IN THE HIGH COURT OF JUSTICE—QUEEN'S BENCH DIVISION

Before: MR JUSTICE ELIAS

January 19, 2000[1]

NOTTINGHAM UNIVERSITY v. FISHEL

[2001] R.P.C. 22

H1 *Employment contract—University lecturer undertaking outside paid work—Whether without prior approval—Whether breach of contract—Whether restitutionary damages available—Whether undertaking outside paid work a breach of fiduciary duty—Whether accepting fees for supervising subordinates doing outside work a breach of fiduciary duty—Account of profits—"Springboard" damages.*

H2 *The first defendant was a distinguished scientist with an international reputation as a clinical embryologist working in the field of in vitro fertilisation (IVF) and similar techniques. In 1985 he joined the claimant as senior lecturer in the Department of Obstetrics and Gynaecology. Initially, he was not solely employed by the claimant and he was also employed for about one-third of his time as a scientific director of a new IVF clinic at a hospital in Nottingham. In 1991 the claimant set up a special unit known as Nottingham University Research and Treatment Unit in Reproductive Medicine (Nurture) to operate an infertility clinic within the University. The first defendant became scientific director of Nurture in 1991 and at that stage his employment became full-time. Although described as scientific director, the first defendant was not ultimately responsible for the Unit's operation and he was not a board member.*

H3 *The first defendant's salary was fixed at the rate of a senior lecturer, but in addition he was entitled to a bonus relating to the amount of fees payable to the Unit. Nurture was a considerable success and by 1997, when the first defendant left, there were some forty staff. This success led to the first defendant becoming very well rewarded under the bonus arrangements and in the financial year ending December 31, 1996 his salary exceeded that of any other employee of the claimant, including the Vice-Chancellor. The claimant took the view that his salary was inordinately high and sought to renegotiate the terms. Eventually the claimant told the first defendant that unless he agreed to the proposed changes, his contract would be terminated and he would be offered a new contract on terms considered acceptable to the claimant. The principal changes in his contract related to the doing of outside work and to his remuneration, which essentially was capped at that payable to a clinical professor in receipt of an A+ merit award.*

H4 *Some months later, on April 25, 1997, the first defendant gave notice of termination of his contract as he was entitled to do. At the same time one of the*

[1] Paragraph numbers added by the publishers.

clinicians who had been working with Nurture also resigned and with the first defendant was involved in setting up another clinic in Nottingham together with a commercial enterprise. Subsequently other staff, including three embryologists, left Nurture to join the first defendant's new clinic.

H5 *Throughout his time at the University, the first defendant had been involved in working in private clinics outside the United Kingdom for remuneration. It was vital for some research work to be done abroad if the Unit was to remain at the leading edge of research. This was because some of the work which the first defendant and his colleagues wished to carry out could not be carried out in the United Kingdom because the Human Fertility and Embryology Act 1990 did not permit it even under licence. In addition to carrying out research abroad, the first defendant also treated patients and was paid by the clinics for each case where the embryo was successfully transplanted back into the womb. He was paid not only for the work he did himself but also for work done by three embryologists trained by himself and subject to his supervision.*

H6 *The first defendant's Head of Department encouraged the first defendant's work abroad and assumed that he was being paid for it, although he was unaware of the magnitude of the sums involved. There was no attempt made by the first defendant to conceal either the facts that the foreign trips were taking place nor their frequency and they were common knowledge within the Unit. The Unit benefited from the first defendant's work abroad (and that of his colleagues) and his foreign trips did not prejudice the functioning of the clinic in Nottingham.*

H7 *The first defendant's contract when he became a full-time employee of the claimant contained the following clause:*

> *"There are no specified hours of work, but the appointment is a full-time one and permission to undertake any other work for which payment will be received must be obtained from the Council of the University through the Vice-Chancellor. This regulation is not intended to prevent the Senior Lecturer from undertaking a limited amount of outside work, such as examinerships, provided such work does not interfere with his duties at the University, but he will be expected to report to the Head of his Department any such work which he may wish to accept."*

H8 *The first defendant admitted that at no time during his employment with the claimant did he seek the consent of the Vice-Chancellor to do paid work abroad and that he did not follow any of the prescribed procedures either before or after the renegotiation of his contract. He contended that the procedures were inapplicable to him and were in any event habitually honoured in the breach rather than in the observance.*

H9 *The claimant contended that in doing outside work without properly authorised consent, the first defendant was in breach of his duties under his contract of employment and of certain fiduciary obligations to which it claimed he was subject. It further claimed to be able to recover restitutionary compensation equivalent to the profits acquired by the first defendant for the mere breach of contract alone. The claim to profits was limited to profits made from August 1993, the date the first defendant became a Reader.*

H10 *The first defendant denied breach of contract saying that he did not in fact need to obtain consent, that in any event he had obtained it or alternatively that the claimant was estopped from denying that he had obtained it in view of the way in which consent had been obtained by the staff in practice. He also contended that if*

there was a breach, damages would only be nominal and that there was no entitlement in law to restitutionary damages. As to the fiduciary claim, the first defendant denied he owed any fiduciary duty, that if he did he obtained the informed consent of the claimant or alternatively the claimant was estopped from denying otherwise. The claimant also alleged that the first defendant had induced its staff to break their contracts of employment when he encouraged the embryologists, without approval from the claimant, to work in the clinics abroad. The first defendant denied that the other staff were in breach for the same reasons he was not and that he was in any event unaware of the terms of their contracts. The claimant also claimed an account of profits which the first defendant had gained by developing a "springboard" as a result of his unlawful activities.

H11 **Held,**

H12 *(1) The legal position with regard to obtaining the consent of the claimant changed when the first defendant joined the University full-time as scientific director of Nurture. Thereafter the senior lectureship was also a full-time office and the general conditions attaching to such appointments were applicable to him even though he might not have fully appreciated it at the time. However, when in August 1993, he was made a Reader he received a document setting out the terms and conditions of his employment, including a provision regulating outside work. Any residual doubt about the applicability of those terms must have been removed at that time.*

H13 *(2) The phrase "outside work" naturally embraced any situation where the employee had contracted to work for another, whether or not he was thereby still performing services in a manner consistent with his duty to his employer. The significance of his benefiting the employer was merely that it increased the likelihood of obtaining consent to his proposed course of action.*

H14 *(3) Whilst the contract of employment recognised that there might be exceptions to the requirement of prior consent, these exceptions were to meet standard and routine activities of an academic nature, where it would be unnecessarily bureaucratic to require consent to be formally obtained on each occasion. The exception did not apply to all outside work, paid or not, which was of academic benefit to the University.*

H15 *(4) The evidence did not establish that the necessity of obtaining prior consent was more honoured in the breach or that there was a widespread tendency to ignore the procedures.*

H16 *(5) The claimant had not held out the first defendant's Head of Department as having authority to give consent to his activities or to waive the requirement of obtaining consent. There was no estoppel preventing the claimant from relying on the written contract.*

India (Republic of) v. India Steamship Co. Ltd *[1998] A.C. 878 referred to.*

H17 *(6) The first defendant was in breach of his contract of employment in failing to obtain the requisite consent for his paid outside work.*

H18 *(7) The breach lay in the doing of the outside work. If consent had been obtained that would have relieved the first defendant from any liability for breach of contract but he was under no contractual obligation actually to apply for consent. The claimant had to establish that it had suffered loss resulting from the fact that the first defendant did the work.*

H19 *(8) The claimant could not demonstrate that it had suffered any loss and in fact it had benefited from the work. There could have been no complaint had the first defendant carried out the same work but unpaid by the foreign clinics. The claimant could only recover if it could show that restitutionary compensation was available for breach of contract.*

H20 *(9) As a general principle an employee was not bound to inform his employer if and when he was doing outside work in breach of his contract. The first defendant was not in breach of the employee's duty of loyalty and good faith in not informing the claimant that he was being paid for his outside work.*

Neary v. Dean of Westminster *[1999] I.R.L.R. 288 and* Bell v. Lever Brothers Ltd *[1932] A.C. 161, HL referred to.*

H21 *(10) Even if the first defendant was contractually obliged to disclose his activities to the claimant, the claimant had not demonstrated that it would have taken the contracts for itself had it been given the opportunity to do so.*

Allied Maples Group v. Simmons and Simmons *[1995] 1 W.L.R. 1602, CA referred to.*

H22 *(11) Restitutionary damages were not available for breach of contract.*[2]

Surrey County Council v. Bredero Homes *[1993] 1 W.L.R. 1361, CA followed.* Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd *[1974] 1 W.L.R. 798, CA and* Attorney-General v. Blake *[1998] Ch. 439 referred to.*

H23 *(12) Although the key feature of a fiduciary relationship was the obligation of loyalty, that had a precise meaning, namely the duty to act in the interests of another and it was this fundamental feature which marked out the relationship as a fiduciary one.*

Bristol and West Building Society v. Mothew *[1998] Ch. 1, CA referred to.*

H24 *(13) Labelling a relationship as a fiduciary one was not sufficient to indicate what fiduciary duties would arise.*

Henderson v. Merrett Syndicates Ltd *[1995] 2 A.C. 145, HL referred to.*

H25 *(14) The employment relationship was not typically fiduciary at all. Its purpose was not to place the employee in a position where he was obliged to pursue his employer's interests at the expense of his own. The relationship was a contractual one and the scope of the employee's powers was determined by the terms (express or implied) of the contract with the consequence that the employer could exercise considerable control over the employee's decision making powers.*

H26 *(15) Fiduciary duties could arise out of the employment relationship but not as a result of the mere fact of that relationship. They resulted from the fact that within a particular contractual relationship there were specific contractual obligations which the employee had undertaken which placed him in a situation where equity imposed the rigorous fiduciary duties in addition to the contractual obligations. Where this occurred, the scope of the fiduciary obligations both arose out of and was circumscribed by the contractual terms because equity could not alter the terms of the contract validly undertaken.*

Hospital Products Ltd v. United States Surgical Corporation *[1984] 156 C.L.R. 41.*

H27 *(16) Care had to be taken in employment cases not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations. It was necessary in each case to identify with care the particular duties*

[2] This judgment was given before the House of Lords decision in *Attorney-General v. Blake* [2000] E.M.L.R. 949 which held that in exceptional circumstances an account of profits was available as a remedy for breach of contract—Ed.

undertaken by the employee and to ask whether, in all the circumstances, he had placed himself in a position where he had to act solely in the interests of his employer.

H28 *(17) The first defendant was under no contractual obligation to obtain work abroad on behalf of the claimant nor could he have been contractually obliged to do the work abroad that he did. The fact that the claimant approved of and benefited from the work (as opposed to the payment) could not create any fiduciary obligation.*

H29 *(18) The conflict of duty and interest principle was not engaged by the mere fact of the first defendant working abroad.*

H30 *(19) The first defendant was not in breach of his fiduciary duties by using his position to make a secret profit. He had not developed his connections with the clinics abroad by representing that he was acting on behalf of the claimant, nor had the opportunities arisen because of his University connection. He did not use this connection to gain benefits that he otherwise would not have gained.*

Cook v. Deeks *[1916] A.C. 554, HL and* Regal (Hastings) Ltd v. Gulliver *[1942] 1 All E.R. 378 referred to.*

H31 *(20) The payments made to the first defendant by the clinics abroad were not made because they were grateful for the service he provided in his capacity as an employee of the claimant but were made in pursuance of their own contractual arrangements with him. He was not working for the claimant when he was abroad and the payments for that work did not belong to the claimant.*

Parkdale (The)*[1897] P. 35 referred to.*

H32 *(21) It was the first defendant's duty to direct the other embryologists what to do and where to do it. By accepting work for them from which he directly benefited he clearly put himself in a position where there was a potential conflict of interest between his specific duty to the claimant to direct their work in the interests of the claimant and his own financial interest in directing them abroad.*

H33 *(22) It was only by virtue of his position at the University that the first defendant was able to have access to a ready supply of embryologists to assist him in his work and he did in fact use his position to secure their services abroad.*

H34 *(23) The profits made by the first defendant were the sums he received in respect of the patients treated by the other embryologists, less the payments made by him to them. In principle the first defendant should also be entitled to deduct any tax he had paid in respect of those profits.*

H35 *(24) Had the first defendant received payment in accordance with his contract he would have received 5 per cent of the income derived from the patients treated by the other embryologists, save after the renegotiated contract because the cap had been reached. It was equitable to award that sum as an allowance for the work and skill which he displayed in assisting and generally supervising the work of his subordinates.*

