Neutral Citation Number: [2012] EWHC 80 (QB)

Case No: HQ11X03120

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th January 2012

Before:

MR JUSTICE HADDON-CAVE

- -

Between:

QBE MANAGEMENT SERVICES (UK) LIMITED	**Claimant**
- and -	
(1) CHARLES DYMOKE	
(2) JOHN HEARN	
(3) STEVEN KIRK	
(4) PRO INSURANCE SOLUTIONS LIMITED	**Defendants**

- -
- -

David Reade QC and Dale Martin (instructed by **Mayer Brown International LLP**) for the **Claimant**
Selwyn Bloch QC, Damian Brown, Craig Rajgopaul-Hicklin (instructed by **Morgan Lewis & Bockius LLP**) for the **Defendants**

Hearing dates: 2nd, 3rd, 7th, 8th, 10th, 11th, 14th, 15th, 18th, 21st, 22nd and 23rd November 2011

- -

Judgment

The Hon. Mr Justice Haddon-Cave:

INTRODUCTION

Expedited trial

1. On 28th April 2011 the First, Second and Third Defendants resigned from employment with the Claimant and said that they intended to commence a start up business with the Fourth Defendant. Their resignations were followed by a spate of eight further resignations by employees of the Claimant in the next three months, all of whom expressed an intention to join the Fourth Defendant.

2. On 25th August 2011 Mr Justice Parker granted the Claimant an interim injunction against the Defendants and ordered a speedy trial. On 18th October 2011 Mr Nigel Wilkinson QC, sitting as a Deputy High Court Judge, granted the Claimant further

interim relief. On 28th October 2011 the Court of Appeal rejected the Defendants' application to appeal the latter order and confirmed the need for an expedited trial.

3. An expedited trial of the Claimant's claim against the Defendants for final injunctive and other relief took place before me between 2nd and 23rd November 2011. In order that the parties should know where they stood as soon as possible, I gave my decision on the last day of the Michaelmas term, 21st December 2011, granting the Claimant 'springboard' relief until 28th April 2012. These are the reasons for my decision.

Background

4. The case arises in the context of Protection & Indemnity ("P&I") marine insurance. It concerns a well-known P&I entity called 'British Marine'. British Marine was founded in 1876. It originally comprised a small group of mutual insurance clubs offering Hull insurance to owners of steamers and sailing ships on a mutual basis. It subsequently expanded and migrated into other types of insurance, including P&I, Defence and Collision cover.

5. Today, British Marine remains a key specialist player in the marine insurance market, underwriting P&I and Hull and Machinery ("H&M") for small and medium sized ships up to about 10,000 GRT. Following de-mutualisation in 2000, British Marine became a fixed-premium insurer. It is the most prominent P&I insurer outside the International Group of P&I Clubs ("IG"). The IG comprises the 13 major P&I Mutuals who together insure some 90% of the world's tonnage. British Marine's only significant rival in the niche fixed premium sub-10,000 GRT market is Shipowners Mutual P&I Association ("Shipowners P&I"). British Marine's history as a mutual meant that it had a loyal following and a high rate of renewals.

6. In 2005 British Marine was acquired by QBE Insurance Group ("QBE Group"). QBE Group is a large insurer and re-insurer which operates in some 49 countries and has over 13,500 employees worldwide. It has its headquarters in Australia. QBE Group's UK employees are employed by a subsidiary service company, QBE Management Services (UK) Limited ("QBE"), the Claimant in this action. The trading name 'British Marine' has been retained and the entity now forms part of the Marine, Energy and Aviation Division of QBE European Operations which employs some 2,800 employees. In June 2010, British Marine moved from its long-established offices at Walsingham House in Seething Lane in the City, where it had been for 25 years, to the headquarters of QBE European Operations at Plantation Place in Fenchurch Street.

The Parties

7. The First, Second and Third Defendants were employed by QBE in the British Marine part of its European Operations. The First and Third Defendants were already employed by British Marine at the time of its acquisition by QBE Group in 2005. The First Defendant, Charles Dymoke, joined British Marine in 2003, became Head of P&I Underwriting in 2005 and was named P&I Portfolio Manager in January 2011. The Second Defendant, John Hearn, joined British Marine in 2006 and was the third most senior underwriter after Mr Dymoke and Tim Harris, the Head of British Marine. The Third Defendant, Steven Kirk, joined British Marine in 2001 and was a senior figure in the Claims Department.

8. The Fourth Defendant, PRO Insurance Solutions Limited (" PRO "), is a large provider of support and resources to insurance and re-insurance operations. It has offices in the USA and Europe, including London. It is a wholly-owned subsidiary of TAWA plc ("TAWA") which specialises in acquiring run-off portfolios of insurance and re-insurance companies. PRO is the service provider to TAWA.

9. Following their resignations on 28th April 2011, Mr Dymoke and Mr Hearn were put on 'garden' leave until the expiry of their respective six-month and three-month employment contract notice periods. Mr Kirk was required to remain working in the Claims Department until the expiry of his three-month employment contract notice period.

Further resignations

10. The trio of resignations of Mr Dymoke, Mr Hearn and Mr Kirk on 28th April 2011 was followed by a further spate of eight resignations from British Marine in the next three months, as follows: (i) James Kent on 27th May 2011; (ii) Kevin Healy on 31st May 2011; (iii) Richard Linacre on 1st June 2011; (iv) James Petrie on 8th June 2011; (v) Vicky Clarke on 11th July 2011; (vi) Gillian Cooper on 12th July 2011; (vii) Shiladitya Bose on 15th July 2011; and (viii) Carl Gill on 4th August 2011. These resignations comprised five people from the P&I Underwriting Department (Mr Kent, Mr Healy, Mr Petrie, Ms Clarke and Ms Cooper) and three from the Claims Department (Mr Linacre, Mr Bose and Mr Gill). All eight employees resigned in order to join with PRO at the new venture being set up with Mr Dymoke, Mr Hearn and Mr Kirk. Mr Healy, however, subsequently had a change of heart and returned to British Marine. Three other British Marine employees who were also approached to join PRO at this time refused and remained at British Marine. They were Matthew Ginman and Carl Glover, both Assistant P&I Underwriters, and Gerald Hamerston, a Senior Claims Adjuster.

11. Another British Marine employee in the Underwriting Department, Matthew Hunt, resigned from British Marine in October 2010 and joined Shipowners P&I. He then later re-emerged as an employee of PRO at the new venture.

12. It was unusual for QBE to have so many employees resign in such a short space of time. In the year ending 30 April 2011, QBE lost only 30 employees across its entire European Operations, of which a third were those from British Marine listed above.

First injunction

13. The interim injunction granted by Mr Justice Parker on 25th August 2011 had three effects: (i) it enforced Mr Dymoke's 'garden' leave and duty of good faith and fidelity until final termination of his employment on 27th October 2011; (ii) it enforced of the non-competition covenants of Mr Hearn and Mr Kirk until their expiry on 27th October 2011 and 27th January 2012 respectively; and (iii) it prohibited PRO from inducing a breach of contract by Mr Dymoke, Mr Hearn and Mr Kirk. Mr Justice Parker also gave directions for disclosure and a timetable for a speedy trial.

Disclosure

14. Following Mr Justice Parker's order for disclosure, the Claimant received some 55 lever arch files of documents from the Defendants. The Claimant said that examination of this disclosure revealed a very different picture from the one which it had hitherto been led to believe, that the First, Second and Third Defendants had simply been head-hunted by the Fourth Defendant. The Claimant's case was that the disclosure showed substantial unlawful conduct by the Defendants in four respects. First, broad-scale solicitation by Mr Dymoke, Mr Hearn and Mr Kirk. Second, substantial misuse of confidential information belonging to British Marine in order to assist the new venture. Third, solicitation by them of British Marine's broker customers. Fourth, a failure to disclose to British Marine management any of these activities or the setting up of a rival competitor.

Second injunction

15. The Claimant contended that the Defendants had not told the full story in evidence put before the Court responding to the original injunction application and sought further, wider relief. The Claimant contended that the documents showed that the Defendants had obtained a major 'springboard' advantage for their new venture, by reason of months of concealed unlawful conduct and numerous breaches of express duties of subsisting contracts of employment.

16. On 18th October 2011, QBE sought a second interim injunction from Mr Nigel Wilkinson QC, sitting as a Deputy High Court Judge, widening the scope of the previous order to embrace the other resignations and extending the protection until trial on a 'springboard' relief basis, restraining the Defendants from what the Claimant said would be shown to be an unfair competitive advantage gained over QBE. Mr Nigel Wilkinson QC noted that the witness statements served by the Defendants appeared to have *"shifted significantly"* in their content since the disclosure and granted the further interim relief. As stated above, on 28th October 2011 the Court of Appeal dismissed the Defendants' appeal against Mr Nigel Wilkinson QC's order.

The parties' rival contentions

17. The parties' rival contentions in this case can be briefly summarised as follows.

18. The Claimant contended that the resignations were part of a careful, covert and concerted plan, hatched by Mr Dymoke and Mr Hearn whilst still employed by QBE in 2010, to 'rip the heart out' of the underwriting and claims handling business of British Marine and transfer it in to a new vehicle of their own. QBE said that the plan was 'nurtured and covertly advanced' by Mr Dymoke and Mr Hearn through the solicitation of fellow employees (starting with Mr Kirk) and broker clients and the misuse of confidential information; that the aim was to poach the core underwriting and claims teams at British Marine and pitch for British Marine's book of business from the new entity; that the launch of the new entity with financial and insurer backing was only possible because of 'numerous abuses and breaches' of Mr Dymoke, Mr Hearn and Mr Kirk's contracts of employment and duties of fidelity and, in Mr Dymoke's case, fiduciary duties; that PRO were privy to, instrumental and implicated in, much of what was going on; and the new venture, which was originally called *"Phoenix"* but re-named *"Lodestar"*, had thereby gained an unlawful 'head start'. Accordingly, the Claimant sought a final injunction preventing further

unlawful conduct until the 'springboard' advantage had expired, together with enforcement of the various restrictive covenants and damages.

19. The Defendants contended that the picture painted by the Claimant was unfair and incorrect, both in its detail and as to the overall nature of what had taken place during the period early 2010 to mid 2011. Mr Hearn had long harboured a desire to set up his own marine insurance business. He and Mr Dymoke had had early discussions in 2010 which mutually led them to aspire to set up a new venture together. Mr Hearn had discussed it with Mr Kirk who asked to be involved and they did enlist his assistance. They also used the limited services of Mr Kent at a couple of meetings with third parties. There were only ever vague discussions with other employees. At no stage, however, was there any 'solicitation' of employees. There was some use of British Marine's documentation for the proposed competitive venture but it was limited and it was, in the main, not confidential. In so far as Mr Dymoke and Mr Hearn did cross any permissible line, such transgressions were minor and could not possibly justify the 'springboard' relief sought. The reality was that morale at British Marine was low in 2010 and such was the status and following of Mr Dymoke, Mr Hearn and Mr Kirk that their resignations from British Marine on 28th April 2010 inevitably triggered the exodus from British Marine of the other employees which in fact occurred in the next three months. In so far as there were any breaches by way of non-disclosure to management, the consequence would simply have been that Mr Dymoke and Mr Hearn would have been put on 'garden' leave earlier and there would have been an earlier start up.

THE EMPLOYMENT CONTRACTS

20. I set out first details of the relevant employees of British Marine and their employment contracts.

First Defendant: Charles Dymoke

21. Mr Dymoke joined British Marine in 2003. He was first appointed as Co-Head of the P&I Underwriting Department. On retirement of his co-head in 2005, Mr Dymoke became solely responsible for P&I at British Marine. His title in 2011 was 'P&I Portfolio Manager'. All the P&I underwriters reported to him. He in turn reported to the Head of British Marine, Tim Harris, who in turn reported to the Chief Underwriting Officer, Mr Colin O'Farrell. Mr Dymoke was obliged to give six months' notice prior to termination, during which period he was placed on 'garden' leave. His employment ended on 27th October 2011.

22. Mr Dymoke's contractual obligations are contained in his original contract of employment with British Marine Management Ltd dated 28th April 2003 which was then transferred to QBE under TUPE in 2006. The terms of Mr Dymoke's contract of employment included the following:

    (a) Under Clause 3.1 Mr Dymoke agreed diligently and faithfully to perform such managerial, administrative and other duties as were associated with his role or such other duties as may reasonably be assigned to him. He also undertook to use his best endeavours to promote and protect the interests of the Group.

(b) Under Clause 3.2, Mr Dymoke agreed that he would "*fully and properly disclose to the Board and the Managing Director all of the affairs of the Group of which he is aware*".

(c) Under Clause 3.4. he agreed not to be directly or indirectly interested in any manner in other business except for two limited exceptions which do not apply in the present case;

(d) By clause 12.1 he agreed not to make use of or divulge to any person, *"and to use his best endeavours to prevent the use, publication or disclosure of"* any information of a confidential or secret nature as defined (without limitation of time, see clause 12.3);

(e) Clause 15.4 of Mr Dymoke's contract of employment provided:

> "*The Company may, at its absolute discretion, require the executive not to attend his place of work for the duration of any notice period and may relieve the Executive of some or all of his contractual duties during that period ("Garden Leave"). All of the Executive's rights, duties and obligations under the agreement shall continue to apply during any period of Garden Leave.*"

(f) Clause 16 contained various post-employment protective covenants including the non-solicitation or enticement of employees for a period of 12 months from the date giving notice of termination of employment, *i.e.* until 28th April 2012 (see further below).

23. It was an implied term of Mr Dymoke's employment that he would act at all times towards the Claimant with all good faith and fidelity.

Fiduciary Duty

24. There was an issue as to whether, in addition to his express contractual duties and duties of good faith and fidelity, Mr Dymoke also owed a fiduciary duty to the Claimant. The test as to the existence of fiduciary duties in the employment sphere was succinctly stated by Elias J. in *Nottingham University v Fishel* [2000] ICR 1461 at 1493E-J as follows:

> *"... 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."*

(Cited and applied by Burton J. in *PMC Holdings Limited v Smith and others* (Unreported, 23 April 2002).)

25. Mr Dymoke held a senior and important position in British Marine. He played a pivotal role in the P&I part of the business. He was responsible for all the P&I underwriters, including Mr Hearn. He was equivalent to a desk head. Although not a statutory director of the Claimant, he had been a statutory director of the company

which was the original employer of the British Marine staff, British Marine Management Ltd. P&I had been divided into Syndicates A and B but these were merged under Mr Dymoke. He was the most senior executive within the British Marine Business after the Head of British Marine, Mr Harris, and its Chairman, Mr Robert Johnston.

26. Mr Dymoke also had a high level of trust placed in him by the Claimant. He was the sole P&I representative on the Divisional Management Committee. As such, he was given access to sensitive business information, quarterly accounts, financial performance information, claims data and information relating to broker relationships and performance against targets. He was also involved in developing and implementing QBE's strategic business plans.

27. For all these reasons, in my judgment, Mr Dymoke did owe a fiduciary duty to the Claimant in the context of his contract of his employment. In coming to this conclusion, I have put to one side Mr Dymoke's alleged admission to this effect at a meeting with Mr O'Farrell on 6th April 2010 (which was denied by him).

Summary of Mr Dymoke's duties

28. Accordingly, therefore, in my judgment, Mr Dymoke owed three principal duties to the Claimant. First, a duty to act in good faith in the best interests of the Claimant, which included, as an incidence thereof, a positive duty to inform the Claimant in a timely manner of any activity, actual or threatened, which might damage the Claimant's interests. Second, a duty to use his best endeavours to promote and protect the interests of the Group of companies of which the Claimant formed part. Third, a duty not to place himself in a position in which his interests, or any duties owed by him to any third party, might conflict with the interests or duties owed by him to the Claimant;

Second Defendant – John Hearn

29. Mr Hearn joined British Marine in 2006 as a senior underwriter in the P&I Division of British Marine. He was the next most senior underwriter under Mr Dymoke. He resigned with Mr Dymoke and Mr Kirk on 28th April 2011. He was required to give three months' notice of termination, during which period he was placed on 'garden' leave. His employment ended on 27th July 2011.

30. Mr Hearn's contract of employment was dated 22nd November 2006 and included the following express terms:

    (a) Under clause 3(c), an obligation *inter alia* to use all reasonable endeavours to promote the interests and reputation of the Claimant and other companies in the corporate group;

    (b) Under Clause 3(d) to *"...keep the Company fully informed of your conduct of the business, finances or affairs of the Company, and any Group Company or any division or Syndicate in a prompt and timely manner."* (Mr Hearn accepted that this included an express reporting obligation in relation to his conduct of the business, finances or affairs of the Company).

(c) By clause 4, it was provided:

> *"(a) You must devote the whole of your time, attention and abilities during your hours of work for the Company to your duties for the Company. You may not, under any circumstances, whether directly or indirectly, undertake any other duties, of whatever kind, during your hours of work for the Company.*
> *(b) You may not, without the prior written consent of the Company engage, whether directly or indirectly, in any business or employment which is similar to or in any way connected or competitive with the business of the Company outside your hours of work for the Company.*"

Clause 4 also obliged Mr Hearn to bring this clause to the attention of any future employer or contractor.

(d) By clause 8, Mr Hearn agreed not to:

> *"(a) disclose or use for purposes unconnected with your Employment any Confidential Information which is imparted or otherwise made available to you or learnt by you whilst in Employment to any unauthorised person…";*
> *(b) copy or reproduce in any form… or allow others access to copy or reproduce any documents… on which Confidential Information may from time to time be recorded or referred to; or*
> *(c) remove from the Company or any Group Company's premises any Documents."*

Third Defendant – Steven Kirk

31. Mr Kirk was employed in British Marine's Claims Department, latterly as Claims Service Manager. He reported to the Claims Manager, Paul Sheppard, who in turn reported to the Director of Claims, Gary Crowley. Mr Kirk was the most technically able within the claims team and dealt with the larger and more complex claims. Other members of the team would come to him for advice.

32. Mr Kirk also resigned on 28th April 2011. Unlike Mr Dymoke and Mr Hearn, however, he was not placed on 'garden' leave but required by QBE to remain working until the expiry of his three month notice period on 27th July 2011. QBE now says that it would not have done so if it had known of the true extent of Mr Kirk's prior activities with Mr Dymoke and Mr Hearn.

33. Mr Kirk's contract of employment was dated 22nd November 2006 and contained the same terms as those set out in relation to Mr Hearn above.

Post-termination restraints

(a) Non-competition and other covenants

34. Mr Hearn, Mr Kirk, Mr Kent, Mr Linacre, Mr Petrie, Ms Clarke, Ms Cooper and Mr Gill, were subject to post-termination restraints in the form of standard covenants

covering (i) non-competition, (ii) non-dealing with customers, (iii) non-solicitation of customers, (iv) non-enticement of employees and (v) non-representation as follows:

"Restrictions after Termination of Employment (only for staff on 3 or 6 months notice)

(a) Since you have obtained and are likely to obtain Confidential Information relating to the business of the Company or any Group Company and personal knowledge and influence concerning clients and customers of the Company or any Group Company in the course of your employment with the Company, you hereby agree with the Company that you will not during your Employment or:-

(i) For a period of 6 months from the Termination Date either on your own account or for any person, firm or company directly or indirectly be employed or engaged anywhere within the United Kingdom in any capacity involving substantially similar duties for any other person, firm or company in competition with the Company or any Group Company without the prior written consent of the Company; or

(ii) For a period of 6 months from the Termination Date either on your own account or for any person, firm or company directly or indirectly have any dealings in relation to the supply of goods or services dealt with by the Company or any Group Company for whom you have provided services under your contract of employment with any customer (including but not limited to any insured, broker and/or intermediary, whether actual or prospective) of the Company or Group company with whom you dealt, in the 12 months prior to the Termination Date; or

(iii) For a period of 6 months from the Termination Date either on your own account or for any person, firm or company directly or indirectly in relation to the supply of goods or services dealt with by the Company or any Group Company for whom you have been provided services under your contract of employment solicit or endeavour to solicit or entice the custom of any customer (including but not limited to any insured, broker and/or intermediary, whether actual or prospective) of the Company or any Group Company with whom you dealt in the 12 months prior to the Termination Date; or

(iv) For a period of 6 months from the Termination Date either on your own account or for any person, firm or company directly or indirectly solicit or entice away or endeavour to solicit or entice away from the Company or any Group Company any person who was an agent, consultant or Key Employee during the 12 months prior to the Termination Date with whom you had personal contact or dealings in the 12 months prior to the Termination Date; or

(v) From the Termination Date will not in the course of carrying on any trade or business or for the purpose of carrying on or retaining any business or custom represent or otherwise indicate any present or past association with the Company or any Group company."

35. Mr Bose was subject to (ii), (iii), (iv) and (v) above but not the non-competition covenant (i).

36. Mr Hearn, Mr Kirk, Mr Kent, Mr Linacre, Mr Petrie, Ms Clarke, Ms Cooper and Mr Gill all had three month notice periods

37. Periods of 'garden' leave are set off from the duration of the covenants. Mr Hearn became free of his post termination restraints on 27th October 2011. Mr Kirk will continue to be subject to his restrictions until 27th January 2012.

Mr Dymoke's post-termination restraints

38. Mr Dymoke's contract of employment contained the following post-termination restrictive covenants:

> *"16.1 Subject to Clause 15.2, the Executive will not within the period of 12 months after the date on which notice of termination of his employment is given by or to the Executive, whether directly or indirectly and whether alone or with any other person, either as a principal, shareholder, director, employee, agent, consultant or otherwise:*
>
> *(a) interfere with, tender for, canvas, solicit or endeavour to entice away from the Company the business of any person who at the date of termination of the Executive's employment or during the 12 months immediately preceding that date was, to the knowledge of the Executive, a customer, client or agent of, or supplier to, or had dealings with the Company;*
>
> *(b) supply, carry out, undertake or provide any product or any service similar to those with which the Executive was concerned during the period of 12 months immediately preceding the termination of the Executive's employment to or for any person who, at the date of the termination of the Executive's employment or during the period of 12 months immediately preceding that date was a customer, client or agent of, or supplier to, or was in the habit of dealing with the Company;*
>
> *(c) be employed by, or enter into partnership, interfere with, solicit or endeavour to entice away the employment of, or employ or attempt to employ or negotiate or arrange the employment or engagement by any other person of, any person who to the Executive's knowledge was, at the date of the termination of the executive's employment, or in the period of 12 months immediately preceding that date had been a senior employee of the Company and with whom the Executive had personal dealings during that period;*
>
> *(d) solicit, interfere with, tender for or endeavour to entice away from the Company any contract, project or business, or renewal of any of them, carried on by the Company which is currently in progress at the date of the termination of the Executive's employment or was in the process of negotiation at that date and in respect of which the Executive had contact with any customer, client or agent of or supplier to the Company at any time during the period of 12 months immediately preceding the termination of the Executive's employment.*
>
> *16.2 None of the restrictions contained herein shall prohibit any activities by the Executive which are not in direct or indirect competition with any business being carried on by the Company at the date of termination of the Executive's employment."*

39. It will be seen that Mr Dymoke's post-termination restrictions did not include a non-competition covenant *per se*. His contract was in different form since it had been entered into before the acquisition of British Marine by QBE and then transferred to

QBE under TUPE. He was subject, however, to a six-month notice period and 12 month restrictions from the date of giving notice. This meant that the Claimant was entitled to put him on six months 'garden' leave until 28th October 2011, and to enforce his above post-termination restrictions until 28th April 2012. In practice, therefore, the post-termination restrictions on Mr Dymoke were even more extensive than his more junior colleagues.

