston Ltd v Headline Filters (No2)* ([1990] FSR 385, 412) Falconer J ruled that, having ceased to be a director, the defendant did not breach of his fiduciary duty to the company in not disclosing his plan to set up a competing business and in buying a company during his notice period. See also: *British Midland Tool Ltd v Midland International Tooling Ltd* ([2003] 2 BCLC 523, par. 89; *Shepherds Investments Ltd v Walters* [2006] EWHC 836, par. 108; *Hanco ATM Systems Ltd v Cashbox ATM Systems* [2007] EWHC 1599, par. 65. In *Foster Bryant Surveying Ltd v Bryant* ([2007] IRLR 425, par. 76) Rix LJ noted, however, that a director's fiduciary duty may not be applied inexorably. Its application in various cases requires sensitivity to the facts and to principles, such as the personal freedom to compete. Thus, with regard to retiring directors, courts adopt pragmatic solutions. Since, here, the director's resignation had not been incited by an intention to compete; he did not breach his duty by accepting, before his resignation took effect, a client's request to work for it after resigning.

[82] [2007] FSR 437, 447-448.

[83] Ibid, 444-445. Moreover, Tunnard's contract included conditions requiring him "to act at all times with the best interests of the company in mind" and precluding the employee from undertaking or arranging the undertaking of "any work which can be seen to affect adversely or be in competition with the Company". There was, however, no restrictive covenant.

[84] Ibid, 450.

[85] And he also accepted that the employer was in a vulnerable position with respect to the use Tunnard would make of the information that he had learned as a salesman, the dissemination of which was outside the employer's control.

[86] [2007] FSR 437, 450-452.

did not breach any such duty by raising funds for such a project while employed[87]. Thus, the employer had failed to establish any breach, either of a duty of fidelity or as a fiduciary.

Moreover, in *Kynixa Ltd v Hynes & Ors,* Wynn Williams J considered the concept of 'loyalty' as a crucial aspect of the implied duty of fidelity to argue that one could not act as a loyal employee if one knows that senior employees (including oneself) may transfer their allegiance to a competitor, but fails to divulge that knowledge, or *a fortiori* if one also misleads the employer about that risk[88]. Likewise, in *Tullett Prebon plc v BGC Brokers LP*, Jack J ruled that although a number of cases deal with what employees may or may not do while still employed in preparation for future activities, these cases do not support the idea that a duty to report a poaching raid is a restraint of trade[89]. One could even argue that senior officers ('team heads') have an implied duty to disclose raids, proposed by a competitor, once they are aware of it[90]. This conclusion is can be supported by referring to the earlier case *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP*[91]*,* where it was ruled that "it would be an obvious breach of their duty of loyalty and fidelity to the employer if senior employees kept silent when they knew of planned poaching raids on the employer's staff or clients and when that was encouraged and facilitated by them from within the company".

And finally, in *QBE Management Services (UK) Ltd v Dymoke*[92]*,* the court interpreted Dymoke's contractual obligation to use his best endeavours to promote and protect his employer's interests, and his duty to "fully and properly disclose to the Board all of the affairs of the Group of which he is aware", as including a duty to disclose his own activities[93]. Although Dymoke was not a statutory director, he played a pivotal role in the company and had a very senior position, implying a high level of trust and access to sensitive information. In light of these circumstances, Haddon-Cave J held that Dymoke had breached his duty of fidelity by poaching fellow employees to defect *en masse,* by misusing confidential material and by soliciting employer's customers during his employment. Moreover, as a senior employee, he was under a duty – similar to that of a director - to disclose any actions by others which will lead to competitive activity, and - unless if he resigned immediately - any similar actions of their own as soon as they have formed an irrevocable intention to compete.

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[87] Similarly, in *Lonmar Global Risks v West* ([2011] IRLR 138, 156), it was ruled that, although the employees had a potential influence over the employer's clients, they had no management responsibilities or board level involvement and hence did not owe fiduciary duties, including a duty of disclosure. Cf. *Ranson v Customer Systems plc* [2012] EWCA Civ 841.

