The Effect of Formalising an Employment Contract: The High Court Misses an Opportunity

J W Carter and Andrew Stewart†*

Assume that an employer (A) and an employee (B) are bound by an oral contract of employment with no fixed duration. Assume also that A and B subsequently enter into a written employment contract for a substantial term which imposes additional obligations, but preserves B's accrued entitlements to long service leave, superannuation and so on. Does the written contract operate as a variation or a termination of the oral contract? Intuitively the answer must be that the oral contract has been terminated and replaced. However, when the question recently arose in *Concut Pty Ltd v Worrell*[1] the High Court held that the contract was merely varied.

A further feature of the facts in *Concut* (as explained below) was that although the employee had seriously breached the oral contract, this was not disclosed to his employer when the written contract was agreed. Unfortunately, by choosing to decide the case on the narrow ground that the right of termination was not affected by the written contract, the High Court passed up the opportunity to resolve the vexed issue of whether employees have a duty to disclose past misconduct to their employers. Given that we consider the High Court's conclusions on the application of the distinction between variation and termination to be less than convincing, we also consider what conclusion might have been reached had the court given more careful consideration than it did to whether an employee is subject to such a duty of disclosure.

Facts and Decision

In 1980 a Mr Wells became the Queensland Branch Manager of Concut Pty Ltd (the defendant), a company involved in the treatment of concrete. The initial employment contract was purely verbal, but in 1986 the parties signed a written agreement (the 1986 agreement) which, in the words of one of the recitals, was intended 'to record the terms and conditions' of Wells's employment. The 1986 agreement provided for Wells to be employed for at least a further five years, with the engagement to continue thereafter on the basis that either party might terminate on three months' notice. Part of the background to the 1986 agreement was that Wells assumed substantial joint and several liabilities for a total of $1.25 million under a personal guarantee to secure the partial management buyout of shares owned by Paynter Dixon

* Professor of Commercial Law, University of Sydney; General Editor, *Journal of Contract Law*; Consultant, Freehills.

† Professor of Law, Flinders University of South Australia; Legal Consultant, Piper Alderman Lawyers.

1 (2000) 176 ALR 693; [2000] HCA 64.

Industries Ltd, which held shares in the defendant. The length of the 1986 agreement reflected Wells's position as shareholder.[2]

In 1988, the defendant dismissed Wells without notice. Wells commenced an action for wrongful dismissal in the Queensland District Court, and was met with the defence that his conduct had warranted summary dismissal. The defendant relied in particular on the fact that Wells had used the defendant's staff and property in the construction of his own home. The trial judge found that this justified his dismissal, notwithstanding that the defendant had not known about this misconduct at the time it dismissed him. After the commencement of the litigation, the affairs of Mr Wells came to be administered by the Official Trustee in Bankruptcy.

An appeal was taken by the trustee to the Queensland Court of Appeal[3] which, with Shepherdson J dissenting, reversed the trial judge's decision and awarded Wells's trustee in bankruptcy damages for wrongful dismissal. The key to the decision of the majority (McMurdo P and Thomas JA) was the judge's finding that the misconduct in question had occurred prior to the written agreement being concluded. While the misconduct may have justified the termination of his original employment contract, Wells had not breached any term of the new agreement. Nor was he under any obligation to disclose any prior misconduct on his part to the defendant. On that basis, the defendant had no right to bring the 1986 agreement to an end.

This decision was appealed to the High Court, where the respondents were the joint and several trustees appointed in place of the Official Trustee. The High Court unanimously reversed the Queensland Court of Appeal's decision. The court found that the 1986 agreement had not terminated and replaced the original oral contract, but had simply 'supplemented' the existing employment relationship by way of contractual variation. That being so, Wells's misconduct was a breach of the very contract which the defendant had terminated, not some earlier agreement. The breach was held to justify termination.

By taking this view of the facts, there was no need for the High Court to address the issues of law that had been central to the Court of Appeal's decision:

- whether an employer can dismiss for misconduct discovered to have occurred under a prior employment contract; and
- whether a failure to disclose such misconduct can itself be regarded as a breach of duty.

Instead, the principal issue discussed by the High Court was whether the 1986 agreement terminated, or merely amended, the prior oral agreement.