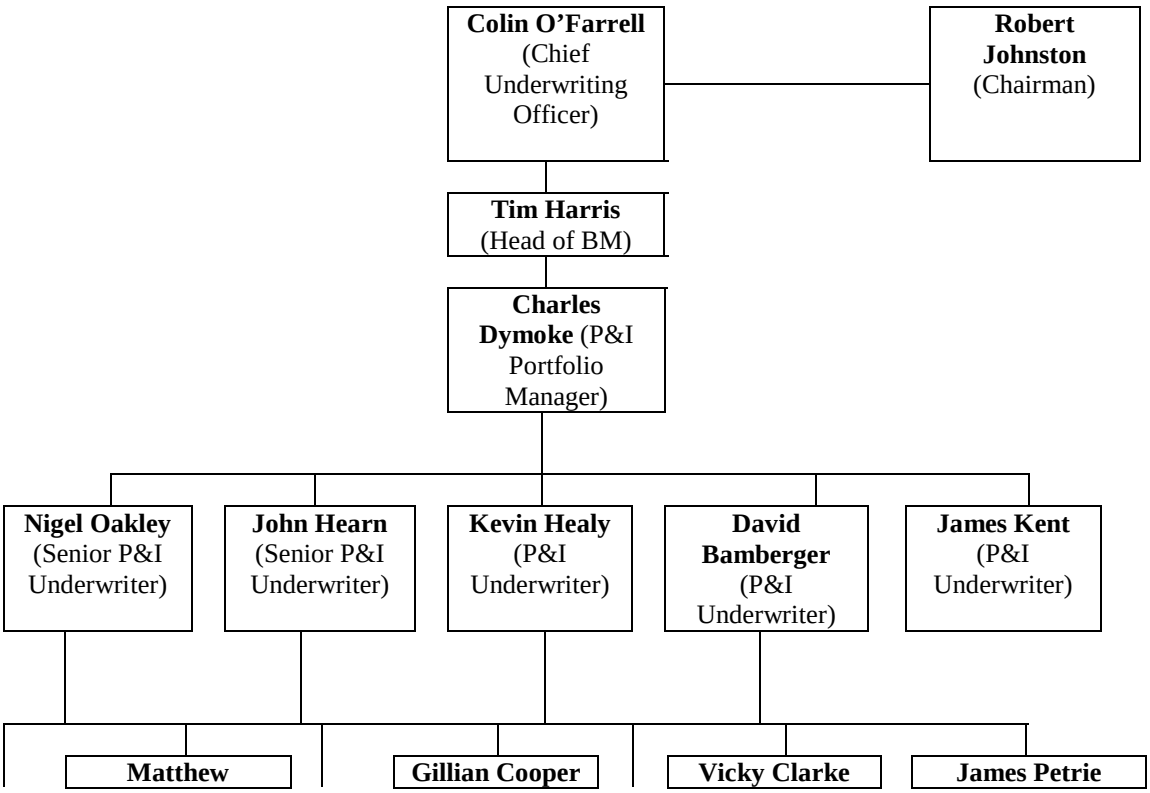
STRUCTURE OF BRITISH MARINE

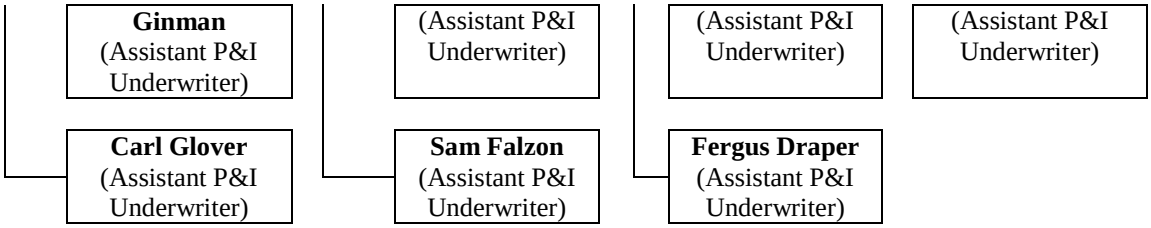
40. I now set out the overall structure of the British Marine underwriting and claims departments and the relative positions of Mr Dymoke, Mr Hearn and Mr Kirk and other personnel who resigned. This is best explained by the two organograms below. The Chairman of British Marine was Robert Johnson. The Chief Underwriting Officer was Colin O'Farrell.

Underwriting department

41. The first organogram shows the British Marine underwriting department as at October 2010. It will be seen that Mr Dymoke reported to the Head of British Marine, Mr Harris. Mr Hearn was one of the underwriters who reported to Mr Dymoke as P&I Portfolio Manger.

British Marine Underwriting (as at October 2010)

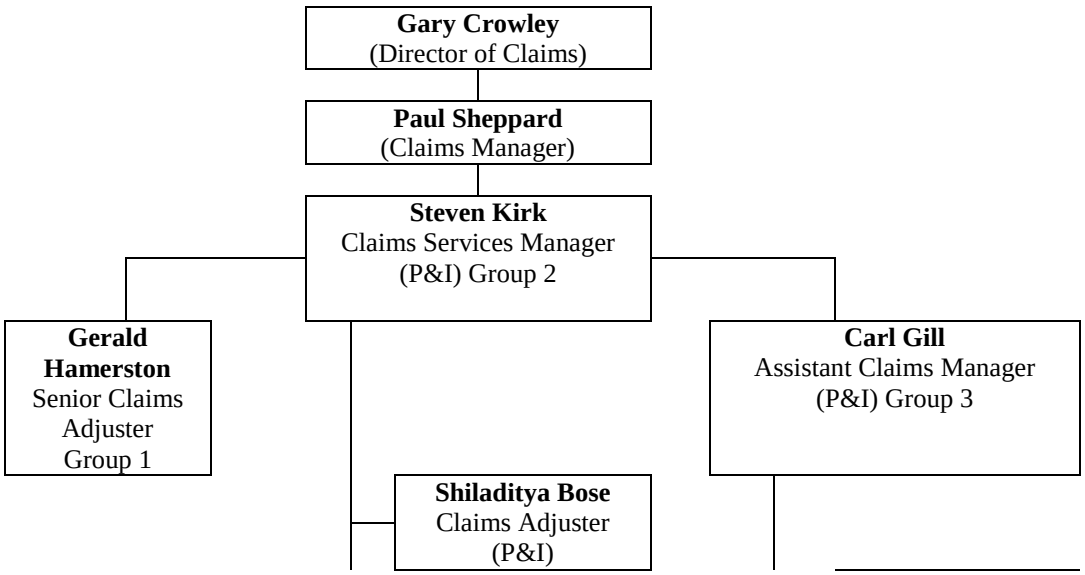


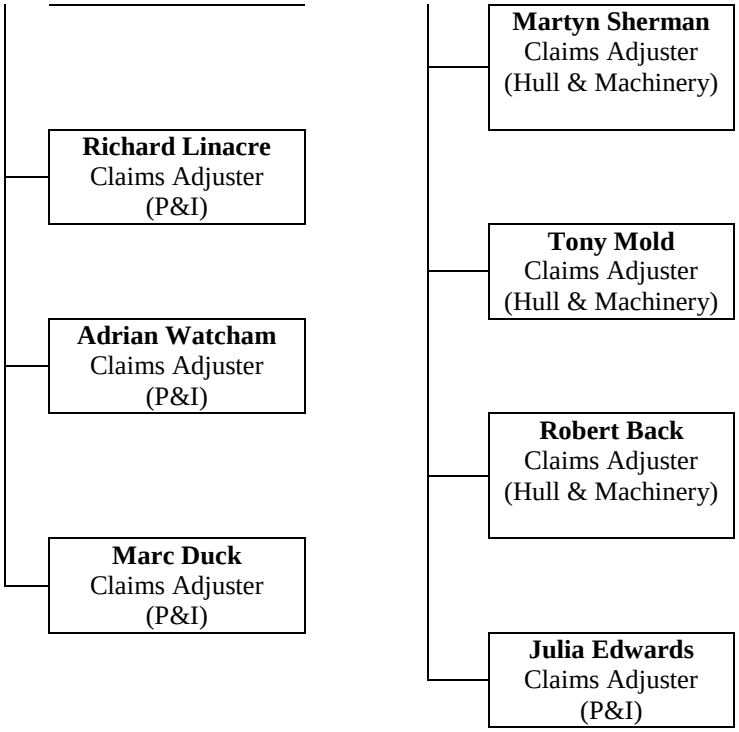


Claims department

42. The second organogram shows the British Marine claims department as at October 2010. Mr Kirk reported to the Claims Manager, Paul Sheppard, who in turn reported to the Director of Claims, Gary Crowley.

British Marine Claims (as at October 2010)





THE FACTS

43. I set out below my findings of fact as to what transpired between early 2010 and mid-2011 when the first injunction was issued. My findings of fact are based on my analysis of the extensive documentation and my view of the witnesses and their evidence.

Disclosure all important

44. This is a case in which disclosure has been all important. The 55 bundles of documents received by the Claimant were whittled down to some 16 lever-arch files before the Court, comprising 7,000 pages of documents. Much of this documentation comprised contemporaneous exchanges between the Defendants themselves. It is evident that Mr Dymoke, Mr Hearn and Mr Kirk did not envisage that many of their candid exchanges would see the light of day. These contemporaneous documents tell their own story. It is a story which accords closely with the Claimant's case. For convenience and ease of reference, I refer to documents by their page number in th Trial Bundle, *e.g.* (1234).

Witnesses

45. Three witnesses were called to give evidence for the Claimant: Mr Healy, Mr Ginman and Mr O'Farrell. Seven witnesses were called to give evidence for the Defendants: Mr Dymoke, Mr Hearn, Mr Healy, Mr Kent, Mr Linacre, Mr Petrie and Mr Gibbons.

46. Without exception, I preferred the evidence of the Claimant's witnesses to that of the Defendants' witnesses. The Defendants' witnesses' evidence, for the most part, flew in the face of the contemporaneous documents. Their explanations were generally

improbable, disingenuous or simply risible. It is clear that, having resigned and burnt their boats, the Defendants' main witnesses gave evidence to suit their case. They had no answer, however, to the version of events that emerged clearly from the contemporaneous documents. For the Claimant, Mr O'Farrell, Mr Healy and Mr Ginman were impressive witnesses. The latter two were frank about their early ambition to be part of the new venture and their subsequent change of heart.

47. Cases such as the present are necessarily fact sensitive and fact dense, as the authorities make clear. It is necessary, therefore, for the Court to embark on a careful and detailed analysis of the evidence. In carrying out this exercise, it is useful to bear in mind Goff L.J.'s guidance in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57 as the importance of contemporaneous documents when considering the credibility of witnesses' evidence. It is also useful to have in mind Lord Bingham's guidance in *"The Judge as Juror: The Judicial Determination of Factual Issues"* ("The Business of Judging", Oxford 2000, pp. 3ff; Current Legal Problems, Vol. 38 Stevens & Sons Ltd 1985 p 1 – 27).

First half of 2010 - Mr Hearn approached Mr Dymoke

48. At some stage during the first half of 2010, discussions began between Mr Hearn and Mr Dymoke about setting up a new P&I venture together. Mr Hearn first approached Mr Dymoke with the idea. Mr Hearn had long harboured an ambition to run his own P&I business. He had been involved in a previous start up which had gone into run-off, namely Markel P&I (formerly Terra Nova). He remained determined to fulfil his dream and try again when the time was right. He described himself as a *"calculated risk taker"*.

49. Mr Dymoke said in evidence that he was not sure how the discussions with Mr Hearn first came about, but, since he and Mr Hearn worked opposite each other, it was perfectly possible for them both suddenly to realise they wanted to start up a new business together without any solicitation on either part. This sort of telepathy, however, seems unlikely, and one particular piece of evidence points strongly to Mr Hearn taking the initiative and soliciting Mr Dymoke. In May 2010, Mr Hearn wrote to Mr Dymoke about their respective salaries and status at the new venture, praising Mr Dymoke's abilities and saying: "*This is why I singled you out as the person I would want to partner in a venture such as this.*" (2315). It was not an immaculate conception.

50. Mr Healy said that he had known Mr Hearn for many years and knew of Mr Hearn's longstanding ambition *"to do his own thing"* one day. I accept Mr Healy's evidence that he also had had various conversations with Mr Hearn when they them were out of the office fetching a sandwich or having a cigarette, and from May 2010 onwards believed that it was only a matter of time before Mr Hearn started a new venture. Mr Healy himself told Mr Hearn that he would be interested in joining such a venture if there was a sufficient financial incentive and stability.

51. The discussions between Mr Dymoke and Mr Hearn probably began in earnest around the time of the office move from Walsingham House to Plantation Place in June 2010. There was much grumbling around this time about the move and Mr Dymoke had made his disapproval clear. From this moment onwards, in my judgment, both Mr Hearn and Mr Dymoke were in breach of their express and implied obligations under

their contracts of employment: Mr Hearn for solicitation of another employee and breach of his duty of fidelity; Mr Dymoke for not reporting the approach to his superiors and for breach of his fiduciary duty. Their breaches were compounded by their subsequent unlawful covert activities over the next 12 months.

52. Mr Dymoke admitted that discussions continued between them in what he described as "*very vague terms*" until October 2010. Their ensuing discussions were, however, anything but vague. Far from being a mere 'pipe dream' around the office water cooler, they quickly developed into detailed private discussions about a firm project which they were determined should rapidly take shape. And this, indeed, is what happened.

53. Leading Counsel for the Defendants, Mr Selwyn Bloch QC submitted that it would not necessarily have been a breach for a more junior employee like Mr Hearn to solicit a more senior employee like Mr Dymoke. I disagree. Whilst the reverse is more normal, there is nothing in any of the authorities to suggest that unlawful solicitation can only occur where there is an authority gradient. It all depends on the facts of each particular case. In this case, it was Mr Hearn who first approached Mr Dymoke with the idea (see above).

'Critical mass' required

54. Mr Hearn and Mr Dymoke were all too aware that previous attempts at P&I start-ups had not been a success. Indeed, Mr Hearn had himself already had personal experience of a failed start-up (see above). There were some competitors to British Marine in the P&I Fixed Premium market but they lacked size and capital backing. As the Phoenix Business Plan, which Mr Hearn and Mr Dymoke subsequently drafted, put it:

> "*[W]hilst there are a number of other small ships P&I providers offering basic cover none can match the limits of liability ([British Marine] USD500,000,000 and [Shipowners P&I] USD7,400,000,000) and service offered by [British Marine] and [Shipowners P&I]. In fact most alternatives provide limits of USD25,000,00 and comprise of 6-7 staff!*" (1694)

55. Mr Hearn and Mr Dymoke recognised, from the outset, that 'critical mass' was vital if a new venture in the small ships P&I fixed premium world was to have any chance of success. Critical mass meant three things in this context. First, sufficient numbers of experienced and suitably qualified personnel to provide the right standard of service to compete with the two established players on both the underwriting and claims handling side. Second, a sufficient injection of initial capital to enable the start up to be funded properly from the outset (in the event, PRO were prepared to provide US$3.1 million by way of start-up costs). Third, sufficient financial backing by way of security to enable the new venture to offer to match the limits of liability of at least British Marine (in the event, US$100 million was secured by Royal Sun Alliance as the first line, and a further four lines of US$100 million were sought to take the total figure to US$500 million in order to match British Marine's figure).

56. Mr Hearn and Mr Dymoke also recognised that these three elements were inter-dependent. Security providers and venture capital providers would be reluctant to put up the requisite security and capital *unless and until* they were satisfied that the right

teams of underwriters and claims personnel were available, amenable and likely to be recruited to staff the new venture. Equally, employees of the right calibre and experience would naturally be reluctant to leave their existing employment to join a new venture *unless and until* they were sure it was going to be viable and well-provisioned in terms of both security and capital. It was going to be crucial to recruit impressive underwriting and claims teams in order to have credibility with the right financial backers and *vice-versa*.

Twin-track approach

57. These considerations drove their thinking and planning for the new venture. Essentially, they developed a twin-track approach. First, preparing what Mr Dymoke called a *"powerful case"* by way of a business plan to persuade prospective backers to put up the requisite security and seed capital for the venture. This involved essentially looking outwards, *i.e.* to capital and security providers such as PRO and Royal Sun Alliance ("RSA"). Second, meanwhile, approaching the best people to make up the requisite underwriting and persuading them to come on board the venture. This involved essentially looking inwards, *i.e.* to their own Underwriting and Claims Departments.

June 2010 – move from Walsingham House and morale

58. The middle of 2010 was a fertile time for such a project. In June 2010 British Marine were forced to leave their old offices at Walsingham House in the City where they had happily been for many years, and move to QBE's large offices at Plantation Place in June 2010. The move was not universally popular amongst British Marine employees and morale undoubtedly suffered. Plantation Place itself drew such epithets as *"the Glass Palace"* and *"Azkaban"* (*viz.* the high-security wizard prison in *Harry Potter*). As mentioned above, Mr Dymoke, in particular, was against the move. He made his views known and told people around the office that morale was *"at an all-time low"*. There was also some disgruntlement in some quarters at this time regarding remuneration packages falling behind what other companies were offering, problems with career progression and the fact of being taken over by a large, impersonal organisation like QBE. Mr Dymoke's influence on office morale at the time was more baleful than beneficial. Low morale would suit his and Mr Hearn's subsequent purposes.

August to September 2010 – first steps

59. The first documented instance of Mr Hearn and Mr Dymoke taking active steps to explore the project is on 16th August 2010 when Mr Hearn sought advice from Robin Stow and Barry Buchan at the insurance brokers, Neuman Martin and Buchan ("NMB"), as to general figures for setting up a business and received some ball park figures from NMB (1683-1687). There is also some evidence of Mr Dymoke making some sort of initial approach to a third party around this time to discuss the raising of capital for a new business (2892).

October 2010 - Mr Kirk approached

60. A new P&I venture needed not just an underwriting team but also a credible claims team to handle the claims arising out of the business underwritten by the underwriters.

Mr Dymoke and Mr Hearn particularly wanted Mr Kirk on board at an early stage because he could bring the British Marine claims team with him. Thus it was in October 2010 that Mr Dymoke approached Mr Kirk directly and invited him to become involved in putting together the plan for the new start up. (Much later, in July 2011, Mr Dymoke and Mr Hearn became concerned that Mr Kirk might *"do the dirty"* on them and decide at the last minute to stay at British Marine, and they considered recruiting Mr Hearn's wife instead).

61. The pre-disclosure letter from the Defendants' solicitors, Messrs Morgan Lewis, to the Claimant's solicitors Mayer Brown dated 17th June 2011 stated that Mr Dymoke and Mr Hearn first spoke to Mr Kirk about their new venture in January 2011 (609). This was incorrect. It is clear (and now admitted) that Mr Kirk was approached four months earlier in October 2010.

October 2010 - the draft Staff Table

62. On 11th October 2010, Mr Dymoke e-mailed to Mr Hearn at his wife's e-mail address what he described as a *"first stab"* of a table comprising a list of staff and projected salary and travel and entertainment costs ("the Staff Table") (1980). It is an important and illuminating document. The Staff Table was headed *"Project Phoenix"*. It had four columns with the following headings left to right: *"Underwriting Staff"*, *"Assistants"*, *"Claims"* and *"Others"*. Each heading had underneath it a list of initials divided horizontally into three phases: *"Phase 1"*, *"Phase 2"* and *"Phase 3"* with proposed salaries and estimated costs. I set out below for convenience a simplified version of the Staff Table:

Project Phoenix				
	Underwriting	Assistants	Claims	Others
Phase 1	CD JH *MH*	CG JP	SK CG	LD
Phase 2	*DM* DB	MG	GH SB	
Phase 3	KH JK		RL	

63. Of the 16 sets of initials listed, it was common ground that 14 corresponded to then current employees of British Marine: *"CD"* (Charles Dymoke), *"JH"* (John Hearn), *"DB"* (David Bamberger), *"KH"* (Kevin Healy), *"JK"* (James Kent), *"CG"* underwriting (Carl Glover), *"CG"* claims (Carl Gill), *"JP"* (James Petrie), *"MG"* (Matthew Ginman), *"SK"* (Steven Kirk), *"GH"* (Gerald Hamerston) *"SB"* (Shiladitya Bose), *"RL"* (Richard Linacre) and *"LD"* (Laura Davies). It was also common ground that the other two sets of initials, *"MH"* and *"DM"*, related

respectively to Matthew Hunt, who had resigned from British Marine in October 2010 to join Shipowners P&I, and David Mahoney who was an employee of NMB.

64. The Staff Table therefore equated to the following names:

Project Phoenix				
	Underwriting	Assistants	Claims	Others
Phase 1	Charles Dymoke John Hearn *Matthew Hunt*	Carl Glover James Petrie	Stephen Kirk Carl Gill	Laura Davies
Phase 2	*David Mahoney* David Bamberger	Matthew Ginman	Gerald Hamerston Shiladitya Bose	
Phase 3	Kevin Healy James Kent		Richard Linacre	

65. On the face of it, the Staff Table represented a very significant footprint on British Marine's P&I underwriting and claims operations. On the P&I underwriting side (*i.e.* the first two columns), it listed Mr Dymoke, the effective head of the P&I underwriting, together with four out of six Underwriters and three out of seven Assistant Underwriters. The only senior Underwriters not on the list were Mr Oakley and Mr Harris. On the claims side (*i.e.* the third column), it listed the three most senior P&I claims people, Mr Kirk (Claims Services Manager), Mr Gill (Assistant Claims Manager), and Mr Hamerston (Senior Claims Adjuster), together with two out of five P&I Claims Adjusters. Laura Davies (in the fourth column) was Mr Dymoke's secretary whom he shared with Mr Harris.