[88] [2008] EWHC 1495, par. 283. In *Lonmar Global Risks v West* ([2011] IRLR 138, 156) this reasoning was, however, rejected as authority for the idea that an employee with no fiduciary duties has to disclose fellow employees' misconduct. According to Hickinbottom J, the decision in *Kynixa* was very fact specific, as the relevant defendant had positively misled the employer about the intentions of her and her fellow employees (rather than merely not disclosed these intentions). But in general, an employee's duty of fidelity does not include a duty to disclose wrongdoing.

[89] [2011] IRLR 420, par. 67. Here, BGC, a leader in the broking market and competitor of Tullett, had directed a raid on Tullett's employees. This raid was led by a former senior employee of Tullett. It was BGC's strategy to approach the heads of Tullett's broking desks to recruit junior brokers. In light of this, Jack J ruled that where a desk head is approached with the object of sounding him out as to the desk, it is his duty in law to act in his employer's interest and not that of the desk, even if the desk head sees it his duty to his desk as being to get the best for them. Since the employer's interest is to prevent the desk's departure, the head desk had to inform the latter that BGC aimed to recruit the desk (ibid, par. 68).

[90] It is an obvious breach of their duty of loyalty to the employer if senior employees kept silent when they knew of planned poaching raids on the latter's staff or clients (*UBS Wealth Management (UK) v Vestra Wealth LLP* [2008] IRLR 965).

[91] [2008] EWHC 1974.

[92] [2012] IRLR 458.

[93] This interpretation has, however, been criticised, for not acknowledging the distinctions between fiduciaries and 'mere employees' (cf. P. Nicholls, 'Employees deciding together to establish a competing business: what are the legal principles' (2012), http://www.11kbw.com/app/files/Case/EncouragingOtherEmployeesPN.pdf (consulted on 10 May 2013) 1, 4-7).

15.Similar conclusions are reached in other Anglo-American systems, such as the Canadian system. Although, absent an enforceable clause in this respect, 'mere employees' must generally not inform their employer about the offers they receive from competitors[94], cases are evaluated differently with regard to 'fiduciary employee's[95]. Indeed, "fiduciary employees cannot enter into engagements in which they have a personal interest that conflict with anything the employer does, or realistically may do, without first making full disclosure and obtaining the employer's consent"[96]. Besides, a fiduciary employee is in breach of his fiduciary duties "if he fails to warn the corporation that its corporate opportunities or its on-going business relationships are in danger of being lost"[97].

In *Bendix Home Systems Ltd v Clayton*[98] for example, the employer argued that his ex-employees, who had had responsible managerial and executive positions, had breached their fiduciary duty to him by founding a competing company after their dismissal and by having preparatory discussions in this respect while being employed. According to the employer the (former) employees' contract of employment contained an implied term which obliged them to act in good faith and with loyalty and to keep secret all confidential and proprietary information of which they had acquired knowledge during their employment. Macfarlane J of the British Columbia Supreme Court accepted that the former employees were in breach of fiduciary duty by using their positions of trust and the opportunities afforded by their employer during their employment to start a new company[99]. Although the employees were allowed to leave their employer and to enter in competition with him, their plan to found a new company and the preparation thereof was in breach with their fiduciary duty of loyalty, because this new company would take other senior employees from the employer and divert from the latter the goodwill of dealers, which it was their duty to attract for the employer. The matter would, however, have had a far different complexion had the employees resigned and then entered into preparatory discussions with others or had they made full disclosure of their plans to their employer before considering the possibility of starting a new competing business[100].

Likewise, in *DCF Systems Ltd v Gellman* Osler J of the Ontario Supreme Court decided that although Gellman had a right to resign and subsequently to enter into competition with DCF. Systems Ltd, he had breached his fiduciary duty to the latter by not revealing his own competitive intentions[101]. Indeed, as a senior officer and director of DCF. Systems Ltd, he had a fiduciary obligation to advise the directors as soon as he learned that other senior employees were planning to gain control of the business by purchase or competition and to notify them of his decision to join these employees[102].