Phipps v. Boardman *[1967] 2 A.C. 46 and* Warman International Ltd v. Dwyer *(1995) 128 A.L.R. 201 referred to.* Guinness plc v. Saunders *[1990] 2 A.C. 633, HL distinguished.*

H36 *(25) The claim to "springboard" damages was unsustainable. No claim could be based on breach of fiduciary duty because in working abroad for pay the first defendant was not in breach of his duty. The claimant had been unable to establish that it would have performed the contracts instead of the first defendant and accordingly had suffered no loss because he was not doing the work in its place.*

Roger Bullivant Ltd v. Ellis *[1987] I.C.R. 464 distinguished.*

H37 The following cases were referred to in the judgment:

Allied Maples Group Ltd v. Simmons and Simmons [1995] 1 W.L.R. 1602, CA.
Attorney-General v. Blake [1998] Ch. 439, CA.
Baring v. Stanton (1876) 3 Ch.D. 502.
Bell v. Lever Brothers Ltd [1932] A.C. 161, HL.
Bristol and West Building Society v. Mothew [1998] Ch. 1, CA.
Bullivant (Roger) Ltd v. Ellis [1987] I.C.R. 464.
Burland v. Earle [1902] A.C. 83, PC.
Cook v. Deeks [1916] A.C. 554, HL.
Coomber v. Coomber [1911] 1 Ch. 723.
Great Western Insurance Co. v. Cunliffe L.R. 9 Ch. App. 115.
Guinness plc v. Saunders [1990] 2 A.C. 633, HL.
Henderson v. Merrett Syndicates Ltd [1995] 2 A.C. 145, HL.
India (Republic of) v. India Steamship Co. Ltd (No. 2) [1998] A.C. 878, HL.
Hospital Products Ltd v. United States Surgical Corporation (1984) 156 C.L.R. 41.
Imperial Group Pensions Trust Ltd v. Imperial Tobacco Ltd [1991] 1 W.L.R. 589.
Industrial Developments Consultants v. Cooley [1973] 1 W.L.R. 433.
Mahmud v. Bank of Credit and Commerce International SA [1998] A.C. 20, HL.
Neary v. Dean of Westminster [1999] I.R.L.R. 288.
New Zealand Netherlands Society v. Kuys [1973] 1 W.L.R. 1126.
Orberg v. Wynrib (1992) 92 D.L.R. (4th) 449.
Parkdale (The) [1897] P. 35.
P. and O. Steam Navigation Company v. Johnson (1937–1938) 60 C.L.R. 189.
Phipps v. Boardman [1967] 2 A.C. 46.
Regal (Hastings) Ltd v. Gulliver [1942] 1 All E.R. 378.
Surrey C.C. v. Bredero Homes [1993] 1361, CA.
Swain v. West (Butchers) Ltd [1936] 3 All E.R. 261, CA.
Sybron Corpn. v. Rochem Ltd [1984] 1 Ch. 112.
Warman International Ltd v. Dwyer (1995) 128 A.L.R. 201.
Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd [1974] 1 W.L.R. 798, CA.

H38 *Timothy Dutton Q.C.* and *Lucy Moorman* instructed by *Lawford & Co.* appeared on behalf of the claimant. *Ashley Underwood* and *Daniel Lightman* instructed by *Bell Tax Litigation* appeared on behalf of the defendant.

ELIAS J.:

Introduction

1 In this action the University of Nottingham seeks an account of profits, or alternatively damages, for alleged breaches of fiduciary duty and breaches of contract by Dr Simon Fishel, formerly one of its employees. He is also alleged to have induced breaches of contracts by other University staff under his control. The claims relate to work done at various clinics abroad from August 1993.

2 I have heard extensive evidence in this case with a string of witnesses appearing for each party. In the event I consider that there are relatively few areas of material disagreement as to the primary facts. I believe that every witness sought honestly to answer the questions put to him or her, although in disputes of this kind witnesses are occasionally prone to rewrite history in a manner convincing even to themselves. I indicate in this judgment where I believe that to be the case. I set out the background as I have found it to be on the evidence I have heard.

The Background

3 Dr Fishel is a distinguished scientist with an international reputation. He is a clinical embryologist working in the field of IVF (in vitro fertilisation). A clinical embryologist works with human embryos, as opposed to a non-clinical embryologist who works with animal embryos. Essentially, IVF involves obtaining human eggs and fertilising them outside the body with human sperm. Many couples who would otherwise remain childless have been able to have children using these techniques. This is a relatively new science, emerging only in the mid-1970s. As one might expect, the techniques have become increasingly sophisticated since then with a corresponding increase in the success rate of the treatment.

4 Dr Fishel has been involved in IVF treatment from the very early days of the science. He did graduate and postgraduate work in Cambridge starting in 1976 where he was working under Professor Robert Edwards. It was significantly as a result of the pioneering work of Professor Edwards and Dr Patrick Steptoe that the world's first IVF baby (commonly referred to as a "test-tube baby") was born in 1978. So Dr Fishel was well placed to develop his skills, and he made full use of his opportunities. He obtained his doctorate in 1980 and was made a lecturer at Cambridge University in 1982. From 1981 he was actively involved in the world's first IVF clinic at Bourn Hall in Cambridge. He wrote a significant number of research papers and built up considerable experience in the field, thereby establishing a very high reputation even before he joined the University of Nottingham in 1985. Since that time he has remained at the "cutting edge" of new developments. For example, he was largely responsible for the development of what is termed "sub zonal insemination" (for which Dr Fishel coined the acronym "SUZI"), a technique which involved the injection of a small number of sperm beneath the zona or "shell" of the egg with the hope that one would penetrate the cytoplasm. He was also involved in the development of the successor technique of intractoplasmic sperm injection ("ICSI"), which is a difficult and sophisticated technique involving the injection of a single sperm into the cytoplasm of the egg to procure its fertilisation. A variation of this technique, in whose development Dr Fishel has also been a leading figure, involves the use of spermatids, which are sperm that have not fully developed. Some men have severe male factor infertility and can produce spermatids but not sperm. This treatment enables them, at least in some cases, to have children.

Dr Fishel and Nottingham University

5 Dr Fishel joined Nottingham University in 1985. Initially he was not solely employed by the University. He became a scientific director of a new IVF clinic at the Park Hospital in Nottingham, but this was combined with a senior lectureship at the University. The arrangement was that Dr Fishel would receive two-thirds of the appropriate University salary, paid by the University but in fact funded by the

Park Hospital, and he was free to negotiate the remaining element of the salary directly with the Hospital. The contract initially entered into by Dr Fishel with the University was a part-time appointment, and the general conditions normally applicable to the post were expressly stated to apply "so far as these are applicable to a fixed term part-time appointment". The contract was for a fixed term, running for three years until 1988. On the termination of that contract, further temporary contracts were entered into on virtually identical terms until a new arrangement was entered into when the University set up its own clinic in 1991.

6 Dr Fishel was employed throughout this period in the Department of Obstetrics and Gynaecology, which was within the Faculty of Medicine. The head of the Department at that time was Professor Malcolm Symonds although subsequently, in March 1993, Professor Grahame Johnson, another professor in the Department, took over that position and Professor Symonds became Dean of the Medical Faculty. Professor Symonds was instrumental in securing the relationship between the clinic and the University, and indeed in attracting Dr Fishel to Nottingham, and he at all times took an active interest in the work being done by Dr Fishel. The two men became friends. Dr Fishel says that throughout his time at the University he treated Professor Symonds as his mentor, and I think that fairly reflects the relationship between them. This is not inconsistent with the fact that Professor Symonds was involved in many other matters engaging his time, particularly once he became Dean of the Medical Faculty in 1993.

The creation of Nurture

7 Nurture was set up in 1991 to operate as an infertility clinic within the University. Its full title was the Nottingham University Research and Treatment Unit in Reproductive Medicine. Broadly, the aim was to operate a self-funding institution which would provide treatment privately to infertile couples and would put the University at the international forefront of teaching and research in the field. Dr Fishel was plainly critical to the whole exercise. Indeed, the original proposals for setting up the Unit, drafted by Professor Symonds and Johnson, said this:

> "The major motivator for developments in research within the Park Hospital unit was Dr Fishel. He has always been a part-time Senior Lecturer within the Department of Obstetrics and Gynaecology, but now wishes to devote more of his time to the academic aspects of these techniques. We have, therefore, a unique opportunity to harness the energies of one of the leading embryologists involved in this work and to gather about him a first-class team. Some of the most important scientific developments in reproductive medicine have come from Dr Fishel's recent work and there are more to follow. In research terms alone the development of such a unit could easily be justified."

8 In a document submitted to the University's Finance Committee the objectives of the unit were stated to be as follows:

> "(1) to participate in the research opportunities in this sector of medicine and especially to capitalise on Dr Fishel's work, which is unique in the field.
> (2) to offer a one year postgraduate taught Masters degree course in assisted reproductive technology leading to the award of an M Med Sci. degree.
> (3) to offer short courses of three months duration in ART techniques.

(4) to use the unit's staff in relevant undergraduate teaching within the Medical School."

9 The idea to set up such a unit had been mooted by Dr Fishel and Professor Symonds for some years. Dr Fishel had resigned from the clinic at the Park Hospital at the end of August 1990 shortly before Nurture was set up, and he had gone to work full time in Rome at a clinic known as RAPRU (Ricercatori Associati Per La Riproduzione Umana). He had already done paid collaborative research work there whilst at the Park Hospital. There is some dispute about precisely why Dr Fishel left the Park Hospital at this time, and whether it was in anticipation of the setting up of Nurture as he claims. However, the reason is not material to my decision. In any event, Dr Fishel's contract as a part-time Senior Lecturer continued whilst he was in Rome, on the understanding (which apparently did not materialise in fact) that RAPRU would meet the salary costs in the same way that the Park Hospital had formerly done. Dr Fishel's relationship with the University then changed, however, when he became Scientific Director of Nurture in 1991. At that stage his employment became full-time.

Dr Fishel's role in Nurture

10 Dr Fishel entered into a new contract with the University when he took up his post on April 21, 1991. Unlike the earlier contracts, this was a full time appointment. His duties specified in the contract, so far as they are material, were as follows:

> "The Scientific Director will be responsible to the Head of Department for the time being of the Department of Obstetrics and Gynaecology in the Faculty of Medicine of the University. He will act as Scientific Director providing an embryological service to the Unit in research and in development.
>
> The Scientific Director must be prepared to give instruction through lectures, tutorials or demonstrations to classes of all grades of students and generally to assist with the work of the Department.
>
> The Scientific Director shall examine, without further payment, in the examinations for initial and higher degrees and for diplomas of the University and shall act as invigilator in such examinations when required to do so. Original research is regarded as an essential part of the Scientific Director's activities and facilities are provided for this purpose ...
>
> The Unit will offer excellent exposure for doctors within the department and the Scientific Director will participate in the training of obstetricians and gynaecologists to be exposed to ART procedures as part of their normal postgraduate teaching."

11 Other material terms were that the appointment was for three years but subject to three months notice by either side; and the hours were to be not less than 36 spread over five days, with longer hours to be worked when "the needs of the job require it". The salary was fixed at the rate of a senior lecturer, but there was in addition a bonus element payable. The precise details of this are not material: suffice it to say that broadly it was 5 per cent of the fees payable to the Unit above a particular threshhold, reducing to 3 per cent above a higher threshhold. Accordingly, he had a direct financial interest in the success of the venture.

12 The Unit had no separate legal status, being merely a part of the Medical Faculty. Although Dr Fishel's role was central to the success of Nurture, he was not ultimately responsible for its operation. It was run by a Board of Management. Professor Symonds was Chairman of the Board and other members included Professor Johnson, the University Bursar, and its Finance Officer. Dr Fishel would usually attend the meetings, but not as a Board member, and would give monthly reports. The description of him as a "director" therefore did not mean that he would carry out the functions that a company director would typically exercise. The board itself was ultimately accountable to the Department of Obstetrics and Gynaecology and thence through the Faculty of Medicine to the University itself. The profits from the Unit did not all go back to develop research activities within Nurture, a matter which caused Dr Fishel no small irritation. The University took an administrative charge, and excess profits were available for the benefit of the Department and not just the Unit.

13 Dr Fishel, as the Scientific Director, was one of the two most senior officers involved full-time in the Unit. The other was the Medical Director. Initially this was a Dr Faratian, but he resigned in 1992 and was not replaced until 1994, when Dr Thornton was appointed. The division of functions was broadly that Dr Fishel was responsible for all aspects of the work of the embryologists, including being ultimately responsible for their allocation to particular cases. He also had a general responsibility for promoting the Unit's research and development activities, which included the laboratory work. By contrast, the Medical Director was the clinical and organisational head, whose functions included having to deal with government agencies. However, neither had final control over staffing or finance. Staff were appointed in accordance with the usual University procedures, and so were not within the control of the Unit. As to finance, neither of the Directors could authorise expenditure or sign cheques on behalf of Nurture. However, in practice I have no doubt that both because of his position in the Unit and his international standing, Dr Fishel's views on such matters as appointments to the Unit and required areas of expenditure would carry significant weight.