The Breach

It was held that Wells's breach related to an implied term of the oral contract requiring him to render loyal and faithful service. Alternatively, as held by

2 The fact that Wells was a shareholder was recorded in recital C of the 1986 agreement. There was, apparently, a separate contract governing Wells's interests as a shareholder.

3 Sub nom *Official Trustee in Bankruptcy v Concut Pty Ltd* (1999) 45 AILR ¶9-146; [1999] QCA 3 (5 February 1999).

Kirby J, Wells's conduct amounted to a repudiation of the contract. Because the breach of contract also involved a breach by Wells of his fiduciary obligations to the defendant (of which, more later), he was also liable to account to the defendant for the benefit obtained by the breach of duty.

Although the defendant did not at the time of its termination of the contract know of the breach, applying[4] the well-established principle[5] that a termination may be justified by reference to any (valid) ground that existed at the date of termination, whether the terminating party was aware of it or not, the High Court held that the defendant had acted lawfully. The court did not rely on an express termination provision in the 1986 agreement in reaching this conclusion. Thus, although they seemed to agree with Shepherdson J's dissenting judgment in the Court of Appeal, where he held that the 1986 agreement was intended to cover Wells's conduct over the whole period of his employment, the High Court appears to have distanced itself from Shepherdson J's somewhat novel proposition that a termination clause may be invoked in relation to a breach which occurred prior to the parties' agreement to the clause.

Termination or Variation?

Where the parties to an existing contract enter into a second contract relating to the same subject matter as the first, it is now established that the question of whether the second contract terminates the first depends on the intention of the parties.[6]

This approach has its origin in the cases concerning contracts affected by the Statute of Frauds and derivative legislation. Even in that context, however, it was recognised that in cases where there was no express agreement by the parties to terminate the first contract, it defied logic to say that the relationship of the parties following the second contract was not regulated by a new and different contract.[7] The reason why the courts were prepared to defy logic is simple. In cases where the second contract did not comply with the Statute of Frauds, if that contract were treated as terminating the first there would be no enforceable contract between the parties. Given the unsatisfactory nature of that result, the preferable view was to treat the second contract as an ineffective variation, with the result that the parties would remain bound by the original (unamended) contract.[8]

Notwithstanding occasional suggestions that the approach taken in the Statute of Frauds cases should not be applied to contracts unaffected by any requirement of writing,[9] the High Court has in *Concut* settled the matter in favour of intention as the criterion. Applying that approach, as noted above, the High Court decided that the intention of the parties was that the 1986

4 (2000) 176 ALR 693 at 701, 707.
5 See J W Carter and D J Harland, *Contract Law in Australia*, 3rd ed, Butterworths, Sydney, 1996, para 1969.
6 See *Dan v Barclays Australia Ltd* (1983) 46 ALR 437 at 448 (HCA); *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 172 ALR 346.
7 *United Dominions Corp (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 348, 349.
8 As in *United Dominions Corp (Jamaica) Ltd v Shoucair* [1969] 1 AC 340.
9 See *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 128.

agreement was to take effect as a mere variation. With respect, however, for three reasons that approach is somewhat counter-intuitive.

First, the decision sits uneasily with a long line of case law in the lower Australian courts, not cited in *Concut*, to the effect that where there is an agreed change in the nature of the employee's job, the parties will generally be taken to have intended to terminate rather than vary the original employment contract.[10] Now it is true that these cases can readily be distinguished, on the basis that in *Concut* there was no change to the duties performed by Wells. Nevertheless, at the very least they show that the concept of employees working under a series of contracts is not unfamiliar to the common law. Indeed there is a well-established practice of hiring certain employees under a succession of fixed-term contracts. At the end of each such contract, either party is free to end the relationship. While legislative or award provisions commonly ensure that employment under a series of such contracts may count as 'continuous service' for the purpose of accruing entitlements such as long service leave,[11] it could hardly be suggested that each new contract is really just a variation of the one that preceded it.[12]

Second, the general requirement of consideration for a promise made under a variation contract has been a recurring problem in employment contracts as elsewhere.[13] The problem has to some extent been avoided in the context of employment contracts by treating the variation contract as a termination of the prior contract, with the result that consideration is present in the agreement to terminate the first contract. Thus, in *Contract Law in Australia*[14] it is suggested:

> Unless the circumstances are such that it is impossible to interpret the second contract as a termination of the first, a court will discern an implied agreement to terminate the original contract and consideration will be present.

