Neutral Citation Number: [2019] EWHC 2839 (QB)

Case No: TLQ18/0226

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: Friday 25 October 2019

Before:

MR JUSTICE FREEDMAN

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Between:

(1) Alesco Risk Management Services Limited
(2) Arthur J Gallagher Services (UK) Limited
(3) Arthur. J. Gallagher (UK) Limited

Claimants

-and-

(1) Bishopsgate Insurance Brokers Limited
(2) Prices Forbes and Partners Limited
(3) The Ardonagh Group Limited
(4) Nawaf Hasan
(5) Peter Burton

Defendants

Mr Gavin Mansfield QC, Mr Craig Rajgopaul and Mr Grahame Anderson (instructed by **Clyde & Co**) for the **Claimant**
Mr David Craig QC, Ms Amy Rogers and Mr Jamie Susskind (instructed by **Lewis Silkin**) for the **1st, 2nd and 3rd Defendants**
Mr Richard Leiper QC and Mr Michael Lee (instructed by **Mishcon de Reya**) for the **4th Defendant**
Ms Jane McCafferty QC and Mr Simon Forshaw (instructed by **Doyle Clayton**) for the **5th Defendant**

Hearing dates: 12th-15th, 18th-22nd and 25th-29th of March 2019, 8th-10th of May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Freedman:

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II Introduction

1. The claim concerns an alleged unlawful team move of employees between rival firms of insurance brokers. The Claimants and the Corporate Defendants form part of large groups of companies in the insurance broking and risk management industry. This dispute concerns the employment of specialist energy insurance brokers in the London market.

2. The Claimants and the Corporate Defendants are commercial rivals with a particular history. Ardonagh's CEO, Mr Ross, worked for Gallagher for 25 years, latterly as CEO of its international business. In 2015, Mr Ross moved to Towergate, along with a number of other Gallagher employees. Mr Ross (and two others) were sued by Gallagher, alleging an unlawful team move. Those proceedings ("the 2015 Proceedings") were compromised with a payment of £20,000,000 to Gallagher and no admission of liability.

III The parties

(i) The Claimants

3. The Claimants are all subsidiaries of the Arthur J Gallagher ("Gallagher") group. The First Claimant ("Alesco") is a wholly owned subsidiary of the Third Claimant ("AJG UK"). The Second Claimant ("AJG Services") is a service company that employs individuals engaged in Alesco's business (and others in the group). Alesco was founded in 2008 by the AJG group of companies (referred to as "AJ Gallagher" or simply "AJG"). AJG owned 65% of the shares of Alesco with the remaining 35% divided among its employees: see Burton 1 [10-12]. It commenced its activities in the energy sector, but subsequently diversified its activities including construction by the recruitment of Mr Thompson and people who worked with him, and casualty by the recruitment of Mr Payne and people who worked with him: see (T2/74/23 - T2/76/4). In 2014, AJG bought the entirety of the shareholding in Alesco, and the employees ceased to share in Alesco's ownership.

(ii) The Corporate Defendants

4. The Third Defendant ("Ardonagh" (formerly "KIRS")) is the holding company for a variety of insurance businesses, notably Towergate which became known as Bishopsgate. The First Defendant ("Bishopsgate") was launched in 2016, and the Second Defendant ("Price Forbes") joined the Ardonagh group in June 2017. Price Forbes has for long had a substantial energy business with a significant presence: see Ross 1 [32-36]. Bishopsgate and Price Forbes now form the "Ardonagh Specialty" segment of Ardonagh. From at least April/May 2017, Bishopsgate has been involved in the energy insurance market.

(iii) Mr Hasan and other employees in MENA business

5. Mr Nawaf Hasan ("Mr Hasan") led and developed energy insurance business in the Middle East and North Africa ("MENA") for Alesco. Mr Hasan's employment contract with AJG UK is dated 9 August 2013.

6. Throughout his time at Alesco, Mr Hasan worked with Mr Gerard Maginn. Mr Maginn led and developed energy insurance business in Asia, including India and the Far East. Mr Maginn's contract of employment with Alesco is dated 12 November 2013. As with Mr Hasan, the Corporate Defendants initially intended that Mr Maginn would work for Bishopsgate, but ultimately, he joined Price Forbes on 1 February

2018 as an Executive Director, working alongside Mr Hasan in Price Forbes' Energy Division. Messrs Hasan and Maginn were supported in much of their work at Alesco by Mr Tarrent Cohen. Mr Cohen's employment contract with the First Claimant is dated 28 May 2014. In addition, Mr Nicholas Game, a claims handler for Alesco, provided particular support for the clients worked on by Messrs Hasan and Maginn. Mr Game's employment contract with the First Claimant is dated 24 November 2014. Another individual, Hussain Hussein, also worked at Alesco during 2017, including in respect of MENA business. Mr Hussein is the son of the Group Managing Director of Doha Insurance, a client that Mr Hasan worked closely with as part of his duties at Alesco. The term "Departing Employees' will be used to refer to the key 4 employees who left Alesco, namely Messrs Burton, Hasan, Brewins and Maginn.

(iv) Mr Burton and other employees in US business/Land Rig Facility

7. Mr Peter Burton ("Mr Burton") developed and managed Alesco's US onshore contractor facility, known as the 'Land Rig Facility'. Mr Burton's employment with Alesco commenced on 1 February 2010; his latest contract of employment with Alesco is dated 24 March 2016. Mr Burton worked with Mr Brewins in respect of the Land Rig Facility. Mr Brewins' contract of employment with the First Claimant is dated 10 May 2010. Mr Burton did not have supervisory responsibility for Mr Brewins. Mr Brewins had a focus on clients in certain areas of the US, in particular, Denver, Oklahoma, Dallas and Kensas: see Brewins 1, [42].

IV Sequence of resignations

8. The sequence of resignations from Alesco of the employees who moved to the Corporate Defendants was as follows:

   (1) on 9 June 2017, Mr Brewins gave six months' notice to terminate his employment, and now works with Mr Burton at Bishopsgate as a Director – Energy;

   (2) on 30 June 2017, Mr Hasan gave six months' notice to terminate his employment. The Corporate Defendants initially intended that Mr Hasan would work for Bishopsgate, but ultimately, he joined Price Forbes as CEO of MENA on 17 January 2018;

   (3) on 3 July 2017, Mr Maginn gave six months' notice to terminate his employment by letter. This was the working day after Mr Hasan resigned;

   (4) on 11 July 2017, Mr Burton gave six months' notice to terminate his employment. Mr Burton has been employed by Bishopsgate as a Director since 12 February 2018 (and actively working for Bishopsgate since 26 July 2018, when the undertakings he gave to comply with his non-compete covenant expired);

   (5) on 15 September 2017, Mr Game resigned: initially the Corporate Defendants also intended that he would work at Bishopsgate, but ultimately, he joined Price Forbes along with Messrs Hasan, Maginn and Cohen;

(6) on 26 September 2017, Mr Cohen resigned from his employment. As with Messrs Hasan and Maginn, the Corporate Defendants initially intended that Mr Cohen would work for Bishopsgate, but he too joined Price Forbes to work with Messrs Hasan and Maginn as an Associate Director;

(7) in October 2017, Mr Hussein left Alesco. He then joined Messrs Hasan, Maginn, Cohen and Game at Price Forbes.

9. Various emails regarded these employees as a team. On 29 November 2017, Mr Newman sent an email to Mr Baxter headed 'Nawaf's Men' stating 'Apparently two of Nawaf's [Nawaf being a reference to D4] team will be available to join shortly possibly before the end of the year'. A Price Forbes email of 21 December 2017 lists all five of Messrs Hasan, Maginn, Cohen, Game and Hussein, describing them as 'this new team'.

V The approach to evidence

10. This has been an unusually hard-fought case from the perspective of the parties. It is in part of the nature of team move cases between rivals. The nature of the rivalry was likened to joining a rival football team: see Matson 3, [30] and (T6/37/5-9). Either you play for the team, or you are part of the enemy: there is nothing between being liked and loathed. Thus, no sooner had a colleague and friend given notice of termination than the person was vilified and subjected to insult and abuse. It seemed to go with the territory.

11. This kind of behaviour makes a Court wary in appraising the evidence. It is almost inevitable that evidence about former colleagues will be heavily influenced by this approach to commercial life. It might be the source of conscious or unconscious distortion in respect of how conversations are recalled or other events relating to the movers and those who were engineering the move. In their closing submissions, the Defendants referred to an *"esprit de corps"* having developed in the course of contemplated and extant proceedings making it difficult, according to them, for the Claimants' witnesses to give a reliable account of their thinking and conduct at the time. This in turn may infect the retrospective accounts of Departing Employees, their history influenced consciously or unconsciously by what they have learned in these proceedings about the attitudes to them of their former colleagues, particularly in the wake of the resignations.

12. By reference to extreme language about the Departing Employees prevalent among some of the witnesses for the Claimants, this is borne out. Whilst there was not the same degree of evidence of such language among the Defendants' witnesses, there is room for concern about the impact of partisanship generally in this case. However much Mr Ross sought to make light of any underlying feelings caused by the 2015 Proceedings, it would be unnatural for that not to have had an effect. The pressure on continuing employees of the respective parties to tow the party lines, whether consciously or unconsciously, has to be taken into account. The way in which the Departing Employees must feel a sense of grievance, whether justified or not, might lead to distortion in their evidence. The result is the need for great caution in looking at the witness statements and the oral examination on all sides in order to appraise the thinking and conduct at the time.

13. Against this background, the advice given by judges as to the approach to evidence is particularly germane. It is the more dangerous simply to rely on matters of impression of each witness. The need to appraise oral evidence against the background of the written contemporaneous evidence is well established. The most reliable guide will be the contemporaneous documents and the inherent probabilities.

14. Reference has been made among the well-known cases to the following in particular:

(1) *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, at 431:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be … though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or overmuch discussion of it with others? … a witness, however, honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after … contemporary documents are always of the utmost importance …"

(2) *The Ocean Frost* [1985] 3 WLR 640 at 676 per Robert Goff LJ (as he then was):

> "it is safer for a judge, before forming a view as to the truth of a particular fact, to look carefully at the probabilities as they emerge from the surrounding circumstances, and to consider the personal motives and interests of the witnesses."

(3) *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 Comm at [15-24], especially at [22] per Leggatt J (as he then was):

> "22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

15. In *Gestmin*, Leggatt J warned about carefully crafted witness statements which sometimes say more about the skill of the lawyers who prepared them than about the witness himself. Further, there is then the problem about the witness statement which was crafted on the basis of moulding a case becoming a part of the story of the well-prepared witness. The statement is almost committed to memory, and its choice phrases become a mantra for even an honest and conscientious witness. The danger of mantras has been identified by the parties in this case.

16. That is about themes in the evidence where a number of witnesses repeat the same. At its best, the evidence may be corroborative, adding to its weight. At its worst, the evidence may be the result of the very conspiracy which is at the heart of the case. In a team move case in particular, it may be somewhere in between, but no more reliable, that is to say the product of people working together in the preparation of their case and appearing to reinforce recollection, whilst in reality speaking consciously or unconsciously to another's script.

17. An example of the foregoing, but chosen as an example only, is the evidence to the effect that the employees were dissatisfied and going to move in any event. Whilst an unsettled workforce might be an indicator that the employees were looking to move in any event, such dissatisfaction might provide the environment where an employer is particularly vulnerable to an unlawful team move. Whilst individual rather than team approaches might indicate that there was no unlawful combination, the Court has to be vigilant about the approaches being stage managed. It is said that different recruitment agents were used for the different employees, but that too might be stage managed to avoid detection. To use the theatre analogy, the vigilance is not only to look at the drama on front stage, but to look carefully at what is going on back-stage and even to consider what is going on off stage away from the eyes of the audience. That is why the cases emphasise looking at the inherent probabilities as they emerge from the surrounding circumstances and the personal motives and interests of the witnesses. All of this is particularly resonant in the instant case.

VI The witnesses

18. This is a case where there have been metaphors of war. The parties have either adopted expressions which have been put into their mouths or which they have come to use in oral evidence. An example is that Messrs Matson, Clarkson and Thompson have all referred to "sharks" or "blood in the water", to describe the position after the Departing Employees resigned. The phrase appears nowhere in the contemporary documents.

19. Another expression adopted by the Claimants has been the word "destabilisation" and similar. That word, and variants of it, appears more than 22 times in the Claimants' witness statements. It appears more than 15 times in the Claimants' Closing Submissions. There was a reference to stability on one occasion in contemporaneous documents, but destabilisation and the like do not appear in the contemporary documents.

20. Whilst the examples are of the Claimants, the carefully crafted statements by the lawyers on all sides frequently were not matched always by the oral evidence. Further, and in any event, there was the overriding feeling that the combination of

warring parties and adversarial litigation led to parties entrenched in positions and affecting their recollections and message, and tellingly frequently more so in the written prepared statements than in the oral evidence.

21. All of this made particularly resonant the approach to oral evidence commended in particular in *Gestmin* and other cases above. It is in those circumstances that an analysis of the demeanour and broad impressions of each witness is not the central aspect of the fact-finding exercise. Very much subject to that stricture, I shall say a few words about some of the key witnesses.

22. I found Mr Matson, the CEO of Alesco at the material times, to be a particularly partisan witness who leapt to positions which were unmeasured and who was quick to anger. It may have been a part of the culture, and he may now regret that he used it, but the inflammatory language used by him at the time of the departures of the Departing Employees was all part of the exaggerated reaction to what had occurred. He even referred at the time to their departure as a *"terrorist attack"*. He leapt to the conclusion that the departure of a number of employees connoted unlawful conduct, he wanted to go to war with Mr Ross and he wanted to *"crush"* him. Mr Kavanagh in his exchange with Mr Matson said *"let's burn all the f***ers"*.

23. He viewed all the evidence - and the lack of any evidence in support of his suspicions – in that way. Hence his statement cited at greater length elsewhere in this judgment in respect of suspicion of business diverted which he could not prove: "*I suspect I have good foundation for my suspicions, I just lack evidence…".*

24. Knowing that he had to prove a conspiracy, he used the word *"orchestrated"* 21 times between his witness statements and in cross-examination. In respect of the Burton loan, he has used language such as *"bribery"*, *"corruption"*, and *"industrial espionage"* (T5/37/7-10) about it. He has briefed the press, and caused the matter to be reported to the FCA, who have taken no action. Since Mr Matson has been very much at the heart of this case from the Claimants' side, it has been necessary to step back from this strong characterisation, as well as being cautious about how much his views have infected his evidence and others on the Claimants' side.

25. Mr Byatt was an important witness in view of the alleged impact of his arrival and his actions on Mr Brewins. Mr Brewins' evidence in this regard was characterised by the Claimants as exaggerated. The core of his evidence was that he could not continue to work with Mr Byatt. Mr Brewins' account of an abusive meeting with Mr Byatt was broadly accepted by Mr Byatt in cross-examination (reference to Mr Brewins and Mr Sambrook as *"the old NMB c***s"* (T8/107/4-25) despite the Claimants' written evidence simply saying that he did not remember exactly what had been said: Byatt 2, [6]). Mr Byatt came over as very sure about himself and as being rather dismissive of Mr Brewins. He presented as obviously ambitious and keen to impress. He had a speedy rise up the ranks, and doing that at the expense of Mr Brewins did not seem to upset him. It is not necessary to be judgmental about that: this was a commercial environment with hard-nosed people. The importance for the case is that seeing Mr Byatt and Mr Brewins give evidence drew attention to the respective characters of the two individuals and assists in connection with the question as to whether Mr Brewins was guilty of exaggeration.

26. The other witnesses for the Claimants included Mr Payne, partner/managing director of Casualty of Alesco, whose written evidence was rather reduced in cross-examination. This was particularly so about his suggestion that Mr Ross had said that Mr Ross was driving a loaded truck at Gallaghers: as set out below, that statement was taken apart in the course of the case. He gave evidence about an offer of £6 million to him, but there was no evidence to the effect that the Departing Employees were involved in the making of such an offer.

27. Whilst attempting to further the Claimants' case, Mr Clarkson in oral evidence did come to accept that Mr Burton's frustrations were "probably genuine on his part" (T7/4/15). He gave telling answers in cross-examination (a) about Mr Hasan and Mr Maginn having been vocal in complaints, (b) about them feeling like a team on their own, about Mr Maginn having been promised a role and being upset when he did not get it, and (c) that it would not be a surprise for competitors to be seeking to hire the Departing Employees. Mr Thompson, at the material time managing partner (construction and energy) of Alesco, was partisan to the Claimants' case, and much of his oral evidence maintained that. Mr Chilton's evidence was not particularly detailed, which may not be surprising in view of his other responsibilities: *"I was running the International division of Gallagher's, and at this time I had been in that role for a couple of years, which was around 7,000 employees globally, of which this was one of those divisions"* (T7/152/6-10). The evidence of Messrs Cosgrove (account management partner of Alesco), Crichton (partner energy of Alesco), Barrett (partner Risk Consulting of Alesco). Likewise, the evidence of Ashfield (account management partner for the Corporate Defendants) does not require special mention, albeit that aspects of their evidence will be considered below.

28. Turning to the evidence of Mr Ross, his evidence was of central importance because, on the Claimants' case, he was at the centre of the unlawful conspiracy.

29. I found him to be a particularly intelligent witness. He generally gave his evidence in a measured and analytical way, making sure that he understood the question. An example was at (T11/24/8-17) when it was put to him that he had two versions of a business plan, and he asked whether it was two copies with different annotations rather than two versions, which Mr Mansfield QC had to accept. He had a way of keeping the temperature down and thereby defusing some of the questioning. This shows a high ability, but does not in the end enable the Court to decide on the extent to which his evidence was reliable. I did not accept all of his evidence. In particular, I shall comment below about his evidence in respect of his 3 June 2017 meeting with Mr Matson.

30. Overall, Mr Ross clearly had an agenda of expansion. He knew that expansion in terms of recruitment of any Alesco employees was likely to cause an aggressive response. He knew that he had to proceed with caution, but at the same time, he had expansionist ideas. I shall appraise whether that was a vendetta against the Claimants arising out of the 2015 Proceedings or for the predominant purpose of advancing the business of the Corporate Defendants.

31. I now refer to the evidence of Mr Burton. There were many times during his evidence when he came over as clear, fluent and cogent in his evidence. Indeed, this applies to a large part of his evidence but there were other times when his evidence was less satisfactory. He was cross-examined about the loan and he said that this did not

influence his decision. Even assuming that the loan was legitimate, the suggestion that it did not influence the decision as to where to go is not credible. It must have affected his willingness to join Bishopsgate. A related point was the difficulty of his evidence that his mind was not settled until a much later stage to join Bishopsgate. His evidence that he had no knowledge about the Departing Employees going to Bishopsgate until August 2017 (or indeed with questions relating to other attempts at recruitment) came over as unlikely to be the case. It was also troubling that he did not understand that Doyle Clayton was acting for him until late July or early August 2017. He has not been able to explain satisfactorily the circumstances in which he withheld information from the Claimants, and, without an explanation, his evidence was defensive and at times unsatisfactory.