14 When in April 1993 Professor Johnson took over from Professor Symonds as Head of Department, he also became Chairman of the Board, although Professor Symonds remained on the Board. At that time an Executive Committee was established below Board level to consider issues affecting the Unit. Dr Fishel played a central role on that Committee. Even after Professor Symonds resigned as Chairman of the Board, he retained a close interest in the work of Nurture. Dr Fishel says, and I accept, that he continued to discuss problems of the Unit principally with Professor Symonds. Within the University hierarchy, however, Dr Fishel became directly accountable to Professor Johnson as Departmental Head.

15 Throughout his time at Nurture, Dr Fishel was the pivotal figure. However, as the Unit grew and additional embryologists and related staff were recruited so his influence, whilst always considerable, inevitably diminished. Other staff, many trained by Dr Fishel, have developed their own academic and technical reputations. This is witnessed by the fact that the Unit has continued to operate, apparently with some distinction, since Dr Fishel left in 1997.

Storm clouds gather: contract renegotiations

16 Nurture proved to be a considerable success. Having started off with a handful of staff, by the time Dr Fishel left there were some forty staff overall. One result of

its success was that Dr Fishel became very well rewarded under his bonus arrangements. In the financial year to July 31, 1996 his total salary exceeded that of any other University employee, including the Vice-Chancellor. The University authorities took the view that it was inappropriately high. They sought to renegotiate the terms. Not surprisingly, Dr Fishel was somewhat resistant to any change. There were strained and protracted discussions and ultimately Dr Fishel was told that unless he agreed to the changes proposed, his contract would be terminated and he would be offered a new contract on terms considered acceptable to the University. He reluctantly agreed. (For some time during the course of this action Dr Fishel contended that this contract was made in circumstances that would constitute duress in law. It was a main plank of his defence. However, although pressurised he clearly was, he wisely did not pursue that particular legal argument to trial.)

17 The principal change to the contract related to the remuneration. In essence, and at the risk of some simplification, Dr Fishel's salary was capped at that payable to a clinical professor in receipt of an A+ merit award. The bonus element was still related to turnover, and there was a new provision requiring him to satisfy some ill-defined quality criteria. Even assuming that he reached the maximum, this was a significant reduction—some 25 per cent—from the salary he had achieved in the previous year. He was, however, given a one-off payment of some £34k as recompense for the future salary loss. The other significant change in the contract related to the doing of outside work, a point which I address later in this judgment.

The final break

18 There is no doubt that the contract renegotiations left Dr Fishel feeling disillusioned. Some months later, on April 25, 1997, he handed in his notice as he was contractually entitled to do. At about the same time, one of the clinicians who had been working in Nurture with Dr Fishel, Dr Kenneth Dowell, also gave in his notice. They were involved in setting up another clinic in Nottingham together with a commercial enterprise. Subsequently other staff left to join them, including three embryologists and Dr Thornton. Professor Symonds in particular was extremely disappointed when he heard that Dr Fishel was leaving; indeed in the witness box he admitted that he felt a sense of betrayal. He had strongly supported Dr Fishel for a Chair, and only a month before Dr Fishel left, the appointment was made to take effect from August of that year. In the event, of course, the appointment never took effect at all.

19 For the three month period of notice, Dr Fishel was placed on what is colloquially termed "garden leave", *i.e.* he continued to receive the benefits of his contract but was required not to attend work. Dr Fishel's counsel has criticised the University for taking this step which, in a University context, is practically unknown. However, Dr Fishel was in a different position to most academics, and he was proposing to join an organisation which would directly compete with Nurture. In the circumstances I consider that criticism was unwarranted: the University was fully justified in taking this step to protect the interests of Nurture.

20 Following the giving of notice, the University sought to recover relevant documents as well as computers which had been made available to Dr Fishel for his personal use. Before handing back a computer at his home, Dr Fishel removed much of the information from the hard-drive. This was subsequently retrieved by the University by sophisticated techniques. It revealed, *inter alia*, detailed information about Dr Fishel's activities abroad. The University again relies on this

fact to demonstrate that Dr Fishel knew that what he was doing was wrong. In my opinion it is equally consistent with Dr Fishel being concerned to prevent the University from obtaining details of what he at least perceived, whether rightly or not, to be his private affairs.

21 There were also disputes at this time about the fact that Dr Fishel had acquired a company (the second defendant in the action) and had its name changed to Nurture. He says it was to prevent its use by anyone else in the event that the University ceased to run its own clinic. The University was understandably concerned about this and took steps to protect its position. In addition, some literature for the new competitor clinic, which became known as CARE, represented that Dr Fishel was a professor. I am satisfied that this was an innocent mistake made without the knowledge of Dr Fishel (although he dissembled about it at the time when asked for an explanation). In any event, these particular issues have now been resolved and I need say no more about them.

Dr Fishel's outside work

22 From his early days at Cambridge, Dr Fishel had been involved in working at private clinics for remuneration. At that time the clinic was Bourn Hall. When he moved to the Park Hospital, he became involved in other outside clinics, all of which were abroad, and after he became involved in Nurture, the range of clinics with which Dr Fishel became involved increased, as I discuss later in this judgment. It is common ground in this case that it was vital for some research work to be done abroad if the Unit was to remain at the leading edge of research. As Professor Symonds recognised, it was also important in maintaining the international reputation of Nurture.

23 There are a number of reasons why work abroad was crucial to the success of research in the field. The principal one was that in Great Britain both treatment and research in the field of what might loosely be termed IVF is subject to detailed and rigorous control. The relevant legislation is the Human Fertilisation and Embryology Act 1990 which created the Human Fertilisation and Embryology Authority ("HFEA"). In order to carry out any treatments or research it is necessary to obtain a licence from the HFEA for each activity. This is granted to a designated individual who is then responsible for supervising the authorised activities. Each specified research activity is the subject of a separate licence. Initially at Nurture the designated person was the Medical Director, but there was a period of some two years when no such officer was in place, and during that time it was Professor Symonds. He was subsequently replaced by Dr Thornton after the latter became the Medical Director. In addition, in the case of certain treatments only licensed individuals could carry them out. Conditions are typically attached to the licences, and they must be strictly complied with. For example, frequently protocols are laid down establishing procedures which must be met. Seeking variations of these can sometimes take significant time—time which may enable a competitor to steal a valuable march.

24 In the case of the work being done by Dr Fishel and his colleagues, some of the research they wished to do simply could not be done in Britain at all because the HFEA did not permit it even under licence. Surprisingly, there is some disagreement between the parties about precisely what was and was not permitted, but that there were potentially important areas of forbidden research is not disputed. For example, a particular restriction resulted from the fact that it was unlawful to replace embryos which have become fertilised as part of any research

project: they could only be replaced as part of treatment which, as its primary purpose, had to be the best way to achieve pregnancy for the couple being treated. A consequence of this is that patients would understandably be reluctant to participate in research trials, or to donate eggs for that purpose. Again, although Nurture was licensed to carry out treatment using ICSI from June 1993, its protocols at that time did not permit immobilising sperm tails, nor at that time was there a research licence for that activity. Subsequently, however, this became a routine part of ICSI treatment. The HFEA also refused permission in 1993 for embryos to be "snap-frozen", and it did not permit research into spermatids until 1996. I am not of course criticising the HFEA for imposing these restrictions. There are complex moral and ethical questions involved in determining the scope of legitimate activity in this field, and its task is an invidious one. The Authority is an extremely high powered body which considered these restrictions justified and I would not for one moment seek to gainsay that. But I have no doubt that these limitations did in fact hamper research and the development of new techniques. Accordingly, if the research of this nature was to be done, it had to be somewhere where the national authorities took a more relaxed attitude to it than the U.K. authorities.

25 Furthermore, as Professor Symonds said in evidence, doing work in other clinics meant that there would be a greater range of cases to analyse than would be generated by one clinic. Of course, the fuller the data, the more reliable the conclusions will be. However, as Professor Symonds frankly recognised, it would not have been possible to share data with other clinics in the United Kingdom because of the element of competition between them. This benefit was obviously greater in the earlier years when fewer patients were using the Unit's services.

26 From 1987, whilst at the Park Hospital, Dr Fishel worked in Rome for RAPRU, as well as in South Africa for a clinic called Vitalab. Links with these two clinics continued throughout his time at the Park and thereafter when he became employed at Nurture. Shortly thereafter, Dr Fishel's relationship with RAPRU ended but in June 1992 he began treating patients at the Biogenesi Clinic, which was also in Rome. Subsequently, from 1996, he also worked at clinics in Cairo, Riyadh and Catania. In all of these cases he was paid. Indeed, he admits to having profited after allowing for tax and all expenses by some £86k since 1993, although that figure is very strongly disputed by the University. (It is only in respect of the period from August 1993 that the University is claiming profits.) On average he earned about £500 for each case where the embryo was successfully transplanted back into the womb. Initially he did the work himself, but as he trained more embryologists to the requisite standard, so he sometimes sent them on trips abroad to do what are termed the "treatment runs". This started in March 1995 when they visited Rome. Three embryologists, Ms Alison Campbell, Dr Steven Green and Ms Garratt were among those who fell into this category. Dr Fishel would, however, still be supervising their activities. He would be paid directly by the clinic for each case and would make his own arrangements with the embryologists concerned about their remuneration. In the relevant period he concedes, as I understand it, that he paid his junior colleagues £47,245. Again, that figure is not accepted by the University.

27 In the course of making these foreign trips, equipment would frequently be taken from Nurture to the clinic concerned. However, in virtually every case the receiving clinic would be invoiced for the cost. Similarly the cost of travel would be borne by that clinic. There appears to have been one exception to this which the

University placed some emphasis upon as demonstrating Dr Fishel's bad faith and which I should briefly address. It seems that on one occasion when he went abroad to South Africa, Dr Fishel was paid his fare by the University even though he was doing treatment work in South Africa. The clinic in South Africa then paid the air fare of his wife (who is South African). Dr Fishel says that he claimed this fare because he was having a meeting with someone in South Africa who was a potential source of funds for Nurture. In fact nothing came of this contact. I believe that Dr Fishel was meeting someone as he alleges, although I also strongly suspect that if his wife had not also been visiting South Africa, he would have charged his fare to the South African clinic, Vitalab, as he always did. I have no doubt that the primary purpose of the visit was to work with the patients. Moreover he signed a statement that the expenditure had been "wholly and necessarily" incurred on University business which was misleading, even if it could be said that the University may have benefited from the work. If the University was indeed gaining a benefit from the trip independently of its association with Vitalab, it would arguably have been wrong to expect Vitalab to have paid for the full travel cost, although some sharing would have been justified. However, the incident does not reflect well upon Dr Fishel.

Work abroad: factual findings

28 Certain issues arise relating to the work abroad which are central to the analysis of this case. I make the following express findings in respect of the work done abroad by Dr Fishel and his colleagues whilst he was employed by Nurture.

29 First, I am satisfied that Dr Fishel at all times genuinely thought that the work he was carrying out abroad was for the benefit of Nurture. As I have said, it is common ground that such work was in principle desirable, and I have no doubt that it proved the basis of much useful research, as well as improving the skills of the embryologists who were able to develop and refine different techniques abroad. There has been some debate before me as to the extent to which research publications could properly be said to be referable to this work. Dr Fishel alleges that certainly over a dozen papers came from it, and the other embryologists who worked abroad likewise claim real research benefits. The University on the other hand denied that much benefit came from it. I suspect that no very precise answer could ever be given to that question, since it is unrealistic wholly to compartmentalise work done abroad and that done in the U.K. Nor, in my view, is it profitable or possible to distinguish clearly between treatment and research since, as Dr Thornton said, they are so closely interrelated in practice, the one feeding significantly on the other. In any event, even if a precise answer can be given to the question, I certainly do not feel equipped to give it.