On that approach, the question in *Concut* should have been whether it was 'impossible' to interpret the 1986 agreement as a termination of the oral contract. In our view, far from being impossible, it was inevitable to treat the 1986 agreement as a termination, because there was nothing in that contract to indicate the parties' intention that the oral contract was to continue to operate.

Third, where the parties to an oral contact enter into a written contract which covers the same ground as the first contract, so that the first contract is reduced to writing, it is a clear principle of law that the oral contract is

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10 See eg *Federated Mutual Insurance Co v Sabine* [1920] SALR 284; *O'Connor v The Argus and Australian Ltd* [1957] VR 374; *Quinn v Jack Chia (Australia) Ltd* [1992] 1 VR 567.

11 See eg Long Service Leave Act 1955 (NSW) s 4(11).

12 Unless, that is, what appears to be a series of short fixed-term contracts is in reality understood by the parties to be an indefinite engagement with an expectation of continuing employment: see eg *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19; *Minister for Health v Ferry* (1996) 65 IR 374; though cf *Fisher v Edith Cowan University (No 2)* (1997) 72 IR 464; *D'Ortenzia v Telstra Corp (No 2)* (1998) 82 IR 52.

13 See eg *Ajax Cooke Pty Ltd v Nugent* (Vic SC, Phillips J, No 6951 of 1993, 29 November 1993); and see J W Carter, Andrew Phang and Jill Poole, 'Reactions to Williams v Roffey' (1995) 8 *JCL* 248.

14 Above, n 5, para 347.

discharged by operation of law.[15] Once an oral contract has been reduced to writing it must necessarily cease to bind the parties for the simple reason that they cannot simultaneously be bound by two sets of obligations (one oral and one written) with the same content. In *Concut*, if any promises expressed by the parties in their oral contract remained to be performed, they were all reduced to writing. Accordingly, the oral contract was discharged.

Of course, these principles are subject to the intention of the parties, but an additional reason why we have described the conclusion in *Concut* as somewhat counter-intuitive is that we can see nothing in the terms of the 1986 agreement referred to by the High Court to show a positive intention by the parties to amend, rather than terminate, the oral agreement.[16] Gleeson CJ, Gaudron and Gummow JJ said[17] that they could discern no intention to displace the 'rights and liabilities' which had accrued under the contract prior to the amendment. They referred in particular to cl 13 (headed 'prior service') which said:

> Nothing contained in this agreement shall in anyway [sic] limit or restrict the accrued rights of [Mr Wells] in respect of prior service with [the defendant] to long service leave, superannuation, holiday pay and other like emoluments.

Gleeson CJ, Gaudron and Gummow JJ also called in aid 'the familiar principle of construction' stated by Lord Goff (with whom the other members of the House of Lords agreed) in *Stocznia Gdanska SA v Latvian Shipping Co*,[18] namely, 'that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law'. Similarly, Kirby J referred on several occasions[19] to the fact that he could see no basis for saying that the 1986 agreement was intended to displace the 'remedies' which accrued to the defendant by reason of Wells's breach of the oral contract.

With respect, however, for several reasons we find these arguments unconvincing.

First, we fail to see the relevance of cl 13 — which clearly preserved accrued entitlements of *Wells* — to the position of the defendant. Far from evidencing an intention to continue the operation of the oral contract, cl 13 simply operated to carry forward Wells's entitlements, so as to bring them within the 1986 agreement. Without calling in aid the expressio unius principle, it seems obvious that cl 13 would have been drafted differently had the parties merely intended to vary the oral contract. Indeed, if that was the intention there was no need for cl 13 at all.

Second, because cl 13 preserved Wells's 'accrued rights', rather than the relevant provision of the oral agreement, the drafting of the clause is

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15 See *Branca v Cobarro* [1947] 1 KB 854 at 858, 859; *Lamont v Heron* (1970) 126 CLR 239 at 245 per Barwick CJ.