Moreover, the fiduciary employee's duty to disclose his plan to compete with the employer or to divert a business opportunity from the latter is one of 'full' disclosure. Consequently, in *Felker v*

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[94] *McMahon v TCG International Inc* (2007) 59 CCEL (3d) 131, par. 71 and 117.
[95] Cf. *Ruwenzori Enterprises Ltd v Walji* (2004 BCSC 741, par. 184-185; *Kirby v Amalgamated Income Ltd Partnership* (2009) 75 CCEL (3d) 186, par. 214 (per Metzger J).
[96] *Manley Inc v Fallis* (1977) 2 BLR 277. Cf. *Felker v Electro Source* [2000] SCCA No 538, 739-741.
[97] *Berkey Photo (Canada) Ltd v Ohlig* (1983) 43 OR (2d) 518, par. 51.
[98] *Bendix Home Systems Ltd v Clayton* [1977] 5 WWR 10.
[99] Ibid, par. 70. The claim that the employees had been in breach of a duty not to reveal confidential information was, however, rejected, as the (former) employees had revealed nothing that would not have been generally known by persons employed in the industry or that could not have been ascertained upon inquiry (ibid, par. 49-50).
[100] Ibid, par. 81.
[101] (1979) 5 BLR 98, par. 56. Nevertheless, Osler J also held (par. 54) that, so far as Gellman's position as a director was concerned, it would appear that, so long as disclosure was made, he could compete with DCF. Systems Ltd even if this would damage the latter. To act secretly, however, conflicted with his fiduciary duty to act in the interest of the company.
[102] Ibid, par. 44.

Cunningham Borins JA ruled that the trial judge had erred in finding that Felker, who was a valuable key employee and as such stood in a fiduciary relationship to the employer, had fulfilled his duty of full disclosure by *only* making casual comments before being hired (and hence being an employee) to the effect that he would start his own business if he would obtain the opportunity to do so[103]. Indeed, as a 'fiduciary employee', Felker was under an equitable obligation of loyalty, good faith, honesty and avoidance of conflict of duty and self-interest that required him to devote his full time, ability and energy with a view to advancing the employer's best interests[104]. This duty implied that Felker was obliged to avoid putting himself in a position where his own interests would supersede his employer's interests or would detract from his ability to work solely for the benefit of the latter. He could hence not enter into engagements in which he had a personal interest that (may) conflict with anything the employer does without making full disclosure and obtaining the latter's consent[105]. Moreover, Felker's duty of good faith urged him to be open, honest and forthright to the employer. In light of this duty, Felker had to make full disclosure of all material facts that the employer would be entitled to know to successfully operate its business. This included the fact that Felker was engaged in preparing a presentation to potential clients with the intention of acquiring these clients for his own company, which would carry on business in competition with the employer's business. Because Felker had not disclosed this, he was found to be in breach of his fiduciary duties[106].

Likewise, in the recent case *Fraser v ProScience Inc*[107] it was held that Fraser, a senior manager with broad responsibilities, as regards price setting and customer relations amongst other things, had breached his fiduciary duty by secretly operating his own business while being employed. Indeed, as a 'fiduciary employee', Fraser was liable to ProScience Inc for the profits he made from taking up the opportunity to sell remotes without the latter's knowledge or consent.

16. Contrary to this prescriptive approach towards the fiduciary principle[108], which explains why Canadian courts are prepared to accept a fiduciary employee's duty to disclose his own wrongdoing, the Australian courts are reluctant to recognise the existence of such a positive duty.