32. Reference is now made to the evidence of Mr Hasan. He is a highly educated person. He is conspicuously clever. He has an extensive vocabulary. He was described in a note of Ms Cooke, the recruitment consultant, as *"very well educated smooth type…"* and as *"very switched on and ambitious".* He was also *"apparently VERY well connected"* in areas such as Libya, Egypt and Qatar and able to do this via family links/friends.

33. Nonetheless, there were significant parts of his evidence which were unsatisfactory. His evidence relating to the Business Plans was unsatisfactory, both as regards the RFIB version and the Bishopsgate copy. I formed the view that it was likely that he had greater discussion with Mr Maginn than he accepted to be the case. His attempts to explain how he was not involved in solicitation of customers were particularly poor. The question then arises as to whether these features and other aspects of the evidence (including non-disclosures and information to Alesco as to his intentions) lead to an inference that Mr Hasan was involved in a conspiracy of the kind alleged by the Claimants.

34. As regards Mr Brewins, his evidence was clear and convincing about the depth of his unhappiness as regards Mr Byatt. He gave evidence about the recruitment being through the Corporate Defendants and in particular Mr Ross and this evidence came over as being plausible. There were other aspects of his evidence which were less convincing including when asked questions by reference to a print-out of what calls he had with Mr Burton. It might have been because it was difficult to recall such calls or because he wished to avoid disclosing any contact with Mr Burton over the period of time.

35. I found Mr Maginn to be a plain-speaking witness. At (T12/204-207), he frankly admitted that his answers at exit interview had been untruthful as to where he was going, but he explained why he acted in that way. He felt that he was being subject to an interrogation. He said that it was aggressive and went beyond an exit interview. He did not wish to provide the information in those circumstances.

36. There were other less significant witnesses. Generally, the Corporate Defendants' witnesses, namely Mr Faraday (head of reward for the Ardonagh group), Ms Walker (then finance director at Bishopsgate) and Mr Baxter (chairman of the Marine, Energy and Natural Resources team at Price Forbes) came over as experienced and conscientious professionals who assisted the Court with their factual evidence. Those attempts as there were to show that they were dishonest were not effective e.g.

as regards in respect of the Burton loan: Mr Faraday came over as his own person rather than acting on Mr Ross's instructions either as regards the loan or his evidence.

VII The probabilities

37. Returning to cases such as *Ocean Frost* and *Gestmin*, I return to the inherent probabilities as per the Claimants' and the Defendants' cases. The Claimants point to various features about common stories and behaviour patterns as are said to show that in fact it is more likely that there was a common design being executed in a planned manner. They include the following alleged matters as submitted by the Claimants (they are not the only important matters):

(1) the proximity in time of the resignations designed to cause panic and alarm, including timed to coincide with the absence due to an operation of Mr Matson;

(2) the common story of dissatisfaction in the employment with Alesco without contemporaneous evidence of this, thus evidencing that the evidence of dissatisfaction has been made up or exaggerated to suit the story;

(3) the resignations without having taken up alternative employment at the Defendants which indicates that in reality they had agreed to go to the Corporate Defendants, but they intended to bolster their story that they were not moving together;

(4) the lies told in their exit interviews, particularly about their intentions despite contractual obligations to inform, which, say the Claimants, would have been unnecessary if there had not been a conspiracy.

38. There are a number of objective facts which are alleged by the Defendants which are said on their part to make the case against them untenable. More realistically, if established, they might inform about the inherent probabilities of the case to be viewed on the context of the facts as a whole. These include the following alleged matters (here too they are not the only important matters):

i) this was not a case of the move of a team. The two central employees, namely Messrs Burton and Hasan, did not work together or operate in the same fields whether by geography or sub-sector;

ii) this was not a case where the idea for the recruitment came from the Corporate Defendants: the principal employees were already in the market seeking to leave Alesco;

iii) the recruitment was individual with the involvement of different recruitment agents and the Corporate Defendants would have taken on any one or more of the principal employees even if the remaining ones did not move;

iv) the attempted recruitment of Mr Sambrook and Mr Baker without any involvement from the Departing Employees evidences the lawful nature of the process.

VIII The Departing Employees

(i) Closeness or otherwise of the Departing Employees prior to terminations

39. The Claimants emphasise that the four principal employees Mr Brewins, Mr Hasan, Mr Maginn and Mr Burton ("the Departing Employees") were all part of the energy team at AJG/Alesco, and they all resigned within the space of about 5 weeks in June/July 2017. Mr Hasan and Mr Maginn were very closely connected, having come together to Alesco, and identified as a unit. They were in the same field (whether by way of geography or sub-sector), namely MENA, referring to Middle East North Africa, downstream. Similarly, Mr Burton and Mr Brewins, whilst not as close, did operate in the same field by way of geography (USA) and in the same sub-sector (USA upstream). Whilst it is true that there was limited contact between the two sets of individuals, they were all in the energy sector, and it was important to join them in the context of offering a truly international energy offering.

40. Nevertheless, there is very little evidence before the Court of any interaction at all between Mr Hasan and Mr Maginn on the one hand and Messrs Burton and Brewins on the other, including during their time at Alesco. Their evidence is that their work only overlapped infrequently (Hasan 1 [60-64], Matson 2 [31], Burton 1 [56-59], Brewins 1 [38-41]; Maginn 1, [28]). This is not substantially contradicted. It is consistent with the documents disclosed in this case which contain few exchanges between Messrs Hasan and Maginn on the one hand, and

41. Messrs Burton or Brewins on the other. Mr Matson accepted in evidence that Mr Burton and Mr Hasan did not work together very often: (T5/48/7 -T5/48/15)). This is also consistent with the oral evidence at trial. Mr Burton told the Court that he did not even have Mr Hasan's telephone number until May 2018, and there is no evidence to the contrary (T12/137/3 - T12/137/6). When asked during cross-examination if he accepted that Mr Hasan did not have much to do with Mr Burton, Mr Matson replied "not significantly" and told the Court that they did not work together on business "very often" (T5/48/7 - T5/48/15). There was evidence to the effect that Mr Burton and Mr Hasan had only limited interaction, and even that they did not get on: see Hasan 1 [60-61]; Burton 1, [57].

42. There is a need to be wary about the evidence that Mr Burton and Mr Hasan did not get on. It was even suggested that Ardonagh used the code names Edison and Tesla (who famously disliked each other) in respect of their recruitment. Mr Ross (Ardonagh's CEO) said that it would have been positively damaging for Mr Burton to know that Ardonagh was looking to recruit Mr Hasan, and *vice versa.* There is some difficulty about how it was that two employees, who on the Defendants' case, had such limited contact with each other had a relationship which had descended into animosity. That is regrettably what arises out of close contact, but there are less opportunities for such intense feeling where people barely have any contact with each other. It is difficult to discern any significant contemporaneous evidence of conflict.

43. The lack of close connection was not just of Mr Burton and Mr Hasan. Mr Hasan and Mr Maginn did not work with Mr Burton or Mr Brewins, save in limited and incidental respects: Burton 1, [56]; Hasan 1, [61, 64]; Brewins 1, [40-41]; Maginn 1, [28]. Even Mr Burton and Mr Brewins, who did work together (and with a considerable number of others) on the Alesco land rig facility, were not a 'team'.

Each worked far more closely with other brokers: Burton 2, [8-11]; Brewins 1, [42]. There were other more likely candidates with whom Mr Burton might have moved as opposed to Mr Brewins, who had been having a tough time. For example, Mr Matson referred to Mr Ryan Short as follows: *"Mr Short was the one I was most worried about, in truth….Mr Short was Mr Burton's right-hand man in the office, the kind of back-up guy in the office, my Lord. For me, he was the most crucial one of that team at that time."* (T5/107:15-21). Mr Burton in cross-examination said *"the closest person I worked with was actually Mr Short and then Mr Short sat on a team which included Mr Baker, Mr Cooke and Mr Suckling."* (T12/40/2-4)

44. I do not accept that the relationship of Mr Burton and Mr Hasan was one of animosity. A reason why I so find is that I accept the inconsistent strand of evidence that their contact was limited, such that any joint recruitment of them would not be of a 'team' as that word is usually used. That is not to say that it is impossible that it could not be planned or organised that they should leave as a team. Further, it is important not to take too literally the term "team" as if it was an ingredient of a wrong: it is simply a useful shorthand rather than a part of the ingredients of the torts which are engaged. Nevertheless, the fact that Mr Burton and Mr Hasan did not work together closely before the move reduces the inherent probability that this was a team move, let alone an unlawful team move.

(ii) The Departing Employees were looking for other employment before contact with the Corporate Defendants

45. There is evidence in respect of each of the Departing Employees that he was looking to leave Alesco and/or that there were reasons why he left other than as part of a conspiracy. The Claimant characterises these reasons as *"an effort to minimise the damages for which they are liable resulting from their unlawful actions"*. If and to the extent that they are established, they may be an answer to the case on causation, but in the first instance, they are relied upon not only as to damages, but also to answer the case on liability. In other words, each of the Departing Employees says that he was pursuing plans for their future, not in concert with the other Departing Employees and without any intention to injure.

46. Mr Ross in his evidence said in cross-examination that insofar as there was competition, it was against competitors in the market to recruit them in the event that they were to leave Alesco. Mr Ross said the following (T11/64/22 – T11/65/18):

> "A. Not really. I mean, the fact is, as I said to you yesterday, I wasn't competing against Alesco for the boys, because the boys were leaving. I was competing against everybody else because there was more than us trying to hire them.
>
> Q. Well, you don't know whether they were leaving or not do you, Mr Ross?
>
> A. They were definitely leaving. That I had absolute comfort on.
>
> Q. You had "absolute comfort on"?

> A. Yes, I believed they were all going to leave.
>
> Q. Because you say that each of them tell you they were going to leave, or that was your assessment?
>
> A. They were very unhappy and very determined to leave.
>
> Q. That is an exaggeration of the position. I will address that with the individual witnesses, but you are exaggerating their determination to leave without your encouragement, Mr Ross?
>
> A. Not at all. I mean, bear in mind that when I met them they were in advanced discussions with other people. I didn't take happy people and make them unhappy, they were just unhappy when I met them."

47. This evidence has to be viewed with some caution. It is self-serving. It is not backed up by a significant number of contemporaneous documents. The evidence must be tested as a whole to see what interest there was in other employers to recruit and in the Departing Employees to leave.

48. Bishopsgate says that it only discovered that there was an opportunity to recruit by chance. In this case, there is evidence, albeit not first-hand, of RK Harrison being ready to recruit a number of employees from Alesco. Mr Burton met Mr Neil Pearce ("Mr Pearce"), a managing director at Bishopsgate, by chance at an industry ski weekend, and told him that he was unhappy and that he had been speaking to a number of other firms: see Burton 1, [142]. Mr Pearce related this to Mr Ross. Mr Pearce obtained Mr Burton's telephone number so that Mr Ross could contact Mr Burton. In February 2017, having found out about dissatisfaction of Mr Burton, Mr Ross spoke with Mr Smith of RK Harrison with whom the Corporate Defendants were in discussions: see Ross 1, [48-49]. In the course of seeking to persuade him to join the Corporate Defendants, Mr Smith told Mr Ross that RK Harrison was hopeful of recruiting not only Mr Burton, but also was in discussions with the other Departing Employees. Mr Ross knew about all of them from his time at Alesco and rated all of them highly. Mr Smith told him that RK Harrison was hopeful of recruiting all of them. There is also evidence of some of the employees being in discussion with other prospective employers.

49. This was an environment where companies in the sector were regularly looking to recruit good employees, and where employees would test their worth by looking around. Mr Ross described the workforce as "fluid" and "migratory": Ross 1 [38] and (T11/71/12). The Claimants say that the fact that an employee was mindful of other opportunities is not by itself particularly significant. This point is made by the Claimants in their skeleton closing at [223.1]:

> "Although the Departing Employees claim to have had approaches from multiple competitors in the market, such approaches are common; on their own evidence they had been taking place on a regular basis prior to 2017 (see for example [Burton 1, §122, 125, 133]; [Hasan 1, §102, 104]; [Brewins 1, §25]; [Maginn 1, §24]); none of them had attracted serious

> interest from the Departing Employees. The unsuccessful approaches by other brokers show the stability of the Departing Employees' employment at Alesco."

50. Despite the conclusory sentence, these approaches do not assist in building up a stable workforce. Particularly good employees would know that if they had reason for dissatisfaction or for other reasons wished to leave that there was no shortage of potential competitors who might wish to hire them. The nature of the approaches is to be considered and it is against this background that the terminations of the employment of the Departing Employees occurred.

51. The foregoing, if accepted, shows that the opportunity for the recruitment of the Departing Employees came not as a result of its being sought, but accidentally in the course of conversations of Mr Ross with Mr Smith following contact between Mr Burton and Mr Pearce. The Claimants could have rebutted this evidence by calling Mr Smith who had joined Alesco in November 2018, but they did not do so. Assuming that the story is true that the Departing Employees did indeed have discussion with RK Harrison, it might be said that it could be evidence of some joint planning of the Departing Employees which started with RK Harrison and moved on to the Corporate Defendants. In fact, it does not appear that way from the way in which the evidence has emerged.

52. There was evidence from Mr Brewins about extensive conversations both in 2016 and 2017 with RK Harrison through in particular Mr Smith with a view to his joining RK Harrison. They played golf over the summer of 2016, there were further discussions in August/September 2016. There were about four or five meetings with Mr Smith and Mr Hillson of RK Harrison, according to Mr Brewins' recollection. These were not passing conversations, but they spoke not only about his recruitment, but about a salary, how his retention would be paid off (part by him and part by RK Harrison) and it was also mentioned that there was a view of the equity structure with a view to his being a part of that: see (T9/132-133, 135, 136 and 194). This was more tangible than that suggested by the Claimants, but, on the other hand, not contained in written offers. Here again, this evidence was uncontradicted, despite Mr Smith having moved from RK Harrison to the Claimants in November 2018 as above stated.

53. The evidence of Mr Burton as to approaches by RK Harrison prior to February 2017 is more limited. It is that Mr Beckett from RK Harrison first contacted Mr Burton in January 2017 and then Mr Burton met with Mr James Beckett and Mr Paul Redgate for dinner on one occasion and breakfast on another occasion in or around February 2017 or March 2017, and discussed plans for the future. Mr Burton said that he would not consider a role until later that year in the summer: see Burton 1, [145]. They continued to stay in touch by text and by phone: see Burton 1 [129], but in July 2017, a written offer was made to which I shall return. This evidence indicates that Mr Smith of RK Harrison might have had Mr Burton within his sights.

54. The evidence relating to Mr Hasan is more limited. There is a document of Ms Arabella Cooke of March 2017 where RFIB is mentioned and others are alluded to, but there is no specific reference to RK Harrison. Mr Hasan's witness statement at [99-101] specifically mentions an approach from RK Harrison in April or May 2017 from Paul Redgate with whom Mr Hasan had two coffee meetings. There was a potential deal in respect of his opening up a Dubai office, but Mr Hasan had

reservations about the success of this venture. The paucity of Mr Hasan's evidence appears to show that the statement related to Mr Ross of approaches to all of the Departing Employees by February 2017 by RK Harrison (Ross WS1 [48]) may not be correct or may be exaggerated in the process of being related from one person to another. If it were true in the case of Mr Hasan, there would be no obvious reason for him either to decide not to mention it or for him to have forgotten about it.

55. There was very limited evidence in respect of Mr Maginn of an approach from RK Harrison. Mr Maginn referred to being approached in 2016 by RFIB, RK Harrison, Marsh, and Willis (Maginn 1, [24]). There were no details about RK Harrison, and no suggestion that there had been any offer made by that company. It did not come over as more specific than the numerous such informal conversations which appear to take place in the industry, and was not supportive of the notion that he and the other Departing Employees were in discussions with Mr Jonathan Smith ("Mr Smith") by February 2017, for example as per Ross WS1 [48]. I conclude that there is no substantial evidence of the Departing Employees as a whole having been in discussion as a team with RK Harrison, despite Mr Ross's evidence.

50. In view of the foregoing, there is no reason to conclude that the Departing Employees were about to go to RK Harrison as at February 2017, and it is difficult to believe that there was an expectation on the part of RK Harrison as at that stage to have them each working for RK Harrison. Nevertheless, there was contact with RK Harrison. That contact may have been limited, but it was not limited in the case of Mr Brewins.

56. There is evidence in respect of each of the Departing Employees that they had had contact with a number of potential employers in 2016 to early 2017. In the case of Mr Brewins, in addition to his contact with RK Harrison, he had some contact with Mr Tim Clarke of Lockton Global Energy in 2016 (Brewins 1 [28]) and with an underwriter friend, but there was an issue as regards payment off of his retention. As regards Mr Hasan, he was approached regularly about possible recruitment opportunities (Hasan 1 [79-80]) and he began discussions with a number of potential employers who had approached him, including RFIB, Ed Broking, RK Harrison, and JLT: see Hasan 1 [81-117]. The RFIB approach was mentioned to Mr Matson. This contact says a lot about the marketability of Mr Hasan and shows that he was interested in considering a career away from Alesco.

51. In the case of Mr Burton, he relates how there were a number of approaches by prospective employers in 2016 and 2017. He named them as nine different insurance brokers: RK Harrison, Ed Broking, Miller, Lockton, Bishopsgate, BMS, Price Forbes, RAP and one other potential start-up venture.

52. There has to be some caution about these oral discussions in that it was common in the industry to have informal discussions without an offer and certainly without a written offer. Nevertheless, the fact that there was interest in the Departing Employees in the market is an important aspect in this case in appraising whether they were intent without any team move on leaving Alesco and in going to a competitor. In order to consider this more in the round than simply the interest of competitors in the Departing Employees, separate consideration will be given to the position of each employee.

(iii) Mr Burton

57. It is significant that in 2016, Mr Burton did not seem interested in moving until the third anniversary of his contract for the sale of shares in the Claimants which would expire in April 2017. Even after that, he wished to stay until the summer in order to facilitate the renewal of the annual brokerage contracts for clients. The Claimants challenge the veracity of this in that they say that he could still have obtained employment to start after April 2017 upon the expiry of his restrictive covenants under his employment contracts and under the share sale agreement. It seems that his interest grew in the course of 2016 to leave, and when he decided that he would leave by early 2017, he wanted to have the renewals behind him. This seemed sensible because if he left at the time of the renewals, his chance of retaining the clients would have been reduced. They would have had to look to somebody else immediately following his departure to assist with the renewals, whereas by timing the departure after the renewals, he would expect either that he would have been released from his contractual restrictions by the time of the next renewals, or he would still be held to them, and shortly thereafter he would be able to resume servicing the customers.