16 In the Court of Appeal, Shepherdson J (dissenting) spent considerable effort showing that the 1986 agreement contained all the terms of the employment contract. Although he treated that as evidence supporting the conclusion that the 1986 agreement was intended to operate as a variation, the opposite conclusion would seem more consistent with authority.

17 (2000) 176 ALR 693 at 699.

18 [1998] 1 WLR 574 at 585; [1998] 1 All ER 883 at 893. See J W Carter, 'Shipbuilding Contracts: Not Quite the Final Chapter' (1998) 13 *JCL* 156.

19 (2000) 176 ALR 693 at 708, 709.

inconsistent with the continued operation of the oral agreement. Even allowing for the fact that the drafter may not have been aware of the niceties of the distinction between termination and variation, it can be expected that a variation will be drafted as such and not as a stand-alone contract which makes no attempt to continue the prior agreement.

Third, the approach taken by the High Court is quite different from that normally applied in cases where there is no express provision on the nature of the second agreement. Take, for example, the speech of Lord Dunedin in *Morris v Baron & Co*.[20] He said that discharge will be inferred where it is impossible for the two agreements to be both performed, which was in our view the position in *Concut*. He also said that where there are no such executory clauses in the second agreement as would enable action on that alone if the first did not exist, the agreement is a mere variation and not a discharge. However, in *Concut* there were ample executory clauses in the 1986 agreement to enable action on that alone. Quite simply, because the oral contract in *Concut* ceased to have any executory effect once the 1986 agreement was agreed — which is why only the '*accrued* rights' of Wells were preserved — the oral contract was discharged.

Fourth, the idea that there was nothing in the 1986 agreement to show the parties' intention that accrued remedies should be displaced was relevant only to the claim by the defendant for compensation or an account in respect of Wells's past misconduct. That claim was not in fact in dispute. Moreover, Lord Goff's statement of principle in *Stocznia* was in fact directed to a quite different point, namely, whether the terms of a contract displace the common law remedies which would otherwise be available following breach of that contract. Apart from being relevant only to remedies, its application depended on the very point that was in issue, namely, whether the 1986 agreement regulated the prior misconduct.

Fifth, what was in dispute in *Concut* was not a remedy. Rather, it was the *right* of the defendant to terminate the contract of employment for breach that was in dispute. The proper perspective, therefore, was whether the right had been lost or for some reason ceased to be available to the defendant. Given that it is impossible to terminate a contract which has already been terminated by agreement, the question was whether the 1986 agreement could be rescinded or terminated by the defendant. If Wells was under a duty to disclose his past misconduct, the 1986 agreement may well have been induced by misrepresentation.[21] Alternatively, if Wells's failure to disclose his past misconduct was the breach of an implied term of that agreement, it may have been open to the defendant to terminate the 1986 agreement. Either way, the High Court should have confronted the question of whether Wells was under a duty to disclose his past misconduct.

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20 [1918] AC 1 at 26.

21 Though note that after two years the exercise of any right to rescind that contract ab initio may well have been barred by the difficulty of restoring the status quo ante, notwithstanding the flexible approach to the remedy adopted by the High Court in cases such as *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; 130 ALR 570 and *Maguire v Makaronis* (1997) 188 CLR 449; 144 ALR 729.

Employees' Duty to Disclose Past Misconduct

In the Queensland Court of Appeal, McMurdo P and Thomas JA took the view that Wells was under no duty, in entering into the 1986 agreement, to disclose his own misconduct. A similar conclusion was reached a few months later, albeit in a somewhat different context, by the Industrial Relations Commission of New South Wales in Court Session in *Hollingsworth v Commissioner of Police*.[22] In holding that an applicant for employment with the police force had been unfairly dismissed for failing to disclose her background as a sex industry worker, the commission surveyed the common law authorities and found that the applicant was under no duty to volunteer such information unless she was specifically asked.

