NO. 1 BESTSELLING REVISION SERIES

EMPLOYMENT LAW

7TH EDITION

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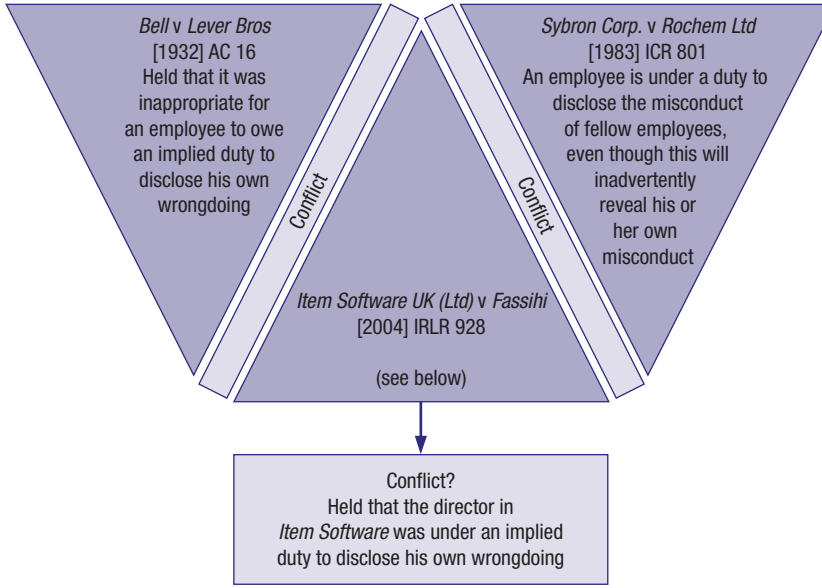
Figure 3.2



Item Software (UK) Ltd v *Fassihi* [2004] IRLR 928

Facts

This case concerned whether the duty of fidelity required a director to disclose important information known to him which was relevant to negotiations which he had been involved in on behalf of his employer. The director had sought to use that information to divert an important contract from his employer to a company which he owned.

Legal principle

The Court of Appeal held that as a matter of policy, a director, being a fiduciary, is under a duty to disclose his own wrongdoing or misconduct to his or her employer.

Analysis

This case has been criticised for failing to make clear whether the obligation to disclose is one imposed on a senior employee as well as a director: on the facts of this case, the employee was a director.

Exam tip

In an essay or problem question, do not put forward the proposition that employees are not obliged to disclose their own misconduct. The extent to which the duty to disclose wrongdoing applies to employees in general is not wholly clear from the judgments of the Court of Appeal in *Item Software (UK) Ltd* v *Fassihi* (2004). If the employee is *not* a fiduciary, *Ranson* v *Customer Systems plc* (2012) is an authority for the proposition that an employee may be subject to a duty to disclose his own wrongdoing and that whether such a duty is implied is dependent on the terms of his employment contract. Therefore, what does appear clear is that:

- *Bell* v *Lever Brothers Ltd* (1932) is not an authority for the proposition that there are no circumstances in which an employee can have a duty to disclose his own wrongdoing;
- employees who engage in illegal or fraudulent activities will be under such a duty to disclose, provided that they are acting as a fiduciary of the employer or where the employer has expressly imparted trust and confidence in them.

See Berg (2005) for further reading.

Duty to disclose wrongdoing or misconduct of other employees or colleagues

Where employees become aware of the misconduct or wrongdoing of other employees, they are under a duty to disclose such misconduct to their employer. See *Sybron Corp.* v *Rochem Ltd* (1983) and *Shepherds Investments Ltd* v *Andrew Walters* (2007), but compare this with the approach of Mr Justice Hickinbottom in the High Court in *Lonmar Global Risks Ltd (formerly SBJ Global Risks Ltd)* v *West* (2011).

Duty not to work for competitors of the employer or compete with employer

Employees owe an implied obligation not to:

- work for enterprises which compete with their employer; or
- trade directly in competition with their employer.

The competing activities may take place during their own spare time or the working time of their employer.

Hivac v *Park Royal Scientific Instruments* [1946] Ch 169

Facts
The employer manufactured valves. Its employees were extremely skilled in assembling those valves. On Sundays during their day off, the employees assembled valves for competitors of their employer.