66. The Claimant contended that the Staff Table was, in effect, a staff recruitment plan that Mr Dymoke and Mr Hearn were to put into effect over the coming months. Mr Dymoke said that the Staff Table was merely "*indicative*" of the kind of staff they would like to employ and the sort of costs they were likely to incur and it was easier to work this out using an existing team they knew.

Staff Table was a 'target' list

67. I reject Mr Dymoke's explanations for the draft Staff Table. The draft Staff Table was quite clearly the first stab at a 'target' list. It identified real people by their initials. It was, in reality, a shopping list of the actual key staff in British Marine's P&I Underwriting Department and Claims Departments that Mr Dymoke and Mr Hearn ideally wanted to take with them to form their new venture if possible. It was not merely 'indicative' of the type and levels of staff. It was a careful, tiered and time-phased blueprint of the precise British Marine employees they were going to approach and entice. And so it proved.

68. Mr Dymoke and Mr Hearn's own contemporaneous e-mail exchanges are redolent with indications that they regarded the individuals listed as potential recruits to be targeted. In Mr Dymoke's covering e-mail dated 11th October 2010, he said *"I have added JK"*, clearly referring to Mr Kent himself. In Mr Hearn's response on 14th October 2010, he said a less expensive alternative might have to be considered because *"CG"* might not be *"good enough value for the price"* (1688). *"CG"* was clearly a reference to Mr Gill himself. The salaries indicated were what they were expecting to pay themselves and their colleagues who moved with them. On 9th November 2010 Mr Dymoke e-mailed Mr Hearn slightly revised figures for the Table stating: *"It may be that you and I are being greedy but the fact remains we are the leaders and we are taking the risk and responsibility."*

October 2010 - The "Phoenix" Business Plan

69. It was necessary for Mr Dymoke and Mr Hearn to prepare a business plan in order to showcase to potential backers of the project. Substantial financial backing was required in the form of venture capital and security. In addition, a 'platform' provider was required to help run the business and provide logistical support. This is how PRO and the Royal Sun Alliance in due course came on the scene.

70. On 14th October 2010 Mr Hearn e-mailed to Mr Dymoke a draft business plan entitled *"Project Phoenix"* (1688). Mr Hearn explained it was very much in its formulative stages and asked for Mr Dymoke's comments. Mr Hearn's covering e-mails are revealing as to his actual thoughts and intentions when drafting. He candidly explained to Mr Dymoke: (i) He had not dealt explicitly with the effect Phoenix would have on British Marine *"though it's there reading between the lines"*. (ii) He had left out the exit strategy and start-up timing since he thought this was something*"better discussed face-to-face"*. (iii) He had not mentioned the names of the underwriters and claims people that Phoenix would boast, but he had alluded to who they were as he thought it was important that*"RSA know who they are dealing with, where they are currently employed and the [Gross Written Premium] for individuals concerned in order to get a feel for the potential..."*. (iv) Appendix A, 'geographical spread and vessel type by gross tonnage', had been taken straight from British Marine's material which did not need to be changed *"as the make up of the book will be similar"*. (v) Appendix B, '5 year business plan', was based on British Marine's current Gross Written Premium ("GWP") and 2010 Business Plan (Version 35). (vi) His premium income figures were based on *"each underwriter maintaining 50% of their existing book at 75% of it's value"* because Phoenix *"may need to be 25% cheaper than the current price in order to obtain the business."*

71. The Executive Summary to the draft Phoenix Business Plan stated that there was a need for an alternative in the existing small ships P&I market. It was currently dominated by two specialist players, British Marine and Shipowners P&I. It stated that Phoenix would offer its clients key advantages including *"Decades of Underwriting and Claims handling experience"*, *"USD 500,000,000 limit of liability"* and *"access to over 300 Correspondents worldwide"*. Under the heading *"Phoenix Model"* it stated that it planned to establish itself as *"market leader"* within 5 years of start up, that business would be sourced on *"a global scale"* with access via *"a worldwide network of brokers"*. The Executive Summary continued: *"Phoenix Underwriting have over 100 years P&I experience between them and have built up a*

global network of broking contacts, numerous who have already guaranteed their support for Phoenix."

72. On the second page, under the heading *"Outline of Phoenix's origins and teams"*, the draft stated: *"Phoenix staff will mostly comprise of current/ previous BM and SOP employees and will feature the following:…"*. There then followed a list of seven underwriters numbered *"Underwriter 1"* to *"Underwriter 7"*, each with precise details of their years of experience and GWP. The cumulative P&I underwriting experience of the first five underwriters was 103 years between them. The sixth had 40 years marine insurance underwriting experience. The seventh had 30 years experience of P&I broking. Footnotes stated Underwriter 2 would be free of any contractual commitment and able to start underwriting *"from 4th March 2011"* and Underwriter 3 would be able to start underwriting *"with immediate effect"*. There then followed the words: *"CLAIMS PROFILES TO BE PROVIDED"* (see further below). The underwriters numbered 1 to 7 were not named but, as Mr Hearn explained in his covering e-mail to Mr Dymoke, were identifiable by their details. They were: (1) Mr Dymoke, (2) Mr Hearn, (3) Mr Healy, (4) Mr Hunt, (5) Mr Kent, (6) Mr Bamberger and (7) Mr Mahoney. All were current British Marine Underwriters, save for Mr Hunt who had already resigned and Mr Mahoney from NMB.

73. Under the heading *"Competition"*, the draft said that none of the current alternatives matched British Marine or Shipowers P&I's limits of liability or service and most had low limits and few staff. It said Phoenix would offer *"[British Marine/ Shipowers P&I] style service, flexible cover and limits of USD500,000,000 backed by A rated security"*. The figure of US$500,000,000 matched British Marine's limit of liability.

74. Under the heading *"Targets"*, the draft stated: *"Business will [be] identified and pursued using Phoenix's underwriters global relationships and reputations. It is anticipated that [British Marine] business will be targeted in particular…"* (emphasis added).

Addition of Claims team details

75. Mr Kirk was quick to give his assistance with preparation of the Business Plan. On Saturday 28th October 2010, he e-mailed Mr Dymoke from holiday in Polzeath with *curriculum vitae* details of Mr Bose and Mr Linacre and suggested Mr Dymoke look at the QBE website for details of *"GH, CG and SK"* (*i.e.* Mr Hamerston, Mr Gill and Mr Kirk). He added "*I will revert with Norsul and Riverdance tomorrow"* (1744). This was a reference to two of the most major claims that British Marine had handled and of which he had details.

76. On 11th November 2010 Mr Kirk e-mailed Mr Dymoke with details of the following claims handlers in his department. These claims handlers were added to the next draft of the Business Plan and numbered 1 to 5: (1) Mr Kirk, (2) Mr Gill, (3) Mr Hamerston, (4) Mr Linacre and (5) Mr Bose (1743).

The Phoenix Business Plan – second draft

77. On 28th October 2010 Mr Dymoke inserted the details of Mr Bose and Mr Linacre that Mr Kirk had given him into a second draft of the Phoenix Business Plan and e-

mailed it to Mr Hearn. Mr Dymoke also amended and expanded the passage quoted above under the heading *"Phoenix Model"* to read as follows:

> *"Phoenix Underwriting have over 100 years P&I experience between them and have built up a global network of broking contacts. It is thought all will support Phoenix. <u>However, discussions with only the phase 1 underwriters and claims staff have been held. They have already guaranteed their support for Phoenix. Phases 2&3 staff have not been specifically approached due to protective covenants but have hinted their support.</u>"* (amendments underlined)

The Phoenix Business Plan – third draft

78. On 7th November 2010 Mr Hearn e-mailed Mr Dymoke a third draft of the Phoenix Business Plan in which he deleted the passage which Mr Dymoke had added (see the underlining immediately above) with the explanation: *"Charles[,] I've removed this part as I don't think RSA need to know this and if they do we can discuss this face to face"*. He also deleted the reference to Underwriter 7 because, as he explained in his covering e-mail, he had not discussed anything with Mr Mahoney at that stage and Mr Stow might ask questions. It should be noted that at a later stage Mr Mahoney re-appeared on the list.

79. On 19th November 2010 Mr Hearn e-mailed Mr Dymoke a further version of the Phoenix Business Plan asking him to find and fill various figures and details. In relation to Appendix D he asked: *"Charles – I couldn't figure out how to obtain this information without raising suspicion. Can you lay your hands on the info?"*. The Phoenix Business plan was populated with information and figures from British Marine's records.

Time critical plan for mass exit

80. On the same day, 19th November 2010, Mr Hearn e-mailed to Mr Stow a timetable setting out precise details of when the employees should resign their jobs, when they would be *"free of contractual obligations"*, and when they could start with the new venture in order to achieve a projected 1st March 2011 start. It read:

"MAR	*Underwriters 4 & 7 plus secretary start*
APR	*Underwriters 1, 2, 3, 5 and 6, all UW assistants & claims team resign*
JUL	*Underwriters 2, 3, 5 and 6 plus all UW assistants & claims team start*
OCT	*Underwriter 1 starts*
JAN	*Underwriters 2, 3, 5 & 6 free of contractual obligations"*

81. It was a structured and time-critical plan whereby two Underwriters should resign in March 2011 ("*Underwriters 4 & 7*", *i.e.* Mr Hunt and Mr Mahoney); and then all of the British Marine employees ("*Underwriters 1, 2, 3, 5 and 6, all UW assistants & claims team"*) should resign in April 2011. This was very much a "*mass exit*" approach. When this e-mail was put to Mr Dymoke during cross-examination, he

merely said that he 'hoped' that the team identified in that e-mail would work together again. His and Mr Hearn's plan was, however clear: to strip out the lion's share of British Marine's underwriting and claims-handling ability which would have substantially destabilised British Marine's ability to operate in the market.

"Fantasy football"

82. Mr Hearn was asked about the list of underwriters and claims people in the Business Plan who were clearly identifiable as British Marine employees. His explanation was colourful but risible. He said he took the view that it was easier to use real names in the list of underwriters and claims people but it was *"a bit like a fantasy football or fantasy cricket, fantasy rugby, where you create a team using real people but the team, in fact, is fictional"*. He denied that it was his ideal team and said the lists were *"just a reference"*.

83. I reject Mr Hearn's evidence that he and Mr Dymoke were merely playing *"fantasy football"*. This was a real game in which they had real players in mind to target (except they were not lawfully on the transfer market). His explanation failed to account for the fact that it was Mr Dymoke who first started using real names in the draft Staff Table (see above) and that he had told Mr Dymoke that he had been careful merely to 'allude' to the employees whom the new venture would *"boast"* (see above). Furthermore page 2 of the Business Plan expressly admitted *"Phoenix staff will mostly comprise of current/ previous [British Marine] and [Shipowners P&I] employees and will feature the following:…"*.

Co-incidences

84. The case is, moreover, full of co-incidences which are only rationally explainable on the basis that the draft Staff List and draft Business Plan lists of British Marine underwriters and claims handlers were always intended by the Defendants to be the intended targets to be enticed away from British Marine. I highlight three such co-incidences in particular.

85. First, it was no co-incidence that a draft timetable Mr Hearn e-mailed to Mr Stow on 19th November 2010 (1778) tallied precisely with the contractual obligations of the particular British Marine individuals listed (see above).

86. Second, it was no co-incidence that over the next few months all those listed on the Staff Table and Business Plan were variously approached, tapped on the shoulder, or spoken to by Mr Dymoke, Mr Hearn and/or Mr Kirk, about the new venture and encouraged and asked to be ready to resign from British Marine and join when the time came (see further below).

87. Third, it was no co-incidence that every one of the 16 people on the list was contacted by Mr Leo Gibbons by the head hunters TPD employed by PRO and offered employment in the new venture, except the secretary, Ms Davies. By contrast, those not on the list but in prominent positions at British Marine, *e.g.* Mr Oakley and Mr

Harris, were never contacted by Mr Gibbons and never offered jobs at the new venture (see further below).

December 2010 – Phoenix Business Plan given to PRO

88. On 13th December, after further drafting and refining, a full final version of the Phoenix Business plan was presented to PRO and its parent company, TAWA. It was a substantial and impressive document. It ran to some 24 pages and included several Appendices (1877 ff.). Under the heading *"Phoenix Management Structure"* it set out lists of *"Underwriters 1-6"* and *"Claims handlers 1-5"* with several notes at the bottom of the page. One read: "*The first 6 underwriters are currently responsible for writing over USD100m gross written premium*". This was plainly a reference to real, not imaginary, underwriters, *i.e.* the five British Marine underwriters who were clearly identifiable from their details, plus Mr Hunt. A second note referred to underwriter 4 being as being free of any contractual obligations and *"can start underwriting from 4th March 2011"*. This was clearly a reference to Mr Hunt.

89. The nine underwriters and five claims personnel clearly identified in the Phoenix Business Plan given to PRO in December 2010 were as follows:

Underwriting	Claims
Charles Dymoke	Stephen Kirk
John Hearn	Carl Gill
Kevin Healy	Gerald Hamerston
Matthew Hunt	Richard Linacre
James Kent	Shiladitya Bose
Carl Glover	
James Petrie	
Matthew Ginman	
David Bamberger	

90. The following points also should be noted about the Phoenix Business Plan submitted to TAWA. (i) The references to *"historic business performance"* were plainly references to British Marine business, and the figures used were figures solely

pertaining to the P&I part of British Marine which were not in the public domain, and so there had clearly been resort to confidential information to draw this up. (ii) Under the heading *"Coverage"*, the terms and conditions relied upon were expressed to be the British Marine terms and conditions (1888). (iii) *"Appendix A - Five year underwriting Forecast"* was based on the business forecast for British Marine. (iv) *"Appendix B – Split of Account by Vessel and Region"* matched exactly or almost exactly the British Marine figures. (v) The Phoenix Business Plan projections were for $32 million in new business in the first year of operation. This was clearly calculated on the basis, and plainly only attainable if, departing British Marine employees took their respective books with them and retained 50% of the book at 75% of the premium. In my judgment, the Defendants' witnesses explanation that $32 million could be achieved on new business alone was unrealistic. I accept Mr Healy's evidence that the Defendants' figures did not stack up and the success of the new venture depended on the demise of British Marine.

91. The aim was to encourage PRO to put up the seed capital for the new venture which Mr Dymoke, Mr Hearn and Mr Kirk would buy back after a suitable period.

92. The Defendants' witnesses had no credible explanation for the various drafts of the *"Project Phoenix"* Business Plan or the co-incidences listed above. The Business Plan was, on its face, plainly aimed at recruiting actual British Marine employees with their respective books and GWP and (as it expressly stated) "*targeting*" British Marine's business. This is what the Defendants then set about meticulously putting into effect.

'Three bells on the fruit machine'

93. On 13th November 2010, Mr Hearn and Mr Healy had dinner together at the Boat Yard Restaurant in Leigh-on-Sea, together with their respective wives. I accept Mr Healy's recollection of this dinner. He said that Mr Hearn had said that, if British Marine were left with limited staff, Mr O'Farrell might eventually look to 'strike a deal' with their new venture on the book of business. Mr Hearn described this as a *"three bells on the fruit machine"* scenario. Mr Healy also said that they joked over dinner about "*the size of our villas and being next door to each other*". Mr Hearn denies saying any of this, but it has the ring of truth about it.

94. I also accept Mr Healy's evidence that, by this stage, he had been made aware by Mr Hearn of who was, and was not, part of the new venture (Mr Harris and Mr Oakley were not) and Mr Hearn kept him abreast of the conversations he was having with the other British Marine employees who were to be part of the new team.

'Mass exit'

95. It was clear that, at this stage, a "*mass exit"* of British Marine employees was the preferred option for Mr Dymoke and Mr Hearn and the best outcome in financial terms. Mr Stow advised this would yield US$100 million GWP (1793). In his e-mail response on 24th November 2011 Mr Dymoke said that he would *"love"* this to be the case, but thought their backers should work on a more conservative scenario. In an e-mail dated 8th January 2011 which had as its subject heading *"Great Escape"*, Mr Dymoke said: *"We are talking about an massive exit* [sic] *and we need to have everything in place."* (1943). The perceived key to success was to set up a 'turn-key'

vehicle which they could all walk in to upon leaving British Marine. The initial launch date was 1st March 2011 but this subsequently slipped to 1st November 2011 (see below).

Dual

96. In December 2010, Mr Dymoke and Mr Hearn met with a company called Dual who were their choice as backers and platform providers. Dual were, however, sceptical of the new venture. Dual thought that the financial projections were overly optimistic and expressed concern that, save for one employee who would be out of contract by 4th March 2012, the remainder would be prevented *"from touching any piece of their existing employer's business for 9-12 months"*. Dual queried how much of what they were currently writing could realistically be *"brought over"* (1841). In an attachment to an e-mail to Mr Dymoke dated 10th December 2010 (1841-2) Mr Hearn discussed the pros and cons of a mass exit: *"I can see [Dual's] argument to take them in one go before the current employers pay big salaries to keep them, but we will end up with 50 per cent of them with nothing to do."* He also said this regarding Dual's concern that there was likely to be a legal reaction by QBE: "*[T]hey paid US$204m for the company in 2006, when GWP was US$121m with a pre-tax profit of US$29.6m. At that time, just over 50% of the book was P&I, so they're unlikely to take such a move lying down. We must factor a significant litigation risk into our thinking*."

Royal Sun Alliance

97. Mr Dymoke and Mr Hearn also approached RSA as a potential backer to provide start up monies. RSA were and remain a major competitor of QBE. RSA had bid unsuccessfully for the British Marine business when it was sold to QBE in 2005. RSA had an investment process which required potential projects to pass three 'gates'. I accept Mr Healy's evidence that he was told by Mr Hearn that the Phoenix Project passed the first two RSA gates but failed the third because RSA became concerned at the restrictions contained in Mr Dymoke and Mr Hearn's employment contracts.

98. RSA subsequently emerged, however, in early 2011 as a potential security capital platform provider for *"Project Phoenix"*. RSA already provided capital security for Osprey P&I. Osprey was a fixed premium business, but much smaller than British Marine. It wrote about $25 million of business and, therefore, was only about one-sixth of the size of British Marine. Talks with RSA about the provision of security for *"Project Phoenix"* began in earnest in the new year. These talks were facilitated by PRO. It was to this end that Mr Kirk and Mr Kent attended meetings in March 2011 with RSA to discuss the technical aspects of *"Blue Cards"* and security (see further below).

New Year Greetings

99. Mr Dymoke sent a special New Year e-mail greetings message to six people in his office. The message and list of addressees speaks volumes about the state of play on 31st December 2010. His message simply read: *"2011 will be great!"*. The addressees were Mr Hearn, Mr Glover, Mr Petrie, Mr Kent, Mr Healy and Mr Bamberger, *i.e.* the precise British Marine underwriting team who had been chosen to move to the new venture (and whose initials and details featured in the Staff List and

Phoenix Business plan). Mr Dymoke had little explanation for this message in cross-examination save to say: "*Well, it was in my mind that it was likely that those people would be part of the team in the -- in due course*". It was clear, in my judgment, that they had all been well 'tapped up' by Mr Dymoke and Mr Hearn by this stage and enticed to join Phoenix after the launch in the New Year.

100. Mr Dymoke had some concerns that Mr Linacre and Mr Gill might meanwhile be poached by RSA and Osprey which he expressed in the *"Great Escape"* e-mail to Mr Kirk on 8th January 2011: *"I am sure that RSA see that the [British Marine] business is the bigger prize in any case. Of much more concern to me is that idea that Richard [or] Carl do not hold their nerve and wait for Phoenix..."* (1943)

January 2011 - PRO active

101. Dual dropped out of the picture leaving PRO as potential backers and 'platform' providers. In an internal e-mail dated 4th January 2011 to David Vaughan, the CEO of PRO and Gilles Erulin the CEO of TAWA, Mr Linnell reported enthusiastically: *"This is an MGA opportunity. There is a formidable team of underwriters who wish to start up their own show. The team is 16 in total, seven of which are active underwriters – fixed premium Protection & Indemnity facility… We have found them a legal adviser for determining the risks of their current employment contracts."* (1904). Mr Linnell weakly attempted in his oral evidence to suggest that he was not talking here about a real team and PRO were only expecting to buy the talents of Mr Dymoke and Mr Hearn. This was palpably untrue. PRO knew from its earliest engagement with this project that they were buying the *"formidable"* team comprising mostly British Marine employees that Mr Dymoke and Mr Hearn had assembled. This was the whole point. This was what made it such a worthwhile MGA opportunity.

102. On 20th January 2011, a meeting took place between Mr Dymoke, Mr Hearn, Mr Stow and Mr Linnell, together with other representatives of PRO and TAWA, to discuss Project Phoenix. TAWA management had put together a Power Point for the meeting (1964 ff.). The agenda included: *"Objective, Time frame, Litigation risk, Financial models, Platform, TAWA/ NewCo Partnership, Next steps"*. The Power Point highlighted under the heading litigation risk the following:

> *"Litigation risk*
> - *Development of a strategy to mitigate current potential for litigation:*
> - *against TAWA*
> - *against employees*
> - *Options:*
> - *Bombshell*
> - *Dribs & drabs*
> - *Open approach*
> - *Brokered deal – planned with 3rd party"*

103. The Power Point reveals PRO's real concern at the litigation risk and its thinking as to the various ways of handling the problem. The references to *"bombshell"* and *"dribs and drabs"* options were references respectively to the option of a *"mass exit"* of British Marine employees in one go, or the option of resignations in stages as

envisaged in the original Staff Table. I reject Mr Linnell's evidence that the Power Point was merely a draft aide memoire and not used or circulated.

'Soft departure' plan

104. PRO's concerns led to a change in tactical thinking by Mr Hearn and Mr Dymoke. They reverted to the plan of rolling out the resignations from British Marine in stages rather than a mass exit. The former would be less conspicuous. Mr Hearn therefore drew up what he called a plan showing*"a "soft" departure from QBE"* which he e-mailed to Mr Dymoke and Mr Stow on 23rd January 2011. He explained that he had added three more Assistant Underwriters *"in the shape of <u>the</u> two girls and one other"* (1971-1972) (emphasis added). Note the definite article. He was clearly referring to Ms Skinner and Ms Clarke who were Assistant Underwriters in his department who reported to him. Mr Hearn's 'soft departure' plan is another telling document to which the Defendant's witnesses had no answer. It comprised a detailed timetable with departures of Underwriters, Assistant Underwriters and Claims personnel listed in waves against four dates in 2011, March, July, August and October 2011, designated by acronyms and numbers, *i.e. "UW1-6"* (Underwriters 1-6), *" UWA1-7"* (Assistant Underwriters) and *"CL1-5"* (Claims personnel). Each has a salary level marked against them. The four waves are as follows: (i) against March were listed *"UW3"* and *"UW4"*; (ii) against July were listed *"UW2"* and *"CL1"* and *"CL2"*; (iii) against August were listed *"UW5", "UW7" "UWA1", "UWA2"* and *"CL4"*; and (iv) against October were listed *"UW1", "UW6" "UWA3", "UWA4", "UWA5", "UWA6", "CL3"* and *"CL5"*.