In both these decisions, reliance was placed on the following passage from the judgment of Lord Atkin in *Bell v Lever Bros Ltd*:[23]

> Ordinarily the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract. The principle of caveat emptor applies outside contracts of sale. There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances . . .
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> I am aware of no authority which places contracts of service within the limited category I have mentioned. It seems to me clear that the master and man negotiating for an agreement of service are as unfettered as in any other negotiation. Nor can I find anything in the relation of master and servant, when established, that places agreements between them within the protected category. It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant 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. The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well-established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant; and if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase in salary and recover back the extra wage paid? If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers.[24]

By deciding that Wells was employed under a single contract, the High Court did not strictly need to address the disclosure point. The fact that it had been fully argued before the court, and that the issue is plainly a contentious one, might well have justified the court expressing a view. Both McHugh and

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22 (1999) 47 NSWLR 151.

23 [1932] AC 161 at 227–8.

24 As to the employer's right to dismiss an employee for untruthfully answering a question put to them *prior* to being offered employment, see G McCarry, 'The Employee's Right To Silence' (1983) 57 *ALJ* 607 at 612, cited with approval in *Hollingsworth v Commissioner of Police* (1999) 47 NSWLR 151 at 192; and see eg *Lane v Arrowcrest Group Pty Ltd* (1990) 99 ALR 45.

Kirby JJ, however, saw no need to express any opinion on the matter.

By contrast, Gleeson CJ, Gaudron and Gummow JJ devoted several paragraphs in their joint judgment to *Bell v Lever Bros*. They pointed out that the issue in *Lever Bros* was whether a contract under which severance payments were made to employees was either void for mutual mistake or could be rescinded for non-disclosure, so that the payments could be recovered by way of restitution. This, they thought, distinguished the issue in *Lever Bros* from the issue in *Concut*. They quoted the section of Lord Atkin's judgment (above) in which he used the example of the butler and the cook to show that what his Lordship was concerned with was 'avoidance of agreements', rather than answering a claim for damages.[25]

Gleeson CJ, Gaudron and Gummow JJ then went on to quote[26] a passage from the judgment of Lightman J in *Bank of Credit and Commerce International SA v Ali*[27] in which *Lever Bros* was said to be authority for the following propositions:

> The current law as generally understood may be stated as follows: that (1) (subject to one exception) neither party to a contract is obliged to disclose facts material to the decision of the other party whether to enter into that contract; (2) the exception is limited to contracts which are uberrimae fidei; (3) neither contracts of employment nor contracts of compromise (unless by way of family arrangement) fall within this exceptional category; and (4) neither the employer nor the employee, once in contractual relations, are under a duty as such to disclose to each other their own breaches of contract.

Their Honours considered proposition (4) might 'require qualification to allow for obligations of disclosure which attend a fiduciary duty, if informed consent is to be obtained to what otherwise would be a breach of that duty'.[28] They also thought that 'particular problems' might arise in respect of the contracts of compromise referred to in proposition (3) in cases 'where there is a question respecting the actual or apparent authority of counsel to enter into such a compromise'.[29] Thus, they noted that in *Harvey v Phillips*,[30] Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ 'said that a court did not appear to possess a discretion to rescind or set aside such a compromise'.[31] Finally, they noted that in certain cases non-disclosure might amount to a contravention of the prohibition in s 52 of the Trade Practices Act 1974 (Cth) on misleading or deceptive conduct in trade or commerce.[32]

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25 (2000) 176 ALR 693 at 701–2.
26 (2000) 176 ALR 693 at 703.
27 [1999] 2 All ER 1005 at 1015.
28 (2000) 176 ALR 693 at 703.
29 (2000) 176 ALR 693 at 703.
30 (1956) 95 CLR 235 at 243–4.
31 (2000) 176 ALR 693 at 703. Note, however, that the passage which they quote from that case in fact appears to acknowledge the application of the traditional bases for rescission, including 'non-disclosure of a material fact where disclosure is required'.
32 (2000) 176 ALR 693 at 703. Given that s 52 requires conduct by a corporation, a more appropriate reference might have been to corresponding provisions in the fair trading legislation (such as s 38 of the Fair Trading Act 1989 (Qld)) proscribing such conduct by persons. The circumstances in which conduct by an employer in the context of an employment relationship may be said to take place 'in trade or commerce' remain unclear: see eg the discussion in *Stoelwinder v Southern Health Care Network* (2000) 177 ALR 501.