30 However, whilst I can give no precise answer to the contribution of the work done abroad to the research and development at the Unit, I am satisfied that it was significant. If this had not been the case, I am sure that Professor Symonds in particular would have raised objections to the extent of the activity. I recognise that he was understandably giving significant autonomy to Dr Fishel to organise the work in a way which he considered to be most beneficial to the Unit, and he trusted Dr Fishel to do just that. I accept, moreover, that he would have given more careful scrutiny to the benefits of the outside work had he been aware of the rewards available to the staff. But even taking these factors into account, I do not

think that Dr Fishel did in fact prejudice the interests of the Unit by putting his financial interests first, although I think he may have come very close to this, particularly after the renegotiation of his contract in 1996. In this context I should add that I have no doubt that Dr Fishel could have earned significantly more from private work than he did in the University, even bearing in mind his favourable and unique pay arrangements. In my view he set considerable store by, and was very committed to, his research, and indeed generally to developing techniques in the field. His academic standing was, quite properly, a matter of considerable importance to him. Although he wanted to capitalise on his skills, he is not in my view a man who is driven by the desire to maximise income at all cost.

31 In reaching this conclusion that the Unit benefited from the work done abroad, I am conscious that the financial rewards to Dr Fishel were such that there was a real risk that he might, even in good faith, wrongly deceive himself into believing that work which was in truth simply treatment runs without any, or any significant, research or development value, was potentially beneficial to the University. As Professor Symonds justifiably observed, where significant financial rewards are at stake, then motivation may be affected. Mammon can be an insidious subverter. However, on the evidence before me, the University has not satisfied me that Dr Fishel did in fact succumb to that self-deception such that he was subverted from his duty to the University.

32 Secondly, I am satisfied that these trips abroad did not prejudice the functioning of the clinic in Nottingham. It did not lead to a reduction in the number of patients that could be seen locally, nor adversely affect the treatment to patients. As Professor Symonds accepted, there was a shortage of space and of clinical staff which limited the number of patients the Unit could take, but there was no evidence that the intermittent absences of embryologists had any impact on this. There was some evidence from Mrs Sargent, who was responsible for the nursing staff, that the nurses were sometimes put under pressure in such absences because they had to provide greater support than normal for the embryologists who remained. She says that she raised the problem with Dr Thornton. I am sure that occasionally there were such difficulties, but if this had been a significant problem then I would have expected it to have been specifically raised by Dr Thornton with Dr Fishel, but it was not. That apart, there was some evidence from Professor Symonds that a graduate student felt that he was being inadequately supervised by Dr Fishel. This evidence was thin, was denied by Dr Fishel, and did not sit happily with the general impression I had of a stimulating and interested teacher. It must also be recognised that floundering research students needing guidance will sometimes feel short-changed even by the most conscientious of supervisors.

33 Thirdly, it is clear beyond doubt that Professors Symonds and Johnson were aware that consultancy work was being done abroad by Dr Fishel. Indeed, they positively encouraged it, for the reasons I have already given. Their knowledge of the activities of the other embryologists was more sketchy. Professor Symonds clearly did know that some trips were being undertaken by them because the matter was raised directly with him by Dr Fishel in March 1993, shortly before Dr Fishel entered into the Biogenesi contract (although by then one embryologist had already been on a trip). Similarly, Professor Johnson was aware of the fact that other embryologists went abroad—a matter which he raised expressly with Dr Fishel since it caused him some concern. I am also satisfied that no attempt was made to conceal either the fact that the trips were taking place, or their frequency.

It was common knowledge within the Unit, and was referred to in news letters about the Unit which were sent to the two Professors.

34 Fourthly, it is admitted by Professor Symonds that he assumed that Dr Fishel was being paid for the work, and I am wholly satisfied that he occasionally made reference to that fact in conversation as a number of witnesses have alleged. In principle, he does not appear to have considered such payment to be improper. I accept his evidence that he did not anticipate the magnitude of the sums involved: he assumed that Dr Fishel would be earning some £10 to £15k per annum, whereas in fact the sums were clearly greater—and the University alleges significantly greater than this. He also assumed that the embryologists were receiving some payment for their labour, if only for the unsocial hours which they had to work. By contrast, Professor Johnson says, and I accept, that perhaps rather naively (to use his expression), he did not realise that private payments were being made to Dr Fishel at all; nor was he aware that the other embryologists were receiving anything.

35 Fifthly, at least in respect of the period prior to the renegotiation of the contract in 1996, I do not believe that Dr Fishel was seeking to conceal the fact that he and the other embryologists were paid for treatment work which they did. The matter was discussed freely amongst the embryologists themselves, and it is clear from the evidence I heard from Ms Campbell and Dr Green that no attempt was made by Dr Fishel to persuade them to keep secret the fact that they were receiving payment. Specifically, I do not accept that the matter was deliberately concealed from Professor Johnson. Indeed, there would have been little purpose in this since there must have been every likelihood that the issue would have come up in conversation between Professors Symonds and Johnson, even although that apparently did not happen in fact.

36 At the same time, I equally have no doubt that Dr Fishel did not want to volunteer the private financial arrangements he had made; he took steps to conceal these matters, such as by requiring in the contract with Biogenesi that the details would not be revealed without his consent. Furthermore, when CARE was in the process of being established, he was at some pains to prevent his colleagues being made aware of the financial arrangements he had made. The claimant says that this is evidence that he was aware that what he was doing was wrong. That may be so, but in my opinion it was equally consistent with his simply—and understandably—wanting to keep private affairs private, although I think that it is distinctly possible that he might also have been somewhat embarrassed at the amount he was able to earn in this way.

37 Sixthly, I have no doubt at all that the clinics abroad employed Dr Fishel because of his personal reputation, not because of his links with the University. Dr Lisi, from the Biogenesi clinic, made this abundantly clear. It is confirmed by the written evidence of Mr Jacobson, Dr Khaleel and Professor Shaeer from the clinics in South Africa, Riyadh and Cairo respectively. I am conscious of, and bear in mind, the fact that the last two were not able to be cross-examined on their evidence as the claimant wanted. However, it is obvious, in my opinion, that these doctors would be seeking a connection with the renowned expert and, as they all indicated, would be indifferent to the particular institution in which he worked. Similarly, they would accept the presence of embryologists sent by Dr Fishel precisely because he was willing to vouch for them and to supervise them. Equally, however, I am sure that as far as these clinics were concerned, they would have been perfectly willing to enter into a direct contractual relationship with the

University provided the services of Dr Fishel himself was made available to them. Dr Lisi said as much. Provided Dr Fishel was involved, the contractual niceties for securing that involvement were not important.

38 Finally, it is admitted by Dr Fishel that at no time during his employment with the University did he obtain the consent of the Vice-Chancellor or any of his authorised deputies to do paid work abroad. He did not follow the prescribed procedures either before or after the renegotiation of his contract. He contends that the procedures were inapplicable to him, and in any event were habitually honoured in the breach rather than in the observance. I return to consider this point later.

The Legal Issues

39 In essence the University contends that in doing the outside work without properly authorised consent, Dr Fishel was in breach of his duties under his contract of employment and of certain fiduciary obligations which, it submits, he was bound by in the particular circumstances of the case. The difference between the two causes of action is that, at least on a conventional analysis, the employee can be liable to account for all the profits he has earned if fiduciary duties are broken but is only liable to compensate for loss where the claim lies in contract. However, the University also claims to be entitled, because of the particular nature of the breach in this case, to recover restitutionary compensation equivalent to the profits acquired by Dr Fishel for the mere breach of contract alone. Its claim is limited to profits made from the date Dr Fishel became a Reader in August 1993.

40 The defence to the contractual aspect of the claim is that there was no breach because Dr Fishel did not in fact need to obtain consent; that in any event he had obtained it; or alternatively that the University was estopped from denying that he had obtained it in view of the way in which consent had been obtained by the staff in practice. Further, it is submitted that even if there were a breach, any damages should be nominal since no loss was suffered, and that there is no entitlement in law to restitutionary damages.

41 As to the fiduciary claim, Dr Fishel denies that he owed any fiduciary obligations to the University at all, and contends that even if he did, he received informed consent from the University, alternatively the University is estopped from alleging otherwise.

42 There are two further claims against Dr Fishel. The University alleges that he induced the staff to break their contracts of employment when he encouraged the embryologists, without approval from the University, to work in clinics abroad. Dr Fishel denies that they were in fact acting in breach of their contractual terms, for the same reason that he says that he was not in breach, and he submits that in any event he was unaware of the terms of their contracts or of the fact (if it be a fact) that they were in breach. In addition the University contends that as a result of his breaches of duty, even after the termination of his contract, he was able to make profits from his existing links with the clinics abroad more quickly than would have been possible if he had had to approach them fresh. Accordingly, it is said, he should account for such profits as he has gained by developing a "springboard" as a result of his unlawful activities.

43 I will first consider the contractual position.

The contractual claim

44 In order to understand the basis of the contractual claim, it is necessary to set out all relevant provisions relating to outside work.

45 Dr Fishel only became a full-time employee of the University when he took up the office of scientific director. However, in combination with that office, Dr Fishel also retained his post as a senior lecturer. The general conditions referable to such appointments did contain a clause regulating outside work in the following terms:

> "There are no specified hours of work, but the appointment is a full-time one and permission to undertake any other work for which payment will be received must previously be obtained from the Council of the University through the Vice-Chancellor. This regulation is not intended to prevent the Senior Lecturer from undertaking a limited amount of outside work, such as examinerships, provided such work does not interfere with his duties at the University, but he will be expected to report to the Head of his Department any such work which he may wish to accept."

46 It is to be noted that this provision does not require consent in all cases; there is an ill-defined category where the employee is free to undertake the work without specific consent, although there is the duty to keep the Head of Department notified. It is probably also implicit that the Head of Department should ultimately determine whether or not the proposed work will interfere with University duties, although nothing turns on that in this case.

47 Whilst Dr Fishel held a part-time post, this provision was binding upon him only so far as it was applicable to a part-time appointment. It is not strictly necessary for me to determine how far it was so applicable, since no complaint is made about Dr Fishel's part-time work at that stage. However, I am inclined to the view that the provision would have no application. If an employee is committing himself only part-time to the University, then it is reasonable to assume that he may well have other paid employment, as of course Dr Fishel did. On this analysis, Dr Fishel was entitled to work for other clinics without the University's consent at this time. This was in fact the view of Professor Symonds, who thought that it was up to the Park Hospital whether or not Dr Fishel could do such work. It is also to be noted that Dr Fishel was not specifically asked to give up his outside consultancies when he joined Nurture, although it was known that he held these posts. Indeed, Professor Symonds said in evidence that he thought they would continue. I did not understand him to be saying merely that any outstanding contractual obligations would have to be honoured, although at the very least I would anticipate that the University would have expected Dr Fishel to honour any such obligations. I accept that all this created a certain lack of clarity about precisely what was and was not permitted.

48 In my opinion, however, the legal position with respect to obtaining consent altered when Dr Fishel joined the University full-time as Scientific Director of Nurture. Thereafter the Senior Lectureship was also a full-time office and the general conditions were applicable to him, although I suspect that he did not fully appreciate this at the time. As I have indicated, he had been working in an environment where he had been doing outside consultancies openly and without anyone apparently being concerned, and the assumption appeared to be that these arrangements would continue. Legally, however, he was now subject to a different set of rules. Moreover, even in the absence of the express restriction in the Senior Lecturer contract, he should have appreciated that as a full-time employee of the

University, he could not work for a third party during working hours without appropriate consent.

49 In August 1993, partly as a result of the active support of Professor Symonds, Dr Fishel was made a Reader in Embryology of the University. He received a document setting out the terms and conditions of his employment, including a provision regulating outside work in precisely the terms set out above. Any residual doubt about the applicability of that clause must have been removed at that time, the relevance of that being that it is only in relation to alleged breaches from that date that any compensation is sought. Initially this contract ran only to April 21, 1994, this being the date when the original fixed term in the Scientific Director contract came to an end. On the termination of that latter contract, it was renewed for a further five-year term on essentially the same terms. By an oversight, nothing was said at that time about the continuation of the Readership, but the point was expressly raised by Dr Fishel, and it was made plain that his Readership continued. The only reasonable inference is that it was on the same terms that had applied hitherto, and which reflected the terms generally applicable to Readers.

50 When his contract as Scientific Director was then renegotiated in November 1995, he entered into a single contract in which he was described as "non-clinical Reader and Scientific Director". This contained a new and different term on outside work. In the course of negotiations Dr Fishel had sought to establish the right to do outside consultancy work for up to 20 per cent of his time, and at one stage it seems that this would be conceded. However, the contract in fact signed by Dr Fishel contained the following provision on this matter:

> "*Outside Work or Consultancy*
> Owing to the exceptional nature of the remuneration arrangements, for this post the scientific director is required to seek permission from the Head of Department and from the Pro-Vice-Chancellor for Staffing for any outside work, including consultancy, on a case by case basis."