105. It is a relatively simple task to work out who these personnel are by a process of deduction and cross-referring to the Staff Table and Phoenix Business Plan. The 18 personnel on Mr Hearn's revised plan are, by my reckoning, as follows:

Underwriters (*"UW1-6"*)	Assistant Underwriters (*"UWA1-7"*)	Claims (*"CL1-5*")
(1) Mr Dymoke	(1) Mr Glover	(1) Mr Kirk
(2) Mr Hearn	(2) Mr Petrie	(2) Mr Gill
(3) Mr Mahoney	(3) Mr Ginman	(3) Mr Hamerston
(4) Mr Hunt	(4) Ms Skinner	(4) Mr Linacre
(5) Mr Bamberger	(5) Ms Clarke	(5) Mr Bose
(6) Mr Healy	(6) AN Other	
(7) Mr Kent		

106. It is no co-incidence that Mr Hearn had Underwriters 3 and 4 (Mr Hunt and Mr Mahoney) joining the new venture first in March 2011 since they were employed by other companies and not subject to British Marine restrictions. Equally, Mr Hearn saw Underwriter 2 (himself) not coming free until July 2011 since he was on three months' notice (his joining salary was to be £180,000), but Mr Dymoke not being able to join the new venture until October 2011 since he was on six-month's notice (his joining salary was quoted as £200,000). Mr Dymoke had no real answer in

cross-examination by Leading Counsel for the Claimant, Mr David Reade QC, as to the obvious import of this document (1972):

> *"Q. If you turn the page to 1972, do you see now the same individuals you've identified before, the underwriters 1 through to 6 and the claims handlers, now they're being recruited to roll out over a passage of time between March and October?*
> *A. Yes.*
> *Q. Same plan, get them all out, but now you're going to do it in a way that reduces your litigation risk.*
> *A. The plan is simply that -- yes, I mean, October, No -- yes. Not so much to reduce the litigation risk but this is all for the purposes of cashflow, that's what we're trying to achieve.*
> *Q. Sorry, purposes of what, sorry?*
> *A. To try to understand what cashflow we were going to have.*
> *Q. I understand why you're working out the cashflow, but we saw earlier that you had one exit. We can see the meeting with TAWA where there are concerns about litigation risk, and after it you seem to shape your plan in a different way: dribs and drabs. Because that reduces the risk.*
> *A. Well, I don't know if it does reduce any risk. But that's -- it's there. So that's what we did."*

Solicitation, enticement and 'tapping up'

107. I am satisfied that all those on the 'soft departure' list were unlawfully solicited or enticed to become part of the new venture. I find as a fact that each of 13 British Marine employees listed, namely, Mr Kent, Mr Healy, Mr Oakley, Mr Bamberger, Ms Clarke, Mr Ginman, Mr Glover, Mr Petrie, Ms Skinner, Mr Gill, Mr Hamerston, Mr Bose and Mr Linacre, were 'tapped up' and recruited to the plan, one way or another, by Mr Dymoke, Mr Hearn and/or Mr Kirk at various times between Summer 2010 and April 2011, *i.e.* during the currency of these three Defendants' actual employment by QBE. I also find that Mr Hunt was approached by them, probably whilst he was still an employee of British Marine. Mr Mahoney was also approached at some stage.

108. It is not possible to be precise about when all these approaches took place and in what precise circumstances. I am quite satisfied, however, such approaches did take place and took place covertly, at various times and in various places, inside and outside the office. A number of the approaches have been admitted (see further below). The approaches would have involved a mixture of blandishments and assurances by Mr Dymoke, Mr Hearn and Mr Kirk: blandishments that the defectors had been specially chosen to be part of the 'new' organisation which was to arise from the ashes of the old; assurances that a critical mass of the best people would be leaving and the requisite financial backing and security provision was already, or would be, in place. The discussions were initially on a 'need to know' basis and kept to a tight circle; but gradually the circle of those 'in the know' was widened as momentum and confidence increased and more people on the list were 'tapped up' and brought into the picture. It clearly became common currency amongst some of them in the office itself. As Mr Linacre candidly said in his evidence, Mr Kirk communicated with him in the office as to how the 'project' was going with a simple thumbs up or a thumbs down.

109. It is clear that some of those listed were well on board by 31st December 2010, *viz.* Mr Dymoke's cheerful New Year message to Mr Hearn, Mr Glover, Mr Petrie, Mr Kent, Mr Healy and Mr Bamberger (see above). The details of the Phoenix Business Plan were initially kept close to the inner circle of Mr Dymoke, Mr Hearn and Mr Kirk and their NMB advisor, Mr Stow. But, by the end of January, Mr Dymoke was prepared to have the Phoenix Business Plan shared with what he called 'Tier 2' people. By the end of March it is likely that everyone on the list was fully in the know and on board. On 25th March 2011 Mr Dymoke e-mailed Mr Hearn and Mr Kirk as follows: *"[T]here is no doubt that we have all been speaking with our colleagues and we all know that strictly speaking there have been breaches of contract (albeit they will be difficult to prove, I hope)."* (2082). Unfortunately, Mr Dymoke did not allow for the rigours of litigation disclosure and cross-examination.

Admissions about soliciting following disclosure

110. Mr Reade QC was right to submit that the substantial disclosure put an entirely different complexion on the case and showed the true scale of what had been going on. Mr Hearn had no real option but to admit at trial speaking to Mr Petrie, Ms Skinner, Ms Clarke, Mr Glover, Mr Kent and Mr Hunt about the new venture. His admissions, however, do not sit happily with his previous evidence to the Court or the Defendant's stance prior to disclosure as summarised by their solicitors, Morgan Lewis, in a letter of 17th June 2011 (600): "*Mr Dymoke and Mr Hearn did speak to Steven Kirk about the new venture in January 2011. They have not spoken to any other QBE employee about the new venture and have refused to engage in such conversations*".

111. Mr Hearn started having discussions with Mr Healy about the project in Summer 2010. He told Mr Healy he was also having similar discussions with Mr Hunt. *i.e.* well before the latter resigned from British Marine in October. Mr Hearn also shared details with Mr Healy about his discussions and negotiations with NMB, RSA and PRO.

112. Mr Dymoke's early witness statements do not appear to have been entirely frank on the question of soliciting. Mr Dymoke was certainly directly involved in recruiting Mr Petrie, Mr Ginman and Mr Kent to the project, as well as other British Marine employees on the list. Mr Petrie admitted that Mr Dymoke had asked him if he would be interested in being involved in the new venture and he said 'yes'. Mr Dymoke started speaking to Mr Mahoney about the project in July 2010. I reject Mr Dymoke's somewhat disingenuous evidence that, in so far as he approached people in the office, it was only about *"a"* venture and not *"the"* venture, or that this makes any practical difference. I have no doubt that he, Mr Hearn and Mr Kirk made it quite plain that something definite and serious was being planned and that all those approached were going to be offered jobs in the new venture.

113. Mr Kirk began recruiting his department from about December onwards and spoke to Mr Hamerston, Mr Linacre and Mr Bose about the new venture. Mr Linacre regarded Mr Kirk as his mentor. Mr Gill needed particular reassurance as to the viability of the project.

Mr Kent

114. There was a dispute about whether it was Mr Healy who first recruited Mr Kent and whether a particular conversation took place on the tube or outside a City pub. Mr Kent said that the first he knew about the new venture was when Mr Healy told him about it during a conversation on the tube from Monument to St Pancras at lunchtime in December 2010. Mr Healy was adamant that he only spoke to Mr Kent about the venture once he knew that Mr Kent was already aware of it and on board and he did this outside the Corney & Barrow pub beside Monument Station in December 2010 with Mr Hearn present. In so far as it matters, I accept Mr Healy's recollection of events as more likely.

115. At all events, Mr Kent was clearly on board by Christmas 2010 and was quickly drawn in to positive involvement with the new venture. Mr Kent was recruited by Mr Dymoke and Mr Hearn to provide actual practical assistance in furthering the project. At their request and inducement, Mr Kent attended two meetings with them in March 2011 and was asked to share his technical expertise and knowledge about 'Blue Cards' and computer systems with RSA. 'Blue Cards' are an important ingredient in marine insurance: they are compulsory evidence of P&I Club cover and certification of insurance required by the international liability and compensation regimes and conventions adopted by the International Maritime Organisation (IMO). Mr Kent's technical knowledge of computer underwriting systems was also used to help further the project when he attended a demonstration of "Websure" software by an organisation called R&Q. I reject his evidence that he was not promised a role in any new venture by Mr Dymoke and Mr Hearn.

Mr Johnston

116. The scale of Mr Dymoke and Mr Hearn's ambition and confidence in their ability to entice whomsoever they wished away from British Marine is evidenced by the fact that even the Chairman of British Marine, Mr Robert Johnston, was approached. On 2nd May 2010 Mr Dymoke e-mailed Mr Hearn and Mr Kirk agreeing that it would be good to have Mr Johnston on board and saying: *"I have arranged to meet him. It is difficult because secrecy is essential!!"* (2163). A handwritten attendance note in Mr Dymoke's handwriting suggested that the meeting was not altogether fruitful.

Solicitation of brokers

117. I am also satisfied that Mr Dymoke, Mr Hearn and Mr Kirk also began soliciting British Marine's brokers and clients whilst still employed by British Marine or on 'garden' leave. The words in the Phoenix Business Plan boasting of "*a global network of brokers, numerous who have already guaranteed their support for Phoenix*" were not merely a 'puff'. I have no doubt that these words were based on some solicitation and sounding out of brokers and clients which had already taken place and they intended was going to take place in the future.

118. It is fair to say that the evidence on this part of the case was fairly patchy. This is probably merely an indication of the difficulty of policing this sort of conduct. There was, however, sufficient evidence to justify a finding that there was some solicitation of British Marine's brokers by Mr Dymoke, Mr Hearn and Mr Kirk whilst they were still employed by British Marine. Mr Hearn had contacts with brokers from his home telephone number (2584). Mr Dymoke observed in April 2011: "*All our current customers are the "ownership" of QBE*" (2153). Whilst on garden leave Mr Dymoke

contacted a Dutch P&I broker saying that he was "*still alive*". Mr Kirk also had drinks with a large Egyptian producer and broker and Mr Dymoke joined them for dinner. I do not accept that this dinner was merely social and involved discussion of the state of Arsenal football club and non-work related matters. On 11th July 2011, Mr Hearn forwarded to PRO Insurance a list of brokers (2649). On the same day there were discussions about Mr Dymoke having a meeting with one of these brokers somewhere *"discrete"* out of the city such as the Captain Cook or Prospect of Whitby pubs (2657). On 19th July 2011 Mr Hearn requested a copy of PRO's expenses declaration form *"as we will undertake a fair bit of entertainment in the next few weeks and probably start firming up travel plans"* (2805).

The name "Phoenix"

119. It was no co-incidence that the name *"Phoenix"* was chosen for the new venture. A 'phoenix' (*Φοίνιξ*) is a mythical sacred firebird which immolates itself and its nest, at the end of its 500 to 1,000 year life-cycle and a new, young phoenix with a similar plumage arises from the ashes. In my judgment, this was precisely what Mr Dymoke and Mr Hearn planned, and hoped, would be the fate of British Marine and their destiny at the new venture.

120. Mr Dymoke said in cross-examination by Mr Reade QC that he had thought of the name *"Phoenix"* whilst watching Harry Potter with his children and it had nothing to do with the Greek or Persian mythological bird. If he did watch *"Harry Potter and the Order of the Phoenix"* (the fifth film in the successful series), I have no doubt that the symbolism was not lost on him and was what attracted him to the name.

121. The name *"Phoenix"* caused some concern to Mr Kirk. On 3rd May 2011 he e-mailed Mr Dymoke and Mr Hearn as follows (2171):

> "*I appreciate that you are both keen on the Phoenix name but, I'm not so sure and it has not received a great reaction from the (safe) people I have mentioned it to. I don't think that Phoenix means that something has failed, rather that something has reached the end of it's natural life. I'm of the opinion that this is what is happening to BM (sadly) and I see it as our job to carry on the spirit of BM forward albeit in a different capacity.*"

122. The new venture was eventually re-named *"Lodestar"* instead of *"Phoenix"*.

Return to Walsingham House

123. It was no co-incidence that a return to the original nest at Walsingham House was planned for Phoenix. It appears to have been Mr Dymoke who initiated enquiries as to whether the much-loved former offices of British Marine, were available for Phoenix (3276). He believed that a return to Walsingham House would send a "*fantastic message to the world*" (3279), a view which Mr Hearn shared, as he commented in May 2011: "*I remain keen on Phoenix due to the connotations it will provide. More so now we have also secured [Walsingham House]*." There also was to be an overlap in the floorspace at Walsingham House that Phoenix and PRO would occupy.

124. In my judgment, Mr Reade QC was quite right to submit that the evidence showed a consistent desire by the Defendants, manifest over many months, to replicate the business of British Marine, not just in its book and its employees, but in its ethos and in the very bricks and mortar in which the new venture was to be launched and to operate.

'Batphones' and home e-mail addresses

125. There were high levels of secrecy employed by the Defendants. Mr Dymoke, Mr Hearn and Mr Kirk were determined to keep all their communications *inter se* and with other internal and external parties about Project Phoenix well out of sight of QBE management or anyone at British Marine who might not be *"safe"* as Mr Kirk called it. From an early stage, they habitually communicated about Phoenix only using their home or wives' e-mail addresses or what they called *"bat phones"* or *"safe phones"* (pay-as-you-go mobiles). The high level of secrecy was consistent with the high level of planning that Project Phoenix required.

126. The process of sharing the details of the scheme with the anointed team was incremental. Thus, on 8th January 2011 Mr Dymoke wrote to Mr Hearn: *"If you think that the Phoenix plan should be shared with "Tier 2", I would prefer you to wait until the end of January and then we must have a lunchtime meeting to discuss exactly what we say. Confidentiality is, and remains, paramount."* (1943)

Computer wiping

127. There was also a great deal of covering of computer tracks. On 5th February 2010 Mr Dymoke e-mailed to himself at his home e-mail address some 60 pages of documents, including a copy of Mr Hearn's contract of employment and a draft of the Phoenix Business Plan. The next day, on 6th February 2010, Mr Dymoke e-mailed Mr Hearn, Mr Kirk and Mr Robin Stow of NMB:

> *"Subject: New mail*
> *I have spent some considerable time this w/e cleaning my computer – this e-mail address is a new, more secure address."* (2050)

128. Mr Dymoke sought to suggest there was *"nothing sinister"* about this; but his elaborate explanation about his TalkTalk ISP frequently breaking down and needing to set up a *"more secure"* Gmail address, lacked credibility; and he gave no real explanation as to why he had spent the weekend *"cleaning"* his computer. It is no coincidence that the three addressees were the inner circle of the Phoenix project. There were also indications of later e-mail exchanges being deleted at Mr Dymoke's suggestion so that QBE would not see them. This reinforces the picture that Mr Dymoke knew very well what he was doing was wrong.

RSA 'due diligence' process and 'FSA approval' process

129. The model for *"Project Phoenix"* developed with RSA was one of delegated authority with a managing general agency agreement. This meant that the security provider, RSA, would give Mr Dymoke and Mr Hearn *et al* delegated underwriting

and claims authority as employees of PRO. The eventual plan was for the business to be handed to a 'NewCo' under PRO, with PRO as the intermediary.

130. In order to be satisfied that it was appropriate to grant such delegated authority, RSA needed first to carry out a detailed due diligence process on PRO and TAWA. This was a laborious process which took much longer than anticipated. It involved the preparation and putting in place of the whole gamut of P&I quotation, renewal, pricing and claims handling procedures needed to run a full P&I business. It also involved RSA knowing who would be the actual underwriters and claims handlers to whom such delegated authority would be granted.

131. PRO had their own Financial Services Authority ("FSA") approval but it was limited to permission to conduct a run-off business. PRO did not have approval to conduct a live P&I underwriting business itself and required specific FSA approval to do so. The need for FSA approval in this context was driven by *"Solvency II"* which required insurance carriers and Managing General Agents ("MGA") to have satisfactory processes and procedures in place, failing which higher capital requirements might be required. This too proved a laborious process. An application for FSA approval was not made until June 2011 and final approval did not come through until October 2011.

132. There were, therefore, two separate processes which had to be gone through in order to progress the start up of the new business and put in place both RSA as the security provider granting delegated authority and PRO as the authorised carrier. These two processes were (i) the RSA due diligence procedure and (ii) the FSA approvals procedure. To satisfy these two processes it was necessary for Mr Dymoke, Mr Hearn and Mr Kirk to have resort to British Marine's information and data in breach of their confidentiality obligations (see further below).

Warranty

133. In April 2011, Mr Dymoke, Mr Hearn and Mr Kirk gave a warranty to TAWA that the Phoenix Business Plan was true and attainable (2103), *i.e.* in effect that they could deliver both British Marine's underwriting and claims teams and business book. I reject the suggestion that this was merely a warranty of some financial spreadsheets rather than the Phoenix Business Plan. In any event, the former reflected the latter. They must have felt that they could be relatively confident in giving such a warranty since they had approached all those on the list and got positive responses from them.

Resignations and 'Recruitment' process

134. On 28th April 2011, Mr Dymoke, Mr Hearn and Mr Kirk handed in their resignations to QBE. This heralded a new phase in the story where the remaining listed British Marine employees were 'recruited' by PRO and resigned from QBE in 'dribs and drabs' over the next few weeks.

April 2011 – appointment of TPD as head hunters

135. The appointment by PRO of TPD as recruitment agents to do the actual head hunting was a 'fig leaf' designed to give the appearance of an arm's length process. In fact, the recruitment process was a sham from beginning to end. Mr Dymoke, Mr Hearn,

Mr Kirk and Mr Linnell played a controlling role behind the scenes throughout the recruitment process in May, June and July 2011. At all material times TPD and its executive, Mr Leo Gibbons, were simply going through the motions of conducting an open selection process. In reality, TPD and Mr Gibbons were working to a 'shopping list' of pre-selected candidates provided to them by the Defendants. The whole recruitment process, including the list of employees to be 'recruited' by TPD to the new venture, was pre-ordained.

136. The *genesis* of the idea of appointing head hunters as a device can be traced back to the formulation of the 'exit strategy' in December 2010. As Mr Hearn had indicated in his e-mail of 10th December 2010 following his discussions with Mr Stow and Dual: *"We also [talked] about exit strategy and the need for Dual to appoint a headhunter, thus keeping us within the bounds of our contract!!"* (1840).

137. On 16th April 2011, Mr Hearn had written to Mr Dymoke regarding the start dates for Mr Mahoney and Mr Hunt and discussed *"Timing of departures (other staff)"* and *"Scripts for staff if faced with QBE management questions/offers (pressure)"* (2151). The whole resignation and recruitment process was effectively scripted and controlled by Mr Dymoke and Mr Hearn.

138. TPD and Mr Gibbons were not an obvious choice for a recruitment job of this nature. TPD had no previous experience of handling either underwriting or claim handling recruitments in the P&I field, whereas there were other recruitment agencies that specialised in this area. Mr Gibbons was working for a lower than normal fee. TAWA were a big client for Mr Gibbons and TPD and it appears he and TPD were somewhat captive, or beholden, to PRO and TAWA as they were involved in several other projects with these clients and seemed prepared to do their bidding. Mr Gibbons said in evidence *"I had no preconceived ideas as to how the new vehicle was going to be staffed."* This was untrue. His notes of his earlier meeting with Mr Linnell on 19th April 2011 record Mr Linnell under the heading *"Phoenix"* saying TAWA*"…want to appoint us to complete"*, *i.e.* complete a process already begun.

139. Mr Dymoke, Mr Hearn and Mr Kirk's resignations took place on Thursday 28th April 2011, the day before the Royal Wedding. It is no co-incidence that on the very next working day after the long holiday weekend, Tuesday 3rd May the following things happened: (i) Mr Hunt and Mr Mahoney called Mr Linnell apparently out of the blue, but apparently already knowing that PRO Insurance was the new employer and Mr Linnell immediately put them in touch with the head hunters TPD (2166); (ii) Mr Hearn e-mailed PRO and said that he and Mr Dymoke could supply a list of the remainder of the team the next day (2168); (iii) Mr Kirk and Mr Dymoke discussed the order in which the claims handlers should leave; (iv) Mr Linnell had a meeting with Mr Gibbons and PRO gave TPD a copy of the Business Plan. I reject Mr Dymoke's explanation that he and Mr Hearn simply told PRO and TPD the level of experience of the people they wanted and *"it was up to them to populate it for the new venture"*. In Mr Hearn's e-mail of 3rd May 2011 to PRO referred to above, he wrote in the context of discussion with Donna Holland at PRO and accommodation at Walsingham House: *"We also discussed the remainder of the team and she will arrange for contracts to be drafted for all concerned (we can supply a list to Mark/ Keith tomorrow) so that we can move swiftly. She will need prospective start dates, we need to decide who joins and when."* (2168). Mr Hearn sent an e-mail on 9th May 2011 to Mr Gibbons purportedly giving him a list of potential underwriters' names

"that should be considered with regards to the population of Phoenix" (2208) none of which comprised British Marine underwriters. This was, however, in my view, a transparent and a self-serving attempt to cover his tracks, as indeed was the strange exhortation at the end *"Good luck!"*. It is no co-incidence that the e-mail followed on the heels of a telephone conversation between Mr Hearn and Mr Gibbons.

TPD's work sheet

140. Most damning is TPD's work sheet for "*Project Phoenix"* (3968). It records the timing of contacts made and meetings arranged with potential recruits by Mr Gibbon's assistant at TPD, Mr Thompson. This document is striking. It lists the following 18 mostly familiar names: *"(1) Dymoke, (2) Hearn, (3) Kirk, (4) Hunt, (5) Mahoney, (6) Kent (7) Healy, (8) Oakley, (9) Bamberger, (10) Clarke, (11) Ginman, (12) Glover, (13) Petrie, (14) Skinner, (15) Gill, (16) Hamerston, (17) Bose, (18) Linacre"*. It is no co-incidence that the underwriting and claims staff marked as 'contacted' and 'interviewed' on the work sheet was materially identical to the 'soft departure' list drawn up by Mr Hearn (see above). The only odd name out is that of Mr Oakley, but against his name is a blank showing no contact was made and the entry "*Await advice before approach"* (3968).