Indeed, in *P & V Industries Pty Ltd & Ors v Porto & Ors,* Hollingworth J rejected the suggestion of the plaintiff employer to impose a prescriptive duty on the employee to disclose 'past wrongdoing'. Relying upon the High Court cases of *Breen v Williams*[109] and *Pilmer v Duke Group*[110] *"*as authority for the proposition that fiduciary duties are limited to proscriptive duties of loyalty"[111] to describe the classical Australian view, and considering the English position on the duty to disclose misconduct[112],

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[103] *Felker v Cunningham* [2000] OJ 3177, par. 19-20.
[104] Ibid, par. 16.
[105] Ibid, par. 14. Cf. *Manley Inc v Fallis* (1977) 2 BLR 277. Moreover, as this fiduciary duty is based on trust and confidence and not economic cost to the employer, as a 'fiduciary employee', Felker was not relieved of this fiduciary duty if the business opportunity sought to further his own ends was one that the employer would have been unwilling or incapable of exploiting (cf. *Berkey Photo (Canada) Ltd v Ohlig* (1983) 43 OR (2d) 518, 530-531).
[106] *Felker v Cunningham* [2000] OJ 3177, par. 16-17.
[107] (2005) 42 CCEL (3d) 245.
[108] Also the American system applies such an approach by describing the fiduciary duty of disclosure as an affirmative duty "to disclose all material facts known to (the trustees) that might benefit (the beneficiaries') rights", and "to make a full and accurate confession of all their fiduciary activities, transactions, profits and mistakes" (cf. *Montgomery v Kennedy* (1984) 669 S.W.2d 309, 312-314).
[109] (1996) 186 CLR 71.
[110] [2001] HCA 31.
[111] *P & V Industries Pty Ltd & Ors v Porto & Ors* (2006) 14 VR 1, par. 15, 23 and 42-43.
[112] Ibid, par. 26-41.

Hollingworth J argues that the English case *Item Software (UK) Ltd v Fassihi*[113], in which a company director was held to have a duty to disclose his misconduct, does not reflect the law in Australia[114]. Noticing that some cases refer to a fiduciary as having a duty to make 'voluntary disclosure', Hollingworth J remarks that, in each instance, this requirement of advance disclosure is only meant to obtain the beneficiary's consent, thereby avoiding a breach of the no profit and no conflict rules - the two basic rules governing proscriptive fiduciary relationships. Put differently, this duty operates "as the means of avoiding a breach of the related duties not to have a secret interest conflicting with their duty as a fiduciary and not to make a secret profit from their fiduciary position"[115], and hence as a defence to the no profit and no conflict rule[116]. Hollingworth J therefore reaffirms that "there is as yet in Australia no positive rule that a fiduciary must disclose personal interests to a beneficiary". Indeed, there is no rule requiring a fiduciary director-employee to disclose any past wrongdoing[117], for any positive disclosure rule would have to have a content and could not be a mere prohibition, but this would be "contrary to the scheme of fiduciary duties[118]. Besides, however lauded any endeavor to increase corporate transparency, courts should not usurp the role of the legislature and, in the process, tinker with established equitable rules such as those that govern fiduciaries' duties[119].

In *Hodgson v Amcor*, Vickery J further develops the distinction made between the disclosure of past and 'prospective wrongdoing'[120]. Accepting that Hodgson, who - as a senior manager within Amcor - was considered to be a fiduciary employee, was under no duty to disclose his past wrongdoing, Vickery J clearly distinguished this latter duty from a requirement to disclose a conflict of interest. The consequence of this seems to be that a fiduciary employee would not be obliged to disclose his past wrongdoing[121], but may be required to disclose where he is engaged in prospective wrongdoing in order to protect the employer from future harm. The practical importance of this distinction can, however, be questioned, considering that in order to claim that the employee has breached his duty to disclose prospective misconduct, the employer must be aware of the employee's misconduct.

3.2. Disclosure of fellow employees' wrongdoings

17.Some of the cases discussed above already reveal that the fiduciary employee's duty to act in the sole interest of his employer does not only oblige him to disclose his own wrongdoings to the latter, but also requires him to confess breaches of contract by lower as well as superior fellow employees.

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[113] [2004] ICR 450. *Supra,* fn. 69.