58. The danger of what was called 'Gallagherisation' formed a significant part of the decision to move. Mr Burton was selling to independent retail brokers in the energy sector of the market in North America. The problem was that following the acquisition by AJ Gallagher in 2014, there was the danger as regards the North American market of competition from AJ Gallagher itself. Mr Matson was actively seeking to prevent competition from AJ Gallagher and/or to reduce any perception that competition would affect the business undertaken by Mr Burton for Alesco. The fact that Mr Matson did genuinely seek to address the problem simply shows that there was a real problem to address. It was ultimately beyond Mr Matson's control, but it was due to the bigger AJ Gallagher organisation in the US.

59. It was important for the business transacted by Mr Burton that Alesco was seen as being independent of AJ Gallagher, a major US retail business, albeit that its presence was less great in the energy sector, as Mr Burton described at Burton 1 [16-21]. An example of his sensitivity about this issue in 2016 was in an email sent by him on 2 August 2016: *"My only concerns are the sensitive independent US retailers. I don't want that verbiage be the reason why producers don't send us business, which it could do."*.

60. Mr Burton made the same point in his exit interviews, saying on 25 July 2017 that he had decided to leave Alesco because of *"conflict over ownership of AJG.*

> "I love Alesco but I worry that it won't stay independent for long. I can't see us staying as we are. My book is independent but I have no real control over the future destiny of it.". "

In his witness statement (Burton 1 [101-104]), he stated his complaint that he had built the Land Rig Facility into a successful product, but that it had been placed into a broader AJG quota share facility. This reinforced his concerns about lack of independence, of which he complained to Mr Matson, Mr Lyne and Mr Raven.

61. Mr Matson confirmed in cross-examination that he shared the concern that it was important that Alesco be seen to be independent of AJ Gallagher: see T5/15/5-16, 24-25; T5/16/1-3.

> "Q. So far as Alesco's US energy business is concerned, it is important that Alesco is seen to be independent of Gallaghers, isn't it?"
>
> A. Yes. Certainly that it acts independently of Gallaghers.
>
> Q. And you understood that not least because your competitors would take any opportunity they could to undermine that perception in the market, wouldn't they?
>
> A. Correct.
>
> Q. And you knew that Mr Burton was sensitive to anything that undermined that perception?
>
> A. We all were, my Lord.
>
> Q. Let me put the question another way, then. So far as the US business is concerned, you needed to ensure that the message in the market was that Alesco acted independently of AJG or Arthur Gallagher?
>
> A. Correct, correct."

62. Whilst Mr Burton acknowledged that Alesco was seeking to manage the Gallagher issue, he became more concerned about the ability to withstand ''Gallagherisation'' (T12/102/21-25; T12/103/1-12):

> "Q. And it had been managed effectively over the years that had it been an issue, hadn't it?
>
> A. Yes, I mean, I was essentially trying -- managing that process, particularly in North America.
>
> Q. Do you accept in principle that that question of independence had been well handled by Gallaghers and Alesco?
>
> A. It had certainly been handled within North America by Alesco. I wouldn't say whether it had been handled well by Gallagher.
>
> Q. And you were -- Mr Matson gave reassurances that Alesco was going to maintain its independence in order to compete with Gallagher, didn't he?
>
> **A. He gave me a lot of reassurances, you know.** But as time went on, whether I was -- whether I could continue to believe

> him or whether I thought that Gallagher were doing stuff without even Matson being consulted." **[emphasis added]**

63. When announcing the roll-up of Alesco into a new Gallagher Specialty division on 3 April 2017, the Claimants considered it necessary to spell out in terms that "*Alesco remains the independent wholesale business it has always been since it joined the group*", to try to dispel the obvious inference to the contrary. In May 2017 Mr Matson referred to the need to retain *"commercial independence"* as *"paramount"*. In June 2017 Mr Matson told Mr Pike *"we have to maintain an independent brand… if few are told we are exclusive we will lose people and business and should be called AJG"*.

64. The threat to independence was not lost in the press coverage at the time. In an article in the *Insurance Insider* about the decision to merge Alesco with AJG's specialty division, with Mr Matson as CEO of the combined division, it was stated in July 2017 that:

> "AJ Gallagher and Alesco have previously retained independent management teams, allowing the latter to trade extensively with third-party retailers….However, under the new structure a unified management team has been created for both businesses, although they remain independent legal entities and brands. …It is not clear to what degree the two businesses will be integrated under Matson's leadership."

65. In early 2017, Mr Burton became aware that AJG had been in discussions to buy Wortham Insurance ("Worthams") and was considering a second approach. Worthams is a large and successful independent retail insurance broker in the US: see Burton 1, [90]. Whilst this did not take place, this was symptomatic of the concern of the effect of 'Gallagherisation', growth in North America at the expense potentially of Alesco's business there. In April 2017 it was announced that Mr Matson was being appointed to head a new Gallagher specialty division, effectively bringing together Alesco with AJG's speciality division. Mr Burton was not forewarned about this, even as a courtesy (T5/182-6). He recorded his concern to Mr Matson at the time: *"you can imagine some will have a field day on this"*.

66. Whilst the Court is wary of placing too much reliance on witness statements for the reasons discussed above, in the light of the foregoing documents, the Court is able to rely upon the evidence of Mr Burton as to his serious concern about the independence issue as set out in Burton 1 at [107-116] and especially at [110-111] as follows:

> "110. That announcement [of 3 April 2017] had a major impact on my decision to leave Alesco. The merging of the two entities contradicted everything I had said to my customers about the independent retail network in North America. AJG had a strong presence in the marine insurance market in the US but did not have much of a presence in oil and gas. By rolling AJG marine together with Alesco's oil and gas business, with Simon Matson

> as its new leader, this would create challenges for me with US retailers.
>
> 111. Crucially, the announcement also went against the promises made to me about the future of Alesco. I felt that this announcement also undermined my (well known) opinion as to how Alesco should be marketed. I had always been vocal on this point and had made it clear that, in my opinion, Alesco should remain independent from AJG."

67. Mr Burton perceived the announcement as *"a serious difficulty for [his] clients"* (Burton 1, [109]**)** and considered then that he *"would have to resign from Alesco"* (Burton 1, [115]**)**. Mr Clarkson knew that Mr Burton was *"unhappy… about the announcement"* (T7/4/23-25; T7/5/1-6).

68. When Mr Burton resigned, the issue of independence was mentioned as a concern by Mr Burton to Mr Matson: that Alesco was becoming *"too Gallagher"*, as Mr Matson acknowledged (T5/22/23-24). He accepted that Mr Burton *"disliked what he viewed as the 'Gallagherisation' of Alesco"* and had raised the issue repeatedly (T5/22/25; T5/23/1-17). It is common ground that Mr Burton raised the 'independence issue' regularly with Alesco's management and that it was a genuine concern for him. Mr Matson, Mr Clarkson and Mr Byatt all accept this in their witness statements[1].

69. Mr Matson reacted to Mr Chilton that day in the following terms, namely *"Another big energy resignation today Chily. Trying to reverse - Pete Burton. Combination of new energy 1eadership, company growth, his interaction with HR and* ***the Gallagher conflict affecting his North American production***. (emphasis added)*…If he stays I wi1l be using the special retention pot.* ***No doubt though that Alesco Independent folk have to feel independent and the market management leak about our rolling together with specialty really hurt as JLT fed it to our retai1 production*** *(emphasis added). We need significantly better retention/tax efficient models otherwise this wi1l continue."*

70. This reaction to the resignation, taking at face value the concerns regarding the independence issue in respect of Gallagher, is reliable contemporaneous evidence and it makes hollow the assertion of the Claimants (Closing Submissions [239.2]) that this is an exaggerated concern.

71. There were other sources of dissatisfaction. They included about terms and conditions. The most proximate to his resignation was in April 2017 when instead of being given a bonus of £140,000 cash which he had been promised, he was offered a retention award of the same sum which would depend on continued service of 3 years in order not to be repayable as a gross clawback in whole or in part and with further more restrictive conditions: see Burton 1, [157]. This came almost at the same time as the announcement relating to Alesco and AJ Gallagher. It also came at a time when Mr Burton was under pressure in respect of his mortgage, which will be referred to elsewhere, such that there was a concern that Alesco was seeking to take advantage of his vulnerability to their advantage. Of course, that was the prerogative

[1] See e.g. Matson 2, [263] Clarkson 1, [18] and Byatt 1, [12-13])

commercially of Alesco, but it is a further explanation of how Mr Burton had become out of sorts with Alesco.

72. Previously, he had been offered a pay increase, but with amended restrictive covenants to his detriment in March/April 2016. In July 2016, Mr Burton was offered a retention award in the sum of £250,000, which was the second instalment due under an agreement with Alesco in 2014, but the Claimants sought, without flagging them, to impose more onerous repayment terms and restrictive covenants. In particular, under the 2014 agreement, the retention payment was reduced on a pro-rata monthly basis whereas under the proposed 2016 agreement the pro rata reduction was only on an annual basis. Mr Burton spotted this, and did not agree, but it affected trust by him of Alesco. When he resigned, Mr Burton made specific reference to such matters and complained about his *"interaction with HR"*.

73. There is a further matter. Mr Burton had enjoyed the benefit of the equity sale to Gallagher in 2014. Whilst this provided a very significant financial benefit to Mr Burton, it was not capable of being repeated, because the consequence was that AJ Gallagher would from 2014 have a 100% shareholding in Alesco. Thus, unlike some competitors, there could not be offered to Mr Burton a share of Alesco going forward. He did say in those circumstances that at the end of

74. his three-year period from his sale when he had restrictions, he would move on. It was suggested to him that if this were his motivation, he would have given notice to terminate at the end of the three-year period, rather than give notice at the end of the period to terminate some time thereafter. Whilst as a matter of law he could have done that, it does not mean that he did not have in mind the end of the three-year period, but not think through the fact that as a matter of law there was a means to bringing it forward. It may also have been that this was one of the factors together with the others including his concerns about Alesco which grew progressively.

75. In conclusion as regards Mr Burton, there was a combination of reasons which appear to have created a determination on his part to leave Alesco including (a) 'Gallagherisation', (b) the fact that competitors were willing to engage with him, and even offer shares of equity, (c) the fact that as a result of the control of AJ Gallagher, there would not be any future prospect of having a further share of the equity at Alesco, (d) attempts of Alesco to tie any benefit to locking in Mr Burton to its business, when he did not wish to do so, and in circumstances where Mr Burton regarded the same as changing previously agreed bargains or understandings.

76. These sources of dissatisfaction and the statements to the effect that in consequence Mr Burton was going to leave Alesco must be tested. The conspiracy case involves consideration of numerous other factors. It will be necessary to test these sources of dissatisfaction against for example the loan which Mr Burton obtained from an associated company of the Corporate Defendants and all the issues about timing of resignations and conduct in concert with one another which lie at the heart of the conspiracy case. In the end, this is a multi-factorial case, and the overall conclusions depend on an analysis of the overall case. At this stage, on the basis of the material which has been analysed, there are significant indicators that by April 2017 at the latest, the die was cast and Mr Burton was going to leave Alesco.

77. In getting to this stage, I have factored in the various arguments of the Claimants to opposite effect. In addition to matters referred above, they refer to the fact that Mr Burton's resignation letter which said that he had '*very much enjoyed [his] time working at Alesco'* and, whilst on 12 July 2017 (after he had handed in his resignation), he told Mr Matson that there were '*deeper issues*' than the role he had, he said that '*Alesco has been the best thing I have done to date and you personally have been immense for me and I will always hold you in the highest regard'*. However, that was in the context of Mr Matson asking him how much he would require financially to stay and arranging dinner for him on 12 July 2017 to discuss matters with him, Mr Clarkson and Mr Thompson. In this context of attempts to reach out to him, it would have been inept for Mr Burton to have behaved discourteously. In any event, such statements are a common incident of terminations even where there has been some bad odour. There is usually a benefit of leaving on good terms: after all, one never knows when one might need the goodwill of a former employer. There was also some residual affection for Alesco, as he acknowledged at his exit interview as quoted above. The suggestion that there is a significance between Mr Burton using the expression "slightly unsettled" to Mr Pearce and in evidence (T12/3/20 – 25) as opposed to "unsettled" is in context a distinction without a difference. Mr Burton appears on the evidence to have been unsettled, however he expressed it, and he was looking for the exit.

78. It is important to draw attention to the fact that the rewards offered by the Corporate Defendants were so much greater than Alesco. This was noted by Mr Matson after an attempt to retain Mr Burton on 12 July 2017. It led to Mr Burton saying that he was asked to say how much he wanted to stay and he was doing so "against [his] will". He then referred to terms including a £500,000 per annum salary and a £8 million retention payment. Mr Matson responded and said that this was "huge, huge" and that it could not be met. Mr Matson texted Mr Payne, and said that "DR [is] in the mix". This was a reference to David Ross/the Corporate Defendants. Mr Payne responded *"Totally, but some people can be blinded by the dough and the DR pitch."* As Ms McCafferty QC said in oral closing *"Mr Matson just could not match the dough that Mr Ross was offering."* (T16(2A)/9/16-23). On 13 July 2017, Mr Burton was told not to attend work, and was placed effectively on garden leave.

(iv) Mr Hasan

79. In accordance with the emphasis on documents in the cases such as *The Ocean Frost* referred to above, a useful starting point is a note of an interview for the "Power of Gallagher" event in January 2017 and a meeting with Ms Cooke the recruitment agent in March 2017 as noted by her following a discussion at Royal Exchange.

80. As regards the former, it contains positively glowing remarks by Mr Hasan about the stewardship of Mr Agnew and Mr Matson and the culture of Alesco including the following:

> "Answer…whereas in London, Gallagher and Alesco, under the patronage and stewardship of Andrew Agnew and Simon Matson under the Alesco brand, have created the London best teams in the specialty product lines.

> Question: So Nawaf, does our culture here differ from other brokers you've worked at?
>
> Answer: I think the culture here differs from other brokers in the sense that this word 'entrepreneurship' and 'entrepreneurial spirit', for me, is over-used in these corporations, but within the Gallagher Group, as well as Alesco, they really do give you a sense of empowerment. It is down to you to deliver the plan that you put forward. So, for me, I had this opportunity to grow and develop the region and they empowered me to do it. No other corporation in the city of London would have done that."
>
> Question: Nawaf, how would you sum up the business?
>
> "Answer: I would sum up the business and expectations for the business on their employees being one of a culture of excellence, hard work and success. "

81. When it was suggested in cross-examination to Mr Hasan that this represented the truth, he said

> "it is an external communication and I wanted to enamour myself to my management. So, I'm trying to build relationships, I'm trying to improve them, and this was one way I thought could." (T14/56/13-16.)

82. In fact, it was not an external communication, as was subsequently put in cross examination. Nonetheless, to refuse such an interview would have looked very odd, and he was not going to speak about internal frustrations in a motivational presentation, whether internal or external. However, in its glowing terms, the interview went further than was required. Mr Hasan speaks about his interest in building up relationships and enamouring himself to management. There is likely to be some truth about this, but at the same time the interview reflects that the views of Mr Hasan to Alesco were not as negative as he might now portray. In my judgment, subsequent events of the statements made internally after his resignation, the way in which his resignation was handled and this litigation may have affected his perceptions.

83. As regards the discussion with Ms Cooke, he says the following:

i) RFIB/Calera have approached him, as has Hyperion, and JLT with "earn out" style deal;

ii) he wanted to lead a Global Energy Division: although he has control of MENA, he does not have an executive position and there is no structure within the organisation for him to have such a position, and Mr Matson cannot resolve this problem;

iii) Alesco/Gallagher are "incredibly nice" to him, albeit that he does have a problem with Ms Wade who is in charge of the regional office network;

iv) it would take some money to extricate him in that he had a £500,000 retention with a five-year clawback.

84. The foregoing is important in the following senses:

i) it evidences that there really have been approaches even if they have not been in writing. Mr Hasan was perceived as a valuable person to hire;

ii) it evidences that he was frustrated that he did not have an executive position and he did want to have one;

iii) nevertheless, this, together with the Power of Gallagher interview, shows that in addition to his dissatisfaction, he also had some positive views about Alesco/Gallagher.

85. The evidence is that in 2016 and continuing into 2017, Mr Hasan received an approach from JLT to become CEO in respect of MENA business. In late 2016 Mr Hasan was approached by Dennis Mahoney, the Chief Executive of RFIB about the possibility of moving to RFIB as CEO of energy. In about January 2017, Mr Mahoney stated that the offer remained open. Mr Hasan informed Mr Matson of Mr Mahoney's approach in about January 2017, whereupon Grahame Chilton (CEO of Arthur J Gallagher's UK-based international brokerage operations) contacted Mr Mahoney and told him to leave the Claimants' employees alone. Mr Hasan considered this unacceptable. In March/April 2017, there was an approach to Mr Hasan from Steve Hearn and Andrew Draycott from Ed Broking comprising two conversations. There was an approach from RK Harrison in April/May 2017 as noted above. In the first quarter of 2017, there was an approach to Mr Hasan from Mr Hussein of the Doha Insurance Group seeking to set up a start-up managing agent in London.

86. In the meantime, in or around March 2017 Mr Hasan was approached by Ms Cooke on behalf of the Ardonagh Group about the possibility of him joining one of the companies in that group. Thereafter on 8 March 2017, Mr Hasan proceeded to meet Ms Cooke, and on 14 March 2017, he met Mr Ross. In the course of the next month, there were three or four further meetings between Mr Hasan and Ms Cooke. The timing of his subsequent employment by Price Forbes will be discussed below, and in particular how he contends that he resigned without having secured employment elsewhere. In the meantime, it suffices to say that the evidence of Mr Hasan is that he received a preliminary offer from the Ardonagh Group in September 2017, and there were negotiations as to terms thereafter. He was in discussions with other potential employers at the same time as his discussions with Bishopsgate: see Hasan 1, [81-117]. By December 2017 Price Forbes was the sole prospective employer with whom Mr Hasan was in discussions. He was offered employment formally by Price Forbes on 4 January 2018 and commenced employment on 17 January 2018. He signed the relevant contracts on 9 February 2018.

87. Despite the absence of written offers apart from the negotiations with the Corporate Defendants, I accept the evidence that there have been approaches from competitors

of the Claimants to Mr Hasan. This is not surprising because such approaches were frequent in connection with the energy sector in insurance broking. It evidences that Mr Hasan was seen as highly desirable and it provides some evidence that Mr Hasan was or became desirous of leaving. The apparent ability to secure a chief executive role coupled with the fact that Alesco could not or would not offer the same made the termination of his employment with Alesco possible and by the summer of 2017 inevitable.