51 This clause, particularly in the circumstances in which it was drafted, emphasised the special significance that the University was placing on the need for the appropriate consent for outside work on every single occasion it was performed. It could hardly have been plainer.

The system for obtaining consent

52 The contractual terms on consent have been supplemented by rules regulating how the consent is to be obtained. In 1989 the Vice-Chancellor issued a provision dealing with obtaining outside work and taking leave. In respect of the latter, it was in the following terms:

> "*Application to undertake Outside Work*
> (a) all applications should be addressed to the Business Manager, Mr D H Davis;
> (b) applicants should state the nature of the work, the outside body for which the work is to be done, the amount of time that will need to be devoted to such work, and the total remuneration that will be received. In addition, applicants should list any other consultative work currently being undertaken;

(c) the applicant should give an undertaking that the work will not involve the use of University facilities (including the use of University headed notepaper), and should supply a completed disclaimer form (copies of which may be obtained from the Business Manager). Work which required the use of University facilities should be the subject of a contract negotiated through the Business Manager's Office.

(d) All applications should be accompanied by a letter from the Head of Department signifying support and affirming that the work will not interfere with the applicant's duties and responsibilities to the University.

The Business Manager will provide advice to the Pro-Vice-Chancellor for staffing who will then write to the applicant indicating the recommendation that will be made to the next meeting of Council. Applications need not be made for the following activities: invitations to act as an external examiner, to give an occasional lecture outside the University, to write an article or a book, or to participate in courses organised by the Department of Adult Education."

53 The provision relating to outside work is consistent with, but more specific than, a provision found in Regulation 3.20.10 of the University's Financial Regulations. Subsequently in February 1992 the then Pro-Vice-Chancellor reminded Heads of Department of the requirements. Dr Fishel accepts that he was aware of them, and indeed he specifically drew them to the attention of Dr Merwyn Jacobson, head of the Vitalab clinic in South Africa, in April 1993.

54 By a memo dated November 30, 1995 Professor Challis, then Pro-Vice-Chancellor, wrote to Heads of Department setting out what on the face of it seem to be new procedures relating to study leave, leave of absence and outside work. In relation to outside work, it provided as follows:

"*Applications to Undertake Outside Work*

1. Members of Non-Clinical Academic Staff may devote up to 20 per cent of their time to outside paid activities, providing their academic and other duties are fulfilled. Members of Clinical Academic Staff are subject to different arrangements in line with NHS procedures.
2. All applications should be addressed to the Director of Research and Business Service, Dr Douglas W Robertson. As much notice should be given as possible.
3. Where the outside work will involve significant use of University facilities this should be handled through the academic Department as a Service Rendered activity.
4. Approval should be sought for the editing of journals given that this can involve a substantial time commitment and utilise significant resources.
5. All applications should be in the following format:
   Summary of proposed activity
   Client
   Amount of time required (with dates if known)
   Remuneration
   Other outside work being undertaken

   And should include the following statement:

(A) 'I confirm that the proposed constancy is a personal activity and that the use of any University/departmental facilities will be paid for. The consultancy will not result in a conflict of interest with any of my University duties and responsibilities.

Signed .....

(Applicant)

(B) Authorisation by the Head of Department.

'I support the above application and confirm that the work will not interfere or constitute any conflict of interest with the applicant's duties or responsibilities to the University.'

Signed .....

(Head of Department)

6. As the activity will be personal to the applicant a disclaimer must be completed by the client and enclosed with the application (copy attached and available from the Office of Research and Business Services)."

55 This procedure makes reference to what has been loosely described as the "20 per cent rule" although it is really a discretion rather than a rule. In fact, the evidence of Professor Challis was that this procedure was not perceived as being materially different to the earlier one. The 20 per cent rule had for some time been the convention adopted in relation to outside work, and the procedure was merely a formal recognition of that fact. It is relevant to point out that notwithstanding the fact that there was extensive work done abroad, neither Dr Fishel nor any of the embryologists who went abroad actually exceeded the 20 per cent time envisaged by that provision.

56 The new procedure draws specific attention to the need for both the applicant and his Head of Department to satisfy themselves that there is no conflict of interest. It also envisages that on occasion University facilities may be used but should be paid for. This is in fact what happened with respect to the trips abroad.

57 In addition, this memo drew attention to the fact that staff were encouraged to register with a University company known as NUCL (Nottingham University Consultants Limited) which provides support for staff wishing to take outside consultancies. This body takes a proportion (20 per cent) of the fee. Apart from the value of the support services provided, a potential advantage to staff registering is that they could be given a "block" consent for a period of three years, thereby obviating the need to obtain consent on each occasion. The renegotiated contract denied that opportunity to Dr Fishel.

58 On his own admission, Dr Fishel did not obtain consent in accordance with the stipulated procedures. On the face of it, therefore, there is a clear breach of contract. However, Dr Fishel contends otherwise, adopting a number of arguments.

59 First, he contends that the work he was doing for foreign clinics was not "outside work" at all within the meaning of the specified procedures (both of which use that phrase), nor was it "outside work, including consultancies" within the meaning of the 1996 contract. The reason is that the work was done for the benefit of the University which, submits Dr Fishel, prevents it from being "outside work". Accordingly, so the argument goes, the duty to disclose is not triggered. I reject this argument. As to the procedures, the concept of "outside work" used therein must be read against the background of the contractual term which it was fleshing out. The Readership contract itself, like other University contracts, required

consent to do "any other work for which payment is received". In my opinion, the procedures are clearly intended to apply to the situation envisaged in the contractual term, since they are drafted in order to regulate the operation of that term, and the concept of outside work should be construed accordingly. In other words, "outside work" must be equated with "other work for which payment is received". In my view Dr Fishel was plainly doing work for which payment was received, and the fact that the work also benefited the University is irrelevant.

60 I should add that even considered independently of the contractual term, in my judgment the phrase "outside work" would naturally embrace any situation where the employee had contracted to work for another, whether or not he was thereby still performing services in a manner consistent with his duty to his employer. The significance of his benefiting the employer is merely that it increases the likelihood in fact that no objection will be taken to his doing the work, but not that he is relieved from the duty to obtain consent.

61 The defendant puts some weight on the fact that Dr Robertson, the Director of the Office of Research and Business Studies, said in evidence that he thought the work undertaken was "inside work". It is clear, however, that he was merely saying that in his view that is how it ought to have been treated by Dr Fishel, that the University ought to have been the party to these contracts in which case no payment would have been made to Dr Fishel. He obviously was not saying that Dr Fishel could ignore the need to seek consent on the grounds that he ought not to have entered into the contract at all. That would be absurd. In any event, Dr Robertson's views of the contractual obligations are irrelevant to their meaning in law.

62 In my opinion, therefore, it is plain that the Readership contract required Dr Fishel to obtain consent from the Vice-Chancellor, or his appointed representatives, before entering into the contracts with foreign clinics. In my view the concept of "outside work including consultancy" in the renegotiated contract should be similarly construed. It must be read in line with the established procedures. In any event, and for reasons I have given, it would natually include paid work for another.

63 I should add that I do not accept that at the time Dr Fishel actually believed that the renegotiated contract could be construed so as to limit the concept of outside work in this curious way. There is no document of any kind supporting that understanding, and it has not been advanced as a possible interpretation of the contract until well into the course of these proceedings. If it had been Dr Fishel's understanding at the time, I would have expected to see it reflected in the defence as originally drafted. Moreover, it is stretching credulity beyond breaking point to believe that when Dr Fishel was renegotiating his contract in 1996 his request to be allowed to do outside consultancies was intended to relate not to the work he was then currently doing, but rather to an entirely different category of outside work that he had not hitherto undertaken.

64 Dr Fishel had another construction argument. The procedures, and indeed the Readership contract, recognise that there will be certain circumstances where formal consent can be dispensed with and the approval of the Head of the Department alone will suffice. This is made plain in the original 1989 procedures which expressly makes reference to activities such as external examining or writing a book. It seems that the matters therein described were not exhaustive; for example it is clear that it had become conventional for clinicians to be allowed to do medico-legal work without consent. I also accept that the parameters of the

exception were not as clear as they might have been. Moreover, they were not specifically referred to in the 1995 procedures, although it is common ground that there was no intention to remove this area of discretion. Mr Cunningham, formerly Bursar of the University, opined in his evidence that this category is intended to cover cases which, broadly, are beneficial to the academic community as a whole. Relying on evidence of this nature, Dr Fishel has submitted that the true scope of the exception is that it applies to all outside work, paid or not, which is of academic benefit to the University. Since, as I accept, his work falls into that category, it is said that the exception applies and no consent was needed. I do not accept that argument. In my opinion it is plain that whatever the precise scope of the exception, it was never intended to cover a case of this nature. It was to meet standard or routine activities of an academic nature, where it would be unnecessarily bureaucratic to require consent to be formally obtained on each occasion. On any view the activities being carried on by Dr Fishel were highly unusual and of the kind when formal consent would plainly have been required.

65 A further construction argument advanced by Dr Fishel was that provided the work fell within the 20 per cent rule, there was no need to obtain formal consent. He relied upon the fact that clinical staff had a general consent to spend up to 10 per cent of their time on private practice. However, they were subject to a quite separate regime because of their particular duties. In my opinion there was no basis for assuming that consent was being dispensed with for the first 20 per cent of outside activities; on the contrary, it is obvious reading both sets of procedural rules that unless the work falls into the exceptional category where consent can be dispensed with, consent is required on each occasion.

66 I should add that neither of the latter two construction arguments could have applied in any case to the 1996 contract. Plainly, there were no exceptions to the obligation to obtain consent in that contract.

Estoppel and ostensible authority

67 Dr Fishel contends that even if he was obliged as a matter of construction to obtain consent under the 1991 contract, in fact the way in which the rules operated in practice has created an estoppel which prevents the University seeking to rely upon the written contract. As I understand the argument, it is that Professor Symonds was held out by the University as having the authority to grant consent for paid activities, and in the circumstances the University cannot rely upon the formal contractual terms. The principal way in which the argument was advanced was that there was an estoppel by convention. This may arise where both parties to a contract "act on an assumed state of facts or law, the assumption being either shared by both or acquiesced in by another": see *Republic of India v. India Steamship Co. Ltd* [1998] A.C. 878 at p. 913 *per* Lord Steyn. In this case it is alleged that the convention was that the parties understood that such consent as Dr Fishel needed could be granted by Professor Symonds. I doubt very much whether, even assuming that the University has held out Professor Symonds to have the authority as alleged, this constitutes an estoppel by convention. There is no shared but mistaken assumption about a fact: rather it is a case where Dr Fishel says that he has been led to believe by the conduct of the University that Professor Symonds had the power to grant him consent. This suggests the doctrine of equitable estoppel rather than estoppel by convention. Whether that be so or not, it seems to me in the circumstances of this case it will be necessary for Dr Fishel to establish both that the representation was in fact made and that they were relied upon.

(Even if estoppel by convention were applicable it would be necessary to establish these elements to show that there was a genuinely shared assumption between the parties.)

68 The first question is whether the University has by its conduct made the representations alleged. Various evidential factors have been put forward to support this submission. For example, it is said that there was a widespread failure to comply with the procedures both generally and in the medical school; that Professor Symonds himself stated that it would not be practicable to comply with the procedures in all cases; and that particular examples can be taken of individuals in the medical school who appear to have done outside work without consent.

69 In my opinion this contention is not sustainable, for a variety of reasons. First, in order for the representation to be established, Dr Fishel has to show that the very same officers who were authorised to give consent had effectively waived the requirement, or at least had appeared to do so, by holding out Professor Symonds as having that authority; he could not hold himself out. I see no solid evidential basis for inferring that any such holding out had occurred. On the contrary, there were regular reminders of the need to honour the procedures both in 1992 and again in 1995, when they were amended. Furthermore, there is a wealth of evidence to show that they were frequently complied with. Dr Robertson gave evidence that there were about 200 applications each year, and I have seen a number of applications from the medical school itself, including from non-clinical staff. It seems that there may have been very few applications from the Department of Obstetrics and Gynaecology itself (indeed I have only seen one, from Professor Symonds himself). However, it could not sensibly be said that Professor Symonds had ostensible authority to give consent for that Department alone, not least because in April 1993, *i.e.* before the period in respect of which this claim is made, he ceased to be Head of the Department and became Dean of the Medical School.