[114] *P & V Industries Pty Ltd & Ors v Porto & Ors* (2006) 14 VR 1, par. 34. Moreover, this conclusion is not altered by the case *Trevorrow v State of South Australia (No 2)* (BC200507294, unreported, 26 September 2005), in which it was said that a fiduciary had a duty to disclose to the beneficiary all interests that may conflict with the latter's interests (i.e. a duty of prior voluntary disclosure), because in that case the court did not comment on the correctness of *Item Software.*

[115] *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (Federal Court, unreported, 28 May 1998). Similarly, in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 576, the duty to seek informed consent was not seen as a positive duty, but as a "means by which the fiduciary obtains the release or forgiveness of a negative duty".

[116] Cf. *Law Society of NS Wales v Foreman* (1994) 34 NSWLR 408, 435G; *Law Society of the Australian Capital Territory v Lardner* [1998] SCACT 24, 22; F. Reynolds, *Bowstead and Reynolds on Agency* (London: Sweet & Maxwell, 1996) 217, 223.

[117] See also: *Levy v Bablis* [2007] NSWSC 565. The question whether an employee should disclose his misconduct was also raised, but left unanswered by the Australian High Court in *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312. Cf. A. Stewart and L. McClurg, 'Playing Your Cards Right: Obligations of Disclosure in Commercial Negotiations' [2007] AMPLA Yearbook 36.

[118] (2006) 14 VR 1, par. 24-25. Cf. J. Glover, *Equity, Restitution & Fraud* (Sydney: LexisNexis, 2004) par. [5.10]; L. Ho and P.W. Lee, 'A director's duty to confess: a matter of good faith? (2007) 66 CLJ 348, 349. Watts, however, disagrees and objects Hollingworth J's viewpoint (cf. P. Watts, ''The Transition from Directors to Competitors'' (2007) 123 LQR. 21, 24).

[119] *P & V Industries Pty Ltd & Ors v Porto & Ors* (2006) 14 VR 1, par. 45.

[120] [2012] VSC 94, par. 1570. It is, however, not clear what is meant with 'prospective wrongdoing'.

[121] Unless the employment contract (or the employer's workplace policy) urges the employee to disclose his misconduct.

This duty to report fellow employee's misconduct is however not a *general* duty, but a matter of fact dependent upon a multitude of factors, including the circumstances of the particular case.

In *Swain v West (Butchers) Ltd*[122] for example, it was held that the employee who was contractually obliged to "do all in his power to promote, extend and develop the interests of the company", had the duty, as part of his contract, to report to the board of directors any act which was not in the company's interests. Hence, it was his duty to report that the managing director had given him unlawful orders, which he carried out – even if he, in doing so, incriminated himself by revealing his own fraud. Indeed, although not in every case where a master-servant relationship exists, it is the servant's duty to disclose any discrepancies of his fellow servants of which he is aware, it was Swain's obvious duty - as a general manager - to find out what he could and report the wrongdoing of somebody else[123]. Moreover, Greer LJ ruled that it was his greater duty when asked to do so[124]. Thus, in light of the contractual obligations Swain had undertaken, he had to report to his employer that the managing director had endeavoured to persuade him to do something which was dishonest and which would, if carried out, be a breach of his duties in controlling the company's business[125].

Similarly, in *Sybron Corp v Rochem*[126] the Court of Appeal held the employee to be under a duty to report the fraudulent behaviour of his subordinates with whom he had acted, despite the fact that this would reveal his own misconduct and thus prevented him to retain the advantageous pension payments he had made to himself and his wife. Although Stephenson LJ accepted that a contract of employment, though often described as creating a relationship of trust between master and servant, is not a contract *uberrimae fidei* so as to require disclosure by the servant of his own misconduct, either before he is taken into employment or during the course of his employment[127], he agreed that an employee can be obliged to report a fellow employee whom he knows to be wrongfully dealing. To support his reasoning Stephenson LJ referred to the above-discussed *Bell*-case and more precisely to Lord Atkin's statement that a servant's duty to protect his master's property "may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property"[128]. Moreover, reference was made to the *Swain*-decision in which the Court of Appeal had already considered that in *certain* circumstances there is a duty to report the misconduct of fellow servants. Likewise, Stephenson LJ argued that the law would do industrial relations generally no great service if it held that, in all cases, there is a *general* duty resting on an employee to inform his master of the breaches of duty of other employees. Indeed, whether there is such a duty depends upon all the circumstances of the case, including the relationship of the parties to their employer and *inter se*, and on the terms of employment of the concrete employee[129]. As in this case, the employee may be so placed in the hierarchy as to be obliged to report the misconduct of his (superior[130] or) inferiors[131] - even if he thereby inevitably would incriminate himself. Indeed, given that the employee was in executive control of the company's European business zone and was expected to report on the state