Legal principle
The Court of Appeal held that the employees had breached the duty of good faith and fidelity, despite the fact that the work undertaken for the competitor was conducted in their own spare time.

Analysis
This case exemplifies how employees are not permitted to carry out work for competitors of their employers during the course of their duties, but also during their free time.

Don't be tempted to . . .

You may be asked in an essay or problem question to provide advice as to whether an employee is competing with his/her employer. Don't fall into the trap of thinking that employees are entitled to compete with the employer in their own spare time. Where an employee intends to leave the employment of the employer for the purposes of setting up in competition with his employer and before or after so leaving does not disclose or exploit the confidential information or trade secrets of the employer, it is a matter of fact and degree whether an employee:

(1) is actually competing with his employer; or

(2) simply has the intention of setting up in competition with the employer in the future.

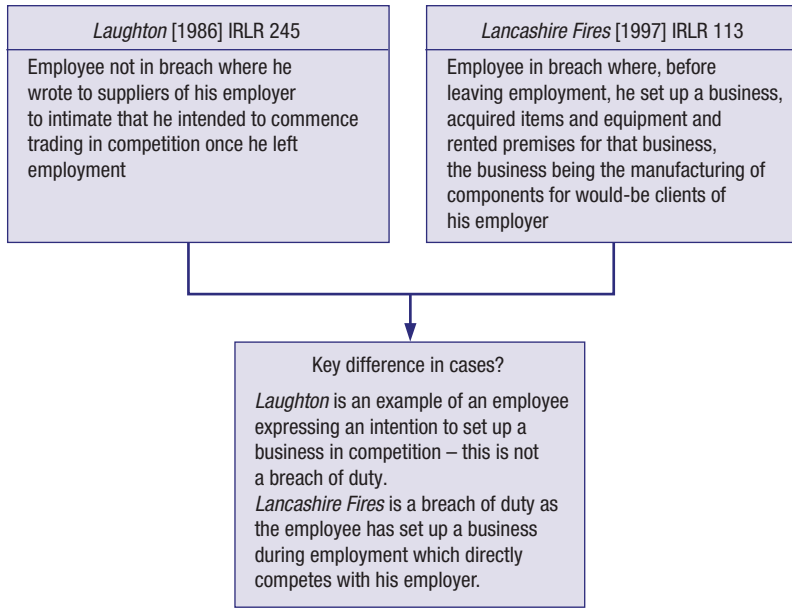
Situation 1 amounts to a breach of duty, whereas situation 2 does not. Which side of the divide between 1 and 2 the actions of the employee will fall is a matter of fact and degree (see Figure 3.3).

Don't be tempted to . . .

An essay or problem question may ask you whether employees are entitled to compete with their employers once they cease to be employed. You should avoid the pitfall of saying that employees will invariably in all circumstances have the right to compete with their employers post-employment. While an employee is free to compete with his

employer subsequent to the termination of his contract of employment, an express term called a restrictive covenant may be included in his contract of employment which prohibits him from competing with a competitor of his employer or setting up in competition with his employer after employment. The common law position is that such a 'non-compete' restrictive covenant is contrary to public policy and will be enforceable only so long as it is no wider than necessary to provide reasonable and adequate protection of the legitimate interests of the employer.

Figure 3.3



Duty not to make a secret profit

An employee is under an implied duty not to make a secret profit out of his or her position without the knowledge or consent of the employer. Where such a secret profit has been generated, the employee must account to the employer for it.

Confidential information and trade secrets: during employment

During the course of their employment, employees are under an implied duty not to disclose or exploit confidential information about their employer's business or the trade secrets of their employer. An employer can seek an injunction or interdict to restrain the employee from making disclosure. However, during the course of

their employment, employees are entitled to disclose or exploit the general skill and knowledge which they have amassed during that period.

Exam tip

An employee's obligation not to disclose or exploit confidential information about the employer's business or the trade secrets of the employer is not absolute. Sections 43A–43L of the ERA 1996 offer protections to employees who release confidential information in relation to their employer's business to various parties where such disclosure is in the public interest. Furthermore, the implied duty not to disclose confidential information is subject to the employee's right to freedom of expression in Article 10 of the European Convention on Human Rights (incorporated into UK law by virtue of Schedule 1 to the Human Rights Act 1998).