At this point, having apparently paved the way for a definitive restatement of the law on employee disclosure, the joint judgment simply asserted that none of these questions arose in this case. The 'fundamental point', according to their Honours, was that the present case was not concerned with any claim to avoid Wells's contract, but rather (because of the earlier conclusion as to the effect of the 1986 agreement) with an employer's right to terminate for a previously undiscovered breach of contract.[33]

So what are we to make of this curious digression, which clearly raises more questions than it answers? It appears that Lord Atkin's judgment in *Lever Bros* is not to be taken to be authority for the proposition that an employee has no implied contractual duty to disclose their past misconduct — despite the fact that, as the full extract from the judgment above reveals, he was plainly saying just that. Are we then to infer that there *is* such a duty, even though there is no statement in the joint judgment to that effect?

The most significant hint may lie in the reference to 'obligations of disclosure which attend a fiduciary duty'.[34] Earlier in their judgment, Gleeson CJ, Gaudron and Gummow JJ had noted that:[35]

> [T]he relationship between employee and employer is one of the accepted fiduciary relationships; their critical feature is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense.

The problem with the mantra that employment relationships are necessarily fiduciary in character is that it obscures the need to subject that proposition to the analysis it deserves. In the first place, it is surely more accurate to say that an employee may owe certain fiduciary obligations to their employer, rather than that the employment relationship itself has a fiduciary character. After all, as the High Court itself has emphasised in other contexts,[36] it cannot be assumed that just because a person is a 'fiduciary', every duty they owe necessarily has a fiduciary character. There is ample authority for the proposition that an employee who misappropriates their employer's property or dishonestly secures a benefit at their expense may be forced to account for their gains through the imposition of equitable and/or proprietary remedies.[37] But those same remedies will not necessarily be available where, for example, the employee's breach of contract consists merely of a failure to take reasonable care of the employer's property.[38]

Second, there must be an element of overstatement in the suggestion that

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It would seem unlikely that conduct by an *employee* vis-à-vis their employer could ever be characterised as conduct in trade or commerce.

33 (2000) 176 ALR 693 at 703.

34 (2000) 176 ALR 693 at 703.

35 (2000) 176 ALR 693 at 698. See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 68, 96, 141, 55 ALR 417; *Breen v Williams* (1996) 186 CLR 71 at 92, 107, 138 ALR 259.

36 See eg *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259.

37 See eg *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 128 ALR 201; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488. Cf *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275.

38 See eg *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1994) 37 AILR ¶5-018.

employees are inherently obliged to act in the best interests of their employer. This is illustrated by the recent case of *Stoelwinder v Southern Health*,[39] where the CEO of a health care agency was effectively allowed to draft the terms that formalised his contractual relations with the agency. In doing so, he included a term (hitherto not discussed with the agency) that provided for a generous payout of accrued sick leave entitlements in the event that his contract was terminated. Finkelstein J rejected the argument that the CEO's failure to alert the agency to the practical effect of this clause (which indeed ultimately entitled him to a payout of more than half a million dollars) somehow constituted a breach of the fiduciary obligations to which he was undoubtedly subject. The fact was that the employer would clearly have understood that, in negotiating the terms of his contract, the CEO would be acting in a self-interested fashion. To suggest otherwise, and to impose some kind of duty of disclosure, would be unjust, since it would unfairly advantage the employer in the negotiations. Indeed taken to its logical extreme, the notion that an employee should invariably subordinate their interests to that of their employer might well mean that the employee should never apply for promotion, or seek a wage rise, or apply for another job!

What *Stoelwinder* indicates is that there must be scope for self-interested behaviour even in the case of a senior manager who occupies a position of high trust and responsibility. Logically, that scope should increase the further down the chain of command an employee is located. In the case of an 'ordinary' employee, it may be that the level of commitment that the employer is entitled to expect is relatively low, and that accordingly it is only for limited purposes, if at all, that the employee should be characterised as a 'fiduciary'.[40] It is true that, as the High Court confirmed in *Concut*,[41] each and every employee is under an implied contractual obligation to serve their employer faithfully and loyally.[42] Nevertheless, as Elias J put it in a recent English decision, *University of Nottingham v Fishel*:[43]

> [C]are must be taken not to automatically equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations . . . [I]n determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached.

As it happens, the distinction that is being suggested here, between the

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39 [2001] FCA 115 (23 February 2001).