141. It was no co-incidence that Mr Gibbon's assistant, Mr Thompson, approached the exact four British Marine claims handlers on the list, and only those claims handlers, but also contacted them in the precise order recommended by Mr Kirk in his e-mail of 3rd May 2011. In that e-mail he also said he had *"no objection"* to Mr Hamerston but he was "*definitely the weakest"* (2169). Mr Kirk admitted that there were "*about 600 claims handlers in the P&I market*" and that it did not matter whether they were mutual or fixed.

142. It was no co-incidence that TPD contacted, interviewed and offered jobs to those who feature on the 'soft departure' list and did not bother contacting British Marine employees such as Mr Duck, Mr Watcham and Ms Edwards who were P&I claims handlers of the same seniority as Mr Bose and Mr Linacre but who did not feature on the list. Mr Gibbons's explanation, that these British Marine employees may not have answered their telephones, was risible. The TPD work sheet did not even mention them, let alone record any attempt to contact them.

143. Mr Gibbons said that candidates' contact details in the work sheet were taken from British Marine's website. Mr Ginman's telephone number as posted on the website was, however, wrong by one digit but it appeared correctly in the TPD work sheet. I infer that Mr Gibbons was not being frank and those details were in fact supplied by one of the Defendants.

144. PRO and Mr Linnell tried to give the impression of distance and that as far as they were concerned the recruitment process was 'arms length'. This was disingenuous. It is clear that PRO and Mr Linnell instructed and set the agenda for Mr Gibbons and TPD. PRO instructed Mr Gibbons and TPD to recruit those identified in the Phoenix Business Plan which listed the background and experience of the candidates (*c.f.* 2614). PRO also passed on messages to TPD, including, for instance, that Mr Dymoke was keen to progress both Mr Linacre and Mr Kent (2442). Mr Linnell's evidence in his first witness statement resisting the first injunction application was less than candid. He said: *"[Messrs Dymoke and Hearn] did not at any time have any*

involvement or contact with individuals (other than the Third Defendant) to discuss their involvement with the Fourth Defendant's new venture and/or assist with the recruitment of further employees from within the Claimant's business or elsewhere" (emphasis added).

145. In early May 2010, PRO gave TPD instructions to *"aggressively"* target British Marine (2174). On 10th to 12th May 2011 various of the listed British Marine staff were contacted by TPD. I accept Mr Ginman's evidence that the 'interviews' conducted by TPD were less than rigorous. His C.V. was not even read, or read in any depth, before he was handed his offer letter. Mr Gibbons surprisingly admitted that none of the British Marine candidates had a competitive interview.

146. Mr Dymoke admitted controlling the recruitment of Mr Hunt and Mr Mahoney. He said he thought he was entitled to do so and that Mr Hunt and Mr Mahoney would not have to go through a process. Mr Hearn chased TPD to get Mr Hunt and Mr Mahoney processed as soon as possible (2328, 2329).

147. The only non-British Marine employees contacted by TPD (other than Mr Hunt and Mr Mahoney) were to fill gaps left after rejections by first choice British Marine candidates. Thus, when Mr Healy refused Pro's offer, PRO were left an underwriter short. Mr Linnell said that Mr Hearn then met Mr Collins, and having decided he was suitable, handed him over to Mr Linnell and Mr Gibbons to be 'interviewed' and taken through the formal recruitment process. British Marine were also looking to recruit Mr Collins to fill one of the gaps left by the exodus. Thus, Mr Hearn was knowingly competing with British Marine for Mr Collins whilst still on 'garden' leave.

148. On 15th July 2011 Mr Gibbons's office drew up a spreadsheet of the progress of the recruitment process which tallied with the work-sheet and put Mr Hamerston on the back burner (2723).

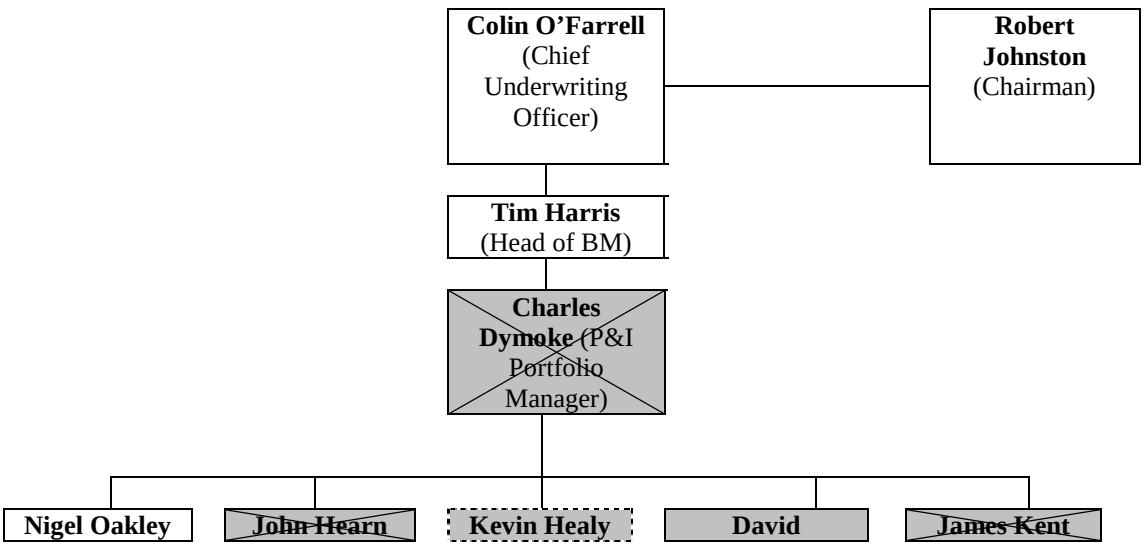
End Result – net impact on British Marine

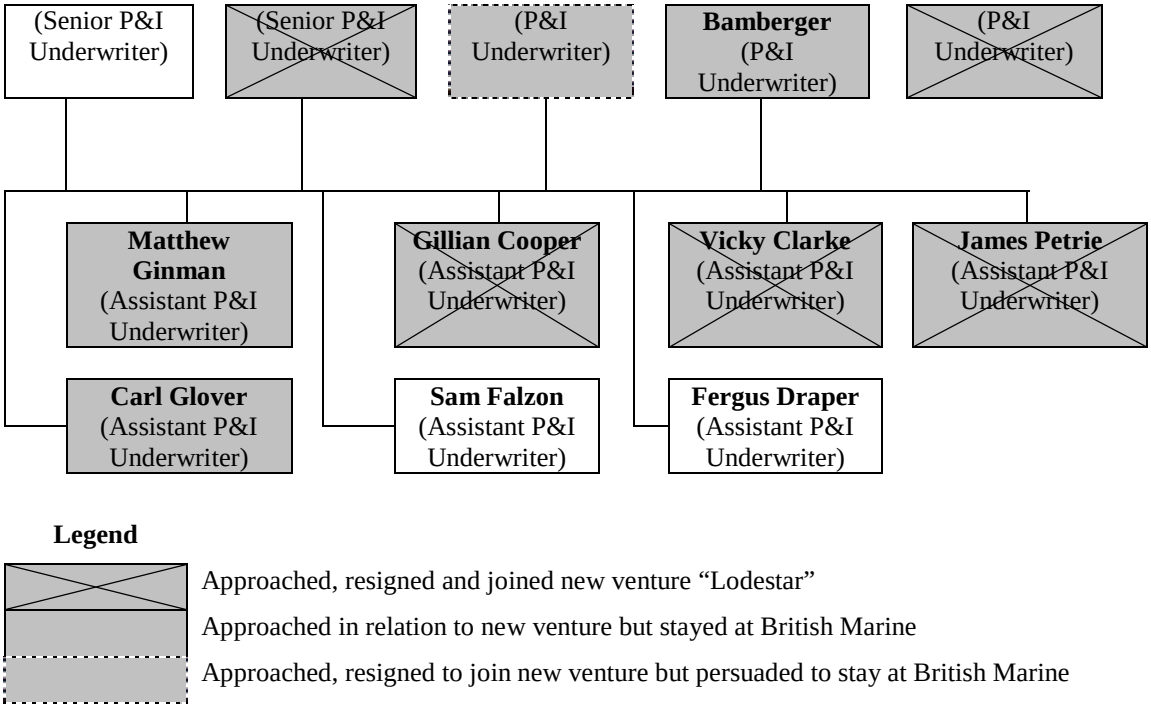
149. The impact on British Marine of the posse of planned resignations was designed to have a major destabilising effect on British Marine. The end result of the 'recruitment' process was, however, not quite what the Defendants had hoped for. When QBE and Mr O'Farrell began to get wind of the scale of the defections which began to unfold in the weeks following 28th April 2011, they began to take defensive action in the form of offers of higher salaries and promotions to some of those who had resigned or were being approached. Mr O'Farrell was successful in retaining Mr Ginman, Mr Glover, Mr Bamberger and Mr Hamerston and in tempting Mr Healy to revoke his resignation and return to British Marine.

150. The exodus of a net six staff from the Underwriting Department and four staff from the Claims Department, nevertheless, left large holes at British Marine. Inevitably significant and lasting damage had been done to British Marine, in terms of structural integrity, reputation, skills and knowledge base, disruption, as well as lost ground in the market.

151. The impact on the structure of British Marine can best be illustrated by the following highlighted organograms. It will be seen that the impact would have been worse but for the defensive measures taken by QBE and Mr O'Farrell to persuade staff who had been approached to stay. The first organogram is for the Underwriting Department:

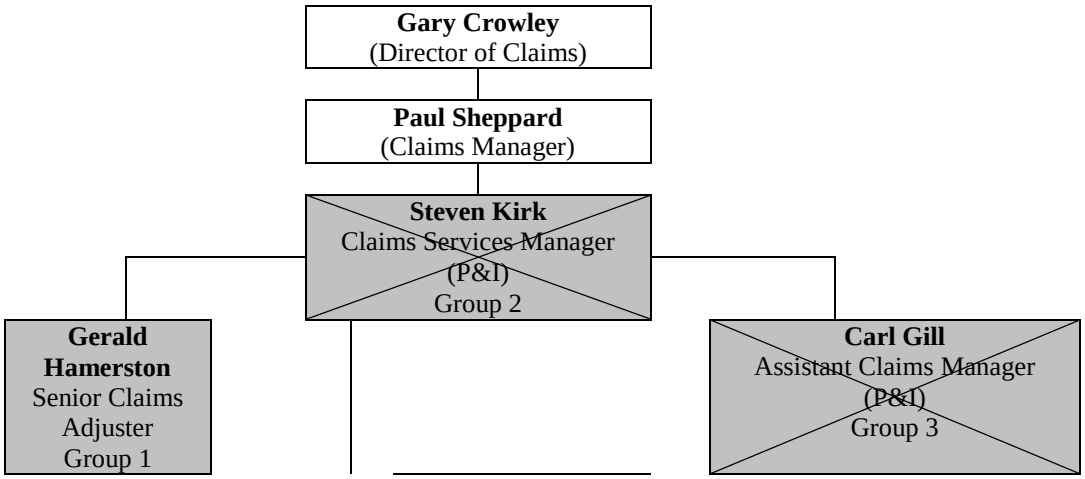
British Marine Underwriting (as at July 2011)

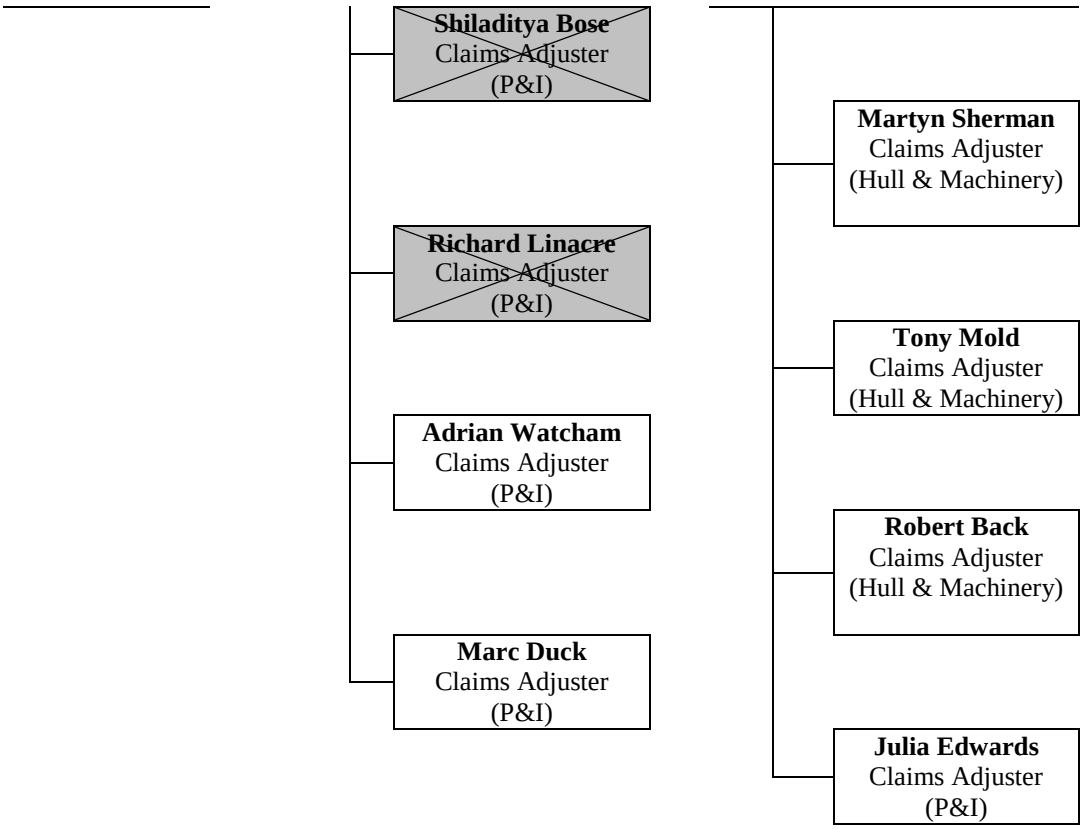




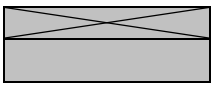
152. The second organogram is for the Claims Department:

British Marine Claims (as at July 2011)





Legend



Resigned and joined new venture "Lodestar"
Approached in relation to new venture but stayed at British Marine

CONFIDENTIALITY

153. I now turn to consider specifically the question of confidentiality. Mr Dymoke, Mr Hearn and Mr Kirk were subject to the usual confidentiality clauses in their contracts (see above). QBE contended that there had been wide-scale breach and abuse by Mr Dymoke, Mr Hearn and Mr Kirk of their confidentiality obligations, both in terms of unauthorised disclosure to third parties and also use of British Marine bespoke documents and templates to produce materials for *"Project Phoenix"*.

154. There were 14 categories of British Marine documents which the Claimant identified and said contained information which was confidential, or 'highly confidential', to British Marine and which were misused:

(1) British Marine Business Plan;
(2) British Marine Underwriting Reports;
(3) CALM IT Application and Database;
(4) Papers for weekly P&I meetings;
(5) British Marine Claims Handling Procedure;

(6) British Marine P&I Quotation Procedure;
(7) British Marine Reinsurance Notes and Updates;
(8) British Marine P&I Renewal Procedure;
(9) British Marine Insurance Policies
(10) British Marine Quotation Template;
(11) British Marine Price Processing Document;
(12) Charterers' P&I Quotation Procedure;
(13) British Marine Quotation Template: Major Claim/ Movement Update, Reserve Summary, File Review Check List and New Beneficiary Form.
(14) Underwriter Rationale Summary;

155. The Claimant also contended that the following parts of the Phoenix Business Plan contained British Marine confidential information:

(1) Section 5: average insurance profit figures and net loss ratios and claims details;
(2) Section 9: underwriting management;
(3) Appendix A: 5-Year underwriting forecast;
(4) Appendix B: 5-Year Projections;
(5) Appendix D: general increases.

Misuse of British Marine's data and materials

156. There is no doubt that, over a period of many months, Mr Dymoke, Mr Hearn and Mr Kirk set about secretly milking British Marine's materials and using them as a quasi-reference library from which to copy, clone and extract information, templates and data in order to draw up the raft of documents they needed to get *"Project Phoenix"* off the ground.

157. A few references from the contemporaneous correspondence give the flavour of this covert process at work. On 19th November 2010 Mr Hearn asked Mr Dymoke if he could *"lay his hands"* on the information to put in section 5 and Appendix D of the draft Phoenix Business Plan, adding in relation to the latter *"I couldn't figure out how to obtain this information without raising suspicion."* (1477). On 24th November 2010 Mr Dymoke e-mailed Mr Hearn and Mr Kirk: *"So far as our department results are concerned, I am playing with fire giving the precise results but have been as daring as I can. I can expand if you wish when we meet."* (1804). On 5th February 2011 Mr Dymoke e-mailed himself at his private e-mail address 15 times with numerous documents including the British Marine Quote Template (1981-1988) and Standard Increases (2049a-b) before he *"cleaned"* his computer (2050). On 14th March 2011 Mr Kirk e-mailed to himself at his private e-mail address the British Marine Provision of Security for P&I Claims (3315a-p).

British Marine Business Plan

158. The above categories of documents under consideration were the subject of a detailed Scott Schedule of comments by both sides as to their confidentiality, materiality and actual use. In broad terms, the Claimant's position was the 14 categories of document contained a large amount of useful, confidential or even highly confidential information belonging to British Marine, which had been systematically lifted, used and disseminated by Mr Dymoke, Mr Hearn and Mr Kirk for their own unlawful

purposes. The Defendants accepted that some of the categories of document were confidential, *e.g.* the British Marine Business Plan, but said that much of the information was either in the public domain or was capable of being recreated with time and effort or very little of it was memorable.

Analysis

159. My views on the confidentiality issues can be summarised as follows. First, the 14 categories of document contained a considerable amount of confidential information not in the public domain. In particular, the British Marine Business Plan contained confidential and price-sensitive information, including combined operating ratios, capital figures, expenses and acquisition costs. Importantly, it was used to populate Appendix A of the Phoenix Business Plan with figures (see below).

160. Second, the Phoenix Business Plan was riddled with British Marine confidential information, in particular in the following parts: Section 5: average insurance profit figures and net loss ratios; Section 5: claims details; Section 9: underwriting management; Appendix A: 5-Year underwriting forecast (from figures in the British Marine Business Plan); Appendix B: 5-Year Projections; and Appendix D: general increases.

161. Third, Mr Dymoke, Mr Hearn and Mr Kirk could not have drawn up the Phoenix Business Plan with anything like the impressive detail that they did without wholesale misuse of British Marine confidential information. In any event, to do so would have taken at least a further three or four months.

162. Fourth, copies of the Phoenix Business Plan were sent to PRO, RSA and the FSA at various stages. It formed a fundamental vehicle for securing the necessary financial backing and support of PRO and RSA for Project Phoenix. To this extent, the whole process of getting PRO and RSA on board was fundamentally tainted.

163. Fifth, the process of drawing up the Phoenix Business plan and other documents necessary for RSA backing and due diligence and FSA approval would have been much more difficult and, in any event, would have taken many months longer. Mr O'Farrell said: *"I don't think they would have got anywhere close to RSA backing had they started with a blank sheet of paper."* RSA were, however, keen to lay their hands on British Marine, having lost out to QBE in 2005. For this reason, the Defendants probably would have succeeded in getting RSA's backing eventually.

164. Sixth, the CALM IT (Computer-Aided Liability Management Information Technology) Application and Database would have provided access to a wealth of general confidential information regarding insured, ship, cover, pricing and renewal details as well as a library of British Marine Precedent clauses. There is direct evidence of misuse of the CALM IT system. On 17th June 2011, Mr Kirk had Mr Linacre e-mail to him at his home e-mail address some of the steel cargo clauses on CALM (2578). I do not accept his somewhat elaborate explanation about needing the clauses to deal with a dispute with a Turkish owner. There seems no good reason why he did not use his remote work e-mail and ask the underwriting department to send him the full relevant policy.

165. Seventh, sections of British Marine standard documents such as the British Marine P&I Quotations Procedures were lifted word-for-word and used as the basis for the equivalent Phoenix documents and those required for the RSA. I do not accept the Defendant's argument that these templates were *"idiots' guides"* or publicly available or easily re-created. They would have been similar to those used by other P&I firms, but in some respects subtly bespoke to British Marine and the product of incremental drafting.

166. Eighth, much of the detail would not have been memorable, although there would have been some general information as regards brokers, clients, rates and renewals which was capable of recollection.

167. Ninth, there was little detail or particularisation, however, of (i) what might be termed 'trade secrets' or 'highly confidential' information which was memorable, or (ii) evidence of the more junior British Marine employees in either the Underwriting or Claims Departments having access to 'trade secrets' or 'highly confidential' information, such as to justify the enforcement of non-competition covenants against them (see further below).

Conclusion on misuse

168. In conclusion, there were numerous breaches by Mr Dymoke, Mr Hearn and Mr Kirk of their contractual obligations of confidentiality owed to QBE during the period September 2010 to July 2011 and substantial misuse of British Marine's materials in furtherance of *"Project Phoenix"*.

THE LAW

(1) The Obligation of Good Faith and Fidelity

The contractual duty of fidelity

169. The general principles relating to employees duties of good faith and fidelity are settled and can be summarised in the following propositions:

(1) It is indisputable that an employee owes his employer a contractual duty of 'fidelity', but how far it extends will depend on the facts of each case (per Lord Green MR in *Hivac v Park Royal* [1946] Ch 169 at 174).

(2) The more senior the staff the greater the degree of loyalty, fidelity and diligence required (*per* Openshaw J. in *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] IRLR 965 at paragraph [10]).

(3) The first task of the court is to identify the nature of the employee's obligations of fidelity and then to decide whether the employee's activities are in breach (per Moses L.J. in *Helmet Integrated Systems v Tunnard* [2007] IRLR 126 at paragraph [32]).

(4) The mere fact that activities are described by an employee as 'preparatory' to competition does not mean that they are legitimate (*per* Moses L.J. I *Helmet Integrated Systems v. Tunnard* [2007] IRLR 126 at paragraph [28]).

(5) It is a breach of the duty of fidelity for an employee to recruit or solicit another employee to act in competition (see *British Midland Tool v Midland International Tooling Ltd* [2003] 2 BCLC 523).

(6) Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct (*Sybron Corp v. Rochem Ltd* [1984] Ch 112).

(7) It is a breach of the duty of fidelity for an employee to misuse confidential information belonging to his employer (see *Faccenda Chicken Ltd v Fowler* [1987] Ch 117).

(8) The court should ask whether the activities in which the employee is engaged affect his ability to serve his employer faithfully and honestly and to the best of his abilities (see *Shepherds Investments Ltd v. Walters* [2007] IRLR 110 at paragraph [131]).