[122] *Swain v West (Butchers) Ltd* [1936] 3 All ER 261, 262 and 264.
[123] Ibid, 264.
[124] Ibid, 262.
[125] Ibid, 265.
[126] [1983] ICR 801.
[127] Ibid, 811.
[128] Ibid, 813. Cf. *Bell v Lever Brothers Ltd* [1932] AC 161, 228.
[129] Ibid, 815-816.
[130] Cf. *Swain v West (Butchers) Ltd* [1936] 3 All ER 261.
[131] Cf. *Sybron Corp v Rochem* [1983] ICR 801.

of the zone, his position urged him to disclose to his employer the continuing malpractices of his inferiors, who were engaged in fraudulent activities designed to maraud the company's assets[132]. Unlike the *Swain*-decision, the Court of Appeal in *Sybron* did not fasten on to an express term in the employee's contract to justify the imposition of a duty to disclose fellow employees' wrongdoing, but rather regarded this duty "as implicit in the high-discretion, high-trust role" of the employee[133]. In Freedland's view this marks "a developing judicial creativeness so far as the fiduciary obligations of employees are concerned, especially where they are senior employees in high-trust roles"[134].

18. It is, however, questionable whether this development to extend the employee's *implied* duty to disclose is appropriate, given that the so-called English Public Interest Disclosure legislation[135] merely affords a degree of protection to whistle blowers in some situations, but neither obliges employees to blow the whistle, nor requires employers to install adequate reporting procedures[136].

Consequently, in a comment on the case *RBG Resources plc v Rastogi & Ors*[137]*,* Lewis criticises the uncertainty created by the recognition of an amorphous *implied* duty to disclose, arguing that "the courts should require employers to devise appropriate *express* terms" accompanied by detailed reporting procedures which make clear what is needed and offer protection against victimisation[138].

In the *RBG*-case, following an auditors' investigation, it was concluded that the business lead by RBG Resources (hereafter RBG) was almost certainly a sham and that various banks had been defrauded of large sums of money. Consequently, provisional liquidators were appointed to act in RBG's name. These obtained extensive freezing orders and issued proceedings for breach of duty against three directors as well as against Patel, the company's senior executive, who disputed his involvement. According to RBG, Patel owed the company a number of implied duties and had breached all of them. One of these alleged duties was the duty to make enquiries concerning the conduct of the three defendant directors in so far as their conduct gave rise to a suspicion of dishonesty and/or to take steps to stop or prevent other's dishonest activities in respect of or otherwise affecting RBG; and to disclose such activities to RBG and, where necessary, to third parties including the authorities and RBG's auditors. Patel, however, denied that he had a duty to monitor the directors' activities, or to prevent or disclose their wrongdoing – a duty which he described as a 'duty to whistle blow'. Although accepting that in an *individual* case an employee may be under a duty to report a fellow servant's misconduct, he argued that he did not exercise a supervisory function over the directors or RBG's departments, so that no such duty could arise. Besides, if there was any duty to report, it could only be to report internally and hence back to the defendant directors - which would be futile. Thus, to force an employee to whistle blow would put him in conflict with his duty of confidence to the company and place him in an invidious position, for if he reported something which proved to be