88. As Mr Matson accepted, Mr Hasan had been promised a CEO role on his appointment, and the Corporate Defendants were unable to deliver on the promise: see Hasan 1 [34-35]; Mr Matson (T3/103/11-19):

> "Q. At the time of Mr Hasan's resignation in June 2017 you were aware of the fact that when he was recruited he had been promised that he would be given a CEO role? A. Correct, by Mr Agnew.
>
> Q. Yes.
>
> Correct.
>
> Q. And he would be given strategic authority for the MENA region, the Middle East North Africa region?
>
> A.That is correct..."

89. In updating the Board of AJG UK on 18 July 2017, Mr Matson referred to the fact that Mr Hasan wanted to be a CEO, which he had been *"promised on the way in"*. T3/104/18-20:

> "Q. You recognised, didn't you, Mr Matson, that that promise had been broken?
>
> It was a promise that couldn't be fulfilled, yes."

90. Mr Matson accepted in cross-examination (T3/161/11-13):

> " Q. You knew there was no prospect of Mr Hasan becoming
>
> CEO of Alesco by the end of 2019?"
>
> A.It is fair to say it was highly unlikely."

91. It was only <u>after</u> Mr Hasan had already resigned that Alesco sought to take any steps to give Mr Hasan a CEO role, coming up to 3 years after Mr Hasan had joined. But by then, it was too late because of the momentum of his decision to move. It was only after Mr Hasan resigned that Mr Matson discussed with Tom Gallagher the prospect of giving him a CEO role, with responsibility for P&L (which in the event they were

not able to offer). On 4 July 2017, Mr Matson texted Mr Hasan saying that he was working "incredibly hard to rectify everything you were promised on your way".

92. Mr Matson accepted that his message recognised that promises had been made but broken (T3/108/10-12):

> "Q. And it also recognises that promises had been made and broken?
>
> Yes, I guess".

93. In any event, the CEO role being discussed with Mr Hasan (which would not have included true P&L responsibility) was, as the Defendants submitted, *"too little, too late"*. As Mr Hasan put it in cross-examination (T14/.68/25 – T14/69/ 1-2):

> "I just felt that they haven't delivered it for three years and they are going to deliver it now because I resign. It is a difficult place to be."

94. Mr Matson asked Mr Hasan whether a £3 million retention payment would be enough to persuade Mr Hasan to stay: see (T3/125/2-4) and Hasan 1, [137]. Mr Hasan did not wish to stay. He was placed on garden leave on 17 July 2017.

95. A particularly difficult area here is to assess the significance of derogatory language about Mr Hasan and Mr Maginn, and also about Mr Brewins made in July 2017 following their resignations. It is most acute in respect of Mr Hasan.

96. He was described by Mr Matson in a message to Mr Lashmar (Alesco's COO) as a *"complicated fat Arab"* and Mr Lashmar added *"and a very greedy one"*. Ms Wade made a wholly gratuitous and in context grossly insulting reference to Mr Hasan's faith. Mr Matson described Mr Hasan to Mr Kavanagh as a "c***" and Mr Kavanagh about Mr Hasan together with Mr Maginn referred to them as "utter c***s pair of them". This language was not reserved for Mr Hasan and Mr Maginn: it was used also of Mr Brewins following his resignation. There was also a meeting where Mr Byatt, to the face of Mr Brewins, in the presence of Ms Eckert and Mr Sambrook, said that the problem was the *"old NMB c***s misbehaving"*. It is unnecessary to refer to each and every coarse expression used. There is no issue between the parties about this characterisation of the words used, and great regret was expressed by the authors about their language: this misses the point. The fact is that this language was used, and it falls to the Court to assess what it says about the issues in the case and in particular what it reflects about the culture at Alesco. It is a part of Mr Hasan's case, who was the subject of abusive and racist comments, that he was not valued in his employment and this explains why he was not promoted. Without in any way mitigating or reducing the seriousness of such remarks, it is necessary to note that each of the remarks occurred only after it had become known that Mr Hasan had resigned. The Court has not been pointed to any such remarks prior to that time. Further, the perception of Mr Hasan was that provided to Ms Cooke of Alesco/Gallagher being incredibly kind. There is no contemporaneous evidence of his having expressed that he felt victimised or discriminated against due to his ethnicity/religion prior to his decision to terminate his employment. On the contrary,

at the point of his resignation, he said on 4 July 2017: '*Simon, you have nothing to apologise for, you have been great'.*

99. What comes over from the evidence which I have seen is twofold. First, as noted above, the reaction to Mr Hasan going was akin to the reaction of fanatical supporters in the terraces. For so long as someone plays for the team, that person may be appreciated, and on a good day put on a pedestal. But if that same person leaves the team, and especially to join a rival team, then being vilified and demeaned follows. That seems to have been the case here. It is almost as if the frenzy of abuse made it easier to cope with the loss and to motivate those who remained to believe that it would be better without him.

97. If that is all of it, then the abuse may be on one analysis irrelevant, and to raise it numerous times, as has occurred in this case, is simply prejudicial. However, there is another strand which may be related. Mr Hasan never became a part of the inner circle. Mr Hasan and Mr Maginn were outsiders. As Mr Hasan describes it, *"I always felt that I was seen as an outsider by members of senior management at Alesco"*: see Hasan 1, [37 and following]. There were a number of references to this in the evidence of the Claimants, albeit almost entirely after the event of the notices of termination, including:

i) Mr Kavanagh to Mr Matson on 9 July 2017: *"they were never Alesco hires"*.

ii) Mr Clarkson blamed their isolated nature on Mr Hasan and Mr Maginn at [11] of his statement, saying *"…they adopted what I would describe as a 'siege mentality' in relation to their own work, seeming to believe (and being quite vocal about their belief) that they were the only people in the Energy team making any money".*

iii) Mr Clarkson in cross-examination (T6/199/19-21):

"Q. So from their perspective, they were a team on their own?

A: I felt that is how they felt about themselves, yes."

iv) Mr Thompson said also that Mr Hasan had "made some enemies within Alesco, that is without a doubt" (T8/17/15-16).

v) On 5 July 2017, (i.e. the Wednesday after Mr Hasan had resigned on Friday 30 June and before he knew that Mr Maginn had resigned), Mr Matson sent an email to Mr Thompson and Mr Clarkson in which he said that he had been:

vi) "reflecting a lot on the events of the last week and have come to the sad conclusion that Energy has become toxic. If I replay why, it starting [sic] changing with the arrival of Nawaf and Gerard …" Mr Matson referred to Mr Hasan and Mr Maginn as a "toxic duo". There is an irony here, namely that this poisonous reference to them did recognise that they were perceived as a duo in the market.

98. Mr Hasan felt that he was not given the respect or status that he deserved.

i) According to Mr Matson (T3/118/16-21; T3/130/24 – T3/25/131/7):

> "Q. A theme running through what Mr Hasan was saying was that he hadn't been given the respect or the status that he merited, wasn't it?
>
> Thematically, yes.
>
> Q. That was a serious issue for Mr Hasan?
>
> A. It appears so, yes."

ii) And according to Mr Clarkson (T6/210/1-3):

> "Q. And he wanted to be given the status that he considered he deserved?
>
> Yes."

99. This theme of Mr Hasan feeling that he was not afforded the respect which he merited is borne out in contemporaneous documents immediately following the resignation, namely

i) Mr Thompson put it this way on 18 July 2017, shortly after Mr Hasan had resigned: *"Nawaf wants to be a CEO which at Gallaghers is never going to happen"*

ii) Mr Lashmar dismissed Mr Hasan's ambition to be a CEO, describing it as a "problem" in his exchange with Mr Matson on 5 July 2017: *"the problem is that he thinks he should be running energy. But it's all about him".*

iii) Mr Agnew recognised on 7 July 2017, a "lack of executive influence which he believes his commercial contributions deserves" lay "at the core" of Mr Hasan's frustrations.

100. It is also significant in this regard that in April 2017, there were promotions made other than of Mr Hasan. In early 2017, Mr Thompson, who joined Alesco at around the same time as Mr Hasan, was promoted to become Head of Energy and Construction. Further, in April 2017, Mr Clarkson, who joined only in 2016 as an Executive Partner, was promoted to Managing Partner and Head of Energy in April 2017.

101. What is to be made of statements such as Mr Hasan in his witness statement that he thought that Mr Matson did not rate him and that he was barely tolerated and not respected? As he put it: *"It was always clear that Simon did not particularly like or respect me…By the end of 2016, I had reached the stage where I had become very unhappy in my employment with Alesco"* (Hasan 1, [70 and 76]). It is difficult to reconcile this with the statement to Ms Cooke referred to above. The Claimants submit that this is deliberately exaggerated, even made up, in order to conceal the

conspiracy of the team move, and without the conspiracy, Mr Hasan would not have moved, at least until December 2019.

102. In my judgment, whilst there has been exaggeration, conscious or unconscious, of the extent of dissatisfaction, I am satisfied that Mr Hasan had decided that it was time to move on. He did have a high sense of his own worth. He did feel that the Claimants had failed to deliver in respect of the promise of the CEO role. He did have a high value in the market, and that was the perception not only of Bishopsgate. He did have reason to feel a sense of grievance about not being given the CEO role, and that there was no real prospect that he would be given that role.

103. It is not necessary to make findings as to what had led to this state of affairs. The evidence that he felt like an outsider is complex because the reality of this is affected by the evidence subsequently discovered about the reaction to his resignation, and understandably so. One possibility is that the prejudices expressed particularly in the remarks about Mr Hasan were there all along and did impact on the relationships. However, there is the possibility that the positive documented remarks made by Mr Hasan reflect that any negative feelings of his have been exacerbated because of his discovery of the remarks made on his resignation. The Defence of Mr Hasan, prior to disclosure where the offensive remarks would first have been discovered, does not make any complaint about his relationship with Mr Matson or relationships more broadly at Alesco.

104. In the end, it is not necessary to make a final decision about whether to infer whether there was discrimination against Mr Hasan because of his ethnicity, whether directly or indirectly. This is not a discrimination case or a constructive dismissal case where such findings might be pivotal to the decision. The whole scope of the enquiry would have had to be greater including an analysis of why others were promoted and he was not, of what communications there were about him prior to the resignation, of whether there was conscious or unconscious discrimination against him.

105. It suffices to find, as I do, that he had been promised a CEO role, and there had not been delivery on that promise. It was important to him at this stage of his career to have this recognition and thereby make the most of his potential. He recognised that there did not seem to be any real prospect that he would be promoted to a CEO role within the short to medium term. By April 2017, others were promoted. There was a perception of his being an outsider: whether this was caused by or exacerbated by matters related to his ethnicity is not a matter on which the Court need make a finding. Further, Mr Hasan felt undervalued. Subject to looking at the case as a whole and particularly considering arguments raised by the Claimants about an apparent combination of the Departing Employees relating to the orchestration of common conduct in and around the resignations, I am satisfied on the evidence before the Court that Mr Hasan had decided to resign at the point when he did, absent the fulfilment of the CEO role then and with no real prospect of it, and in the context of interest of others, and the belief that he would land a very substantial package elsewhere with better prospects for him, as in fact came to pass.

106. Whilst the Defence did not refer to relationships within Alesco, it did refer to other sources of discontent which need to be considered. Mr Hasan complained about lack of executive authority, lack of support offered to his client base and his April 2017 bonus. As to the first, it is said that he had been offered a head of downstream role.

However, that was not the same as a CEO role, and if it had any substance, it was not going to be enough. Mr Thompson, who offered it, said (T8/16/12-17):

> "Q. You know, don't you, that Mr Hasan was much more ambitious than that? A. I do.
>
> Q. He wanted, didn't he, to be a CEO with much greater responsibility?
>
> A. That's correct."

Mr Matson accepted that it was not going to be sufficient to retain him (T3/162/1-17). In this context, the characterisation of this offer by the Claimants as *"an award demonstrating the esteem with which his work was held at Alesco"* is not justified because as was accepted by Mr Matson, Mr Hasan wanted *"a substantive change to his role"* (T3/161/23-25), which was what he had been promised for the start.

107. As regards support for clients, Mr Hasan accepted that the support his clients received was '*a minor issue*' (T14/66/6-11), just as he had done in his exit interview [C9/99/189): albeit that earlier in his evidence, he had said that it was a major issue (T14/65/17). As far as his April 2017 bonus was concerned, he accepted that: (i) he wanted a change to the structure of his bonus; and (ii) Mr Matson went and resolved the issue in his favour (T14/59/9-12).

108. In the circumstances, this stage of the analysis indicates that Mr Hasan had decided at the time of his resignation to leave Alesco. There was a combination of reasons which led to this decision. In part, it was dissatisfaction with Alesco about not being given a CEO role and in part it was the realisation that he could achieve his ambitions with a competitor of Alesco. In the end, that came through the Corporate Defendants, but he had so much to give, that it was likely that he could have achieved the change that he desired with other companies.

109. This militates strongly against the Claimants' case that *"he would not have left but for the conspiracy he had entered into, and in any event not before December 2019."* Before reaching a conclusion in that regard, this judgment will consider matters raised by the Claimants including but not limited to the timing of the resignations, resigning apparently without a job to go to, lying in interview and other breaches of contract. In other words, this case is multifactorial, and only when the case is considered as a whole can one come to a conclusion about the conspiracy case and causation and the like.

(v) Mr Brewins

110. Mr Brewins was deeply unhappy at work such that it was having an impact on his personal life. The principal reason for Mr Brewins' unhappiness was Mr Byatt. He

and his wife agreed that he needed to leave Alesco for the sake of their marriage: Brewins 1, [6-8]:

> "By late 2016, I was so frustrated that I felt I needed to get out of Alesco. There were many days when I genuinely hated coming into work. I was bringing my frustrations and upset home each day, and it was having a terrible effect on me and my personal life...it reached the point where it was clear to both me and my wife that I needed to leave Alesco for the sake of our relationship.
>
> There is no chance that I would have stayed working at Alesco after the summer of 2017, even if I had not had the opportunity to join Bishopsgate. I could not live with the situation any longer. I had been looking for an offer from a new employer prepared to pay out my Alesco retention awards for some time...However, my wife (Holly) and I even agreed that if the worst came to the worst, and all my options fell through, we would use our savings and sell our house to pay back Alesco and move on."

111. It was obvious having seen Mr Brewins and Mr Byatt give evidence that Mr Brewins found having to work with Mr Byatt both stressing and distressing. Mr Byatt was thrusting and ambitious, and not apparently sensitive to the fact that Mr Brewins was struggling. By 2016, Mr Byatt had decided that he wanted to climb the management ladder. Mr Byatt effectively accepted this in cross-examination: "*I definitely had a mindset change of I had to take on responsibility if I was going to work in a big company"* (T8/100/10-14). That is how Mr Brewins perceived things at the time, it was as though *"a switch in Matt had flipped"*: see Brewins 1, [10**]**. Mr Byatt lacked respect for Mr Brewins, a man he recognised was struggling, calling him "Heinz 57" behind his back (T8/99/4-8). In that regard, the evidence of Mr Matson was telling. He referred to this nickname, meaning that Mr Brewins had good days and bad days. He knew that Mr Brewins viewed Mr Byatt as a competitor: Matson 3, [23]. He knew that Mr Brewins did not get on well with Mr Byatt, and that he was having real marital problems, albeit that he did not know that he was thinking of leaving: Matson 3, [38]. No attempt was made by the Claimants to retain Mr Brewins, no doubt because the reasons for his leaving were understood and his resignation resolved the problem about his relationship with Mr Byatt.

112. Mr Byatt plainly viewed Mr Brewins as competition and someone who stood in his way. Their relationship began to deteriorate. Examples of the tension are as follows:

i) Mr Brewins managed two junior brokers (Max Bartell and Rosie Eckert) prior to Mr Byatt joining Alesco (which he did in early 2015). Mr Brewins had spent several years training them from early on in their careers. He did their appraisals and set their goals and objectives. This was an aspect of his job which he found challenging, but enjoyed. In 2016, Mr Byatt began making comments to Mr Brewins that he thought his leadership style was not good for Mr Bartell and Ms Eckert, and that others were better suited to managing them. He said that his own style of leadership was to *"inspire"* people, as he had done at his previous role at JLT, and it felt to Mr Brewins as if Mr Byatt

was positioning himself to try to take over this part of Mr Brewins' role. Mr Byatt was successful. In late 2016 or the very start of 2017, Mr Brewins' management of Mr Bartell and Ms Eckert was taken away from him and given to Mr Byatt. Mr Raven called Mr Brewins into a meeting with him and Jonathan Lyne (Alesco's Chairman - Energy) and told him that they were moving Mr Byatt into management, and moving him out of it. This was upsetting and humiliating and Mr Brewins was unhappy about it, as Mr Matson accepted in cross-examination (T3/80/4-10).

ii) Mr Byatt gave Mr Brewins a 'dressing down' in front of Ms Eckert and Mr Sambrook, saying that the problem was the *"old NMB c***s misbehaving"* (Brewins 1, [15]). Mr Byatt accepted at trial that this was a *"terrible meeting"* (T8/107/18-25):

> "Q. And [Mr Brewins] also said that you had told him and Mr
>
> Sambrook that the problem was "the old NMB c***s", referring to him and Mr Sambrook; you said that didn't you?
>
> A. It was a terrible meeting which I regret, which wasn't appropriate and I said things in there which I shouldn't have said. Q. Including what Mr Brewins recalls?
>
> A. Quite likely, yes."

iii) In early 2017, Mr Byatt became Head of Broking, with line management responsibility for all Upstream brokers other than Mr Burton and Mr Brewins (T8/101/24-25; T8/102/1-2). As far as Mr Brewins and the rest of the team was concerned, Mr Byatt had been promoted above Mr Brewins: T8/106/19-25; T8/107/1-3).

iv) Mr Byatt took Mr Brewins aside and stated that he had been promoted because his family was better connected than Mr Brewins' family. (Mr Byatt's uncle is apparently a former underwriter: T8/110/3-4.) Mr Brewins said the following of that conversation (T10/41/4-7):

> "I don't think I will ever forget the conversation. It absolutely happened the next day. It was so embarrassing. It was cringeworthy and I don't think I will ever forget it. It absolutely happened."

v) In around May or early June 2017, Mr Brewins felt strongly that Alesco should not go after work with a particular Colombian drilling contractor. The position was discussed at two different Alesco Energy Division meetings, and it was agreed that they would not go after this account. A few days later, Mr Byatt sought to obtain terms for the contractor in question. This was embarrassing and undermining of Mr Brewins.

113. Mr Brewins raised his concerns about his relationship with Mr Byatt with Alesco's senior management on several occasions. As he saw it, his complaints largely fell on deaf ears: see Brewins 1, [15].

114. Mr Matson accepted that Mr Brewins and Mr Byatt did not get on well: Matson 3, [28] and T3/77/20-25; T3/78/1-19. Mr Brewins had told Mr Matson that Mr Byatt was *"political and is someone who plays games"*, and was very competitive with him: Matson 3, [23]; T8/108/10-21.