70 I have no doubt that there were occasions when the rules were not complied with, as is inevitable in a large institution of this nature. I suspect there may be a number of academics who are a little cavalier about the requirements and who will in good faith not seek consent even when they should, particularly when they consider that it is likely to be a formality. But even if this is so, it is a mile away from suggesting that there is a widespread tendency to ignore the procedures. The evidence simply does not begin to support that. Moreover, it is clear that the University itself was not in any way condoning any slackness in their operation; the reminders about the procedures make that plain. I have no reason to doubt the Vice-Chancellor's claim that Nottingham was a "tight ship", as he described it, albeit that it was not altogether leak-free; and I am sure that the objective was to make it so.

71 Even if the evidence had sustained the representation relied upon, Dr Fishel would need to show that he genuinely believed that the formal procedures did not apply to him and had been supplanted by the informal arrangements on which he now relies. I do not accept that he did. I accept that he assumed that obtaining consent was not particularly important, especially since Professor Symonds acquiesced in his working abroad, but that is a different matter. He was aware of the contractual terms and the procedures, and I do not believe that he thought that the Medical School, or indeed the Department, were exempt from their operation. Accordingly, I reject this contention.

72 Given my conclusions on this matter, it is not strictly necessary for me to consider an argument of Mr Dutton Q.C. that the University could not in any event waive the need for consent from the University Council since that was required by the University regulations. I very much doubt that it is correct, however, since it is possible for the University to authorise the granting of consent to be delegated, as indeed the University has already done in respect of certain categories of outside work. In principle, I see no reason why the University could not have authorised Professor Symonds to give consent, whether expressly or impliedly. It would not have been *ultra vires* the University to have done this.

Damages for breach

73 I have no doubt that Dr Fishel was in breach of contract in failing to obtain the requisite consent for his paid outside work. The University can seek to recover damages arising out of the breach. On the traditional view this means they can recover such loss as has resulted from the breach. The question is what that loss is in the circumstances of this case.

74 In order to answer this question it is necessary to identify exactly wherein the breach lies. In my opinion it is not, as the claimant alleges, in the failure to obtain consent. Strictly, the breach is doing the outside work; if consent had been obtained, that would have relieved Dr Fishel from any liability for breach of contract, but he was under no contractual obligation actually to apply for consent. The question, therefore, is what loss has resulted from the fact that Dr Fishel did this work. In my opinion it cannot demonstrate any loss. For reasons I have given, I consider that the University benefited from the work. Indeed, I doubt whether there would, or could legitimately, have been any complaint had Dr Fishel done precisely the same work but unpaid by the foreign clinics. In my view if any claim for damages for breach of contract is to succeed, it has to be on the basis that restitutionary damages (or perhaps more accurately, compensation) are available, a point to which I return later in this judgment.

75 Mr Dutton has advanced a further argument that the employee's duty of loyalty and good faith obliged Dr Fishel to inform the University that he was being paid for his outside work. The argument then is that had the University been aware of the opportunity to do outside work, it would have sought to do it itself. In my view the premise is wrong. I do not think that as a general principle an employee is bound to inform his employer if and when he is doing outside work in breach of his contract. Mr Dutton relies upon the case of *Neary v. Dean of Westminster* [1999] I.R.L.R. 288 in which Lord Jauncey, sitting as special commissioner appointed to hear the case on behalf of Her Majesty the Queen as Visitor, held that in the circumstances of that case the employee in question was in breach of the duty of trust and confidence in failing to inform the Abbey authorities of certain activities he was conducting on his own behalf. However, in that case Lord Jauncey clearly considered that the employee had taken advantage of his position as Organist at the Abbey for his own benefit. In other words, the duty to inform the Abbey authorities arose because Dr Neary had used his position to earn secret profits; he ought to have accounted for these to his employers in the absence of full disclosure and consent. It is similarly contended in this case that Dr Fishel was a fiduciary who abused his position for his own benefit. I consider that issue later in this judgment. If that is right, then it may be said that by acting in secret Dr Fishel has both acted in breach of his fiduciary duty and in breach of contract. But the contractual claim then adds nothing to the fiduciary claim. Absent the fiduciary

obligation, the employee is not obliged to disclose the fact that he has earned sums from third parties. Indeed, were he to be so obliged, this would circumvent the well established rule in *Bell v. Lever Brothers Ltd* [1932] A.C. 161 that employees are not obliged to disclose their own past misconduct or breaches of contract. (It might conceivably be said in this case that Dr Fishel was obliged to disclose the wrong doing of his fellow embryologists, in accordance with authorities such as *Swain v. West (Butchers) Ltd* [1963] 3 All E.R. 261 (CA) and *Sybron Corpn. v. Rochem Ltd* [1984] 1 Ch. 112, even if this also involved revealing his own wrongdoing. However, the case was not put on this basis, and furthermore I do not believe that Dr Fishel perceived the other embryologists to be committing misconduct. I doubt whether the principle applies in such circumstances.)

76 Even if I am wrong in concluding that Dr Fishel was not contractually obliged to disclose his activities to the University, I do not in any event consider that the University has shown that it would have taken the contract for itself. This must be established on the balance of probabilities since it is asking what the claimant would have done in the past had there been no breach: see *Allied Maples Group v. Simmons and Simmons* [1995] 1 W.L.R. 1602 at 1610 *per* Stuart-Smith L.J. It seems highly unlikely that the contract would have been approved at all without the consent of the Head of Department, who at all material times was Professor Johnson. His evidence was that he was extremely reluctant to permit Nurture staff to do paid work abroad because of Nurture's status as a fee-earning Unit. He considered that working for other clinics, whether here or abroad, would conflict with the duty owed to Nurture, citing the fact that exceptionally Nurture patients were redirected to clinics abroad. (It is not disputed that these were proper decisions taken in the interests of the patients concerned.) He also considered that the research benefits were a poor reward for the time involved. The logic of his position is that if he had been fully aware of what was going on, he would not have supported the work on the grounds that it was not in Nurture's interests, whether or not Nurture itself was paid in place of the staff. Similarly, Professor Chiplin, who was Pro-Vice-Chancellor for about four years until July 1995, said he would not have approved the work because of the length and frequency of the absences abroad. Accordingly, I am not satisfied that on the balance of probabilities the University would have elected to do the work even if it had been given the opportunity to do so. Finally, it is clear that it could not in any event have been done without the co-operation of Dr Fishel himelf. He could not have been required to do this work abroad. On the principle that it must be assumed that he would have acted to limit his damages, he could have refused to work abroad and thereby have scuppered the contracts. Mr Dutton says that the answer to that is that he did in fact do the work and therefore it should be assumed that he would have done so whoever was the contracting party. However, he did not do the work purely in pursuance of his contract of employment, and I do not see why he cannot say that in that different context it should not be assumed that he would have been willing to go beyond his contractual obligations.

Restitutionary damages

77 The University claims that even if it is not entitled to damages for loss on the traditional basis, it ought to be entitled to claim restitutionary damages, the sum being assessed by reference to the gain made by the defendant. It makes this claim only insofar as it fails on its fiduciary argument. The circumstances, if any, when such damages can be recovered for breach of contract have been considered in two

recent Court of Appeal cases. In *Surrey C.C. v. Bredero Homes* [1993] 1 W.L.R. 1361, the defendant purchased certain land from the plaintiff and undertook to develop it in accordance with certain planning permission he had obtained. This permitted him to build 72 dwellings but in fact he built 77. The vendor sued for breach of contract and sought to recover the profits gained by the breach, *i.e.* the profits accruing from the fact that five additional houses were built. The Court of Appeal, upholding the judge at first instance, held that only compensatory damages were available which, as the defendant conceded, were nominal only since no loss had been suffered. Dillon L.J. affirmed the traditional view that restitutionary damages were not available for breach of contract; Steyn L.J. thought they could be available in exceptional circumstances, exemplified by the case of *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd* [1974] 1 W.L.R. 798, which involved the invasion of property rights and, as Lord Steyn pointed out, was analogous to cases where the defendant makes use of the claimant's property, thereby saving expense. Whilst accepting that there may be some scope for further development, he rejected both on principle and policy grounds any significant extension, particularly in areas such as commercial and consumer law where predictability is important.

78 In *Attorney-General v. Blake* [1998] Ch. 439[3] the defendant was the spy who escaped from prison and fled to Moscow. He wrote an autobiography in which he made use of information acquired during his time in the security services. This was in breach of a specific undertaking he had given not to use such information. The Crown sought compensation for breach of fiduciary duty but that failed on the ground that any such duties ceased with the employment. There was thereafter a duty to respect confidential information, but the material had ceased to be confidential. The Crown did not seek to claim restitutionary compensation despite being invited to argue the point. Lord Woolf M.R., giving judgment for the court, indicated that the court was "not convinced" that it was precluded from awarding restitionary damages in the circumstances of that case, and the court expressed what it described as "tentative views" on the subject. It suggested that there were at least two situations where such an award might be appropriate. The first was where there was "skimped performance", in which the defendant fails to provide the full extent of the services contracted for; and the second was where "the defendant had obtained his profit by doing the very thing he has contracted not to do".

79 Given that these comments are *obiter*, I would feel some reluctance in following them even if I thought they were applicable, given the more limited support for any development of this nature in the *Bredero Homes* case which is binding on me, and where the issue was the subject of full legal argument. Moreover, there is in principle no reason why employment contracts should be treated differently to commercial contracts in this regard. Indeed, arguably there is an additional policy reason making such compensation inappropriate: holding an employee accountable for profits gained by taking other employment could have implications for the principle that an employee should not be compelled personally to work for any employer.

80 In the event I do not think that either of the situations envisaged in *Blake* arises in this case. Mr Dutton Q.C. has argued that this case falls into the second category referred to by Lord Woolf in the *Blake* case, namely where the defendant has

[3] See fn 2 on page 370—Ed.

obtained his profit by doing the very thing that he had contracted not to do. I do not think that analysis is right. Dr Fishel never expressly contracted not to work for another. It is of course correct that by promising to work full time for Nurture he was by necessary implication promising not to work for anyone else during his working time at least in the absence of consent. But every contractual undertaking involves an implied promise not to do anything inconsistent with that undertaking, and on this analysis every breach of contract would involve the party in breach doing what he had contracted not to do. Restitutionary damages would then be available as a matter of course for breach of contract. Clearly the Court of Appeal did not intend such a sweeping extension of legal principle. It had in mind the type of situation arising in that case itself, where the employee had signed an undertaking not to divulge any official information gained as a result of his office. The Crown had thereby indicated the importance it attached to that promise, which was more restrictive than the limitation on using information which the law would otherwise have permitted. By contrast, in this case there is no such express limitation. On the contrary, the contract actually envisages that in appropriate cases permission might be given for doing outside work during working hours, which the law would otherwise forbid, and a procedure is established regulating how such permission is to be obtained. It is true that the renegotiated contract emphasised the need for consent in each case, but even in that contract there was still not any express undertaking not to work for another. Accordingly, even assuming that I were free to apply the *dicta* in *Blake*, in my judgment they do not assist the claimant in this case.

Fiduciary duties

81 A major allegation in this case is that Dr Fishel acted in breach of his fiduciary duties. In particular, it is alleged that by working abroad for reward, and by profiting from the work done by embryologists under his control, he acted in breach of the conflict of duty and interest rule, which prohibits him from pursuing his own interests when he is duty bound to advance the interests of his employer; the conflict of duty and duty rule, which prevents him from placing himself in a situation where he owes a duty to another which is inconsistent with undivided duty of loyalty which he owes to his employer; and the obligation not to make a secret profit by misusing his position to exploit opportunities which came to him in his position as employee. This raises the question to what extent, if at all, Dr Fishel is subject to such duties. It also involves a consideration of whether he received fully informed consent from the University, for if he did there will be no fiduciary liability.

Establishing fiduciary obligations: the legal principles

82 What then are the underlying principles which enable the court to determine whether or not fiduciary obligations arise? Lord Millett, writing extra-judicially, has identified three distinct categories of relationship (see his article "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214). Two of them have no application in this case. These are first, where the obligations arise out of the fact that one party is in a position of influence over another; and secondly, where they arise from the fact that one is in receipt of information imparted in confidence by the other. Employees frequently fall into this latter category, because their work will often involve their being made privy to trade or business secrets of their

employer. But although the existence of the employment relationship explains why the employee comes to be in possession of such information, and the contract of employment will define the purposes for which such information may be used, the employment relationship itself in such cases is really only incidental to the imposition of the fiduciary duties. As the Court of Appeal noted in *Attorney-General v. Blake* [1998] Ch. 439 this fiduciary obligation of confidence often arises in the course of another fiduciary relationship but it is not derived from it. It is for this reason that the obligation of confidence can continue to subsist even when the employment relationship, and any fiduciary duties arising out of it, has terminated.