[132] Ibid, 817.
[133] Cf. M. Freedland, 'High Trust' (n. 66), 33.
[134] Ibid, 35.
[135] Cf. Public Interest Disclosure Act 1998 (Part IVA if the Employments Rights Act 1996). See also: Section 93A of the Criminal Justice Act 1993; Regulation 14 of the Management of Health and Safety Regulations 1999.
[136] Cf. D. Lewis, 'When Do Employees have a Contractual Duty to Report Wrongdoing?' (2004) 33 ILJ 278, 280).
[137] [2002] EWHC 2782.
[138] D. Lewis, 'Duty to Report Wrongdoing?' (n. 136), 280. Also, in Lewis' view, in the context of Public Interest Disclosures, these procedures should provide for conciliation, mediation and arbitration as alternative forms of redress for employees who feel that their disclosures have not been dealt with properly or who have suffered retaliation ('Resolving Whistleblowing Disputes in the Public Interest: Is Tribunal Adjudication the best that Can be Offered?' (2013) 42 ILJ 35, 35-53). Lewis' criticism must be put in perspective in light of the limited application of the duty to disclose of senior employees (cf. C. Wynn-Evans, 'Self Incrimination' (n. 69), 181).

groundless, he could risk his own job. This latter argument was, however, rejected by Laddie J, who reiterated that if what an employee knows amounts to wrongful acts pursued by other employees against the company, such acts are not protected from disclosure by a duty of confidence[139]. Indeed, "there is no confidence in an iniquity"[140]. Moreover, referring to the *Sybron*-case, Laddie J reaffirmed that there is no *general* duty to report the fellow employee's misconduct or breach of contract, for the existence of a duty to whistle blow is a matter of fact dependent upon a multitude of factors[141].

So, in *Sybron,* the defendant employee's position in the company was considered to be a crucial matter based upon the reasoning that a person in a managerial position could not possibly stand by and allow fellow servants to pilfer the assets of the company and do completely nothing about it. Nevertheless, Laddie J specified that having a supervisory function was not a requisite factor. Indeed, there is no general rule that before an employee can be obliged to disclose the wrongdoings of his fellow employees, he must be given a supervisory function over these other employees[142]. Relevant factors include among other things the terms of the employee's contract of employment, his duties and seniority in the company, as well as the nature of the wrongdoing and its potential adverse effect on the company[143]. Thus, where the alleged wrongdoing went to the very survival of the company it is more likely that the court would imply a duty to whistle blow, especially where - as in this case - the employee in question the same time exercises a senior ('fiduciary') position[144].

Next, with respect to the question "to whom the whistle must be blown", Laddie J reminisced that, in the context of breach of confidence actions, it was said that the disclosure had to be to one with a proper interest to receive the information[145]. This implied that Patel's duty to report the frauds included reporting to members of the board and the advisory board, or to members of these boards who Patel could not believe to be implicated, as well as to the company's auditors, whose task it was to inquire into the substantial accuracy of the company's balance sheet[146]. Given the existence of this possibility to report internally, Laddie J did not find it necessary to consider whether or not Patel also had to blow the whistle to external law enforcement agencies, such as the police, or to the company's solicitors, who had not much concern with the day-to-day running of the business[147].

Finally, as regards RBG's claim that Patel had breached his duty to make inquiries as to whether there had been internal wrongdoing and to investigate the suspicious conduct of the three directors, Laddie J rejected the assumption of a *universal* duty to investigate, arguing that a major factor in deciding whether such a duty exists must be the terms of the employee's contract of employment and the duties that had been granted[148]. For this reason, given Patel's previous auditing experience, Laddie J found it arguable that he had a duty to investigate when the original auditors resigned[149].