'Team moves' or 'poaching'

170. In the context of 'team moves' or 'team poaching', four recent cases provide useful guidance and illustrations of what may constitute illegitimate conduct.

171. In *Shepherd Investments Ltd and Anr v Walters & another* [2006] EWHC 836 (Ch), Etherton J. held that when former directors and employees set up a competing business, diverting business opportunities and misusing confidential information, they had acted in breach, not only of their fiduciary obligations, but also their implied obligation of fidelity, from the moment that they procured the services of attorneys in the Cayman Islands to set up the rival business. On the facts of that case, Etherton J, held that a former employee was also in breach of obligations as a fiduciary, whether or not he was to be regarded as a director, and that he was in breach of his duty of fidelity.

172. In *UBS Wealth Management v. Vestra Wealth LLP* (*supra*) Openshaw J. said at paragraph 24:

> "*I cannot accept that employees, in particular senior managers, can keep silent when they know of planned poaching raids upon the company's existing staff or client base and when these are encouraged and facilitated from within the company itself, the more so when they are themselves party to these plots and plans. It seems to me that that would be an obvious breach of their duties of loyalty and fidelity to [their employer]*".

173. In *Kynixia v. Hynes* [2008] EWHC 1495 Wyn Williams J. said at paragraph 283:

> "*I simply do not see how one can be acting as a loyal employee when one knows that three senior employees (including oneself) may transfer their allegiance to a group of companies which includes a competitor and yet not only fail to divulge that knowledge but also say things which would have the effect of positively misleading the employer about that possibility.*"

174. In *Tullett Prebon plc v. BCG Brokers LP* [2010] IRLR 648 Jack J. said at paragraphs 68-69:

> "*[A] desk head must not do anything to assist the recruitment of his desk... Where a desk head decides that he is in favour of the recruitment of his desk and thereafter assists the recruitment in such small or large ways as may arise, he is in plain breach of his duty: he has crossed the line between observing his duty to his employer and acting in the interest of his employer's rival.*"

175. The position as regards mutual soliciting by employees is usefully summarised as follows in *Goulding* on *Employee Competition* (2nd Edition) at paragraphs [2.164] to [2.166]:

> *"Discussions between employees as to proposed concerted competitive activity will rarely if ever be acceptable, given the near-inevitable damage to the employer as a result of such concerted activity. It remains possible that a discussion between close friends at a similar level within the business as to the potential of working together in the future would give rise to no breach. In such circumstances, neither employee would be soliciting the other and neither would be encouraging the other to terminate their employment with the employer. However, as set out in the* British Midland Tool *case, once an irrevocable intention to compete is formed, resignation and disclosure of the intention is probably the only certain means of avoiding a breach."*

Defendants' reliance on Searle v Celltech [1982]

176. Mr Bloch QC placed some reliance on a well-known passage in *Searle v Celltech* [1982] FSR 92 at pp. 101-102 where Cumming-Bruce L.J. said *obiter*:

> "*The law has always looked with favour upon the efforts of employees to advance themselves, provided that they do not steal or use the secrets of their former employer. In the absence of restrictive covenants, there is nothing in the general law to prevent a number of employees in concert deciding to leave their employer and set themselves up in competition with him.*"

177. The potency of this passage has, however, atrophied in the past 30 years. It has also been stigmatised in the textbooks. The excellent textbook, *Brearley and Bloch* on *Employee Covenants and Confidential Information* (3rd Edition), states that *Searle* now has to be approached with some caution and explains that the second sentence of the above passage is now of *"doubtful value"* (paragraph 3.54) and will not often reflect the true position because of *"the way team moves are generally planned and effected "* (paragraph 3.59).

178. In my judgment, the above passage in *Celltech* is only relevant in very narrow circumstances which are unlikely to exist very often in practice. As the following passage in *Goulding* at [2.137] elucidates:

> *"There is an argument that mere employees [as opposed to fiduciaries] may be entitled to have preliminary discussions with other employees* [1] *for whom they have no responsibility and* [2] *over whom they exert no control or influence to discuss a future outside the business. If those individuals then* [3] *resign as soon as their plan is irrevocably formed (and* [4] *avoid misuse of confidential information,* [5] *solicitation of clients, exclusive suppliers or other employees and* [6] *are careful to avoid misleading their employers, whether as to the reasons for*

> *their departure or as to their intentions, they may commit no breach of their duty of fidelity. However,* [7] *any more senior employee will be at serious risk of breach by a failure to alert their employer to a nascent commercial threat."* (numbers in brackets added)

179. The facts of the present case are pretty much the exact opposite of each of points [1] to [7] and, accordingly, the passage in *Celltech* is irrelevant in any event.

Defendants' reliance on Lonmar Global Risks Ltd v West [2011]

180. Mr Bloch QC also placed some reliance on a recent passage of Hickinbottom J. in *Lonmar Global Risks Ltd v West* [2011] IRLR 138 at paragraph 151:

> *"Generally … an employee is under no obligation to report to his employer his own misconduct (*Bell v Lever Brothers *[1932] AC 161), or the misconduct of his fellow employees (*Sybron v Rochem *[1983] IRLR 253); nor is he under a restraint from legitimate preparation for himself engaging in future competition with his employer (*Tunnard*), or informing another employee of his plans to do so and offering him a potential job in that competitor in the future (*Tither Barn v Hubbard *(EAT/532/89 (Wood J), unreported, 7 November 1991). If it is not unlawful for an employee to inform a fellow employee of plans to set up in competition, and (without inciting him to breach his contract with his current employer) offer him a job in the future, then the employee to whom such matters are confided cannot sensibly be under a general obligation to inform his employer of those plans and offer."*

181. I respectfully doubt whether the above *dicta* of Hickinbottom J. accords with the main direction of travel of recent cases in this developing area of law. The law has clearly moved on since *Tither Barn* and *Celltech*. It does not appear, however, that Hickinbottom J. had the benefit of being referred to relevant cases such as *UBS Wealth Management* or *Tullett Prebon* or *British Midland Tooling* (*supra).* Nor did he have cited to him any of the cases in *Goulding* supporting the passage at [2.164] (see above), namely *Sanders v Perry* [1967] 1 WLR 753, *Marshall v Industrial Systems and Control Ltd* [1992] IRLR 294, *Adamson v BSL Cleaning Services* [1995] IRLR 193.

182. I also respectfully doubt whether *Bell v Lever Brothers* did determine the question of whether an employee is under an obligation to report to his employer his own misconduct. In *Item Software (UK) Ltd v Fassihi* [2004] IRLR 928, Arden L.J. said at paragraph [55] and [56] that *Bell* does not in fact determine this point. Moreover, as the authoritative *Brearley and Bloch* states at [4.154]:

> *"In the case of both [fiduciaries and 'mere' employees], a duty of disclosure exists where it relates to the misdeeds of colleagues, at least where there is an ongoing threat to the business – even if disclosure would inevitably lead to the disclosure of the wrongs of the disclosing employee himself."*

183. In any event, in my view, the above passage of Hickinbottom J. does not help the Defendants here because on the facts in the present case (i) the Defendants engaged in *"illegitimate preparations"* for future competition and (ii) did *"incite"* each other to breach their contracts with their current employer.

Meaning of 'solicitation'

184. Counsel debated the meaning of 'solicitation'. Mr Bloch QC cited *Sweeney v. Astle* [1923] NZLR 1198 and *Equico Equipment Finance Ltd v. Enright Employment Relations Authority 2009 AA 2412/09 5158060* and suggested that HHJ Simon Brown QC in *Baldwins (Ashby) Limited v. Maidstone* QBD, 3 June 2011 (unreported) correctly added a requirement that there must be a *"direct and specific appeal"* in the context of solicitation of customers rather than a more general approach (paragraphs [22-27]).

185. I do not think that this case will turn on nice definitions of the meaning of 'solicitation'. Nevertheless, for the sake of good order, in my view, HHJ Simon Brown QC did not *"add"* any requirement but merely echoed the language of Cotton L.J. in the time-honoured test in *Trego v Hunt* [1896] AC 7 which requires that there should be a "*specific and direct*" appeal. In any event, in my view, allowing for the different context, a helpful recent statement of the test for present purposes is that cited by HHJ Simon Brown QC at paragraph [22] namely *Equico Equipment Finance Ltd v. Enright Employment Relations Authority* (at paragraph [32]):

> '"*In my view, "canvas" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or custom. I consider a degree of "influence" is required. There must be an active component and a positive intention.*"

Fiduciary duties

186. A fiduciary has a duty of disclosure. There was an issue between the parties as to how far this extended. The Defendants relied on a decision of Falconer J. in *Balston v Headline Filters* [1990] FSR 385 to argue that a director was not in breach of his fiduciary duties in failing to disclose his intention to set up a competing business because:

> "[386] … *an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflict in interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading.*"

187. In *British Midland Tool Ltd v Midland International Tooling Ltd* (*supra*) Hart J. usefully explained the content of the duty of disclosure of a director fiduciary in the following passages of luminous clarity:

> *"*[89] *A director's duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. The fact that the activity is contemplated by himself is, on the authority of* Balston's *case, a circumstance which may excuse him from the latter aspect of the duty. But where the activity involves both himself and others, there is nothing in the authorities which excuses*

> *him from it. This applies, in my judgment, whether or not the activity in itself would constitute a breach by anyone of any relevant duty owed to the company."*
>
> *"*[81] *A director would be under a duty to alert his fellow board members to a nascent commercial threat to the future prospects of the company, and that duty would be all the greater (and certainly no less) when he himself was planning to be part of the threat."*
>
> *"*[89] *A director who wishes to engage in a competing business and not disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps."*

188. As will be apparent from the passages above quoted, Hart J. distinguished *Balston* on the basis that it was limited to the situation where the director was intending to compete *on his own, i.e.* without any involvement with other employees or directors of the employer. I respectfully agree with his approach. There is a world of difference between a fiduciary, or any other employee for that matter, acting alone to advance their careers and a situation where they act knowingly in concert with other employees in the organisation to set up in direct competition with their employer.

189. Furthermore, a fiduciary's duty of disclosure is not a separate, stand-alone duty but a tributary flowing from a fiduciary's mainstream duty to act in good faith. As Arden L.J. explained in *Item Software (UK) Ltd v Fassihi* (*supra*) in the context of a director fiduciary (the other two members of the Court agreeing on the issue of disclosure):

> *"*[41] *For my part, I do not consider that it is correct to infer from the cases to which I have referred that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it. So to hold would lead to a proliferation of duties and arguments about their breadth. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. This duty of loyalty is the 'time-honoured' rule: per Goulding J in* Mutual Life Insurance Co of New York v Rank Organisation Ltd *[1985] BCLC 11, 21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies."*

190. *Balston* pre-dates the Court of Appeal's guidance in *Fassihi* and is, in my view, overtaken by it. In all cases, the test which the Court has to apply is essentially a broad one: Did the fiduciary breach the duty to act in what he in good faith considers to be the best interests of his company?

191. As *Goulding* succinctly summarises (at paragraph [2.120]):

> *"The net effect of the decisions in* Fassihi *and* Helmet Integrated Systems *would appear to be that:*

(1) A fiduciary, and in particular a director, will owe a duty to disclose his own misconduct whenever he in good faith considers that misconduct prejudices the best interests of his employer or the company in question;

(2) There is no overriding rule that this duty cannot apply in the case of an employee fiduciary, indeed the position in that regard is 'clear'; but

(3) In respect of mere employees, there is only a contractual duty to report on other employees, and even then only when in all the circumstances such a duty can be inferred from the nature of the employment."

192. *Goulding* advises, rightly in my view, that the working assumption should be that there has been a tightening of the law in this area [2.138]:

> *"In summary, given the conflicting first instance decisions and the running of the current judicial tide against directors, the working assumption must be that directors and senior employees ought to disclose: (a) any action at all, if taken by others, that will lead to competitive activity; and (b) any action of their own, as soon as the irrevocable intention to compete is formed (unless they resign immediately)."*

(2) Inducing Breach of Contract

193. There was not much between the parties on the legal principles and approach relating to inducing breach of contract.

194. The leading case on inducing breach of contract is *OBG Ltd v. Allan* [2008] 1 AC 1. The Defendants relied on Lord Hoffmann's judgment in *OBG Limited* to submit that actual knowledge is required for a finding of inducing breach of contract, *i.e.* the Claimant had to show that PRO had had actual knowledge that it was inducing the other Defendants to act in breach of contract. The Defendants point to paragraph [39] where Lord Hoffmann says:

> *"*[39] *To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter* of *law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."*

195. If one reads on in his judgment, however, Lord Hoffmann goes on to make it clear that 'knowledge' includes turning a 'blind eye'. Having earlier cited, with approval, *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 where Lord Denning MR dealt with 'reckless indifference', Lord Hoffmann states at paragraph [41]:

> "[41] *It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact*".

196. In *Aerostar Maintenance International Ltd v. Wilson* [2010] EWHC 2032 (Ch), para. [163] Morgan J. usefully set out the five steps necessary for a finding of inducing breach of contract:

> "[1] *first, there must be a contract,* [2] *second, there must be a breach of that contract,* [3] *thirdly, the conduct of the relevant defendant must have been such as to procure or induce that breach,* [4] *fourthly, the relevant defendant must have known of the existence of the relevant term in the contract or turned a blind eye to the existence of such a term and,* [5] *fifthly, the relevant defendant must have actually realised that the conduct, which was being induced or procured, would result in a breach of the term.*" (numbers added).

(3) Conspiracy to injure

197. The basic tenets of an actionable conspiracy to injure are set out in *Kuwait Oil Tanker Co SAK v. Al Bader* [2000] 2 All ER (Comm) 271 at para [108] per Nourse L.J.:

> "[108] *...A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the pre-dominant purpose of the defendant to do so.*"

198. So long as each individual conspirator knows the central facts and entertains the same object it is not necessary that all conspirators join the agreement at the same time (*Kuwait Oil* at paragraph [132]). The requirement for knowledge includes 'blind-eye' knowledge (see *Bank of Tokyo v. Baskan Gida* [2009] EWHC 1276 (Ch) at paragraphs [837– 840]).

199. The Defendants must intend to injure the Claimant. However, the 'intention' element of the tort is satisfied if injury to the Claimant is the inevitable consequence of the benefit to the Defendant. As Lord Nicholls said in his 'explanatory gloss' to the general rule at paragraph [167] of *OBG (supra)*:

> *"*[167] *Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."*

(4) The Duty of Confidence

200. As part of his general duty of fidelity, an employee owes a duty of confidence to his employers. There was an issue between the parties as to extent to which an employer must be required to particularise the relevant confidential information and its misuse, in order to justify the enforcement of non-competition covenants against his employees.

201. The answer to this issue lies in understanding the rationale behind the particularisation rule. It is to enable the court to be satisfied that the claimant has a legitimate interest

to protect. This was explained by Aldous L.J. in *Scully (UK) Ltd v Lee* [1998] IRLR 259 at paragraph [23]:

> *"[23] [T]he confidential information must be particularised sufficiently to enable the court to be satisfied that the plaintiff has a legitimate interest to protect. That requires an inquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect… Sufficient detail must be given to enable that to be decided but no more is necessary."* (emphasis added).

202. In *Thomas v Farr* [2007] IRLR 419, Toulson L.J. expressly approved of Aldous L.J. in *Scully (supra)* and added at paragraph [42]:

> *"*[42] *Provided that the employer overcomes that hurdle, it is no argument against a restrictive covenant that it may be very difficult for either the employer or the employee to know where exactly the line may lie between information which remains confidential after the end of employment and the information which does not. The fact that the distinction can be very hard to draw may support the reasonableness of a non-competition clause.*

203. Toulson L.J. went on to explain the relevance of the point on the facts in *Farr* at paragraph [47] as follows:

> *"Part of Mr Thomas's case was that he had no recollection of any truly confidential information after he left Farr. The judge did not accept that evidence. He found that, while Mr Thomas would not be able to recall the details of every transaction, it was likely that for key clients and for important aspects of the insurance he would be able to recall key figures and percentages and strategies. I can see no proper basis on which that finding of fact can be challenged. I would only add that if it had been the case that, as events turned out, Mr Thomas was unable to recall any truly confidential information after leaving Farr, that could afford a reason for the court not granting an injunction in support of the non-competition clause. It would not follow that the clause was unreasonably in restraint of trade at the time of his appointment."*

204. In *Farr* the claimant, a former managing director of the defendant firm of insurance brokers in a niche market, challenged the enforceability of a 12-month covenant restraining him working for a competitor in the same geographic area as he had worked in for the defendant. At *nisi prius*, the judge held that a 12-month covenant in this niche market was justified and the Court of Appeal upheld his decision.

205. The time for considering whether there is a protectable interest with regards to confidential information is the date at which the contract was entered into. It should be noted that the duty of confidence exists as an equitable obligation which may affect third parties (such as PRO). Thus, where a third party knows that confidential information has been imparted to it in breach of an obligation of confidence to the original confider it may be open to sanction. This extends to a third party that is 'wilfully ignorant' of the likelihood that the information was obtained in breach of confidence: *Royal Brunei Airlines v. Tan* [1995] 2 AC 378 at page 389.

(5) The Non-Competition Covenants

206. The Claimant sought direct and indirect enforcement of the non-competition covenants. The Claimant sought to enforce the non-competition covenants of Mr Hearn and Mr Kirk directly (although it should be noted that Mr Hearn's covenants had expired just before the trial on 27th October 2011); and to enforce the non-competition covenants of Mr Kent, Mr Linacre, Mr Petrie, Ms Cooper, Ms Clarke and Mr Gill indirectly, by way of prohibition of the Defendants' inducement of their breaches of contract. The Defendants contend that all the non-competition covenants were void as being in unlawful restraint of trade. The Claimant pointed out that the Defendants had changed their stance since they had previously said that the non-competition covenants of Mr Hearn and Mr Kirk would be honoured.

Employer's burden of proof

207. It is trite that a restrictive covenant is void as an unlawful restraint of trade unless the employer can show it goes no further than is reasonably necessary to protect his legitimate business interests: *Herbert Morris Ltd v Saxelby* [1916] AC 688, HL.

General Principles

208. The general principles as regards the enforcement of covenants was usefully summarised by the Court of Appeal in *FSS Travel and Leisure Systems v Johnson* [1998] IRLR 382 in the judgment of Mummery L.J. at paragraphs [29–34]:

> *"(1) The court will never uphold a covenant taken by an employer merely to protect himself from competition by a former employee.*
>
> *(2) There must be some subject matter which an employer can legitimately protect by a restrictive covenant. As was said by Lord Wilberforce in* Stenhouse Ltd v Phillips *[1974] AC 391 at p.400E (cited by Slade L.J. in* the Office Angels *[1991] IRLR 214 case, supra):*
>
> > *'The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation.'*
>
> *(3) Protection can be legitimately claimed for identifiable objective knowledge constituting the employer's trade secrets with which the employee has become acquainted during his employment.*
>
> *(4) Protection cannot be legitimately claimed in respect of the skill, experience, know-how and general knowledge acquired by an employee as part of his job during his employment, even though that will equip him as a competitor, or potential employee of a competitor, of the employer.*
>
> *(5) The critical question is whether the employer has trade secrets which can be fairly regarded as his property, as distinct from the skill, experience, know-how, and general knowledge which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor. This distinction necessitates examination of all the evidence relating*

to the nature of the employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition to the employer.

(6) As Staughton L.J. recognised in Lansing Linde Ltd [1991] IRLR 80 … the problem in making a distinction between general skill and knowledge, which every employee can take with him when he leaves, and secret or confidential information, which he may be restrained from using, is one of definition. It must be possible to identify information used in the relevant business, the use and dissemination of which is likely to harm the employer, and establish that the employer has limited dissemination and not, for example, encouraged or permitted its widespread publication. In each case it is a question of examining closely the detailed evidence relating to the employer's claim for secrecy of information and deciding, as a matter of fact, on which side of the boundary line it falls. Lack of precision in pleading and absence of solid evidence in proof of trade secrets are frequently fatal to enforcement of a restrictive covenant…"

209. As Mummery L.J. said, the critical question is whether the employer has "*trade secrets*" which can be fairly regarded as his property, as distinct from the "*skill, experience, know-how, and general knowledge*" which can fairly be regarded as the property of the employee to use without restraint for his own benefit or in the service of a competitor.

General approach

210. The general approach the Court should adopt when considering the enforceability of the non-competition covenants was set out in *Norbrook Laboratories (GB) Limited v Adair* [2008] IRLR 878 at paragraphs [38] to [46] and can be summarised as follows:

(1) The Court must determine what the covenant means, properly construed.

(2) The Court must then consider whether the former employer has shown on the evidence that it has legitimate interests requiring protection in relation to the employer's employment.

(3) Once legitimate protectable interests are shown, the covenant must be shown by the former employer to be no wider than reasonably necessary.

(4) Even if the covenant is held to be reasonable, the Court will decide whether, as a matter of discretion, the injunctive relief sought should in all the circumstances be granted having regard, amongst other things, to its reasonableness at the time of trial.

(5) The burden is on the covenantee to establish that the restraint is no greater than reasonably necessary for the proper protection of protectable interests.

(6) Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties at the time that the contract was entered into or varied and having regard to the contractual provisions as a whole and to

> the factual matrix to which the contract would then realistically have been expected to apply (paragraph [48]).

(See also the guidance in *Office Angels v Rainer-Thomas and O'Connor* [1991] IRLR 214 (CA) summarised by Laddie J. in *Countrywide Assured Financial Services Limited v. Smart et al.* [2004] EWHC 1214 at para. [8])

Assessing reasonableness

211. I refer also to the useful guidance by Cox J. in *TFS Derivatives Ltd v. Morgan* [2005] IRLR 246 at paragraphs [36-38] as to the correct approach to the question of assessing reasonableness of covenants:

> "*...In assessing reasonableness, there is essentially a three-stage process to be undertaken.*
>
> [1] *Firstly, the court must decide what the covenant means when properly construed.* [2] *Secondly, the court will consider whether the former employers have shown on the evidence that they have legitimate business interests requiring protection in relation to the employee's employment. In this case, as will be seen later on, the defendant concedes that TFS have demonstrated on the evidence legitimate business interests to protect in respect of customer connection, confidential information and the integrity or stability of the workforce, although the extent of the confidential information is in dispute in relation to its shelf life and/or the extent to which it is either memorable or portable.*
>
> [3] *Thirdly, once the existence of legitimate protectable interests has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. Reasonable necessity is to be assessed from the perspective of reasonable persons in the position of the parties as at the date of the contract, having regard to the contractual provisions as a whole and to the factual matrix to which the contract would then realistically have been expected to apply.*"

212. On the first question of construction, Cox J. stated (at para [43]):

> "*[I]f, having examined the restrictive covenant in the context of the relevant factual matrix, the court concludes that there is an element of ambiguity and that there are two possible constructions of the covenant, one of which would lead to a conclusion that it was in unreasonable restraint of trade and unlawful, but the other would lead to the opposite result, then the court should adopt the latter construction on the basis that the parties are to be deemed to have intended their bargain to be lawful and not to offend against the public interest.*"

213. In *TFS Derivatives*, the Court enforced a non-competition clause (with some blue-pencilled removal of some unreasonably wide wording). It did so on the basis of the closeness of contacts that were formed between employees and their broker contacts and the confidential information to which the employee would have been exposed. The Court emphasised in particular the difficulty of policing other forms of protection (see paragraph [84] of the Judgment).