115. Further, Mr Brewins had told Mr Matson that he was having marital difficulties in the months before his resignation, as Mr Matson accepted: (T3/75/10-16) and Brewins 1, [6]. When Mr Brewins resigned, Mr Matson noted that he had *"problems at home"* and was *"vying with Byatt for top job"*. As Mr Matson put it: *"Mr Byatt is competitive with everybody"* (T3/79/10). Mr Byatt frankly accepted that Mr Brewins' resignation "*definitely made life easier, yes"* (T8/112/8).

116. No effort was made to retain Mr Brewins, after his resignation. Mr Matson said *"I think it may well be best for him to go…"* and told Mr Byatt that *"he couldn't have two chiefs".* Mr Brewins was put on garden leave the next working day (Monday 12 June 2017).

117. There were other concerns for Mr Brewins in the year or so before his resignation, albeit less problematic than his difficulties with Mr Byatt: see Brewins 1 [21-23]. They comprised the fact that Mr Matson was becoming CEO of AJG's entire London business thereby expected to make him more remote; the roll together of Alesco and AJG Specialty was *"very problematic"* for his business; he felt that he had been misled as regards equity and independence.

118. The departure of Mr Brewins was not surprising. He had made clear at his last appraisal that he was not going to sign another retention deal, and his line manager, Mr Raven, knew that he was talking to RK Harrison: Brewins 1 [32]. Against the background above concerning Mr Byatt and the effect on his marriage, it was inevitable.

119. The Claimants claim that Mr Brewins was valued: he was put on the "future leaders programme". However, that was underwhelming. He was with people who had been with the business for six months or a year, whereas he had been there for 7 years, and incredibly unhappy by this stage: (T/10/38/20-24). He had an *"overwhelming sense that Alesco was no longer somewhere* [he] *wanted to be"* and so he left (Brewins 1, [20]). Mr Matson accepted that it appeared that he was going to leave, bearing in mind the problem with his marriage: T3/76/1-5.

120. In line with the culture of being part of the team or nothing , when asked whether Mr Brewins was a *"big signing"*, Mr Matson replied *"no"***.** Later he stated that the *"Team will be strong and less emotional without… Brew"*. Mr Matson and other senior managers also called him a *"c***"* and an *"utter t***"* - and Mr Matson's said that Mr Brewins was *"dead to [him]"*. He described him as a *"prick"* within 3 minutes of being told that he had resigned**.** He also immediately referred to getting in Rob Neighbour as a replacement, which the Claimants did within a matter of days. Mr Matson considered him an upgrade.

121. This was symptomatic of a culture in which Mr Byatt was more likely to thrive than Mr Brewins. In the event, Mr Brewins was undermined and he left. His personal life depended on his leaving. Nothing short of getting rid of Mr Byatt and probably much more besides was going to stop that from happening. That was not going to happen. Mr Brewins was yesterday's man and the future was Mr Byatt.

122. Mr Brewins was, as Mr Matson acknowledged, *"an attractive potential recruit"* (T3/95/10-14). He was in discussions with several potential employers both before and after his resignation. In addition to Bishopsgate, these were: (i) RK Harrison; (ii) Lockton; (iii) an underwriter; and (iv) Price Forbes. And his resignation prompted further conversations. As regards, RK Harrison, Mr Brewins had extensive conversations with Mr Smith in the course of both 2016 and 2017. They played golf together in the summer of 2016 and Mr Smith had suggested that he would like to have a further discussion with Mr Brewins (T9/132/5-10).

123. There were further discussions in August/September 2016 and Mr Brewins was offered a job verbally with RK Harrison, subject to resolving what to do about buying him out of his retention payment (T9/132/14-25 – T9/133/1-5). There were further meetings thereafter, about four or five times with Mr Hillson as well as Mr Smith (T9/135/3-19). The discussions took some time (2016 up to June 2017) because RK Harrison were in the process of reviewing their equity structure, of which Mr Brewins might be a part (T9/136/14-21).

124. Mr Brewins had also been in discussions with Tim Clarke, the Co-Leader at Lockton Global Energy, in the course of 2016. Mr Clarke wanted Mr Brewins to delay resigning until October 2017: Brewins 1, [28] Those discussions continued after Mr Brewins' resignation: T9/130/7-9. Mr Brewins was also offered a job by an underwriter friend, but again, there was an issue as to his repayments to Alesco. Nonetheless those discussions continued (T9/131/17-22).

125. After Mr Brewins' resignation, he also had conversations with a head-hunter, Ms Jane Watson, who was interested in recruiting Mr Brewins for Price Forbes. She contacted Mr Brewins on 27 July 2017. There followed a telephone conversation, and Mr Brewins supplied his CV to Ms Watson on 2 August 2017. That he did so makes plain that he was not 100% committed to Bishopsgate.

126. The fact that the recruitment of Mr Brewins was independent of Mr Burton is the result of the fact that Mr Brewins was known to Mr Newman, then about to become the chairman of Bishopsgate. They had worked together at Ed Broking when it was called NMB, 'N' referring to Mr Newman. Mr Matson thought that Mr Brewins must have been a Newman hire. Reference has been made above as to why there would be others within Alesco who might have suited Mr Burton more than Mr Brewins who was struggling. This is evidence of the fact that Mr Burton did not solicit or encourage Mr Brewins, but the recruitment was from Bishopsgate/the Corporate Defendants.

127. In summary:

    i) Mr Brewins was looking seriously for another job from 2016 onwards when his relationship with Mr Byatt seriously began to deteriorate;

ii) The sticking point, in some of his early discussions, was the need to pay off the clawback of £150,000 on retention awards to Alesco if he resigned before October 2017;

iii) However, Mr Brewins was so unhappy at work that he had agreed with his wife that he would leave Alesco for the sake of their relationship and was prepared to countenance repaying part of his retention award in order to extract himself from Alesco before then;

iv) When he received the first written offer from Bishopsgate, it gave him confidence that he had other options (and that the clawback on his retention award would be covered) and he resigned the next day.

(vi) Mr Maginn

128. The totality of the evidence was that Mr Maginn and Mr Hasan were seen as a pair: if Mr Hasan left, Mr Maginn would follow. They had worked for the same employer before joining the Claimants. In his evidence in chief Mr Matson stated that (Matson 2), [95]:

> "In the context of how closely Mr Hasan and Mr Maginn worked together, I suspected that, if Mr Hasan could not be retained, Mr Maginn may also resign."

129. The contemporaneous documents were to the same effect. He told Ms Wade on 2 July 2017: *"Nawaf goes, he [Mr Maginn] almost certainly will."* On the same day, he told Tom Gallagher: *"Nawaf is very tight to Gerard Magin [sic] and they operate in partnership. If Nawaf goes, we can bank on Gerard going."* Mr Maginn confirmed that this was his intention. On 3 July, Mr Maginn is recorded as having said to Mr Thompson: *"…Gerard saying that if Nawaf goes he goes"*

130. On 18 July 2017 in Mr Matson's email to the board of AJG UK, he said:

> "Although Gerard has resigned, we are still talking to him but assume he will ultimately go as they work as a double act"

131. It was confirmed at trial by the Claimants' witnesses that if Mr Hasan left, Mr Maginn would leave: per Mr Matson (T5/8/11-12 and 18-22; T3/133/4-8;T3/152/2-4 and 17-20; T3/163/23-25; T3/164/1-3): per Mr Clarkson (T7/19/34); per Mr Thompson (T8/24/17-19).

132. Mr Maginn also expressed the fact that he had become disillusioned and fed up, and that he did not feel valued or liked by Alesco's management: see Maginn 1 [6] and following. He was also unhappy with the way Alesco, and in particular the energy division, was managed (Maginn 1, [12]). He said:

> "It felt as if there was no strategy, no long-term planning, and no real interrogation of client and performance data. It wasn't a

> 'business' in the way I was used to. It was not joined up. In addition, it felt very political, very 'cliquey', and almost as if people were being pitched against each other. I was used to working in an environment where old hands like me would work collaboratively, and help build up and bring on the younger members of the team. That was not the way Alesco functioned." 137. Mr Thompson accepted that Mr Maginn was *"unhappy with certain elements"* of how the energy division was managed and that *"it definitely needed some changes"* (T8/10/17-25; T8/11/1-17).

133. Mr Maginn was particularly disappointed that, having made a number of proposals, in February 2017, for the improvement of the energy division, none were put in place by the time of his resignation in July, and he felt that his review had been *"a complete waste of…time"* (Maginn 1, [18]). Mr Clarkson and Mr Thompson understood some of his frustration: per Mr Clarkson (T7/65/3-17) and per Mr Thompson (T8/15/15-19).

134. Mr Maginn had been promised the role of Head of Upstream (or certainly he believed that he had been), but that was then withdrawn from him. He was instead offered *"an invented title"* in relation to *"business production"* which was *"obviously just a fudge"* (Maginn 1, [21]). Mr Clarkson confirmed that Mr Maginn believed that he had been promised this role, and was upset about it (T6/202/8-19 and T6/210/22-24). Mr Thompson stated that he had told Mr Maginn that he would endeavour to get this job for Mr Maginn, and when he did not get it, Mr Maginn was unhappy (T8/14/15-24). To the extent that the Claimants maintain a contrary case in their closing at [236], this is inconsistent with the evidence especially of Mr Clarkson and Mr Thompson.

135. As with Mr Hasan, Mr Maginn contended that he was an outsider. He considered that he *"was not really their kind of person"* (Maginn 1, [6]) and *"did not fit in with the senior management 'club'"* (Maginn 1, [31]). Mr Byatt, who appeared to fit in much better with the culture at Alesco, was given the role of Head of Upstream.

136. Mr Maginn expressed other concerns including about substandard work of the rest of the team, as acknowledged by Mr Clarkson (T6/198/9-19). He also expressed concerns about what he perceived to be Mr Chilton's conflict of interest in respect of Cap Re. His complaints were ignored (Maginn 1, [15]). As with the others, Mr Maginn was demonised on news of his departure. He too was called a *"c***"* by Mr Kavanagh. Mr Lashmar said he would like to lose all of him but the money (as with Mr Hasan). According to Mr Matson, Mr Maginn was someone: who was *"deeply, deeply disruptive"* (T3/133/15-16); towards whom there was a *"lack of trust"* (T3/138/3-4); who was in large part to blame for the toxic culture within the energy division (T3/142/24-25; T3/143/1-7).

137. In light of how Mr Maginn and Mr Hasan were perceived in the market – as a duo – it is unsurprising that they were approached by some of the same competitors. One was RFIB. Mr Matson was aware that RFIB had approached Mr Hasan and Mr Maginn in some form in January 2017 because they told him that (Matson 2, [123-124]). Mr Hasan and Mr Maginn each told the Court that they had respectively had separate approaches to each of them, and there was no first-hand evidence to contradict this. (Maginn 1, [24], Maginn 2, [6]; Hasan 1, [81-84] and [88-91]). The approach was notified at the time to Mr Matson.

138. Mr Maginn received regular approaches from Alesco's competitors. In 2016 this included not only RFIB, but also RK Harrison, Marsh, and Willis (Maginn 1, [24]). Ms Cooke's notes of her meeting with Mr Maginn in March 2017 refer to *"various courtships from RFIB/Ed etc."*. He said that he was his own man, but he decided that his best course was to join Bishopsgate after he had spoken to Gordon Newman (T12/195/6-20); Maginn 1, [27].

139. Mr Maginn resigned on 3 July 2017. Mr Matson asked Mr Maginn if he would stay for a seven-figure remuneration package, but Mr Matson decided to bring the conversations to an end. In my judgment, these conversations had no prospect of causing Mr Maginn to remain, which caused Mr Matson to bring the conversations to an end. Mr Maginn was placed on garden leave on 31 July 2017.

IX The various matters relied upon by the Claimants

140. As noted above, this case is multi-factorial, and the matters above which indicate that each of the key four departing employees was about to leave the

Claimants have to be tested against matters which lie at the centre of the Claimants' case. The fact that there is a good deal of evidence to show that each of the Departing Employees appear on the basis of the evidence to have been looking around for a move and to have had reasons for dissatisfaction such as would indicate that they were likely to leave by the summer of 2017 does not prove conclusively that they could not have been involved in an unlawful team move. They are factors which weigh heavily against such a possibility, but they are not conclusive. The matter has to be seen as a whole. There has to be considered features such as common conduct of the Departing Employees which the Claimants rely upon as evidence of a conspiracy. The Claimants' points in this regard will now be considered. Although the points logically have to be considered separately, it is important not to lose sight of the fact that they may derive their force in their totality.

(i) The departure of the Departing Employees all at or about the same time

141. First, the Claimants rely on the proximity of time of the resignations of these four key Departing Employees in June and July 2017. The timing of their notices of resignation has been identified above. In addition to that, it is said that they were then joined by Messrs. Cohen, Game and Hussain who resigned in September and October 2017, and that their moves were orchestrated as part of the team move. I shall turn to their position below: suffice it to say at this stage that they were auxiliaries who were not income generators and therefore their move was of a different character from the move of key employees which the Departing Employees were.

142. It was submitted that it was significant that on 29 November 2017 Mr Newman sent an email to Mr Baxter headed '*Nawaf's Men*' stating '*Apparently two of Nawaf's team will be available to join shortly possibly before the end of the year*'. A Price Forbes' email of 21 December 2017 lists all 5 of Messrs Hasan, Maginn, Cohen, Game and Hussein, describing them as '*this new team'*. There are few such

documents, and documents of this kind months after the arrangements for the move have occurred do not seem particularly probative as to whether this was intended from the outset as the move of all of these employees, let alone whether there was unlawfulness in the move.

143. The Claimants say that it makes no sense that the key Departing Employees would join Bishopsgate/Price Forbes without knowing who else they were going to join. Given that they were moving to a "start-up company" (Bishopsgate) (Burton 1, [213]) with no established energy presence, they needed to know with whom they would be working. A point that was disappointing about the Gallagher nature of Alesco was the fact that there was no longer any opportunity for sharing in the equity of Alesco. If this were to be meaningful, say the Claimants, it would depend upon knowing about the prospects of the new company, and the identity of the individuals who would be involved would be highly significant to the prospects of success of the new company. The security of their new jobs might depend upon whether or not the business got off the ground.

144. The contemporaneous documents show that they were going to be part of the same structure (see, for example, the documents that went to the Remuneration Committee on 9 May 2017 in respect of Messrs Hasan and Burton saying that '*The International Energy Team will be formed under NewCo'*, and the identical subscription and shareholders' agreement sent to Messrs Burton and Maginn). By early May 2017, it was intended by the Corporate Defendants that the four Departing Employees together with Mr Robin Todd and Mr Darren Conlon, both from Ed Broking, would go to Bishopsgate.

145. There were statements made by the Departing Employees that they did not know of others who would go with them until later in the year. There is evidence from Mr Burton that he knew nothing about any of the other individuals even being in negotiations with Bishopsgate until a press announcement in August 2017 (Burton 1, [6]), and to like effect from Mr Brewins (Brewins 1, [39]). The position of Mr Hasan and Mr Maginn is that, other than a brief discussion with each other about the fact that they had received a call from

146. Bishopsgate, they '*agreed not to discuss it any further, and to take our own course*' (Maginn 1, [29-30] and Hasan 1, [170]).

147. In oral evidence, Mr Brewins accepted that their bonus pot would depend on the performance of the energy team as a whole and the performance of the others in that team (T10/17/7 – T10/20/8). However, he referred to Mr Todd, Mr Conlon and especially Mr Newman, because he says that when he decided to leave, he did not know of the departure of the Departing Employees including Mr Burton. It was put to him that he needed to know who was joining in case Mr Byatt was joining which would frustrate everything, but he said that he thought that Mr Byatt's future was with Alesco. Mr Maginn's evidence was that it was a 'priority' for him to know with whom who he was going to be working, but that he was comfortable with the Price Forbes team that were there including Mr Newman:(T12/195/13 – 17). However, Mr Hasan would not accept that he would want to know who was going to be in the team producing alongside him: 'not at all' (T14/24/12).

148. I regard it as unlikely that neither Mr Burton nor Mr Brewins knew anything about anybody else moving until August 2017. It is much more likely that they discussed the approaches from Bishopsgate, and, like Messrs Hasan and Maginn, agreed not to discuss it further at least in any detail and allowed it to take its own course. Even if their discussions were more involved than that, it was unnecessary for one to solicit the other or to act actively vis-à-vis each other or even to plan actively together. That was because the solicitation was instigated and was being executed by the Corporate Defendants and Mr Ross in particular who did not owe duties to the Claimants. This is subject to their not committing economic torts and incurring the secondary liabilities such as inducing breach of contract or assisting in breach of fiduciary duty and the like.

149. I regard it as possible that Mr Hasan and Mr Maginn agreed not to discuss the matter further, knowing about the risks with their employer. However, it is more likely, bearing in mind how close they were to each other at work, and regarded as a duo in the market, that they did discuss matters with each other under the radar, being careful not to commit matters to writing. There is likely to have been some element of encouragement of Mr Maginn from Mr Hasan. It is evident that there was a sharing of information in particular about the various opportunities with competitors. In his evidence, Mr Maginn said the following, namely that

> "…I spoke to Nawaf, I was aware that he was unhappy at the time at Alesco, for lots of reasons, and my experience of these things is that if you discuss with too wide a party your own opportunities it gets leaked out and I really didn't want to know -- he had various other options on the table, I believe, that I was aware of, who may have spoken to him and I wanted to leave it like that and if I wanted to pursue it, I would pursue it myself." (T12/191/15-23).

150. Further, the Business Plan indicated a desire on the part of Mr Hasan to move with Mr Maginn. The suggestion that it meant that there was a desire for Mr Maginn to join him at some point in the future was not some vague aspiration.

151. However, I am not satisfied on the evidence that Mr Hasan discussed with Mr Maginn the provision of the business plans to RFIB and Bishopsgate in that Mr Maginn said that he was not aware about their provision or that he was a party to the discussions in which they were used.

152. That is not to say that any sharing of information or any encouragement by Mr Hasan of Mr Maginn was a key to their respective decisions to leave. In my judgment, Mr Hasan was going to decide on his own course irrespective of Mr Maginn's actions. Further, with reference to their history, Mr Maginn was going to follow Mr Hasan in any event wherever he went, provided that Mr Hasan's port of destination was sensible and rational, as Bishopsgate, and ultimately Price Forbes, was. Further, as noted, the operative discussions took place between Mr Maginn and the Corporate Defendants directly.

153. Notwithstanding the foregoing, it does not follow that it was necessary for the key Departing Employees to liaise with the others in order to decide whether to move, still less for any of them to act as a recruiting serjeant. For the reasons set out above, each

of the employees had their own reasons to leave and for that departure to be imminent. It is more frequent for employees to have a job to go to at the point of their resignation, but it does happen that this is not arranged: Mr Maginn did that when he moved to Alesco. Here, there were offers and a belief that the offers would be kept open and potential from a number of other competitors which could at least be used as a negotiating tool with the Corporate Defendants.