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[139] Ibid, par. 36. Cf. *AG v Guardian Newspapers (No 2)* [1990] 1 All ER 109, 268.
[140] Cf. *Initial Services Ltd v Putterill* (1968) 1 QB 396; *Gartside v Outram* (1857) 26 L. J. Ch 113.
[141] [2002] EWHC 2782, par. 37-39.
[142] Ibid, par. 40.
[143] Ibid, par. 40.
[144] Patel's level of seniority was just below that of the defendant directors, so that even without regard to his special duties, it was readily arguable that he was under a duty to report (suspected) wrongdoings by fellow employees.
[145] [2002] EWHC 2782. par. 41. Cf. *Initial Services Ltd v Putterill* (1968) 1 QB 396, 405.
[146] Ibid, par. 43-45.
[147] Ibid, par. 46. The issue of external reporting becomes, however, important if there is no one within the company that can be trusted, if the internal recipient of the information disclosed fails to take appropriate action, or if this disclosure includes illegal activities (cf. D. Lewis, 'Duty to Report Wrongdoing?' (n. 136), 279).
[148] Ibid, par. 47. Cf. *Swain v West (Butchers) Ltd* [1936] 3 All ER 261, 264.
[149] Ibid, par. 48-49.

19. Similarly, in other Anglo-American systems, courts have occasionally recognised that a fiduciary employee owes the employer a duty to disclose his fellow employees' wrongdoings.

Thus, in Canada, in *Houlihan v Douglas College Students' Society*, an employee manager was found in breach of her duty of faithfulness by not disclosing to the employer suspected thefts by subordinate employees[150]. "By keeping silent about acts that may amount to dishonesty so as to protect other employees, she misled her employer and breached the faith inherent to the work relationship"[151].

The Australian courts, however - once more[152] - appear to be more reluctant to approach the fiduciary principle prescriptively and hesitate to impose such a positive duty of disclosure on employees. In *Hodgson v Amcor*, for example, Vickery J observed that, although there is no general duty imposed on employees to report misconduct of fellow employees[153], an exception may arise by implication from the (senior) position occupied by the employee in the employer's organisation[154]. Hence, a managerial ('fiduciary') employee breaches his fiduciary duty owed to the employer if he allows fellow employees to help themselves from the company's assets and does nothing about it.

4. Conclusion – Importance of the qualification as a fiduciary employee

20. Referring back to the research aim and research question set out at the beginning of this paper, it can be concluded that open-textured concepts, such as those of 'trust and confidence' or 'loyalty', provide the judge with a tool to respond to problems and insecurities related to the content and scope of the employee's obligations of non-competition and disclosure. Indeed, due to their open-texture and *ad hoc* application, these concepts enable to determine the employee's obligations, thereby taking into account his concrete role and function and the employer's related expectations. More precisely, it appears that in order to determine how exacting the employee's duty of loyalty is, the qualification of the employee as a 'fiduciary employee' is of great practical significance. After all, an employee's 'general' duty of loyalty (fidelity) or good faith cannot be equated with the fiduciary employee's duty of 'utmost' loyalty. This is true for all the Anglo-American systems under discussion.

First of all, a fiduciary employee's duty of non-competition prevents him from making secret profits from the employment relationship, given to induce him to act in favour of a competitor. Moreover, just like a 'mere employee', he can compete with his ex-employer (and even plan to set up a competing business during his employment); however, he is prevented to actively approach the latter's customers and employees during a reasonable period of time after he has left the employer. Finally, a fiduciary employee owes a continuing duty to keep confidences.

Secondly, contrary to 'mere employees', it has been accepted that, because of his special position, a fiduciary employee can have a duty to disclose his or fellow employees' wrongdoing to his employer. Here, it must, however be noticed that the Australian system seems to be more reluctant to impose such a positive duty on employees.

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[150] 2002 BCSC 16 and [2003] BCJ No 928.
[151] Ibid, par. 54.
[152] *Supra,* par. 16.
[153] Except where the employment contract (impliedly) requires the employee to disclose other's wrongdoing.
[154] [2012] VSC 94, par. 1575-1576. Cf. *Bell v Lever Brothers Ltd* [1932] AC 161; *Swain v West (Butchers) Ltd* [1936] 3 All ER 261; *Sybron Corp v Rochem* [1983] ICR 801, 815.