Other points

214. The Court is entitled to consider whether a covenant of a narrower nature would have sufficed to protect the employer's position as explained in the following passage of Sir Christopher Slade in *Office Angels v Rainer-Thomas (supra)* [50]):

> *"The Court cannot say that a covenant in one form affords no more than adequate protection to a covenantee's relevant legitimate interests if the evidence shows that a covenant in another form, much less far reaching and less potentially prejudicial to the covenantor, would have afforded adequate protection".*

215. It will be seen it is only if the Court finds that a "*much less far-reaching*" covenant would have afforded adequate protection is it likely to regard the existing restriction as unreasonable. The exercise is not a marginal one, otherwise Courts would be faced with a paralysing debate in every case about whether a covenant with x days shaved off would still provide adequate protection.

216. In *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, the Court of Appeal drew a distinction between confidential information and "*highly*" confidential information. Whilst the distinction is not always easy to divine, the importance is that the former is generally not protectable after employment but the latter is being of a different category and akin to a trade secret.

Analysis of enforceability of non-competition covenants

217. It is convenient to turn to deal with the enforceability of non-competition covenants at this stage. The Claimant puts forward three separate grounds to justify the enforceability of the non-competition covenants which I analyse below:

(1) Confidentiality;

(2) Client connections; and

(3) Stability of workforce.

Ground (1): 'Confidentiality'

218. The first ground upon which the Claimant contended that the non-competition covenants were justified and enforceable was the need to protect confidential information which would have come to the knowledge of the employees in question.

219. The Defendants complained that the Claimant had failed sufficiently to plead and particularise the confidential information relied upon. The Claimant sought to rectify this prior to trial by listing 13 specific categories of documents in Mr O'Farrell's statement which are said justified the non-competition covenant. This list was further expanded and particularised in the Scott Schedule prepared during the hearing relating to 14 categories (see above). The Defendants denied that these documents amounted to 'trade secrets' or were sufficiently confidential information to justify a post-termination non-competition covenant restriction.

220. The following points are pertinent as regards the 'confidentiality' justification. First, a number of the documents were fairly basic business procedure documents which were not, by their nature, particularly sophisticated or secret, and, in any event, would be capable of recreation by the Defendants and ex-employees using their own skill and knowledge given enough time and effort (*viz.* the five standard British Marine documents relied upon by the QBE, namely the British Marine P&I Quotations Procedure, P&I Quotations Procedure, P&I Renewal Procedure, Pricing Processes and Marine Claims Handling Procedure).

221. Second, many of the documents contain material that would be remarkably unmemorable, *e.g.* as to details of some 10,000 ships, and which would not be capable of independent recollection or afford much practical advantage since such details would normally require updating or broker or shipowner verification before a renewal (*viz.* the CALM IT database, the Insurance Policies, the Underwriting Reports, the papers provided for the weekly P&I meetings, the Reinsurance Notes and Updates, and Underwriter Rationale Summary).

222. Third, much of the information in the documents is publicly available in identical or similar form (*e.g.* the precedent clauses held on CALM IT, the General Increase Record, some of the Reinsurance Notes and Updates).

223. Fourth, much of the information in the documents is underwriter-focussed and not particularly relevant to those with claims roles (*viz.* the P&I Quotations Procedure; the Underwriting Reports, the data provided with the minutes of the weekly P&I meetings, the General Increase Records, the Underwriter Rationale Summary, the Charterers P&I Quotations Procedure, the P&I Renewal Procedure and the British Marine Pricing Process).

224. Fifth, as stated above, despite the identification of broad categories of documents, there was little particularisation by the Claimant of the 'trade secrets' or '*highly* confidential' information justifying additional protection by non-competition covenants.

225. Sixth, whilst it was clear that Mr Dymoke had access to 'top level' data and figures, there was insufficient evidence that junior British Marine employees had access to such information as to justify the enforcement of non-competition covenants against them.

226. For these reasons, in my judgment, the Claimant has not justified the enforcement of the non-competition covenants on the grounds of access to 'trade secrets' or 'highly confidential' information.

Ground (2): 'Client connections'

227. The second ground upon which the Claimant contended that the non-competition covenants were justified and enforceable was the need to protect its client base from ex-employees who had built up client connections and might seek to entice them post-termination.

228. The P&I world is very much a relationship-driven business. There is a step change, however, between being an assistant or deputy underwriter and being the Underwriter.

It is the Underwriter who is the key figure and to whom shipowners and brokers have primary regard. It is the Underwriter who forms the closest relationships with clients. There was some evidence of assistant and deputy underwriters at British Marine travelling to visit clients abroad as part of their career development path to becoming underwriters (*e.g.* Mr Petrie travelled as the sole representative of the British Marine underwriting to his specialist areas in Bulgaria and the Far East). The evidence was, however, thin and did not demonstrate such regular contacts by assistant or deputy underwriters as to give rise to close client relationships of the type enjoyed by their more senior underwriting colleagues.

229. As regards claims personnel, they too have client contact and are not simply 'back-office'. British Marine prided itself on its claims handling service. There was some evidence of claims personnel travelling on occasion to visit clients (*e.g.* Mr Linacre travelled to Holland, Belgium, Turkey and Bangladesh on business to see brokers and advise assureds on claims and claims protection). The evidence was, again, limited and did not demonstrate the building up of strong client relationships by personnel in the claims department. There was some evidence regarding the difficulty of 'policing' *extra-curricular* client contacts and unlawful enticement to transfer business but this evidence was not particularly conclusive.

230. In my judgment, the evidence did not justify enforcement of the non-competition covenants against the employees in question on 'client contacts' grounds.

Ground (3): Stability of workforce

231. The third ground upon which the Claimant contended that the non-competition covenants were justified and enforceable was on the basis of the need to protect the 'stability' of its workforce.

232. The Defendants contended that this ground was not open to the Claimant because it did not feature in the preamble to the restrictive covenants clause in the employee's contracts as one of the 'legitimate business interests' which it was intended that the restrictive covenants should protect. The preamble only referred to two legitimate business interests: (i) the fact that employees had obtained or were likely to obtain *"Confidential Information"* relating to the business of the company in the course of their employment; and (ii) the fact that employees had obtained or were likely to obtain *"personal knowledge and influence concerning clients and customers"* of the Company in the course of their employment (see full quotation from the Employment Contracts above). The preamble made no mention of 'workforce stability' or any other ground.

233. Accordingly, the Defendants argued, the Claimant cannot now be permitted to rely on other grounds to seek to justify or buttress the non-competition covenants, such as the stability of its workforce. In support of this contention, the Defendants cite the following passage of Sir Christopher Slade in *Office Angels* at paragraph [39]:

> *"In a case where the wording of a covenant restricting competition by an employee after leaving his employer's service does not specifically state the interest of the employer which the covenant is intended to protect, the court is, in my judgement, entitled to look both at that wording and the surrounding circumstances for the purpose of ascertaining that interest, by reference to what*

would, objectively, appear to have been the intentions of the parties. However, in a second category of case where the employer, who proffers the covenant for the employee's acceptance, chooses specifically to state the interest of the employer which the covenant is intended to protect, the employer is not, in my opinion, entitled thereafter to seek to justify the covenant by reference to some separate and additional interest which has not been specified. An employee who is invited to enter into a covenant of this kind may wish to take legal advice as to its validity and effect before he accepts it. His legal advisers will, in my opinion, be entitled to give him such advice on the basis of the stated purpose of the covenant, if any such purpose is stated."

234. The Claimant submitted that the principle enunciated by Sir Christopher Slade does not apply in this case because the preamble to the non-competition covenant is not exclusive and the stability of a workforce is not a "*separate and additional*" ground but merely a matter of 'common sense' arising in almost all employment relationships. The Claimant pointed to *TFS Derivatives Ltd (supra)* contending the preamble to the restrictive covenants protecting *" sensitive information", "clients"* and *"goodwill"* but proved no bar to Cox J. holding that 'workforce stability' was an additional legitimate business interest justifying the protection. In my judgment, however, *TFS Derivatives* is of limited assistance to the Claimant on this point. There the defendant conceded that stability of the workforce was one of the legitimate interests to protect, and the curtilage of the preamble was not in issue. Nor was the Court referred to the above passage of Sir Christopher Slade in *Office Angels (supra).*

235. The wording in the present case falls within Sir Christopher Slade's second category, namely an employer, who has proffered various covenants for the employee's acceptance, has chosen specifically to identify the interest or interests which the covenants were intended to protect. There is no reason as a matter of language (or common sense) why the parties should not have expressly referred to 'stability of workforce' as a legitimate interest requiring protection, in the same way as other general interests like *e.g.* 'goodwill'. In any event, protecting 'stability of workforce' is *"separate and additional"* to 'confidentiality' and 'client relations'. Furthermore, where the language and identification of the particular legitimate business interests to be protected is clear (as it is here), there are no grounds for justifying a departure from normal rule of construction, *i.e. inclusio unius est exclusio alterius*. Putting the matter colloquially, as it was in *Countrywide Assured Financial Services Limited v. Smart* (*supra*), if an employer nails his colours to the mast, he is stuck with those colours and that mast.

236. In my judgment, the third ground is not open to the Claimant as a matter of construction.

Non-competition covenants are not enforceable

237. For the above reasons, in my judgement, the Claimant has not discharged its burden of proof and justified the enforcement of non-competition covenants against the eight British Marine employees in question on any of the three bases put forward. Accordingly, I therefore decline to grant this aspect of the relief sought. Given my conclusions on 'springboard' relief, however, it makes little practical difference to the result (see further below).

No issue as to other post-termination covenants

238. No issue arises as to the operation post-termination of the other covenants. Morgan Lewis, on behalf of the Defendants, gave repeated assurances on 7th and 17th June 2011 and subsequently in July and August, that their clients would comply with their contractual obligations to the Claimant (601-602, 609-612, 652, 663 and 665) and only latterly took issue with the non-compete covenants. Similarly, on 6th July 2011 PRO gave an undertaking that it would not induce individual Defendants to breach their contractual obligations to the Claimant (515-516). Rightly, no issue was taken with any of the other covenants.

(6) Springboard

239. The principles behind 'springboard' relief are now well-established and, in my view, can be summarised as follows.

240. First, where a person has obtained a 'head start' as a result of unlawful acts, the Court has the power to grant an injunction which restrains the wrongdoer, so as to deprive him of the fruits of his unlawful acts. This is often known as 'springboard' relief.

241. Second, the purpose of a 'springboard' order as Nourse L.J. explained in *Roger Bullivant v Ellis* [1987] ICR 464 is *"to prevent the defendants from taking unfair advantage of the springboard which [the Judge] considered they must have built up by their misuse of the information in the card index*" (at page 476G). May L.J. added that an injunction could be granted depriving defendants of the springboard "*which ex hypothesi they had unlawfully acquired for themselves by the use of the plaintiffs' customers' names in breach of the duty of fidelity*" (at 478E-G). The Court of Appeal upheld Falconer J.'s decision restraining an employee who had taken away a customer card index from entering into any contracts made with customers.

242. Third, 'springboard' relief is not confined to cases of breach of confidence. It can be granted in relation to breaches of contractual and fiduciary duties (see *Midas IT Services v Opus Portfolio Ltd.*, unreported Ch.D, Blackburne J. 21/12/99, pp. 18-19), and flows from a wider principle that the court may grant an injunction to deprive a wrongdoer of the unlawful advantage derived from his wrongdoing. As Openshaw J. explained in *UBS v Vestra Wealth* (*supra*) at paragraphs [3] and [4]:

> *"There is some discussion in the authorities as to whether springboard relief is limited to cases where there is a misuse of confidential information. Such a limitation was expressly rejected in* Midas IT Services v Opus Portfolio Ltd, *an unreported decision of Blackburne J made on 21 December 1999, although it seems to have been accepted by Scott J in* Balston Ltd v Headline Filters Ltd *[1987] FSR 330 at 340. In the 20 years which have passed since that case, it seems to me that the law has developed; and I see no reason in principle by which it should be so limited.*
>
> *In my judgment, springboard relief is not confined to cases where former employees threaten to abuse confidential information acquired during the currency of their employment. It is available to prevent any future or further economic loss to a previous employer caused by former staff members taking an unfair advantage, and 'unfair start', of any serious breaches of their contract of*

> *employment (or if they are acting in concert with others, of any breach by any of those others). That unfair advantage must still exist at the time that the injunction is sought, and it must be shown that it would continue unless retrained. I accept that injunctions are to protect against and to prevent future and further losses and must not be used merely to punish breaches of contract."*

243. Fourth, 'springboard' relief must, however, be sought and obtained at a time when any unlawful advantage is still being enjoyed by the wrongdoer: *Universal Thermosensors v. Hibben* [1992] 1 WLR 840 Nicholls V-C; see also *Sun Valley Foods Ltd v. Vincent* [2000] FSR 825 esp at 834.

244. Fifth, 'springboard' relief should have the aim *"simply of restoring the parties to the competitive position they each set out to occupy and would have occupied but for the defendant's misconduct"* (*per* Sir David Nicholls *VC Universal Thermosensors v. Hibben* [1992] 1 WLR 840 at [855A]). It is not fair and just if it has a much more far-reaching effect than this, such as driving the defendant out of business [855A],

245. Sixth, 'springboard' relief will not be granted where a monetary award would have provided an adequate remedy to the Claimant for the wrong done to it (*Universal Thermosensors v. Hibben* [1992] 1 WLR 840 at [855B]).

246. Seventh, 'springboard' relief is not intended to punish the Defendant for wrongdoing. It is merely to provide fair and just protection for unlawful harm on an interim basis. What is fair and just in any particular circumstances will be measured by (i) *the effect* of the unlawful acts upon the Claimant; and (ii) *the extent* to which the Defendant has gained an illegitimate competitive advantage (see *Sectrack NV. v. (1) Satamatics Ltd (2) Jan Leemans* [2007] EWHC 3003 Flaux J.). The seriousness or egregiousness of the particular breach has no bearing on the period for which the injunction should be granted. In this regard, it is worth bearing in mind what Flaux J, said at paragraph [68]:

> *"[68] I agree with Mr Lowenstein that logically, the seriousness of the breach and the egregiousness of the Defendants' conduct cannot have any bearing on the period for which the injunction should be granted - <u>what matters is the effect of the breach of confidence upon the Claimant in the sense of the extent to which the First Defendant has gained an illegitimate competitive advantage</u>. In my judgment, Mr Cohen's submissions seriously underestimate the unfair competitive advantage gained by the Defendants from access to the Claimant's "customer list" and ignore, in any event, the impact (if the injunction were lifted) of actual or potential misuse of other confidential information such as volume of business or pricing information. It is important in that context to have in mind that the Claimant maintains in its evidence that all the information said to be confidential remains confidential."* (emphasis added)

247. Eighth, the burden is on the Claimant to spell out the precise nature and period of the competitive advantage. An 'ephemeral' and 'short term' advantage will not be sufficient (*per* Jonathan Parker J. in *Sun Valley Foods Ltd v. Vincent* [2000] FSR 825 esp at 834).

ANALYSIS – SPRINGBOARD RELIEF

248. This is an overwhelming case on the facts. Whatever the precise tests on the law, in my judgment, there could not be a clearer case for 'springboard' relief than the present case. The facts of this case are in many respects stronger than any of the recent quartet of case cited above, *i.e. Shepherd Investments, UBS Wealth Management, Kynixia,* or *Tullett Prebon* (*supra*). I set out my analysis below.

The Project Phoenix plan

249. Project Phoenix was, in its conception, simple and ruthless: to 'hollow out' by stealth British Marine's underwriting and claims teams and move them across, together with their books and clients and data, to a new ready-made turn-key vehicle, financed by PRO, secured by RSA with up to US$500m cover, owned and controlled by the Defendants, which would steadily acquire British Marine's business, starting with the 2012 renewals. The model to be used of delegated underwriting and claims authority and a managing general agency agreement was a matter of form and did not materially alter the fact that this was intended to be the spirit of British Marine 'rising like a Phoenix from the ashes', back in its original offices, Walsingham House, with most of its key people but with a different name, *"Lodestar"*. The Defendants' plan was effectively to acquire British Marine's business by stealth and without paying for it.

250. Project Phoenix was, in its execution, a remarkable feat of planning, plotting, organisation and secrecy, carried out over 12 months from July 2010 to July 2011. It was carried out during the course of actual employment. It would have been a considerable tribute to the formidable abilities of Mr Dymoke and Mr Hearn but for the fact that it necessarily involved them in numerous, repeated and continual breaches of their duties of fidelity, duties of confidentiality, fiduciary duties and other contractual duties owed to their employers, QBE, and inducing many others into their tangled web.

251. Mr Bloch QC accused Mr Reade QC of viewing and presenting every fact and document through the 'prism' of dishonesty, when there were other perfectly innocent explanations for them. The problem is that any process of ratiocination in this case leads inexorably to the same conclusion. In my judgment, everything points to the Defendants having been engaged, over many months, in a careful, concerted and covert campaign of unlawful behaviour with the illegitimate aim of acquiring British Marine's people and business.

Breaches by Mr Dymoke, Mr Hearn and Mr Kirk

252. There was unlawful conduct by Mr Dymoke, Mr Hearn and Mr Kirk in four main respects. (1) First, broad-scale solicitation by Mr Dymoke, Mr Hearn and Mr Kirk during the currency of their employment, initially of each other, and then of other key British Marine underwriting and claims employees, to join the new venture. (2) Second, substantial abuse and misuse of materials and confidential information belonging to British Marine in order to assist in the process of getting financial backing from PRO, security provider for the new venture from RSA and FSA permission. (3) Third, significant solicitation of British Marine's broker customers with a view to encouraging them to give their future business to the new venture. (4) Fourth, a complete failure to disclose any of these activities to British Marine

management, notwithstanding they were aimed at setting up a new venture in direct competition with British Marine.

253. In my judgment, Mr Dymoke's obligations under Clause 3.2 of his contract and his obligations as a fiduciary meant that from that moment he was approached by Mr Hearn in mid-2010 with the proposal to set up a new venture together in direct competition with British Marine, he was obliged to 'come clean' and immediately inform Mr Harris and/or Mr O'Farrell. It was also incumbent upon him to alert QBE Group management as soon as the threat of a significant number of British Marine underwriters and claims handlers jumping ship and moving *en bloc* to a brand new start up competitor became a possibility. Mr Dymoke himself acknowledged that it was part of his responsibility to warn the Claimant about the possibility of Mr Hunt moving to Shipowners P&I and to try and prevent this from happening. The coup that he was seeking to achieve by enticing a large number of employees away to a start-up competitor was a much greater threat than this. When asked why he did not warn QBE Group management he simply said candidly: *"Well, it's quite evident that I was potentially going to be that competitor."* His only explanation was that he would not wish to tell QBE Group that he was 'going for an interview' with another employer. But his activities with Mr Hearn and Mr Kirk were a far cry from a mere interview. He said: *"I wasn't drawing up a whole load of people and making sure that they were targeted. That wasn't what I was doing"*. But that is precisely what he was doing, in concert with Mr Hearn and Mr Kirk.

254. Mr Dymoke, Mr Hearn and Mr Kirk took full advantage of the time that they were employees of QBE: (i) by using their senior positions to exert influence over subordinate employees in order to foment those employees' resignations from QBE; (ii) by lifting British Marine's confidential information to which they had access by reason of their status within the company or other British Marine materials in order to use them for their future venture; (iii) by negotiating with backers such as PRO and RSA from a position where they had access to whatever information and materials were required to secure their support; and (iv) by contacting some of British Marine's existing broker and client base and securing their support for their future venture. These are classic 'springboard' advantages that could never have been achieved but for their unlawful conduct whilst still employed by QBE, and could never have been realised if Messrs Dymoke, Hearn and Kirk had not been able to start setting up their new venture until when their employment had terminated and their covenants had run their course (see further below).

255. The present case shares similarities with the facts of *Kynixia (supra)* where the defendants were senior employees who planned to transfer their allegiance to a competitor and misled the claimant leading up to and during their exit interviews. Cases such as *Tullett Prebon plc* make it clear that the Courts will not sanction raids on teams of staff, particularly those led by desk heads or their equivalents, such as Mr Dymoke, Mr Hearn and Mr Kirk. The tide of recent cases runs against this sort of conduct.

256. It should also be emphasised that all this unlawful activity by Mr Dymoke, Mr Hearn and Mr Kirk took place during their actual employment or garden leave. Further, the competitive vehicle was the defendant employees own creation. To this extent, the facts of this case are *a fortiori* many of the current authorities.

Not merely preparatory

257. The conduct here of Mr Dymoke, Mr Hearn and Mr Kirk went way beyond what could properly or rationally be described as 'preparatory'. It was not simply taking time off individually to attend the odd interviews with new prospective employers, or individually exploring how to set up a new business and discussing with financial backers. As stated above, it was concerted, covert action by them over many months to further a detailed plan, conceived jointly, to 'rip the heart' out of their own employer's business by setting up a new entity outside, comprising a virtual 'mirror business' in direct competition with their employer, using their own employer's key people and materials, which it was intended would be pretty much on a 'ready-to-go turn-key' basis, with all the requisite financial backing, security and even offices fully negotiated, signed and sealed.

258. If one asks the basic question whether or not the activities in which the employee was engaged affected his ability to be able to serve his employer faithfully and honestly and to the best of his abilities (*Shepherds Investments Ltd v. Walters, supra*), there really is only one answer: Mr Dymoke, Mr Hearn and Mr Kirk could not possibly claim to be faithfully serving British Marine and QBE when conducting themselves in the manner outlined above. They were actively trying to destroy British Marine and re-create it elsewhere for their own benefit.

Summary of breaches

259. Mr Dymoke, Mr Hearn and Mr Kirk's breaches are too numerous and various to list in full but include, in particular, the following:

(1) Mr Hearn approached Mr Dymoke with a view to them leaving the employment of QBE and setting up a business venture together in competition with the British Marine business of QBE staffed by present employees of QBE. Mr Dymoke and Mr Hearn then agreed that they would set up a new business venture in direct competition with QBE using present employees of QBE.

