

IMPLICATIONS OF BREACHING AN EMPLOYMENT AGREEMENT

In the matter of *Bayley & Associates Pty Ltd v DBR Australia Pty Ltd* (2013) FCA 1341, the Court served to emphasise that the contractual obligations of an employment agreement are important and that an employee's conduct which breaches the common law duties of fidelity and confidence won't be tolerated.

Facts

Bayley & Associates Pty Ltd (the business) is a consulting company formed in 1996 that provided financial and project management advice primarily to government departments and agencies.

The business was owned and operated by Ruth Bayley (Bayley). In February 2008, Bayley engaged Nigel Huckstep (Huckstep) as the General Manager of the business. The employment relationship ended in December 2008 after 10 months. Huckstep formed DBR Australia Pty Ltd (DBR) in September 2008.

Between December 2008 and March 2010, Huckstep and Bayley undertook common assignments for the benefit of both DBR and the business.

In March 2010, Bayley discovered that Huckstep had taken a number of confidential documents that belonged to the business. He had obtained by electronic transfer, a library of courseware and he also used his position to enhance relationships with clients of the business for the benefit of DBR and to direct transactions away from the business to DBR. Bayley argued that this amounted to a misuse of confidential information, a breach of fiduciary duty and a breach of contract.

Findings

Justice Foster found for the business. In doing so, he made a number of salutary observations that serve as important reminders for employers and business owners.



Contractual duties

- Certain contractual obligations continue after the termination of employment.
- Huckstep was obliged to work in the best interests of the business and to avoid conflicts of interest¹.

Equitable duty

- Huckstep owed an equitable duty of confidence in respect of the confidential information owned by the business².

Common law duty of fidelity

Huckstep owed a common law duty of fidelity to the business and breached his employment contract when he used the confidential information of the business without permission. He did so by:

- Establishing and carrying on a business through DBR in competition with the business.
- Secretly opening negotiations with Defence Signals Directorate.
- Stealing confidential documents, client information, courseware from the business and using it for the benefit of DBR.
- Diverting clients away from the business to DBR³.

- Employment relationships are fiduciary in nature. The test is whether the fiduciary agrees to act in the interests of another person in the exercise of power which will affect the interests of the other person in a practical or legal sense⁴.

- Senior managers owe fiduciary duties, but the question is one of degree where the matters to be considered include how vulnerable the employer is to the potential misuse of the position of power granted to the employee and how much latitude is afforded to the employee by the employer⁵.

- Fiduciary obligations can be imposed in addition to contractual obligations, with the test being a consideration of the precise activity agreed to be undertaken by the employee and whether the activity is to be performed solely in the interests of the employer to the exclusion of the employee's own interests⁶.

- Fiduciary relationships cannot be superimposed on a contract in such a way as to alter the operation which the contract was intended to have⁷. It is necessary to have regard to the circumstances of each particular case in order to specifically identify the particular obligations owed and from there determine whether there has been a breach of those obligations.

In the present case, Huckstep had significant responsibility for managing the staff and the business. He was trusted by his employer. The business was very vulnerable to any breach of his employment contract and duty of fidelity. It was these factors that led to the conclusion that Huckstep's relationship with the business was a fiduciary one.

Equitable obligations of confidence

The courseware, documents, client information and training materials were all confidential to the business. The materials were significant to the business and represented a significant investment of time and money over many years. They were sufficiently confidential to attract obligations of confidence in equity as well as in contract.

The following elements make out the equitable duty of confidence:

- The information must be specified.
- It must have the necessary quality of confidence.
- The information must have been received in circumstances that import an obligation of confidence.
- There must be an actual or threatened misuse of the information without the owner's consent⁸.

1 Bayley & Associates Pty Ltd v DBR Pty Ltd (2013) FCA 1341 at cl 228

2 Bayley & Associates Pty Ltd v DBR Pty Ltd (2013) FCA 1341 at cl 226

3 Bayley & Associates Pty Ltd v DBR Pty Ltd (2013) FCA 1341 at cl 223

4 Adopting the reasoning of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96, the Court noted that fiduciary relationships were referred to as relationships of trust and confidence. The other person is accordingly vulnerable to abuse by the fiduciary because of the special opportunity to exercise that power.

5 Bayley & Associates Pty Ltd v DBR Pty Ltd (2013) FCA 1341 at cl 232

6 *Einstein J in Woolworths Ltd v Olsen* (2004) 184 FLR 121

7 Bayley & Associates Pty Ltd v DBR Pty Ltd (2013) FCA 1341 at cl 236

8 *Gummow J in Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services & Health* (1990) 22 FCR 73



Business opportunity rule

Where an opportunity comes the way of an employee in the course of executing his duties as an employee, the employee is not entitled to exploit the opportunity for himself nor is he entitled to do so after the termination of his employment⁹.

Breach of copyright

When Huckstep electronically transmitted the confidential information belonging to the business and created paper versions of the downloaded material, he was in breach of the prohibitions contained in s31 of the *Copyright Act*.

Remedy

The Court held that the question of relief posed considerable difficulty because the business sought compensation in the form of contractual damages and equitable compensation on the one hand and an account of profits on the other. It instructed the business to make that election before judgment could be given.

The position in the UK

*Thomson Ecology v APEM Limited & Ors*¹⁰ is a recent decision of the Chancery Division of the High Court of Justice. The primary factual issue concerned the fiduciary obligations owed by an operations manager to his employer. The manager resigned from Unicomarine on 27 November 2012, signed a contract of employment with APEM on 6 November 2012 and commenced employment with his new employer on 2 January 2013. Shortly

after that time, 17 biologists from Unicomarine resigned and commenced employment with APEM.

The Court, in considering the extent of the obligations owed by a senior manager when employed and on 'gardening leave', made the following observations:

- The terms of employment and tasks contained in the job description define the scope of the employee's duty of fidelity.
- A senior manager has an obligation to report to his superiors the existence of a threat to the business or the staff. Staying silent when in possession of knowledge about a planned poaching raid is an obvious breach of the duty of loyalty and fidelity.
- Attempts by senior employees to solicit junior staff constitutes serious misconduct.
- Where an employee is not required to work during the period of his notice, the employer is still entitled to ongoing loyalty from the employee.
- The duty of loyalty, which touches upon competitive activity, or the enticing away of employees, should not be attenuated so as to interfere with the legitimate purposes of garden leave - being the delay of the transfer of loyalty to the new employer.

Implications for employers

These judgments clearly signal an appetite of low tolerance by the courts for conduct that breaches the common law duties of fidelity and confidence and the contractual obligations contained in the employment agreement. Employees will be held to account if evidence of disregard of those duties is established.

Employers will be well served to remind employees of their contractual and common law duties and to ensure that such reminders are clearly indicated in employment documentation and folded into performance management processes.

For more information, please contact **Richard Jowett**, Partner, on +61 (0)3 8601 4521 or richard.jowett@hfw.com, or **Aaron Jordan**, Partner, on +61 (0)3 8601 4535 or aaron.jordan@hfw.com, or **Matthew Blycha**, Partner, on +61 (0)8 9422 4703 or matthew.blycha@hfw.com, or **Andrew Dunn**, Partner, on +61 (0)2 9320 4603 or andrew.dunn@hfw.com, or **Mikaela Stafrace**, Consultant, on +61 (0)3 8601 4500 or mikaela.stafrace@hfw.com, or your usual contact at HFW.

9 Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd (2011) 285 ALR 63

10 Thomson Ecology v APEM Limited & Ors (2013) EWHC 2875

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