40 See *Colour Control Centre Pty Ltd v Ty* (NSW SC, Santow J, 24 July 1995); *EFG Australia Ltd v Kennedy* [1999] NSWSC 922 (9 September 1999); P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity*, LBC, Sydney, 1996, pp 329–30.

41 (2000) 176 ALR 693 at 700, 704, 706.

42 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81–2. See generally R C McCallum and A Stewart, 'Employee Loyalty in Australia' (1999) 20 *Comparative Labor Law & Policy Journal* 155.

43 [2000] ICR 1462 at 1493. See V Sims, 'Is Employment a Fiduciary Relationship?' (2001) 30 *Industrial Law Journal* 101; and see also L Clarke, 'Mutual Trust and Confidence, Fiduciary Relationships and the Duty of Disclosure' (1999) 28 *Industrial Law Journal* 348 for a discussion of some of the earlier UK case law on this point.

position of a senior manager who must necessarily accept a strong degree of commitment to the employer, and that of an ordinary employee who should logically have a greater freedom to pursue their own interests, is well established in the context of identifying a duty to disclose misconduct committed by *other* employees. It is only the more highly placed employees who are considered to be under an implied obligation to 'dob in' their fellow workers.[44] It may be that the same approach should be adopted in relation to disclosure of an employee's own misconduct, if indeed Lord Atkin's blanket rejection of a duty to confess is no longer to be treated as good law. On this basis senior managers such as Wells, but not necessarily more lowly placed workers, might well be subject to an implied contractual duty of disclosure — whether or not that duty also had a fiduciary character.[45]

Conclusion

It may well be that *Concut* is a case where the right outcome was reached for the wrong reasons. What Wells had done would certainly seem to the ordinary person (let alone the ordinary employer) to warrant his dismissal. As Kirby J put it:[46]

> Given the nature of an ordinary employment relationship, at least as here in the case of a senior employee serving as the Queensland Branch Manager of a private company with national operations, the result reached by the primary judge seems unsurprising and appropriate. The notion that an employer, in such a case, does not enjoy a right summarily to terminate the relationship with such a senior employee, would appear to be an odd one: one out of step with common sense. To suggest that the common law would effectively insist that such parties continue in the personal, and often quite close and trusting, relationship of employment, as if nothing had happened, would seem remarkable. The effect of this would be to demand the employer put out of mind (as it were) the discovery of the misconduct, and continue to pay the employee under the supervening Service Agreement as if nothing had occurred. This is a conclusion to which a court would need to be driven by clear legal authority or by singular factual circumstances of the case, so far undisclosed in this matter.

Nevertheless, as we have explained, the route that the High Court took in avoiding that conclusion involved what we would view as an incorrect analysis of the effect of what is, after all, a commonplace event in employment relationships, the replacement of one set of terms by another. Moreover by neither remaining silent on the issue of a duty of disclosure, nor providing definitive guidance, Gleeson CJ, Gaudron and Gummow JJ have created significant uncertainty where previously the law appeared to be (relatively) settled.

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44 See *Sybron Corp v Rochem Ltd* [1983] ICR 801; *Turner v Carpet Call (Vic) Pty Ltd* (1994) 59 IR 78; M Freedland, 'High Trust, Pensions, and the Contract of Employment' (1984) 13 *Industrial Law Journal* 25.

45 Cf A Abadee, 'A Fiduciary's Obligation to Disclose in a Commercial Setting' (2001) 29 *ABLR* 33.

46 (2000) 176 ALR 693 at 705. In his dissenting judgment in the Court of Appeal, Shepherdson J had suggested that a win for Wells in this case would send the business community 'the wrong message on commercial morality': *Official Trustee in Bankruptcy v Concut Pty Ltd* (1999) 45 AILR ¶9-146; [1999] QCA 3 (5 February 1999) at para [16].

There is nothing in the decision that cannot be overcome by careful drafting. Employment lawyers will doubtless advise their clients to be absolutely clear as to whether the offer of new terms is intended to vary or replace the existing contract, and it is already common to see employers including standard terms in their contracts empowering them to terminate for earlier misconduct and even imposing express duties of disclosure on their workers. But it would have been better had the High Court done a tidier job of sorting out the issues in the first place.