83 The third category identified by Lord Millett, and described by him as the most important, is as follows:

> "[it] is the relationship of trust and confidence. Such a relationship arises whenever one party undertakes to act in the interests of another, or where he places himself in a position where he is obliged to act in the interests of another. The core obligation of a fiduciary of this kind is the obligation of loyalty."

84 In *Bristol and West Building Society v. Mothew* [1998] Ch. 1 at 18, he elaborated on this analysis, and identified the duties which classically arise from such a fiduciary relationship:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

85 It is vital to recognise that although the key feature identified is the obligation of loyalty, that has a precise meaning, namely the duty to act in the interests of another. This is the fundamental feature which, in this category of relationship at least, marks out the relationship as a fiduciary one.

86 It is necessary to point out, however, that occasionally the concept of fiduciary has been used to describe relationships which lack this distinguishing feature. Millett L.J., as he was, strongly criticised the cavalier and imprecise use of the term in *Bristol and West Building Society v. Mothew* [1998] Ch. 1 at 16. Moreover, there has been a tendency to describe someone as a fiduciary simply as a means of enabling the courts to impose the equitable remedies. Again the English courts have treated this as a wholly illegitimate use of the concept adopting, in the *Blake* case, the words of Sopinka J.'s salutary warning in *Norberg v. Wynrib* (1992) 92 D.L.R. (4th) 449, 481:

> "Fiduciary duties should not be superimposed on those common law duties simply to improve the nature or extent of the remedy".

Employees as fiduciaries

87 It is important to recognise that the mere fact that Dr Fishel is an employee does not mean that he owes the range of fiduciary duties referred to above. It is true that in *Blake* Lord Woolf, giving judgment for the Court of Appeal, said that the employer–employee relationship is a fiduciary one. But plainly the Court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion the Court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary. In *Blake* itself, as I have indicated, it was the receipt of confidential information. There are other examples. Thus every employee is subject to the principle that he should not accept a bribe and he will have to account for it (and possibly any profits derived from it) to his employer. Again, as Fletcher-Moulton L.J. observed in *Coomber v. Coomber* [1911] 1 Ch. 723 at 728, even an errand boy is obliged to bring back my change, and is in fiduciary relations with me. But his fiduciary obligations are limited and arise out of the particular circumstances, namely that he is put in a position where he is obliged to account to me for the change he has received. In that case the obligation arises out of the employment relationship but it is not inherent in the nature of the relationship itself.

88 As these examples all illustrate, simply labelling the relationship as fiduciary tell us nothing about which particular fiduciary duties will arise. As Lord Browne-Wilkinson has recently observed:

> "... the phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case." (*Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 206.)

This is particularly true in the employment context.

89 The employment relationship is obviously not a fiduciary relationship in the classic sense. It is to be contrasted with a number of other relationships which can readily and universally be recognised as "fiduciary relationships" because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category which Dr Finn, in his seminal work on fiduciaries, has termed "fiduciary offices". (See P.D. Finn, "Fiduciary Obligations" (1977)). As he has pointed out, typically there are two characteristics of these relationships, apart from duty on the office holder to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act; and the second is that these fiduciaries have considerable autonomy over decision making and are not subject to the control of those beneficiaries.

90 By contrast, the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or

implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers.

91 This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result from the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken. The position was succinctly expressed by Mason J. in the High Court of Australia in *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 C.L.R. 41 as follows:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

92 The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence—concepts which tend to shade into one another. As I have already indicated, Lord Millett has used precisely this language when describing the characteristic features which trigger fiduciary obligations. But he was not using the concepts in quite the same sense as they tend to be used in the employment field. Lord Millett was applying the concepts of loyalty and good faith to circumstances where a person undertakes to act solely in the interests of another. Unfortunately, these concepts are frequently used in the employment context to described situations where a party merely has to take into consideration the interests of another, but does not have to act in the interests of that other. This narrower concept of good faith is graphically demonstrated by the decision of Sir Nicolas Browne-Wilkinson V.-C. as he was, in *Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd* [1991] 1 W.L.R. 589. The case concerned the nature of the employer's power in a pension scheme to give or withhold consent to proposed pension increases. The Vice-Chancellor expressly agreed with the concession that this was not a fiduciary power, observing that:

> "... if this were a fiduciary power the company would have to decide whether or not to consent by reference only to the interests of the members, disregarding its own interests. This plainly was not the intention." (page 596)

93 However, he then went on to consider the nature of the term and analysed it as follows:

> "In every contract of employment there is an implied term:
> '... that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee,' *Woods v. W.M. Car Services (Peterborough) Ltd* [1991] I.C.R. 666, 670, approved by the Court of Appeal in *Lewis v. Motorworld Garages Ltd* [1986] I.C.R. 157. I will call this implied term 'the implied obligation of good faith'."

94 His Lordship held that whilst it was legitimate for the company to look after its own interests in the operation of the scheme, it could not do so for a collateral purpose detrimental to the employees.

95 It is plain that here the implied duty of good faith is being used in circumstances where no fiduciary obligation arises at all. Similarly, in *Mahmud v. Bank of Credit and Commerce International SA* [1998] A.C. 20 the House of Lords confirmed the existence of the term relied upon by the Vice-Chancellor although describing it as the duty of trust and confidence. In that particular context it was held to be a breach of the term for an employer to conduct a dishonest business. Clearly, however, the employer does not have to run his business solely by reference to the interests of the employees. Indeed, as Lord Steyn commented, the origin of the term is probably the duty of *co-operation* between the contracting parties. This is consistent with the recognition that the duty is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other. The duty of trust and confidence limits the employer's powers, but it does not require him to act as a fiduciary. It is a contractual but not a fiduciary obligation.

96 Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations. Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical: see *e.g. Neary v. Dean of Westminster* [1999] I.R.L.R. 288 at 290 where the mutual duty of trust and confidence was described as constituting a "fiduciary relationship".

97 Accordingly, in 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 Lord Upjohn commented in *Phipps v. Boardman* [1967] 2 A.C. 46 at 127:

> "Having defined the scope of [the] duties one must see whether he has committed some breach thereof and by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises."

98 It follows that fiduciary duties may be engaged in respect of only part of the employment relationship, as was recognised by Lord Wilberforce, giving judgment for the Privy Council in *New Zealand Netherlands Society v. Kuys* [1973] 1 W.L.R. 1126 at 1130:

> "A person ... may be in a fiduciary position quoad a part of his activities but not quoad other parts: each transaction, or group of transactions, must be looked at."

Applying the law to the facts

99 I now turn to consider the application of the law to the particular facts of this case. I shall distinguish between the situation where Dr Fishel undertook work at clinics abroad in his own right, and the situation where he earned money through the use of the embryologists under his control.

Working in his own right

100 The University alleges that Dr Fishel's position within the University was such as to make it obligatory on him to ensure that if any outside work was done for reward, he was obliged, in the absence of informed consent, to account for moneys earned to the University. It accepts that the mere fact that Dr Fishel was an employee is insufficient to create that duty, but it points to a number of features in the relationship which, it says, establishes it as a fiduciary one. Indeed, it contends that Dr Fishel owed duties at the higher end of the scale of fiduciary obligations.

101 The factors relied upon include the following: the fact that the University is an academic institution; that it is a publicly funded body; that he was employed in a separate and self-financing unit which was akin to a business; that he played a key role in that unit as its Scientific Director which, it is alleged, meant that he was in a similar position to an executive director of a company; and that his salary was fixed in part by reference to a bonus related to turnover.

102 I do not accept that his position could fairly be equated with that of an executive director of a company; he was more akin to a senior employee with the title of director. Further, in my opinion, when considering the context it is also relevant to bear in mind the fact that Dr Fishel was working in an environment where doing outside consultancy work was encouraged. There are many benefits to the University from its staff doing outside work, not least the fact that many academics are under-rewarded for their skills and may be tempted to leave the University unless they can supplement their income. However, notwithstanding that, I accept that the matters relied upon by the University would support the contention that the relationship is one which could in principle create fiduciary duties. The question is whether it has done so in the particular circumstances relied on here. If not, whether one says that there is no fiduciary relationship in all the circumstances, or whether one says that there is in principle such a relationship but it is not engaged in the particular case, is perhaps a matter of no great moment.

103 The University has relied upon two cases in particular in contending that Dr Fishel was in breach of the duty of conflict and interest. One was the *Neary* case which, for reasons I have already given, must be treated with some caution insofar as it suggests that a duty of loyalty can automatically be equated with a fiduciary duty. Moreover, it turned on improper use of position rather than conflict of duty and interest as such. The other was *Industrial Developments Consultants v. Cooley* [1973] 1 W.L.R. 433. In that case the defendant was an architect and the managing

director of the plaintiff company. In that capacity, he entered into correspondence with the Eastern Gas Board seeking to obtain work from them for his company. The attempt failed but subsequently the Board approached the defendant separately to see if he would do the work in his own right. As a result, he dishonestly found an excuse to leave the plaintiff company, set up a new company, and was engaged by the Gas Board to do the lucrative work which he had tried to secure for the plaintiff. Roskill J. held that he was in breach of his fiduciary duty and that he had to account for the profits gained. This was so even although he accepted that had the defendant persisted in his efforts to obtain the work for the plaintiff, he would only have had a 10 per cent chance of success. In the course of his judgment, he said this:

> "The first matter that has to be considered is whether or not the defendant was in a fiduciary relationship with his principals, the plaintiffs. Mr Davies argued that he was not because he received this information which was communicated to him privately. With respect, I think that argument is wrong. The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity was as managing director of the plaintiffs. Information which came to him while he was managing director and which was concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to pass onto the plaintiffs because between himself and the plaintiffs a fiduciary relationship existed ..."

104 The University has sought to base on these *dicta* the argument that Dr Fishel was obliged to pass on the opportunities to do the work he did abroad to the University itself. It was information which came to him whilst he was employed by the University and was relevant to them to know. I reject this argument. In my opinion Roskill J. was not saying that every opportunity which comes to an employee and is of interest to the company must be pursued for the benefit of the company (unless it consents otherwise). The important feature of the *Cooley* case, which is clearly implicit in this judgment, is that the defendant had a specific duty to secure contracts of this nature. Once that duty is undertaken, he cannot pursue the opportunity for himself, even although the third party wishes to engage him in his own right. He no longer has a private capacity but must act at all times in the employer's interests, even where the opportunity comes to him wholly independently of his employment.

105 This case can be contrasted with *Burland v. Earle* [1902] A.C. 83. Mr Burland, who was the President, director and manager of a company, purchased some assets from the liquidator of an insolvent company and later resold them at a significant profit to the company of which he was a managing director. The Privy Council held that he was not liable to account for the profits. Lord Davey, giving judgment for the Board, said this:

> "There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee of the purchased property. It may be that he had an intention in his own mind to resell it to the company; but it was an intention which he was at liberty to carry out or abandon at his own will."

106 A similar conclusion was reached by the High Court of Australia in relation to a managing director in *P and O Steam Navigation Company v. Johnson* (1937–1938)

60 C.L.R. 189. Whilst the courts might now take a less sanguine view of the scope of the duties of a managing director than those courts did, I consider that the principle enunciated in them remains good law. Dr Fishel can hardly be in a worse position than these senior managers.

107 In my opinion the crucial question is whether Dr Fishel was under a specific duty to secure the work abroad for the University. It is not relevant that his fiduciary duty may have been engaged in other circumstances, such as if he had treated patients at a competing clinic. In such circumstances the nature and scope of Dr Fishel's duties, when considered against the background of the factors relied upon by the University, may very well have been sufficient to trigger his fiduciary duty and make him accountable for any profits. The question, however, is whether it was engaged in these particular circumstances.

108 I do not think that it was. He was under no contractual obligation to seek to obtain work abroad of this nature on behalf of the University, nor in my opinion could he have been contractually obliged to do the work abroad that he did. It was recognised that he would be building up the international reputation of Nurture, but he could have achieved this with far less international involvement than he in fact had. The fact that the University approved of and benefited from the work (as opposed to the payment) cannot in my view create the fiduciary obligation. If Dr Fishel had done work of this kind in his spare time, I doubt whether the University either would, or could, have alleged that he was infringing any duty, not even the contractual duty not to compete, since these clinics abroad were not competitors. By contrast, it is clear that Mr Cooley was obliged to seek to secure the contract for the company employing him and could not have sought to keep it to himself by doing the work in his spare time.