154. The Corporate Defendants were alive to the danger of litigation from the Claimants so they were unlikely to seek to use any of the employees as recruiting serjeants. On the contrary, the Corporate Defendants used their own recruitment consultants to pick out those employees whom they regarded as the most useful and the most likely to leave. They included the four key Departing Employees. They also did not use Ms Cooke alone for recruitment: she was used for Mr Hasan and Mr Maginn, but Mr White, a separate recruiter, was used for Mr Brewins.

155. It follows that the departure of a number of key employees at or about the same time does not prove a conspiracy or wrongdoing on their part. As indicated, it seems likely that there was knowledge of the other employees going, at least as between Mr Hasan and Mr Maginn, and separately as regards Mr Burton and Mr Brewins. However, there was not a combination of the employees soliciting each other and seeking to arrange to leave together as part of a team move.

(ii) The significance of the attempt to recruit Messrs Sambrook and Baker

156. It is suggested by the Claimants that it is significant as part of the team move case that the Corporate Defendants also made formal, written offers of employment to two other employees who worked in Alesco's Energy Team closely with Messrs Burton and Brewins in respect of the Land Rig Facility: Mr Dean Sambrook and Mr Chris Baker: see Claimants' Written Opening [6], [104] and [118-9]; Claimants' Written Closing [160], [246-250], [310] and [313]. As noted above, discussions with Messrs Sambrook and Baker were underway by early June, prior to Mr Brewins' resignation. Indeed, the fact that Bishopsgate tried to recruit Mr Sambrook and Mr Baker individually, without any involvement from any of the Departing Employees, and without any suggestion to Mr Sambrook or Mr Baker that they would be moving as part of a 'team' (or trying to have them divert clients to Bishopsgate, or to assist in recruiting other employees etc), underscores that this was Bishopsgate's approach to the recruitment generally. As the Corporate Defendants submit in their closing, there is no suggestion that Messrs Sambrook or Baker (a) had meetings together or together with any other of Claimants' employees, or (b) were asked to or encouraged to provide any of Alesco's confidential information, or (c) were asked to or encouraged to solicit or divert clients, or (d) were asked to conceal their discussions about prospective recruitment or to conceal or destroy evidence.

157. In my judgment, there is a telling omission in the case of the Claimants. It is the failure to call either Mr Baker or Mr Sambrook to give evidence. Their case should have been obvious, namely that they were solicited by Mr Burton and/or Mr Brewins (or even Mr Hasan and/or Mr Maginn), and that they only left the team because the Claimants agreed to make substantial retention payments to them. If this were what occurred, then the case would be expected not to be a case based on inference or hearsay, but based on their direct evidence. After all, they had agreed to remain with

the Claimants. They were the obvious smoking gun at the heart of the Claimants' case. Yet they have not given evidence. On the contrary, the evidence is that they were approached by a head- hunter. As Mr Clarkson tells the Court in his witness statement at [51(b)] [B1/191]:

> "I have since been told by Messrs Baker and Sambrook that each of them were approached by Stuart White of Eames Consulting (the same headhunter that appears to have been involved in the recruitment of Mr Brewins) and they were offered employment with the Corporate Defendants".

158. This tends to indicate that there was not a recruitment sergeant among the Departing Employees, but deliberately the use of an outsider. If that is the case in respect of Messrs Sambrook and Baker, then it is evidence more generally of this being the case as regards the other employees. It is also supported by contemporaneous documents which show that meetings were arranged with each of them separately (see, e.g. as to Mr Burton, as to Mr Maginn, as to Mr Hasan (and as to Messrs Game and Cohen)). This refutes the pleaded case that the conspiracy involved the Corporate Defendants using Mr Burton and Mr Hasan as recruiting sergeants to recruit other employees: see Amended Particulars of Claim ("APOC") [51(a)].

159. The contemporaneous evidence as regards Messrs Sambrook and Baker shows that their recruitment was lawful: there has been no evidence of unlawful solicitation, and indeed they have not provided the same either to the Court or to the Claimants. Instead of providing some support for a course of conduct supporting the Claimants' case about the unlawful team move, these findings provide some assistance to the wider case of the Defendants about individual recruitment by the Corporate Defendants without unlawful solicitation by employees of Alesco.

(iii) Resignations in September 2017 including Messrs Game and Cohen

160. In my judgment, it is important to separate the key employees from their auxiliaries. Mr Tarrent Cohen supported the day-to-day work at the Claimants. Mr Nicholas Game was a claims handler for Alesco, who supported the clients worked on by Messrs Hasan and Maginn. They did not work with Mr Burton who did not know them well at all: see Burton 1 [58]. However, there was nothing unique about their contribution and no reason to believe that they could not easily be replaced or that their move was of particular importance to the Defendants. Mr Hussain Hussein also worked at Alesco during 2017, including in respect of MENA business, but he was at the start of his career. His most significant feature was that he was the son of the Group Managing Director of Doha Insurance, a client that Mr Hasan worked closely with as part of his duties at Alesco, and which has transferred its business to Price Forbes. In the circumstances, the characterisation of a team move is not made more forceful because of the inclusion of these auxiliaries and someone who was barely more senior than an intern.

161. The contact relied upon by the Claimants to prove unlawful conduct involving recruitment of Mr Game did not occur until after an article in the Insurance Insider on

18 July 2017 entitled *"Alesco hit by energy defections"*. This referred to the move of the Departing Employees, when it was apparently not known which company they would be joining. On 24 July 2017, there was a discussion between Mr Game and Mr Cohen. By this stage, it is to be inferred that Mr Game and Mr Cohen would have been considering the possibility of following those who were moving to Bishopsgate, given their auxiliary status. There is a question as to whether Mr Hasan solicited them: he was part of a WhatsApp group called 'Lone Wolf' set up by Mr Game on 28 July 2017 including Mr Hasan and Mr Hussein. He also went to a horse racing event with Mr Game and Mr Hussein on 29 July 2017. Mr Hasan denies that he discussed recruitment at that social event: Hasan 1, [23]. Mr Hasan says that when Mr Game said that he had been approached, Mr Hasan said that Mr Game must make his own decision: (T14/46/7 – 9). Mr Ashfield gave evidence that their recruitment was suggested to him by Ms Cooke: see Ashfield 1, [8-13]. She spoke to them and prepared profiles of them.

162. In this judgment, there are criticisms of Mr Hasan for discussing business with clients during his garden leave and for solicitation. It seems more likely than not that Mr Hasan would have discussed recruitment with Mr Game and Mr Cohen and Mr Hussein during Mr Hasan's garden leave period, amounting to a breach of the duty of fidelity. However, I am not satisfied on the basis of the evidence before the Court that their resignations were caused by any encouragement of Mr Hasan. Mr Game and Mr Cohen were not in the loop until the resignations of Departing Employees was publicised. Mr Game and Mr Cohen discussed matters themselves before the day at the races. It is more likely than not that they would follow Mr Hasan with or without encouragement. On 3 August 2017, Mr Game met with a number of Bishopsgate individuals including Mr Pearce. The resignations then followed in September, Mr Game on 15 September 2017 and Mr Cohen on 26 September 2017, and Mr Hussein when his work permit expired in October 2017. In his exit interview on 29 September 2017, Mr Cohen said that he did not have a new employer and had not received an offer from Bishopsgate, whereas in fact he had received an offer on 3 August 2017. Mr Cohen was placed on garden leave on 10 October 2017 and Mr Game was placed on garden leave on 8 December 2017.

163. It is clear from the contemporaneous documents and from the oral evidence of Mr Ashfield that Mr Game and Mr Cohen (and Arabella Cooke) had no idea about the fact that they might be recruited into Price Forbes rather than Bishopsgate, and further that they were very unhappy about it: see T14/217/18 -T14/220/24; T14/222/19 – T14/223/9. Indeed, that was the Claimants' positive case in cross-examination. That is inconsistent with the Claimants' case that these individuals were recruited as part of a team with Mr Hasan and Mr Maginn, and with the assistance of Mr Hasan and Mr Maginn. Were that the case, they would obviously have known about the fact that Mr Hasan and Mr Maginn might be joining Price Forbes - and accordingly would have had no concerns or issues with the prospect of their similarly joining Price Forbes, rather than Bishopsgate. This provides evidence showing that they had purely auxiliary roles. It also suggests that their recruitment was by the Corporate Defendants rather than orchestrated with Mr Hasan and the Departing Employees.

164. The Claimants maintain that these employees must have been solicited unlawfully by Mr Hasan at least. There is an issue as to whether social contact was permitted whilst Mr Hasan was on garden leave. In any event, there was some reference, even on Mr

Hasan's account, to the possibility of a move to Bishopsgate. In my judgment, it is likely that Mr Hasan did indicate that he would be supportive of a move. An issue has been raised as to whether there was an instruction to Mr Hasan not to have any social contact with his friends during the garden leave (he says that the trip to the races was permitted by Mr Clarkson): if there was such a prohibition, it is contended that it would have been unreasonable. In my judgment, this issue is a red herring in that if the contact was purely social, then it would make no difference, but if the contact was of a business nature in whole or in part, then it would be a breach of contract, and it would then be necessary to consider whether it caused the employees to move to the Corporate Defendants.

165. Whilst it is more likely than not that Mr Hasan made encouraging noises at the races or elsewhere, this had no effect in the sense that the moves would have happened in any event. The following points are significant. First, there is no evidence that Messrs Game and Cohen were approached or that there were discussions with a view to their moving prior to the public announcement of the resignation of the Departing Employees. Secondly, the Bishopsgate and other plans did not name them as people who were moving. Thirdly, the recruitment was effected at direct meetings with Bishopsgate. If Mr Hasan did make encouraging noises, he should not have done so, but, in my judgment, there is nothing to indicate that such discussion as took place was causative of Messrs Game and Cohen or Mr Hussein moving. Fourthly, if Mr Hasan and Mr Maginn had been actively soliciting a team, then they would have solicited Mr Cosgrove and Mr Crichton with whom Mr Hasan in particular worked closely, but neither was approached, such that they did not know of the resignation until the weekend after it happened: see Hasan 1, [47]; Crichton 1, [12]; Cosgrove 1, [21] and Mr Cosgrove's evidence (T8/203/12 – T8/204/6). Fifthly, the fact that they did not know about the intended move to Price Forbes, and indeed were disconcerted, is evidence that they were out of the loop and not central to the move. Sixthly, it is more likely that Mr Cohen lied during his exit interview because of concern that Alesco would approach Bishopsgate to his detriment rather than as part of a pre-conceived strategy.

166. Further and in any event, Messrs Game and Cohen (and also Mr Hussein) were not high-level employees. They did not produce business. They have not been replaced by anyone at greater expense. Their roles could be fulfilled by other employees. There is no evidence that any loss has resulted from their moves to Price Forbes.

167. Further, I am satisfied that if there was any breach of contract by Mr Hasan as regards their recruitment, it does not take the conspiracy case any further for the following reasons. First, Messrs Game and Cohen were not key employees, but were auxiliaries. There was no evidence to suggest that their role could not have been carried out by anybody else. As Mr Hasan told the Court, he was not reliant upon any specific individual or individuals to provide him with support (Hasan 2, [7-13]). The required support could be provided by any employee with an adequate level of technical understanding and experience who was sufficiently engaged in the tasks in question. The clients in the MENA region, in particular, with whom Mr Hasan dealt were interested in dealing with him. They were not focused on the identity of those supporting him. Secondly, they were not named in the Business Plans and they had no knowledge of the project until after publication of an article in July 2017, thereby showing their limited role. Thirdly, they had no knowledge about the change from

Bishopsgate to Price Forbes, again showing that they were mere auxiliaries. Thus, they were not involved in the plan to move, and came on to the scene in their ancillary capacity only after the resignations of the key employees had taken place.

168. Without a pleaded case, it has been contended by the Claimants that there was unlawful solicitation by Mr Hasan of Mr Hussein, and indeed there are numerous references to Mr Hussein in the trial submissions of the Claimants. Mr Hasan did say in cross-examination that Mr Hussein had not been offered a new contract by the Claimants, and asked Mr Hasan for assistance: Mr Hasan did introduce Mr Hussein to Ms Cooke which he said was so that he could have opportunities: (T14/34/4 - 11). Mr Hasan has made a valid point in his Closing that a result of this matter not being pleaded has been that no disclosure has been sought in respect of Mr Hussein and his departure, and the allegation has not been adequately addressed. The fact that Mr Hussein said that he was going to go into banking in Qatar, but in the event, he went to work for the Corporate Defendants does not compel an inference that he was involved in collusive concealment, but may simply indicate that he has changed his mind. I have come to the view that it is not right for this matter to be relied on without a pleading. I am not satisfied that the matter relied upon from the evidence of Mr Hasan proves breach of duty, but if it does, causation is not proven, let alone any loss from the fact that Mr Hussein joined Price Forbes.

169. As stated above, in late November 2017, Mr Newman had identified Nawaf's team, which must have included Messrs Game and Cohen and Mr Hussein. That is apparent because on 4 December 2017, Mr Ashfield emailed Mr Masterton 're Middle East Energy Team' to say that the '*three new employees that will be available to start employment are Hussein Hussain*[2]*...; Nick Game ...; Tarrent Cohen ...*'. That identification does not mean that there was an unlawful move, but it is inevitable that having worked with Mr Hasan at Alesco that they would be identified as part of his team. In my judgment, the position of these auxiliaries was of a different character from the Departing Employees. Even if there had been any combination, they were people who could easily be replaced, and the move was not made the more effective or damaging by reason of the fact that they had moved. Their move does not make more likely the case of conspiracy or the other causes of action. If Mr Hasan had not had unlawful contact with these auxiliaries, they still would have moved, and any breach of contract on the part of Mr Hasan did not cause any loss.

(iv) Attempts to recruit further individuals

170. The Claimants also point to the fact that the Corporate Defendants sought to recruit other Alesco employees. Reference is made to Mr Payne where a very large offer was made of £5 million net in 5 years' time, subsequently increased to £6 million. The approach according to the Claimants' Closing at [271] was by Mr Ross. There is no allegation of any approach or participation in this approach by the Departing Employees. If it was by Mr Ross, there was nothing unlawful about Mr Ross making this approach. In fact, the first approach appears to have come from Mr Payne for the reasons set out in the Closing of the Corporate Defendants at [464-467]. That

[2] In the version originally disclosed, Mr Hussein's name was redacted. Lewis Silkin confirmed Mr Hussain's identity in correspondence on 22/2/19.

requires careful unpacking, but it is unnecessary to prolong the judgment by going through each communication. It is said that Mr Payne agreed to stay with Alesco because he reported the offer to Alesco who made a substantial retention payment. That is irrelevant to the cases of the Departing Employees who for the above reasons were going to leave in any event. An offer of a substantial retention payment to Mr Burton had already been refused.

171. It is also a part of the Claimants' case and the evidence of Mr Thompson that an offer was also made to Mr Thompson by Mr Ross in the nature of a multimillion-pound deal. This was in the context of interest by Mr Ross in building up its construction team in September 2017. There was a conflict of evidence between Mr Thompson and Mr Ross as to what precisely occurred. Mr Thompson reported this to Alesco and he was persuaded to remain with a substantial retention payment. Once again, the approach on Mr Thompson's evidence was by Mr Ross and there is no case to the effect that there was any approach or participation by the Departing Employees. There were other approaches by Mr Ross or through Ms Cooke including to Mr Martin Emkes and Mr Gary Oakes. These approaches were after the resignations of the Departing Employees. The fact that there were ambitious plans on the part of Mr Ross did not give rise to wrongs on the part of the Defendants.

172. It is alleged that there was an approach from Mr Hasan on 6 July 2017 to Mr Andrew Agnew (then-Chairman of Alesco) to go and work with Mr Hasan. This only comes about in a very unspecific part of Mr Matson's second witness statement at [102], and so it is hearsay. Mr Hasan's case is that when informing Mr Agnew about his departure in the course of an awkward conversation, Mr Hasan sought to draw the conversation to an end by saying words to the effect of "perhaps in the future we can work together". This was not an offer of employment, but in effect no more than a social pleasantry. Mr Agnew has not given evidence to contradict this. He communicated to Mr Matson at the time with a throwaway sentence "Cheeky bugger offered me a job!", which does not suggest that Mr Agnew believed that it was a serious proposition. It seems much more likely that nothing that Mr Hasan said could reasonably be taken as an offer of employment or as an encouragement to move with Mr Hasan, and accordingly, the case that there was an offer to Mr Agnew by Mr Hasan is rejected.

(v) Timing of the approaches to the Departing Employees

173. There is evidence to the effect that the early contact was with Mr Burton and Mr Hasan. Mr Hasan says that Ms Arabella Cooke approached him by telephone and told him that Mr Ross was interested in meeting him (Hasan 1 [106 – 108]). She met with him on 8 March 2017. Mr Ross met with him on 14 March 2017. There has been no disclosure of the instructions given to Ms Cooke by the Corporate Defendants. There are no notes of the meeting of Mr Hasan and Mr Ross. There was no evidence as to how Ms Cooke acquired the contact details of Mr Hasan. Mr Hasan's evidence is that, by the time of that meeting, he had already prepared and provided to Ms Cooke's Seer Group the Bishopsgate Business Plan based on information prepared for RFIB. Messrs Hasan and Maginn each had their respective reasons to leave Alesco as set out above. Further, Mr Maginn was going to follow Mr Hasan in any event, given their

working history together. It is a significant omission in the case that neither Ms Cooke nor Mr White was called to give evidence. Their absence is a matter of comment in considering the totality of the evidence as to whether the recruitment was made in the way in which the Defendants contend, and I take it into account as a point against the Defendants. However, there are numerous deficiencies in the evidence. In respect of this aspect, the absence of Mr Smith is significant: he has been since November 2018 an employee of the Claimants. As regards, the recruiters, they are not employees of the Corporate Defendants. I decline to infer as a result of their not being called or the absence of certain documents relating to them that their involvement was a front to pretend that this was not a team move, since this is far too strong a matter to derive from their not being called or from the documents not produced. There are in fact numerous contemporaneous documents relating to their involvement.

174. Mr Burton and Mr Ross spoke on the telephone on 9/10 March 2017, and Mr Burton says that Mr Ross first contacted him '*shortly before*' that: see Burton 1, [141]**.** In my judgment, the fact that there was contact of Mr Ross with Mr Burton and Mr Hasan at roughly the same time is more likely in the context of the evidence as a whole to indicate that that they had been in touch with competitors, and word had got back to Mr Ross, than that Mr Burton or Mr Hasan was acting as a recruiting sergeant for the other. Mr Ross was seeking to build up an energy team, and so he identified Mr Burton and Mr Hasan.