Confidential information and trade secrets: after employment

There is a distinction between:

(1) the general skill, know-how and knowledge which an employee has;

(2) information about the employer's business which is in the public domain or has been learnt by the employee during the course of his employment;

(3) information about the employer's business which has been imparted to the employee in confidence during the course of his employment;

(4) the trade secrets of the employer.

An employee is under a duty not to disclose or exploit 3 or 4 subsequent to the date of termination of his employment, whereas 1 and 2 are freely transferable. A clear example of 4 arises where an employee leaves employment to set up in competition with the employer and before doing so transfers files containing secret information to a USB key, taking it away with him and subsequently exploiting it.

Faccenda Chicken Ltd v *Fowler* [1986] IRLR 69

Facts

The employer's business was the sale of fresh chickens. The employee was the sales manager. Thus, he was privy to customer lists, pricing policies and information regarding the quantity and quality of the goods sold. The employee left employment to set up in competition with his employer, selling the same products to the same clients.

Legal principle

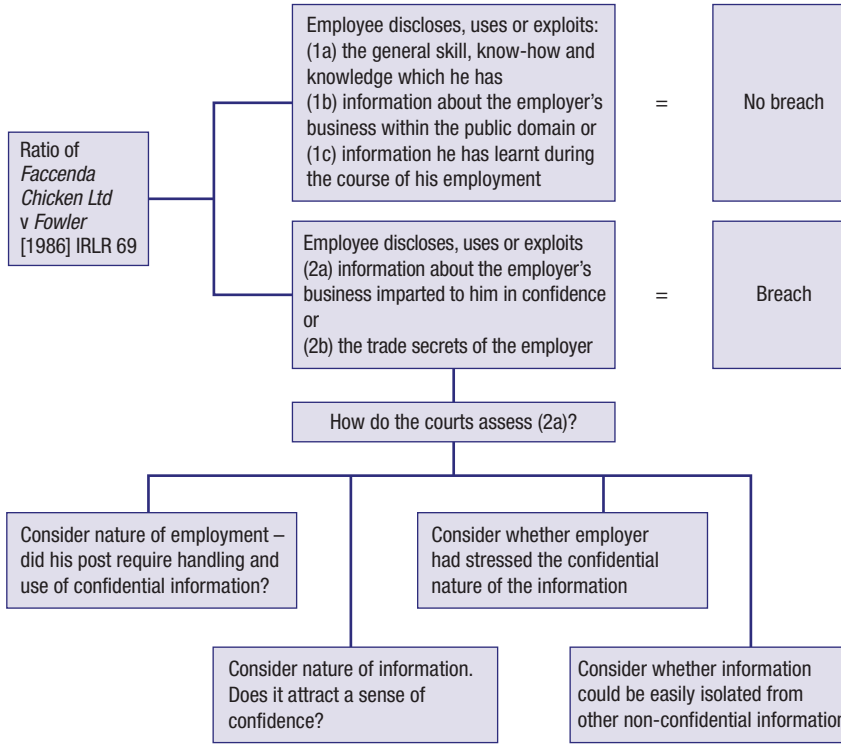
The information used by the employee was not information about the employer's business which had been imparted to the employee in confidence during the course of

his employment. Nor did it amount to the trade secrets of the employer. Accordingly, the employee was not in breach of the implied duty of fidelity. See Figure 3.4.

Analysis

This case shows how the nature, quality and content of information belonging to an employer must be carefully analysed to determine whether it is protected confidential information or a trade secret.

Figure 3.4



Restrictive covenants

It is open to an employer to include restrictive covenants in the contract of employment of the employee. These may restrict the employee from disclosing *any* confidential information or trade secrets of the employer subsequent to employment. Such express terms complement the implied terms of the contract of employment, thus increasing the protection available to the employer. The common law position is that such restrictive covenants are contrary to public policy and will be enforceable only so long as they are no wider than necessary to provide reasonable and adequate protection of the legitimate interests of the employer.