109 In similar vein the University also relied upon a passage in Dr Finn's book where he says that "the important matter is whether or not that opportunity relates to a transaction falling within the scope of the business or venture". The University then says that since research and treatment was the core business of Nurture, it was an opportunity which should have been made available to the University. However, those words were made in the context of considering the scope of the fiduciary obligation as it applies to partners and joint venturers. Such persons are undertaking to share the work which falls within the scope of the partner or joint venture. The same principle cannot simply be treated as being automatically applicable in the very different context of the employment relationship. The employee does not in general promise to give his employer the benefit of every opportunity falling within the scope of its business. Nor do I accept that the bonus arrangements were such as to render the relationship akin to one of a joint venture.

110 It follows that I do not consider that the conflict of duty and interest principle was engaged by the mere fact of Dr Fishel working abroad. Given that I have concluded that the nature of the duties imposed on Dr Fishel were not such as to attract the operation of the conflict of duty and interest rules, it follows that neither could they attract the operation of the conflict of duty and duty rules. In taking the work he was not in breach of either of these "no conflict" duties.

111 The third way in which it was alleged that Dr Fishel was in breach of his fiduciary duties was by using his position to make a secret profit. The University relies upon the well-known cases of *Cook v. Deeks* [1916] A.C. 554 and *Regal (Hastings) Ltd v. Gulliver* [1942] 1 All E.R. 378. This principle overlaps with, but is sometimes wider than, the strict conflict of duty and interest rule which I have already addressed. It

prevents someone from using his position as a fiduciary to advance his interests. The short answer to this point is that Dr Fishel did not develop his connections with the clinics abroad by representing that he was acting on behalf of the University, nor did the opportunities to do the work arise because of his University connection. On the contrary, the clinics were indifferent to his University links. He did not use his University connection to obtain benefits that he would not otherwise have gained.

112 The University runs another related argument which is in essence very simple: it says that Dr Fishel was working for the University when he was abroad and accordingly anything paid to him for doing that work must be given to the University. It submits that whilst an employee may keep a small reward given to him by a grateful third party, who has benefited from the services provided by the employee (such as tips and occasionally larger sums: see *e.g.* "*The Parkdale*" [1897] P. 35), this case falls outside that category. There is force in this argument, but ultimately I reject it. Dr Fishel was not being paid by outside bodies because they were grateful for the service he provided in his capacity as a University employee; they were paying him pursuant to their own independent contractual arrangements with him. In my opinion the fact that he was also doing this work in pursuance of his University duties does not convert him into a fiduciary. It was not by virtue of that position that he did the work nor was it because of his position that he was remunerated for it. It would be strange if contractual duties also gave rise to fiduciary duties where the employer benefited from the breach but not where he did not.

113 I should add that there was one document strongly relied upon by the University that did appear to indicate that Dr Fishel had indeed diverted an approach to the University to himself. It is a fax to a Dr Naif sent in March 1996 in which Dr Fishel stated that:

> "Very briefly, the University position is a 20 per cent take of revenues for all activities of any unit we fully integrate our services with .... However, you could contract directly through me directly for a 'fee for service' provided by our highest trained professionals ..."

114 The University understandably wanted to see the document to which this is a reply, but apparently it has not been found. Dr Fishel maintains that he was simply indicating why he did not want to put the contract through NUCL. This seems to me to be the most plausible explanation, since otherwise the reference to 20 per cent seems strange. The University would plainly take all the revenues if it were a contracting party, and so it does not seem likely that that possibility was being considered. Accordingly, I accept Dr Fishel's explanation of this document.

Profiting from the work of other embryologists

115 As I have indicated, Dr Fishel also profited from the fact that he was paid for work done by other embryologists for whom he was responsible. In my opinion this activity has to be seen in a different light to his own activities abroad. It was his duty to direct the other embryologists what to do and where to do it. By accepting work for them from which he was directly benefiting, he was in my view clearly putting himself where there was a potential conflict between his specific duty to the University to direct the embryologists to work in the interests of the University, and his own financial interest in directing them abroad. The fact that

he did not in fact act contrary to the interests of the University is irrelevant: it is trite law that the potential conflict is enough.

116 I also consider that in respect of this element of the work, Dr Fishel did use his position to further his own interests. It was only by virtue of his position that he was able to have access to a ready supply of embryologists to assist him in the work. Moreover, even if he could have obtained a supply of embryologists elsewhere, the fact is that he did not do so. He did in fact use his position to secure their services abroad.

Was there inforemed consent?

117 I have already found that the contractual requirements as to consent were not complied with. However, Mr Underwood contends that such a finding is not conclusive when it comes to the question of fiduciary duties. He accepts that informed consent is needed but says that it was received. The argument goes as follows. Professor Symonds had authority to give consent for fiduciary purposes; he knew that the work abroad was taking place; and although he did not know how much was being earned, this was because he chose to turn a blind eye to that issue. Having chosen not to ask, the University must be taken to have accepted that Dr Fishel would earn a reasonable rate for the work, in accordance with the well established authorities of *Great Western Insurance Company v. Cunliffe* Law Rep. 9 Ch. App. 115 and *Baring v. Stanton* (1876) 3 Ch.D 502.

118 In my view this argument is wholly unsustainable. I suppost it is theoretically possible for the employer to require different modes of consent for contractual and fiduciary purposes, but wholly fanciful to believe that he would do so, and even more fanciful to suppose that he would have more lax requirements for the fiduciary duties than the contractual if he were to do so. There is no basis whatsoever to support the contention that there were different requirements in this case. Even more importantly, for reasons I have already given there are no grounds for saying that Professor Symonds had the authority to authorise outside work. Accordingly, I am wholly satisfied that there was no consent of any kind, let alone informed consent.

The remedy

119 The claimants are clearly entitled to an account of profits in respect of the fiduciary breaches I have identified. That is the appropriate remedy, but two issues arise in respect of it. First, how is the profit calculated? Secondly, should any allowance be given for the work and skill which Dr Fishel displayed in assisting and generally supervising the work of his subordinates?

120 I am not at this stage concerned with the precise figures. There is disagreement about them, and a further hearing may be required if they cannot be agreed. I have been asked to indicate the principles on which the profits should be calculated.

121 In my view, the profits in this case are simply the sums received by Dr Fishel in respect of the patients treated by the other embryologists employed by the University, less the payments made to those embryologists by Dr Fishel himself. That is the measure of his profit. The University contended that no allowance should be made for the payments he made to the other embryologists save to the extent that it represents overtime payments which would have been earned had they been in England. I do not accept that: to refuse such an allowance would be unjust and would mean that a relevant expense was simply being ignored. In

addition I consider that Dr Fishel should in principle be entitled to deduct any tax he has paid in respect of these profits, although this may need some qualification if he would be entitled to recover any such tax in consequence of this ruling. I shall if necessary hear further argument on this point.

122 The question of the appropriate allowance is more difficult. The possibility that such an allowance might be made where it was equitable to do so was recognised in *Boardman v. Phipps* [1967] 2 A.C. 46. One justification for this, recognised by the High Court of Australia in *Warman International Ltd v. Dwyer* (1995) 128 A.L.R. 201 is that if the profits are partly the result of the work of the fiduciary then they do not, to that extent, derive directly from the breach of fiduciary duty itself. However, in *Guinness plc v. Saunders* [1990] 2 A.C. 663 at 701 Lord Goff held that an allowance should be made only in circumstances when it would not have the effect of encouraging a fiduciary to put himself in a position where his personal interest might conflict with his duty. The University relies on this case for the proposition that no compensation should be made in this case. In the *Guinness* case itself the appellant was a director of the company who was claiming over £5 million for services which, it was assumed, were rendered in good faith to Guinness. However, the payment was related to the amount of any successful bid by Guinness for the Distillers company. In that case the arrangement was plainly placing the appellant in a position where, in his capacity as a director, he would be put in the starkest of conflicts. His interest would benefit from a high bid; his duty to the company obliged him to give independent and impartial advice about whether to make a bid at all, and if so, to seek to secure Distillers for the lowest possible bid. It is, with respect, easy to see why the Court thought it would be wrong to make any allowance at all in respect of an arrangement so obviously inimical to the director's duty. In my opinion it would also be likely in many cases to infringe Lord Goff's principle to award a fiduciary the full value of the services rendered. Even shorn of any profit element, fiduciaries would not necessarily be encouraged to hold to the straight and narrow if they were to be properly rewarded for their breach of fiduciary duty. However, in an appropriate case I do not consider that the principle would preclude some reward for services rendered, albeit not compensation representing the full value of those services. This would hardly encourage breaches of duty in the normal case.

123 Accordingly, I do not consider that *Guinness* bars the way to any allowance being made. However, any sum awarded must be equitable in all the circumstances. In my opinion a crucial feature of this case is that Dr Fishel was drawing his University salary whilst doing this work, and indeed contends that it was an acceptable way of performing his duties. If he had received payment in accordance with his contract, he would have received 5 per cent of the income received from these patients, save after the renegotiated contract when he would have received nothing because the cap was apparently reached. I consider that it would be equitable to award that sum in this case.

124 Accordingly, I consider that the starting point should be that Dr Fishel should pay to the University 95 per cent of the moneys received relating to those patients in respect of whom other University embryologists received payment from Dr Fishel until the new salary arrangements came into force, from which time it should be 100 per cent. In each case, however, Dr Fishel can deduct from those amounts the sums he paid to the embryologists. As I have indicated, I will hear further argument if necessary on the question how far potential tax rebates may affect matters, as well as on the question of interest.

The claim for "springboard" damages

125 The University alleges that as a result of his breaches of contract, Dr Fishel was able to establish and maintain links with clinics in Italy, Cairo, Catania and Saudi Arabia, and profits from them immediately on termination, whereas if he had acted lawfully he would have had to build the connection from scratch. Accordingly, it says that he should have to account for the profits that he has earned as a result of gaining this "springboard". The relevant period for which it is said he should account is then identified by reference to how long it took him originally to forge links with these clinics. The argument is slightly different in relation to the Biogenesi contract. There it has been established that Dr Fishel has a contract running until March 2000. The University contends that it should derive benefits for a period which would have elapsed whilst the contract would have been renegotiated.

126 I do not consider that this claim is sustainable. No claim can be based upon any breach of fiduciary duty, since I have held that in doing this work abroad for pay, Dr Fishel did not break any such duty. As to the breach of contract, I have concluded that the University would not have performed these contracts even if it could sustain the argument that contractually it ought to have been given the chance to do so. Accordingly, it has suffered no loss since Dr Fishel is not doing the work in its place. The position might have been otherwise if the clinics abroad were in competition with Nurture, but they are not, as Professor Symonds recognised. In my view it is wholly unrealistic to say that this competition is demonstrated by the fact that a very few patients were encouraged to attend clinics abroad when it was considered to be in the patient's interests to do this, Dr Fishel will not, therefore, be damaging Nurture's existing business by working abroad. This fact distinguishes this case from *Roger Bullivant Ltd v. Ellis* [1987] I.C.R. 464, the authority relied upon by the University, where an employer obtained an injunction to restrain a former employee from using information, obtained during his employment, to set up in competition with his employer earlier than he would otherwise have been able to do. Even if this principle can be extended from the use of information to the exploitation of opportunity, there can be no claim unless damage is suffered, and here there was none.

127 I should add that in any event I do not think that it is realistic to assume that it would have taken Dr Fishel the same time to forge these links if he had been a free agent as it did when he was connected with the University. He is essentially selling his skill, which is widely respected, and his labour. I have little doubt that these clinics would have jumped at the chance of having his name connected with theirs. As to the Biogenesi contract, it is in my opinion virtually inconceivable that the clinic would have bound itself to the University in circumstances where the University was no longer able to suply Dr Fishel's services. Accordingly, any benefits from that contract would have come to an end on the termination of his contract with the University.

Inducing breaches of contract

128 The University also claims damages for inducing breaches of contracts. It is alleged that Dr Fishel, with knowledge of the terms of the contracts of the other embryologists, induced them to work abroad in breach of those contracts. It is accepted that they did not obtain consent in accordance with the terms of their contracts.

129 In view of the conclusion I have reached in relation to the question of breach of fiduciary duty, it is not strictly necessary for me to analyse this matter. However, since damage is an essential ingredient of this tort, and I have found that there was no damage caused to the claimants, I do not think this cause of action has been made out. It is not necessary for me to explore potentially difficult areas of knowledge and intention.

Conclusions

130 In the circumstances I find that Dr Fishel is liable for breach of contract, but since I have found that there is no loss to the University, there are no damages. He is also, in my judgment, liable for breach of fiduciary duty in making profit out of the treatment carried out abroad by embyrologists working under his supervision. If the sums due, calculated in accordance with the principles I have set out above, cannot be agreed, there will have to be a further hearing to agree the relevant figures.