175. The Court is unimpressed by the argument that there was enmity between Mr Burton and Mr Hasan which, it was contended, lay at the origin of having two projects known as Tesla and Edison. The central feature is that there was no close working relationship between them. As noted above, their spheres of operation were different and they had little personal contact: they did not work together as a team within Alesco. The approaches to them by or on behalf of Mr Ross coincided in time, but they were not concerted between Messrs Burton and Hasan.

176. There is emphasis in the Claimants' case on the facts that the Tesla documents produced for RemCo for both Mr Hasan and Mr Maginn show revenue lifted wholesale from the figures for the team including Mr Maginn provided by Mr Hasan as part of the Bishopsgate Business Plan. Further, the Edison documents produced for RemCo similarly show a combined revenue for Mr Burton and Mr Brewins based on numbers provided by Mr Burton in respect of a team including Mr Brewins (as Ms Walker effectively conceded at (T13/122/14 – T13/123/10); see also Mr Burton's evidence at (T12/44/12 – T12/45/5).

177. This does not indicate that Mr Hasan must have solicited Mr Maginn or Mr Burton must have solicited Mr Brewins. It was very likely that Mr Maginn would follow Mr Hasan, and, still likely, but not as likely, that Mr Brewins would follow Mr Burton. Mr Brewins was definitely going to leave, come what may. It is not significant that there is no evidence of questions being asked as to whether Mr Byatt had been hired for the new operation: all the indicators were that Mr Byatt was achieving all his ambitions and more at Alesco, and was there to stay. There is nothing in the suggestion that the absence of questions being raised about Mr Byatt during the recruitment process indicates in some way that the Byatt element to the dissatisfaction of Mr Brewins has been invented or exaggerated. The existence and size of the Mr

Byatt problem for Mr Brewins could not have been clearer as the documentary and then the oral evidence unfolded.

178. It is suggested also that the lie to the idea that any employee could move by themselves without the others was shown by the fact that the documentation did not have alternative scenarios based on the hire of individuals. In my judgment, the absence of such evidence does not detract from the fact that the target for the Defendants was to hire all of the Departing Employees.

(vi) Hiring did not depend on the acquisition of a team

179. The Claimants contend that *"the Corporate Defendants were only interested in hiring a team, not individuals"*. I reject that case: I am satisfied that in the expansionist ideas of Mr Ross, he was willing to make individual hires. Mr Burton, Mr Hasan, Mr Maginn and Mr Brewins were all attractive producers and would be attractive to, at least, many competitors: see Mr Matson's evidence (T3/95/10-14; T5/32/19-21); Mr Clarkson's evidence (T7/15/3-11); and Mr Thompson's evidence (T8/10/7-9). In these circumstances, whilst aspirationally there may have been a desire to hire all of them, in the context of the expansionist agenda of Mr Ross, in my judgment, each of the employees would have been taken by themselves. Especially as regards Mr Burton and Mr Hasan, and to a lesser extent Mr Maginn and Mr Brewins, it is easy to see how they were attractive recruits to an expansion minded business, eager to go into energy.

180. The evidence supported the fact that the Departing Employees would have been recruited individually. By way of examples from the evidence:

i) Mr Ross in cross-examination in questions about Mr Hasan and Mr Maginn (T11/48/25 – T11/49/1):

> "Q. You wanted to recruit them as a team?
> A. I wanted to recruit them individually or as a team."

ii) Mr Ashfield at Ashfield 1 at [6]:

> "I recall Gordon saying that it would be great if we could hire even one of these guys. So far as I am aware, there was never any doubt internally as to the merits of recruiting all or any of these individuals; rather, the concern was that another firm might make them a better offer and we would miss out."

Mr Ashfield in cross-examination (T14/203/7-24) rejected that this was the party line and denied that the recruitment was only as a team.

iii) Ms Walker clarifying a point made in her evidence at (T13/122/4-9) when she said that they would have been recruited individually, said in answer a question from the Court said *"…we were recruiting all four of those individuals, individually. So if, for example, Pete Burton had decided he wasn't going to come and James Brewins was, that wasn't going to be a problem. They were separate hires. The same with Gerard and Nawaf. If*

> *Gerard had decided he wanted to come to Bishopsgate and Nawaf didn't, we still would have hired Gerard. Does that make sense?"* (T13/127/13-20)

iv) In the evidence in chief of Mr Faraday at [9]:

> "I did not see the potential recruitment of these four individuals as a 'team', and that is not how the recruitment was presented. Rather, the idea, as it was described to me, was that each one of these individuals would fill a gap in our existing corporate capability, opening up markets in which we wanted greater presence. They were, therefore, effectively all separate initiatives. In other words, we would be happy to take each one of the individuals irrespective of whether any other individual joined."

I have commented favourably above upon the reliability particularly of the evidence of Mr Faraday, and also referred to the evidence of Ms Walker in a favourable way.

181. Further, the new business was not being created solely around Alesco employees. Mr Ross was trying to build an energy team at Bishopsgate and was recruiting much more widely. He recruited (a) Mr Gordon Newman, an extremely big name in the industry, having previously co-founded NMB (now Ed Broking), who on 4 July 2017, joined Bishopsgate as Executive Chairman; (b) Mr Neil Pearce, as Managing Director, another big name, and (c) Mr Robin Todd and Mr Darren Conlon, two very senior and experienced producers from Ed Broking. He was trying to recruit Mr Smith from RK Harrison. As Mr Chilton said at the time:

> "Undeniably, David will be trying to target not only AJG Alesco but any production sources he can".

182. The scale of his recruitment has been referred to above, going far beyond the few recruits referred to here from Alesco. Mr Ross's companies engage 6,500 people of whom a very small number is from Alesco/Gallagher. Mr Ross expressed the view that he was not competing against Gallagher/Alesco; rather, he was competing against other competitors in the market who were seeking to recruit these individuals (T11/64/22 - T11/6/18):

> "A. Not really. I mean, the fact is, as I said to you yesterday, I wasn't competing against Alesco for the boys, because the boys were leaving. I was competing against everybody else because there was more than us trying to hire them.
>
> Q. Well, you don't know whether they were leaving or not do you, Mr Ross?
>
> A. They were definitely leaving. That I had absolute comfort on.
>
> Q. You had "absolute comfort on?

> A. Yes, I believed they were all going to leave.
>
> Q. Because you say that each of them tell you they were going to leave, or that was your assessment?
>
> A. They were very unhappy and very determined to leave.
>
> Q. That is an exaggeration of the position. I will address that with the individual witnesses, but you are exaggerating their determination to leave without your encouragement, Mr Ross?
>
> A. Not at all. I mean, bear in mind that when I met them they were in advanced discussions with other people. I didn't take happy people and make them unhappy, they were just unhappy when I met them."

183. What is the significance of the later timing of the approaches to Mr Maginn and Mr Brewins? In the case of Mr Maginn, Ms Cooke met with Mr Maginn on 29 March 2017, after Mr Ross had met with Mr Hasan together with Ms Cooke. Mr Ross said he could not recall whether Mr Maginn's name came up during his discussion with Mr Hasan on 14 March 2017 (T10/74/7). Mr Maginn met with Mr Ross on 12 April 2017, which Mr Maginn described as *"a good pitch"* in which Mr Ross shared his plans for the future: see (T12/193/4-9). Mr Maginn was impressed with the presentation and met Mr Ross again in late May 2019. He regarded the opportunity to work with Mr Newman as an "attractive proposition": see Maginn 1, [26-27]. Mr Newman regarded Mr Maginn as a "fantastic operator" which he passed on to Mr Ross: see (T11/163/1-2).

184. The first evidence of communication with Mr Brewins is on 27 April 2017, when there were texts between him and Stuart White of Eames Partnership. He passed on to Mr Matson and Mr Clarkson that he had been approached by a recruiter: see Brewins 1, [33]. On 3 May 2017, Mr White met with Mr Brewins in which he pitched an opportunity to work with Mr Newman: see (T9/138/20 – T9/141/25). Mr Brewins met with Mr Ross on 4 May 2017 at 18.45. Mr Brewins was evidently impressed and trusted Mr Ross. Thereafter he had a number of discussions with Mr White, and he met again with Mr Ross on 8 June 2017.

185. It is apparent that immediately preceding these meetings, Mr Ross was speaking to Mr Hasan and Mr Burton respectively. In the case of Mr Brewins, the Claimants point to the fact that on the Saturday before that contact took place, Mr Ross spoke to Mr Burton for 17 minutes on the telephone (T10/81/9 – T10/82/15). Mr Ross spoke with Mr Burton on the phone only a few hours prior to the meeting of 4 May 2017 (T10/82/19 – T10/84/1). It is contended by the Claimants that the fact that these communications took place not immediately after the contact with Mr Smith in February 2017 shows that it was not the RK Harrison contact which led to these approaches, but that they must have been due to suggestions from Mr Hasan and Mr Burton respectively. In my judgment, it is more likely to have been the case that the original idea did indeed come from the knowledge that they were available in the market. Their names appeared in the business plans. I find that this was not due to solicitation from Mr Hasan and Mr Burton or from their moves being proposed in the first instance by them.

186. The Claimants' case is that the recruitment consultants, Ms Cooke (in respect of Mr Hasan and Mr Maginn) and Mr White (in respect of Mr Brewins), were used as a 'front' to give the appearance that Alesco employees had been identified and solicited separately and by legitimate means. There is a note of Ms Caroline Fallon (an in-house lawyer) at a meeting of Remco of 9 May 2017 including the following: *"Individual approaches – segregated recruiters used (Stuart White & Arabella Cooke)".* Absent evidence from Ms Cooke, and absent disclosure of instructions given to the recruitment consultants, it is difficult to have a full picture about their role. If, as I apprehend it to be, the contention that they were acting as a 'front' means that their involvement was intended to conceal the true position, I do not find that this is established. It is more likely that there was an active attempt to keep each recruitment target separate, and, if anything, having more than one recruitment consultant, is more a point against, than supportive of, a case about a team move. There was an apprehension, which was realistic in the circumstances, that lawful or unlawful, the approaches to employees of Alesco would come under the most intense scrutiny from the Claimants. It was with this in mind that discussions were kept separate: see Ross 1 [72, 83 and 109].

187. It is necessary to appraise whether this was untruthful evidence, that is to say self-serving window dressing in the face of the allegation of a team move. Against the background of earlier litigation arising out of the departure of Mr Ross from Alesco, it cannot have been unexpected that this kind of litigation would ensue from the recruitment to Bishopsgate at about the same time of a number of Alesco's employees. The apprehension of a claim made the Corporate Defendants more careful to recruit separately. There was confidence that the relevant people could be recruited separately, such that there was no need to act unlawfully. These issues were addressed at the time. In my judgment, there was no front here, but a carefully planned process to recruit individually by the Corporate Defendants, as they were entitled so to do.

188. It is suggested that the fact that Messrs Hasan and Burton both instructed Peter de Maria of Doyle Clayton very early in the process is significant. Mr Burton first called Doyle Clayton on 7 March 2017, which is prior to the first known contact between Mr Burton and Mr Ross. By 29 March 2017 at the latest, Doyle Clayton was also acting for Mr Hasan. On that date, Doyle Clayton sent to Ms Fallon at Towergate extracts of the terms of his contract of employment. Subsequently, Messrs Maginn and Brewins also instructed Doyle Clayton. Doyle Clayton was recommended by Bishopsgate through Mr White in the case of Mr Brewins, through Ms Cooke in the cases of Mr Hasan and Mr Maginn and directly from Doyle Clayton in the case of Mr Burton. I have noted above that it was troubling that Mr Burton said that he did not know the basis on which Doyle Clayton was acting. However, considering that unsatisfactory evidence with the other evidence, I reject the submission that the fact that the Departing Employees each chose to instruct the same solicitor is an indication that they were working in concert in relation to their move. It was the result of Doyle Clayton being put forward through Bishopsgate. The Claimants say that they make no allegation against Doyle Clayton, and indeed they have appeared as solicitors in this action which reinforces the fact that there is no criticism of that firm. In all the circumstances, the common involvement of the same firm does not evidence a conspiracy.

189. As early as 27 March 2017, Ms Walker, at the time the Chief Financial Officer of Bishopsgate, produced the first financial model for what was called Project Duracell, named as such because a Duracell battery is a source of energy. In addition to the recruitment of the Departing Employees and Messrs Todd and Conlon and Mr Newman, Bishopsgate was in discussion with Mr Smith, an Executive Director of RK Harrison and other brokers from Ed Broking and RK Harrison: see Ross 1 [49] and (T11/146/21 – T11/147/2). I am satisfied from the documents that by 8/9 May 2017, there were advanced plans within the Corporate Defendants for recruitment of each of the key Departing Employees, particularly by reference to the Tesla and Edison models. There were plans to have (a) Tesla comprising Mr Hasan and Mr Maginn in a total team of three in 2017, rising to five in 2018, and (b) Edison comprising Mr Burton and Mr Brewins in a total team of six in 2018. On 9 May 2017, the Ardonagh RemCo approved Project Duracell. There was also a note of Ms Fallon referring to AJG stating '*conflict inevitable*'. This is relied upon by the Claimants as evidence of wrongdoing of the Defendants. In my judgment, it was a realistic recognition of the Claimants' apprehended aggression faced with a withdrawal of a number of employees at or about the same time. The history of the 2015 Proceedings indicated that they would have a strong reaction to it simply because of the loss of a number of employees. It does not assist one way or the other as to whether there was wrongdoing.

190. There was heavy emphasis by the Claimants on a text message from Ms Cooke to Mr Ross on 18 May 2017 '*Met with GM this a.m. there are some things we need to help him with. We cannot rely on N to completely speak for him.'* It is said that that demonstrates that Mr Hasan had been speaking for Mr Maginn up to that date, and there was criticism over the evidence of Mr Maginn and Mr Hasan not reading the email that way, which was characterised as a party line. In my judgment, the text message does not demonstrate that Mr Maginn had been represented by Mr Hasan. It would have appeared likely that Mr Maginn would follow Mr Hasan because of their common work history, but this message appears to be a reminder that they have separate interests, and that it could not be expected that Mr Maginn would simply follow Mr Hasan.

X The significance of the Burton loan

(i) The facts

191. A central aspect of the history is the loan made to Mr Burton for a sum of £625,000 whilst he was an employee of Alesco. It was made by a company known as Nevada TopCo and it was arranged by Mr Ross. The agreement is dated 18 May 2017. It is said that this was not a Bishopsgate loan, and that Nevada was a separate company, which is true. However, it was a Cayman corporation, and there is a clear inference that it was connected: hence being arranged through Mr Ross. The extension of the interest period to the end of December 2017 was confirmed by the Ardonagh Group.

192. The background to the loan is that Mr Burton had a serious financial difficulty. He was due to complete the purchase of a new home. He had lent a sum of over £1 million to a friend Bob Camping, a property developer, expecting a substantial return. However, by April 2017, it had become apparent that the money would not be paid

when it was required, albeit that at that stage, Mr Burton believed that it was about when, rather than whether, he would be paid.

193. A short-term solution to the problem was a loan from a friend of Mr Burton's wife/family friends, namely the Skelts. He borrowed a sum of £775,000, which was a short-term loan. Mr Burton remained anxious to replace that loan as soon as possible, and despite his hopes and expectations, the money was not coming from Mr Camping, although I accept that he did believe at least at this juncture that he would be paid by Mr Camping. During final speeches, I was informed that the moneys had been repaid in April 2019, although as time went on during the intervening two years, there must have been times when Mr Burton did not think that he would be paid. It was against this background that Mr Burton mentioned at work that he had this concern. This then led to Mr Matson apparently being of assistance at work offering him and his wife accommodation in one of his homes.

194. In addition to this, a retention payment was offered of £1,000,000 from the Claimants, but this was on terms that in the event of termination other than for redundancy within a period of seven years, it would be repayable gross. Mr Burton recognised the offer as a commitment to the Claimants for seven years. He was not prepared to provide such a commitment because he was already dissatisfied, and was looking to leave in any event. It also involved the danger of his being dismissed during the seven years (for example, because of some fall in his results), in which event the money would be repayable. It appeared to Mr Burton that this was an attempt to take advantage of his difficulty. The Claimants have sought to put forward a case to the effect that they were not bound to assist Mr Burton, that these retentions were common in the industry, and that Mr Burton showed some appreciation at the time. However, in my judgment, there was no prospect of Mr Burton accepting such terms: they were seen (rightly or wrongly, it matters not) as an attempt to shackle him: in addition to the loan, there were other sources for Mr Burton to receive money which would repay the loan from the Skelts in the nature of a signing on fee.

195. The Claimants contend that the Nevada loan was entered into in circumstances where, but for the loan, Mr Burton would have been driven to accept the Claimants' retention payment. I am satisfied that this is not the case. If the Nevada loan had not been forthcoming, then I am satisfied that Mr Burton would still not have entered into a contract with Alesco bearing in mind all his reasons for leaving. He would have continued the Skelts' loan for longer and continued until he obtained a contract of employment with the Corporate Defendants or another competitor and then been able to pay off the same from a joining fee or other financial provision. If the employer were not Bishopsgate, it might have been RK Harrison or some other competitor. His sign-on bonus from RK Harrison would have enabled him to cover the amount of the loan and any clawbacks to Alesco: (T12/ 27/8-18); (T12/161/6-16).

196. This was recognised by Mr Matson in his statement at [209-210] when he said: *"I was concerned that an employee who needs a significant amount of money is a flight risk"* and *"if Mr Burton needed money, he was a flight risk. In other words, he might look to move in order to secure a better remuneration package, including sign-on bonuses which are common for senior individuals in the insurance industry".* It follows that Mr Matson was seeking to sign him up to prevent him from leaving, but the availability of sign-on bonuses elsewhere would prevent him from being able to shackle Mr Burton: he knew this, and so did Mr Burton. This is a complete answer to

the case of the Claimants in their closing submissions that Mr Burton would have accepted Mr Matson's 'retention award" (Claimants' Closing at [186.4]) and that Mr Burton had no way of repaying the loan [Claimants' Closing at [188].

(ii) A quid pro quo for the loan?

197. That then takes the discussion to what there was in return for the loan. It is said in APOC at [80] that acceptance of the Loan placed Mr Burton in a position where his own interests and those of his employer were in conflict. Further, it is said at [81] that Mr Burton concealed the fact of the Loan from the Claimants so that he could delay his resignation and delay commencement of garden leave, so that: (a) the Defendants could continue the process of recruiting Alesco employees without Alesco's knowledge; and (b) Mr Burton could solicit clients on behalf of the Corporate Defendants without Alesco's knowledge.