(2) Mr Dymoke and Mr Hearn sought Mr Kirk's participation in the venture and the latter then gave his assistance.

(3) Mr Dymoke, Mr Hearn and Mr Kirk planned to acquire QBE's underwriting and claims employees and brokers for the benefit of their new venture.

(4) Mr Dymoke, Mr Hearn and Mr Kirk serially approached numerous QBE employees and sought their agreement to become involved in the competing business and required them to keep silent about the new venture thereby inducing them to breach their own contracts of employment to QBE.

(5) Mr Dymoke, Mr Hearn and Mr Kirk approached some of QBE's brokers.

(6) Mr Dymoke, Mr Hearn and Mr Kirk sought the assistance of QBE's employees in helping set up the new venture and thereby induced them to breach their own contracts of employment, in particular, Mr Kent, who lent his active assistance to the project.

(7) Mr Dymoke, Mr Hearn and Mr Kirk attracted and negotiated investment and insurance backing for the new venture using a business plan which contained much QBE confidential information relating to the British Marine business of QBE.

(8) Mr Dymoke, Mr Hearn and Mr Kirk further attracted and negotiated investment backing from PRO and insurance backing from RSA on the basis that they would bring a hand-picked team of British Marine underwriters and claims handlers with them who would be able to bring across 'their' book, or part of it, to the new venture.

(9) Mr Dymoke, Mr Hearn and Mr Kirk misused confidential information of QBE and QBE materials for the purposes of carrying out the plan, in particular, negotiating and setting up security facilities for the new venture provided by RSA.

(10) Mr Dymoke, Mr Hearn and Mr Kirk engaged in steps to negotiate and secure a security facility from RSA on the basis of the appointment of the new venture as a managing agent.

(11) Mr Dymoke, Mr Hearn and Mr Kirk competed for staff for the new venture (*i.e.* Mr Collins).

(12) Mr Dymoke, Mr Hearn and Mr Kirk did not report any of their above actions or wrongdoing to QBE at any stage; and, indeed, at all material times, Mr Hearn and Mr Kirk sought to conceal their above unlawful activities and plans from QBE.

260. In summary, analysed against any of the authorities outlined above, the conduct of Mr Dymoke, Mr Hearn and Mr Kirk was plainly unlawful.

PRO's role and liability

261. From an early stage, Mr Linnell and PRO were very well aware of the obstacles and restrictions that the British Marine contracts of employment placed in the way of Mr Dymoke, Mr Hearn and Mr Kirk and the other targeted British Marine employees and Project Phoenix and the litigation risks they were all running in pursuing Project Phoenix. Despite this, however, PRO were determined to press ahead (i) regardless of the numerous breaches of contract they would induce, (ii) regardless of the damage it would cause to British Marine and (iii) regardless of the risk of serious litigation (which has come to pass). It is clear that decisions were taken at the highest level. Mr Linnell reported direct to the CEO of TAWA, Mr Gilles Erulin, and the COO of TAWA and CEO of PRO, Mr David Vaughan (1903).

262. At all material times, Mr Linnell and PRO played a full and active role in Project Phoenix. This involved supporting Mr Dymoke's, Mr Hearn's and Mr Kirk's unlawful activities, both logistically and financially, in order to seek to bring Project

Phoenix to fruition as planned under the noses of QBE Group management. PRO understood they were getting the cream of the underwriting team identified in the Phoenix Business Plan (1903). PRO knew that Mr Dymoke was a very senior employee of British Marine. Mr Linnell admitted that PRO were given the contracts of employment of the British Marine staff identified in the British Marine *"very early on"*. PRO knew that the process of getting Project Phoenix up and running involved pitching to RSA, a competitor of QBE, and the cloning of large numbers of British Marine documents. PRO gave the order *"aggressively to target the staff of British Marine"* (3963). PRO knew that the recruitment process by TPD was a sham and the process of extracting the British Marine personnel was being orchestrated by Mr Dymoke, Mr Hearn and Mr Kirk whilst still employed by British Marine (see further below).

263. In my judgment, this was a 'knowing inducement' case. At all material times, PRO knew exactly what they were doing. A 'blind eye' is, however, enough to give rise to liability for inducing breach of contract. It is enough if, as here, PRO had "*the means of knowledge which they deliberately disregarded"*; or *"deliberately sought to get [the] contract terminated, heedless of its terms, regardless whether it was terminated by breach or not"* (see *Emerald Construction, supra,* Lord Denning at pp. 700-701). Even indifference to whether or not the intended departure of employees is lawful or not is sufficient to give rise to liability for inducing breach of contact (see *Tullett Prebon, supra,* at para [178]).

264. PRO's knowing inducements of breaches of contract by Mr Dymoke and Mr Hearn and Mr Kirk and others are apparent from the facts outlined above and are too numerous and various to list in full but include, in particular, the following elements:

(1) PRO agreed to back and enter into the new venture knowing that Mr Dymoke, Mr Hearn and Mr Kirk intended to bring with them QBE employees, brokers and confidential information for use in that business, or being wilfully blind to the unlawful implications of the business plan, the implementation of which they were supporting, facilitating and funding.

(2) PRO's financial backing for the new venture was given on the basis of a business plan unlawfully conceived by Mr Dymoke, Mr Hearn and Mr Kirk to 'lever out' the P&I business from British Marine, or a substantial part of the same.

(3) At all material times PRO knew of the contractual obligations owed to QBE by Mr Dymoke, Mr Hearn and Mr Kirk and Mr Kent, Mr Linacre, Mr Petrie, Mr Gill, Ms Cooper and Ms Clarke, or were wilfully blind to them, and that the implementation of the business plan would necessarily involve numerous breaches by these employees of their contractual obligations to their employer, QBE.

265. For the above reasons, PRO are liable for inducing numerous breaches of contract by Mr Dymoke, Mr Hearn and Mr Kirk and others.

Conspiracy to injure

266. In view of my conclusion on inducing breach of contract, it is not necessary for me to deal with actionable conspiracy to injure, save to observe that all the ingredients of *Kuwait Oil Tanker Co SAK v. Al Bader (supra)* would appear to be present here.

DEFENDANTS' ARGUMENTS

Limited breaches of fidelity

267. In his final submissions for the Defendants, Mr Bloch QC raised two general arguments.

268. The first was regarding breach of the duty of fidelity. He accepted that Mr Dymoke and Mr Hearn had 'crossed the line' into what he called 'impermissible preparations' but submitted only in three limited respects, namely: (i) using British Marine's documentation for the proposed competitive venture, whether confidential or not; (ii) using the limited services of Mr Kent to advise RSA at two meetings and attend a meeting with a potential software provider; and (iii) inviting Mr Kirk to join the venture, enlisting his assistance and encouraging him to stay on board when he had doubts in April 2011. Mr Bloch QC argued that these three breaches could not conceivably have given the Defendants a significant head start.

269. His second argument was regarding breach by non-disclosure. Mr Bloch QC also said that there was no obligation to disclose one's own breaches of the duty of fidelity to one's employer but accepted that there might be (i) a duty to disclose other employee's breaches even if this involved indirect disclosure of one's own breach; (ii) a duty to disclose breaches of fiduciary duty if one was a fiduciary; and (iii) a duty to disclose a threat to the business irrespective of any breach of contract. He again argued, however, that any failure to disclose these matters could not conceivably have given a head start, and any misuse of British Marine's documents, for instance, would only have given a transient advantage.

270. The short answer to both these arguments is that they fly in the face of the weight of the facts and ignore the sheer scale of the breaches and unlawful and covert conduct by the Defendants that took place over many months which were all specifically aimed at targeting British Marine's key personnel and its book of business (see above).

Causation defences

271. Mr Bloch QC also raised three arguments by way of defence on causation.

(A) No proof of causation by particular breaches

272. The first was that the Claimant was unable to show that any particular individual breaches of the duty of fidelity or other duties had caused it any particular loss, damage or disadvantage.

273. In my judgment, however, the correct approach is not to look simply at the individual breaches *seriatim* or in isolation, but to have regard to the totality of conduct complained of and ask whether the cumulative effect thereof is such as to have caused loss, damage or disadvantage to the Claimant. On this basis, there is no question in

this case that some 12 months of unlawful activity acting in concert put the Defendants at a major advantage and caused commensurate loss, damage and disadvantage to QBE. In short, by their unlawful conduct, the Defendants stole a march on the Claimant.

(B) 'Springboard' advantage illusory

274. The Defendants' second causation argument was even if Mr Dymoke and Mr Hearn and Mr Kirk had done the right thing and 'fessed up' about their intentions to QBE management as early as October 2010, the likely consequence would have been that (i) all three would immediately have been put on garden leave, (ii) Mr Hearn and Mr Kirk would have been free of their three-month notice period plus their three-month post-termination constraints by April 2011, (iii) Mr Dymoke would have been free of his six-month notice period plus his six-month post termination constraints by October 2011, and, *ergo*, (iv) the end result would have simply meant an accelerated timetable of preparations for the new venture. For these reasons Mr Bloch QC asserted the Claimant's case on a 'springboard' advantage having been gained is illusory.

275. The short answer to this second causation point is, as Mr Reade QC for the Claimant rightly submitted, that the matter has to be tested on the basis that there was no wrong-doing *whatsoever* on the part of Mr Dymoke, Mr Hearn and Mr Kirk at any stage either prior to or after their notional resignations until the end of their 'garden' leave and restrictive covenant obligations, *i.e.* no solicitation, no enticement, no use of confidential information to prepare a business plan, no secret negotiations with potential backers of a rival business partners *etc.* On this hypothesis of entirely lawful behaviour throughout, Mr Dymoke, Mr Hearn and Mr Kirk would have been locked into a period of *stasis* and unable to further their plans until the effluxion of all their contractual obligations and restrictions. Moreover, it is entirely possible that Mr Kirk might have been persuaded to stay given his later reticence. In these circumstances, in my judgment, it is unlikely (to put it no higher) that they would have been in a more advanced position than they were in fact by reason of their months of covert activity.

'Pied Piper' Defence

276. The third argument raised by Mr Bloch QC was the 'Pied Piper' defence. He argued that, such was the respect and esteem in which Mr Dymoke and Mr Hearn were held in the office, if they had resigned in October 2010 to form a new venture, a substantial number of their colleagues at British Marine would inevitably have followed, including those who did in fact subsequently resign.

277. In my judgment, this is not correct. There was no inevitability about it. It is true that Mr Dymoke and Mr Hearn were charismatic and dynamic figures and commanded great respect and loyalty amongst their more junior colleagues in the office. It is also true that morale at British Marine was not good in 2010, partly due to the move from Walsingham House and partly due to some unhappiness about remuneration packages and other issues. In my judgment, however, the malaise was not such that if Mr

Dymoke and Mr Hearn had jumped ship, this would inevitably have triggered a mass exodus of disaffected British Marine employees loyal to them. One or two like Mr Linacre, who had a particular loyalty to Mr Kirk, might have followed, but any haemorrhaging would certainly not have been anywhere near the scale which it was subsequently discovered the Defendants had orchestrated. It is likely that Mr O'Farrell and other senior management at QBE would, in any event, have taken defensive measures to stem any trickle. Mr O'Farrell did, in fact, do so albeit somewhat belatedly in May 2011 when he and QBE realised the serious scale of covert solicitation that had already gone on. These defensive measures did have the effect of keeping figures such as Mr Healy and Mr Ginman in the fold.

278. The further fatal problem with this 'Pied Piper' argument is that, like the second causation argument (see above), it too fails to take account of the need to test the matter on the assumption of entirely lawful music being sounded by those playing the pipes. The likelihood is that Mr Dymoke and Mr Hearn would have stood alone in splendid isolation for some time if they had started merely with a green field site. This was amply demonstrated by the following piece of cross-examination by Mr Reade QC of Mr Kent:

> *Q. Suppose that Mr Dymoke and Mr Hearn, without offence to them, were starting a business in a green field with nothing other than their skill and aptitude, and no financial backing. You would never have accepted a job with them, would you?*
> *A. That's correct.*
> *Q. And it had to be the case, did it not, that they had to have a business that had sufficient financial support to command the security of providing the sort of salary that you wished to be paid from the beginning?*
> *A. They would have needed that, that's correct.*

279. The emperors had to have clothes if they were to attract a following.

REMEDY – SPRINGBOARD RELIEF

280. In my judgment, damages would not be an adequate remedy and 'springboard' relief is appropriate in this case. Only an injunction could properly protect the Claimant from the advantage which the Defendants have gained by their meticulous and sustained campaign of unlawful actions aimed at targeting British Marine's people and business for so long a period.

281. The launch of the new venture, particularly this side of annual renewals on 20th February 2011, could have led to significant damage to British Marine's business interests and position in the market. Such damage would have been difficult to quantify and potentially irreversible. It may only take one telephone call with a broker or a client to cause a shift in loyalties and the transfer of business, particularly as the new venture will have the advantage of operating with many ex-British Marine staff. The destination of lost business would not in all cases be known. Furthermore, any enquiry into damages would be heavily dependent on evidence to be provided by the Defendants and their co-operation to establish the extent of any calculable losses.

Defendants' assertions of lawfulness untrue

282. The Defendants' behaviour set out above in detail in this judgment must be viewed in the context of the Defendants' assertion that they had never been in breach of contract or ever engaged in unlawful conduct. On 17th June 2011, for instance, the Defendants' solicitors, Messrs. Morgan Lewis asserted that the Defendants' previous conduct had been lawful and said *"our clients believe that they have complied with their contractual obligations"* (609). It is now abundantly clear from the disclosure and the evidence that this was simply untrue. The Defendants had engaged in over 12 months of remorseless unlawful activity which involved numerous breaches of contract and was specifically targeted at the Claimant and its business which at all material times the Defendants sought to hide from the Claimant. Mr Nigel Wilkinson QC's instincts were entirely right when granting further interim relief (see above).

283. In all the circumstances, in my judgment the Claimant is entitled to, and deserving of, the full protection of the Court by way of an effective final 'springboard' injunction.

Length of springboard

284. I turn to consider length of the 'springboard', *i.e.* the period and scope of the injunctive relief to be granted. The Court must assess the actual advantage gained by wrongdoers as a result of their unlawful activities and grant appropriate relief. Springboard injunctive relief is for unlawfully 'stealing a march' on competitors. The essential question is therefore: how much of a march have the Defendants in this case, in fact, stolen on the Claimant as a result of their wrongdoing? This depends on both the length and tensile strength of the 'springboard' itself and gauging the relative advantage gained by its use. The Claimant contends for injunctive relief until June/ July 2012.

285. The principles to be applied by the Court in this assessment exercise are, in my view, as follows:

(1) First, the appropriate measure for the length of a springboard injunction is the length of time that it would have taken the wrongdoer to achieve lawfully what he in fact achieved unlawfully, relative to the victim.

(2) Second, it must be emphasised that the exercise is a relative one and any advantage must be measured as such. Wrongful activities may have both a positive and negative effect, *i.e.* benefiting the wrongdoer whilst simultaneously harming the victim. Thus, for instance, the unlawful poaching of key staff is likely to advantage the wrongdoing party whilst disadvantaging the victim who has lost key staff and may have to recover lost market ground.

(3) Third, it is relevant to look at the period of time over which the unlawful activities have in fact taken place. The relationship of this period with the length of any springboard relief is, however, kinetic not linear.

(4) Fourth, there may be many different factors at play during the period of unlawful activity materially affecting the advantage gained which may, or may not, obtain in similar assumed circumstances of purely lawful activity. These factors might include, for instance, (i) the advantage of soliciting junior employees whilst still being employed and in positions of power, compared with the trying to recruit as an ex-employee, (ii) the advantage of stealth and

secrecy, so that management are unaware and do not take defensive measures, and (iii) conversely, the advantage sometimes of being able to work speedily and not having to be covert.

(5) Fifth, the nature and length of the 'springboard' relief should be fair and just in all the circumstances.

Relevant considerations

286. There are numerous relevant considerations to take account of in the present case, some of which I briefly touch on below.

287. The unlawful activity started at the latest in July 2010 when Mr Hearn first approached Mr Dymoke with definite intent. They did not, however, start working in earnest on the Phoenix Project until August 2010 when they first sought the assistance of NMB in putting together figures and approached a third party for funding. There was a great deal of activity that then took place covertly without QBE being aware which included enlisting Mr Kirk, soliciting the key employees in their British Marine and claims teams, putting together the Phoenix Business Plan, finding the right financial backers, pitching to PRO and RSA, preparing the base documentation and the FSA application and negotiating financial terms.

288. The Defendants were originally aiming at a launch date for Project Phoenix of 1st March 2011 which subsequently slipped to 1st November 2011. Even the latter date might have been somewhat optimistic, however, given a slower than expected RSA due diligence process and the fact that the FSA only granted approval in October 2011.

289. Mr Hearn, Mr Kirk and Mr Dymoke would not have been able to start working on many of these tasks until the expiry of their contractual restrictions. Released from the shackles of employment contracts, however, and the need to act covertly, these able and ambitious individuals would have been able to work more quickly and effectively in the open.

290. There were, however, many pieces of the jigsaw puzzle to be put in place which required a concerted effort of the three of them leading the project. Their 'pulling power' with junior employees at British Marine may not have been so potent once no longer employed. Their ability to persuade PRO and RSA that they had a ready made team prepared to jump ship less obvious. This, in turn, might have slowed the willingness of British Marine staff to take the plunge.

291. Part of the plan seems to have been to use Mr Hunt and Mr Mahoney as advance 'outriders' to help with early marketing prior to the arrival of the main cohort of ex-British Marine employees arriving; and it is for this reason that the comment was made that the "*spotlight*" might well fall on them (2402). But, in my view, it would be unfair to allow the Defendants to use them to establish some sort of a 'bridgehead' for similar reasons to those enunciated by Openshaw J.'s in *UBS v. Vestra (supra)* at [32]).

292. The most important date in the calendar year is 20th February 2012 when over 70% of renewals take place. The Defendants main aim was to have "*Lodestar*" up and

running in time to take advantage of these 2012 renewals. This was the main prize and advantage which the Defendants sought unfairly to gain. But for their unlawful activities, however, the Defendants would have stood little chance of a set up and launch this side of the 2012 renewals. In my judgment, to allow the Defendants to launch *"Lodestar"* before the February 2012 renewals would be highly injurious and unfair to QBE and allow them to gain materially from the unlawful advantage which they should not have gained in the first place.

Springboard relief granted until 28th April 2012

293. In my judgment, taking all the relevant factors into account, it would be fair and just in all the circumstances to grant 'springboard' relief to QBE until 28th April 2012, *i.e.* just over two months after the February 2012 renewals and 12 months after the resignations of Mr Dymoke, Mr Hearn and Mr Kirk.

294. Accordingly, I grant QBE 'springboard' relief by way of a final injunction which is to run until 28th April 2012 against each of the Defendants.

LOSS AND DAMAGE

295. In view of my conclusion that damages would not be an adequate remedy in this case and 'springboard' relief by way of a final injunction is appropriate, the only remaining question is whether there was loss and damage occasioned which falls to be considered and compensated quite apart from the matters to which the final injunction relates.

296. It is not disputed that recruitment and retention costs are foreseeable losses that flow from the Defendants' actions, that is to say the costs the Claimant reasonably expended by way of defensive measures in order (i) to retain staff who might have been tempted to follow the exodus and (ii) to recruit new staff to fill the gaps left by those who had resigned to join PRO.

297. The Defendants' 'soft departure' strategy (*i.e.* of resignations being rolled out over a period of time) worked. It took some time for QBE management to wake up to the full scale of the defections taking place. I do not, however, accept that Mr O' Farrell is to be criticised for being a bit slow off the mark, other than with the benefit of hindsight. The trio of resignations on 28th April 2011 came out of the blue; and given the lack of success of previous attempts at start-ups, it was reasonable for Mr O'Farrell and QBE Group management to suppose that any further departures in the wake of the trio would be limited. The Defendants' successful campaign of secrecy regarding Project Phoenix kept QBE management pretty much in the dark. Those who resigned were unforthcoming and did not even disclose the name of their new employer. As Mr O'Farrell explains, PRO's name was discovered by chance when Mr Harris spotted the contract for one of the departing employees on the printer by his desk.

298. When the true picture began to emerge, however, it was clear that rapid action had to be taken and the company cheque book had to be opened in order to try to stem the outflow. This meant shoring up the existing employee base as quickly as possible and seeking to persuade those who had resigned to return. In the event, Mr Ginman, Mr Glover, Mr Bamberger and Mr Hamerston were persuaded to stay but, of those

who actually resigned, only Mr Healy was persuaded to change his mind and revoke his resignation.

299. QBE claimed three heads of loss: (A) Retention cost, (B) Recruitment costs and (C) Claims adjuster costs.

(A) Retention costs

300. The Claimant claimed for pay rises given to retain staff amounting to £73,238.53 which included a bonus to Mr Healy of £25,000. Pay rises were offered to all relevant staff and backdated to 1st June 2011 (save for Mr Kent who said he had made up his mind to leave). These were by way of advance pay rises and only claimed up to January 2012 when pay rises would normally have been given in any event. There was no general practice of offering mid-term pay rises at British Marine. In my judgment, the staff retention costs of £73,238.53 were reasonably incurred.

(B) Recruitment costs

301. The Claimant claimed recruitment expenses totalling an estimated £214,837. There were 10 vacancies to fill. Mr Gibbons confirmed that 18% was a reasonable agent's fee for recruitment of permanent staff. In the circumstances, it was reasonable and necessary for QBE to offer salaries in excess of market rates. The Claimant needed to recruit staff quickly to fill the gaps to maintain confidence and clients and prevent a further collapse. To date, I understand that something like half of the vacancies have been filled. In my judgment, the staff recruitment costs of £214,837 were properly incurred.

(C) Claims adjuster costs

302. The Claimant claimed £25,955.28 in respect of the cost of employing a temporary claims adjuster from July 2011 to January 2012. Given the disruption that the spate of resignations caused and the need to keep work ticking over, in my judgment, it was reasonable for the Claimant to employ a temporary claims adjuster and the figure of £25,955.28 is reasonable.

Summary of damages

303. In summary, I find each of the heads of claim for loss made out and, accordingly, award the Claimant a total figure of £314,030.81 by way of damages.

RESULT

304. In the result, I find for the Claimant on the major issues and grant appropriate 'springboard' relief and damages.

Postscript

305. I would like to pay tribute to solicitors and counsel on both sides for the impressive way in which they got this matter ready for trial in short order, for the skill,

thoroughness and elegance with which both side's cases were presented and for the constructive atmosphere in which the hearing was conducted throughout.