198. Mr Ross described the purpose of the loan as '*partially commercial and partially humanitarian*'. The terms of the agreement show that in the event of repayment by 30 September 2017, interest that was to be charged at the rate of 10 per cent above Barclays base rate, would be waived. It was entirely unsecured. It was not administered commercially in that the evidence at the time of trial was that it had not been collected for almost two years, and no interest had been sought or collected. The evidence was that the payment date had been extended from 30 September 2017 to the end of 2017, and then to the end of 2019. It was repaid without interest on 23 April 2019 on the basis that *"the period when interest would kick in had been extended"*. In my judgment, Mr Ross intended by the loan to induce, rather than to compel, Mr Burton to choose to join Bishopsgate. It was not a term that he would do so, but it must have changed the dynamic of any negotiation. The adjective 'humanitarian' is inapposite in context.

199. Mr Ross was using the financial difficulty of Mr Burton as an opportunity to secure Mr Burton's services. It is plain from the evidence as a whole including that of Mr Faraday and Mr Ross that the loan was organised by Mr Ross and that it was discussed at RemCo. The contrary was put to both Mr Ross and Mr Faraday, but I accept the evidence that it was discussed: see (T9/91/3-4; T9/92/2-7 and 21-25; T9/99/18-22; T9/102/13 – T9/103/12 and T10/93/19 – T10/94/29). As head of reward for the Ardonagh group, Mr Faraday was well able to deal with questions regarding the loan. Mr Faraday expressed concerns about the loan from the perspective of the difficulties which might ensue if the loan were not repaid whether Mr Burton was employed or not employed. I accept that Mr Faraday did have those concerns, and I found his evidence reliable and given with knowledge and authority about the matters in respect of which he was employed. As to the purpose of the loan, he was clear about that (T9/87/3 – T9/88/11):

> "Q. Yes. So just to break that down, this was a remuneration decision?
>
> A. Well, the principle stands. I think we were making a loan based on personal need. Whether it was a remuneration one or not the principle applies. It is a commercial decision taken on the basis of personal need.

> Q. My question was to ask if you agree this was a remuneration decision?
>
> A. No, my view was that it is not and still is. The loan agreement says there was no guarantee of an offer of employment.
>
> Q. But it was clearly a loan that was being made in the context of recruitment of Mr Burton?
>
> A. We wanted to appear a good employer, prospective employer to Mr Burton, that is certainly true.
>
> Q. So it wasn't a personal thing being done on terms of friendship, for example?
>
> A. I wasn't part of the discussions so I couldn't say definitively, but in my mind, no. We were doing it to be an attractive employment proposition.
>
> Q. So the commercial benefit for Bishopsgate was to increase the prospect of Mr Burton joining you?
>
> A. The commercial benefit was for Bishopsgate to look a more attractive employment proposition.
>
> Q. But it would have been more than that, wouldn't it, Mr Faraday, because you had plenty of ways of making Bishopsgate look an attractive proposition without lending £625,000; is that right?
>
> A. Yes.
>
> Q. Was it your understanding that the purpose of the loan as to secure Mr Burton's commitment to the Bishopsgate Business?
>
> A. No, that was not my understanding."

200. The loan as characterised in this way is not by reference to the work of Mr Burton for Alesco. It was to make Bishopsgate a more attractive proposition, that is to increase the chance that Mr Burton would join Bishopsgate. Mr Faraday took issue with the suggestion that the loan was to commit Mr Burton to Bishopsgate, and he clearly rejected that suggestion.

201. Assume that there was no obligation to do something unlawful in return for the loan, as I have found that there was not. The question then is whether the very fact of the loan was unlawful. I shall assume that it is not an answer to this question that the loan was from Nevada, and Nevada was not a competing company. Nevada must have been connected with Bishopsgate (Mr Ross accepted that it was a vehicle of

Highbridge (T10/98/18), Ardonagh's private equity backers). In the course of the trial, I sought assistance as to any legal authorities directly in point, but the researches of Counsel have not revealed any. I shall return to that later in this judgment when I consider the law. I mention it at this stage in order to refer to the characterisation of the parties about the nature of the arrangement.

202. For the Claimants, it is said that there is no analogy in a signing-on fee. That is payable at the start of employment, which by definition is after the termination of the earlier employment. It is said that the effect of the loan would be to give a sense of loyalty to a competitor.

203. For the Defendants, it is said that there is nothing wrong with entering into discussions with a view to changing employment, nor to taking on a signing-on fee, and that does not exclude the possibility of the money being payable before the commencement of employment.

204. There was no express written obligation on the part of Mr Burton to transfer his employment to the Corporate Defendants. On the contrary, the loan agreement stated the contrary. I find that there was no such obligation, even one made orally. Nevertheless, there was a belief of Mr Ross that if Mr Burton took the loan, he would be likely to join Bishopsgate. The loan must have been a significant influence on Mr Burton to choose Bishopsgate. He would have been entitled as a matter of law to have gone elsewhere, and indeed, he continued to look round competitors. These findings are consistent with the evidence of Mr Faraday.

205. The evidence of Ross 1, [65] is that he had made this offer without leveraging Mr Burton's position because that would have created trust issues long term: that might have had some germ of truth. However, he took it too far when he said *"There was never a question of attempting to "buy" him or his loyalty."* He was doing exactly that, seeking to win over Mr Burton to the Corporate Defendants. There was an issue as to whether Mr Pearce the managing director of Bishopsgate had said on 8 August to Mr Payne that *"their arranging the deposit on Pete Burton's house "did the deal" and that they knew they had their guy once he agreed to take their cash for the deposit"* (Payne 1, [16]). Whether it was said or not, the loan must have been a significant driver in causing Mr Burton to choose to go to Bishopsgate, and not to competitors.

206. Insofar as it is said that there was a quid pro quo that Mr Burton became committed to soliciting staff or customers unlawfully, I reject this case. There is no documentary or circumstantial evidence to suggest that it is true. The pleaded case that there was an inference from mid-May 2017 to the effect that Mr Burton would solicit employees and customers for the Corporate Defendants was not substantiated upon disclosure or in the oral evidence. Having seen Mr Burton give evidence, and having considered the evidence, as a whole, I am satisfied that the loan was not in return for the solicitation of staff or customers by Mr Burton. Further, I am satisfied that he did neither thereafter. The fact that he did not move then and there was because it suited him and Bishopsgate not to give notice of termination until after the renewals. It may even have been upon the suggestion of Mr Ross that Mr Burton did not resign until after he had secured the renewals for 2017-2018: I shall return to that issue later in this judgment. It is common ground that Mr Burton had renewed his entire book in May and June, as acknowledged by Mr Matson (T5/38/13-22); (T5/40/3-7).

(iii) Mr Burton did not solicit business or employees

207. Specifically, there was a suspicion which Mr Matson had entertained that there was an attempt to divert the business of Chesapeake after the resignation of Mr Brewins, but Mr Matson was driven to agree that the business was retained for Alesco, and not diverted (T6/10323-25; T6/104/4-6; T6/108/20-25; T6/145/24 – T6/147/22). In that regard, Mr Matson said:

> "Q. But you accept now that your suspicions are wholly unfounded... A. No, I think what I am saying, my Lord, is I suspect I have good foundation for my suspicions, I just lack evidence…"

208. A case turns on evidence, not suspicions. The evidence was that not one client of Mr Burton transferred from Alesco to the Corporate Defendants during his notice, garden leave or the currency of his post-termination restrictions.

209. Such evidence as there was of solicitation on the part of the Defendants was a hearsay conversation of early June 2017 related by Mr Matson that Mr Rathmell (President of Lockton Marine and Energy "Lockton") had informed him not that Mr Burton had told him that he was going to Bishopsgate, but simply that he was leaving (APOC [82]). This was denied by Mr Burton and no evidence was called from Mr Rathmell. This allegation is therefore not only hearsay, but falls short of solicitation. A particularly telling point of Mr Burton was that he did not mention his departure to Mr Rathmell (which was said to be in early June 2017). If he had done, he could have expected an immediate approach from Lockton (since the best friend of Mr Rathmell was Mr Tim Law of Lockton): Burton 1, [137] and T12/85/12-25; T12/86/1-3. In fact, he did not receive an approach from Lockton until late July 2017, thereby indicating that he did not mention his departure to Mr Rathmell in early June 2017. The contemporaneous documents do not cite Mr Burton's departure as reasons for leaving. It is said that Lockton Houston attempted to move its business to Bishopsgate once Mr Burton had resigned: on 14 November 2017, seeking to transfer the business of Xtreme Drilling, not to Lockton London, but to Bishopsgate. The Claimants seek to say inferentially that this shows that Mr Burton must have solicited this business. The inference is rejected. There is no documentary evidence to support it. In fact, the business went to Lockton London. Certain Lockton clients were 'repatriated' to Lockton's wholesale arm ("Lockton London"), and one was retained by Alesco at reduced brokerage after a competitive retender. In fact, the large majority of Mr Burton's contacts remained with Alesco not just during the garden leave period but also during the period of the post-termination restrictions. There is no direct evidence, documentary or oral, of Mr Burton seeking to solicit business or entice employees to the Corporate Defendants. Hence in that context of Mr Burton behaving lawfully, there is no scope for the inference that this business was solicited unlawfully by Mr Burton.

210. There is also no evidence of unlawful solicitation by Mr Burton of any employees to join him at the Corporate Defendants, nor is there scope for an inference that he solicited them. Mr Matson accepted in oral evidence that Mr Burton (i) did not work with Mr Game, (ii) did not work with Mr Cohen, (iii) *"didn't have much to do with"* Mr Hasan (*"Not significantly...probably didn't work on...pieces of business together*

very often"), and (iv) did not have much to do with Mr Maginn either (*"Probably the same answer"*) (T5/46/6; T5/47; T5/48/1-15). Further, there is direct evidence of their solicitation by the Corporate Defendants and Mr Ross and the recruitment agents, but none from Mr Burton.

(iv) Timing of resignation not unlawful

211. The timing was not unlawful as a matter of law. A party is entitled to continue to serve an employer even if there is an ulterior motive for doing so. There is nothing unlawful in an employee treating clients well with a view to calling upon them at a lawful later date. As Greer LJ stated in *Wessex Dairies Limited v Smith* [1935] 2 KB 80:

> "the servant may, while in the employment of the master, be as agreeable, attentive and skilful as it is in his power to be to others with the ultimate view of obtaining the benefit of the customers' friendly feelings when he calls upon them if and when he sets up business for himself."

212. There are no contractual or fiduciary restrictions on an employee's ability to resign (other than as to notice), nor as to the timing of the same. An employee can resign whenever he wants to, even if that is at a time particularly inconvenient to his employer. As to the position in contract, cf. Lord Millett in *Johnson v Unisys Ltd* [2001] UKHL 13; [2001] 1 AC 518 at [78].

213. In Monde Petroleum SA v Western Zagros Ltd [2016] EWHC 1472 (Comm) [2017] 1 All ER (Comm) at [261], Mr Richard Salter QC, sitting as a Deputy Judge of the High Court said

> "In my judgment, a contractual right to terminate is a right which may be exercised irrespective of the exercising party's reasons for doing so. Provided that the contractual conditions (if any) for the exercise of such a right (for example, the occurrence of an Event of Default) have been satisfied, the party exercising such a right does not have to justify its actions."

214. This part of the judgment was unaffected by the subsequent appeal, and Mr Salter QC cited a number of cases for it at [262-264]. This included *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch) where Andrews J rejected an alternative argument that the bank's right of termination was impliedly restricted so that it could only be exercised in good faith, observing that: *"When a contract gives one of the parties an absolute right, a court will not usually imply any restrictions on it, even restrictions preventing the right from being exercised in an arbitrary, capricious or irrational manner".*

215. Thus, an employee can, if they wish, remain in employment and resign at the time when it suits them best to do so, subject to restrictive covenants and the like. Thus, Mr Burton was able to continue to be employed until after he secured the renewals for Alesco. His obligation was then to continue to honour the contract: in the meantime, the employer would benefit from that by getting the renewal premiums. The

employee would then resign at the time of his choosing. Indeed, if he had chosen to resign just before the renewals were due to be made, and had then gone on garden leave, the position of Alesco could only have been worse because they would have had only the chance of renewals being made at such short notice without Mr Burton rather than the certainty of their being made through Mr Burton. Thus, this point by itself did not involve a breach of contract on the part of Mr Burton or an inducement to breach of contract by anybody else.

(v) Failure to disclose the loan at the time of exit

216. The Claimants also say that Mr Burton failed to disclose the loan to Alesco at the time of the loan, and that he also failed to do so in response to questions during his exit interview. It is said that he lied in this regard. At his exit interview on 22 August 2017, Mr Burton was asked if he had received '*any money or any benefits in kind from Bishopsgate to date'.* Mr Burton may have believed that this was true, but the answer was misleading in that the loan was organised by Bishopsgate through Nevada. By a statement made on 20 September 2017, Mr Burton said that he had received a loan in respect of a personal investment, which was not in respect of an employment-related context. It was employment-related in that it related to the negotiations with a view to joining Bishopsgate. His subsequent statement at the end of November 2017 that he was offered the loan on '*purely commercial'* and '*arms' length terms'* was strictly untrue in that there was no interest payable at first, and it was unsecured.

217. To the extent that any of these statements were false, it was in the context of a very intense interrogation on the part of the Claimants, leading to a defensive approach on the part of Mr Burton. The Claimants wish to infer that the statements which were not wholly true were intended to conceal a dishonest scheme in which Mr Burton was acting in the interests of the Corporate Defendants and no longer those of the Claimants. In my judgment, the evidence does not support such an inference. The highest that it goes is that the loan was made in order to induce Mr Burton to move at a convenient moment. This would involve giving notice of termination only after Mr Burton had secured for the Claimants the benefit of the renewals, albeit with an ulterior motive. This did not involve a dishonest conspiracy as alleged or at all. It is a difficult question as to whether any of the answers amounted to a breach of contract, to which the judgment will refer below.

(vi) Mr Burton was not a fiduciary and the loan was not inherently unlawful

218. It then remains to consider whether there was something inherently unlawful about the loan itself. The pleaded case is that it is to be inferred from the time of the loan that Mr Burton acted for the Corporate Defendants including encouraging employees to leave the Claimants and join the Corporate Defendants, encouraging clients and suppliers to cease to do business with Alesco and to transfer business to the Corporate Defendants: see APOC [82]. In fact, I am satisfied as set out above that there has been no such wrongful conduct. This negatives any implied suggestion that the loan was in return for such unlawful conduct.

219. If it is alleged that the matters relating to the loan gave rise to a breach of contract, there is a failure to plead clearly what aspect of the loan amounted to a breach of contract. As noted above, it is stated in the APOC at [80] that acceptance of the Loan

placed Mr Burton in a position where his own interests and those of his employer were in conflict. However, a conflict of interest cannot be engineered into a duty. The 'no conflict' rule is a fiduciary obligation. It will be set out in the section on law below that it does not follow from the fact that a person is in position where his own interests and those of an employer are in conflict that the employee thereby has a fiduciary duty. Further, the no conflict rule is not an ordinary incident of the employment relationship. This appears to be common ground; the 'no conflict' obligation is pleaded only as a fiduciary duty at APOC [20] and not as a contractual obligation. It is not alleged that Mr Burton was under any contractual obligation to disclose the acceptance of a loan. Any such obligation could only potentially arise as an incidence of a fiduciary duty.

220. Further, I am satisfied that Mr Burton was not in the position of a fiduciary akin to a director or a trustee. The Claimants allege that he did owe such duties because of his contractual duties, his seniority and autonomy: see APOC [27(i)]. His contractual duties do not take him outside any other employee. There is no attempt in the pleading to delineate the precise scope of any fiduciary duties by reference to Mr Burton's obligations as is required (see, e.g., Elias J (as he then was) in *Nottingham University v. Fishel* [2000] ICR 1462) (*"Fishel"*). Fiduciary duties do not come as 'one size fits all'. An example of how this does not work is that Mr Burton was a line manager in respect of Mr Tom Jones alone: if that sufficed to give rise to a fiduciary duty, it would have to be something specific vis-à-vis his charge, but there is no allegation of a specific fiduciary duty, let alone a breach.

221. The Claimants seek to invoke his seniority. Seniority on its own does not give rise to fiduciary duties. In any event, Mr Burton was not particularly senior, and he had little management responsibility. He was a producer rather than a manager. This distinction was mentioned by Mr Byatt who said (T8/99/22 – T8/100/3):

> "A…you can be a very senior, very well paid producer and not have any line management or you can go down the management path. Two different careers. At the time, when I first started actually my intention was to go down the production route and, as time went on, I accepted I needed to take management responsibility."

222. Mr Burton worked in the North American Energy Upstream Broking Team: see Burton 1 [40]. He did not lead that team. Mr Clarkson was from April 2017 the Managing Partner in charge of the Energy Division in succession to Mr Jonathan Lyne, who was the chairman of the Energy Division. Beneath them, Mr Julian Raven was Head of Upstream, and beneath him was a team of brokers and a team of account executives. Mr Burton was one of the brokers. Of course, Mr Burton was a very productive and a highly sought-after broker, but this did not give rise to the epithet of senior management employee or something that gave rise to a generalised fiduciary position.

223. Mr Burton had some client facing tasks as did other brokers. He spent a large part of his time managing and developing the Land Rig Facility. It is said that Mr Burton was trusted to develop and manage the Land Rig Facility, and autonomously to develop and maintain relationships with Alesco's clients for the benefit of Alesco, without any material oversight (Matson 2, [30]). He accepted, for example, that of

Alesco's staff he had the closest relationship with Mr Stilwell of Lockton Houston (T12/145/11) He went to the US several times per annum, but usually with colleagues. As Mr Matson said at the time when Mr Burton left: "Whilst Peter is a very good operator, all of his production has been done as a team and has all recently renewed again for 12 months. Peter was the main face of the rig facility but production came from all."

224. This was confirmed by the evidence of Mr Burton in his oral evidence (T12/37/25 - T12/38/16). Sometimes he is referred to as the lynchpin of the Land Rig Facility. None of this gave rise to wide ranging fiduciary duties, and if they did, they would have to be confined to something in respect of the relevant relationships, as to which no specific duty or breach is alleged. Insofar as it is said that he was a part of an energy team or one relating to the Land Rig Facility or one relating to US Upstream, this is not a promising basis for a general fiduciary duty: if it were, it would apply to most employees in anything other than a junior role who work together as teams. He was not the line manager of Mr Brewins who reported to Mr Raven; Mr Burton and Mr Brewins rarely travelled together, and they focussed on different parts of the US. Mr Burton did not owe any fiduciary duties in relation to his interactions with colleagues, but if he did, they were necessarily limited to those interactions with colleagues in relation to whom he had some supervisory responsibility. He owed no fiduciary duties in relation to his relationship with Mr Brewins as an employee of Alesco.

225. There was some discussion in the case about the significance of the fact that Mr Burton was on the Alesco Energy Committee for just over a year before he resigned. However, this committee did not have any executive decision-making authority: its remit was limited to making recommendations which Mr Matson could choose to accept or ignore: see Clarkson evidence (T7/63/4 -T7/64/5). A large number of its meetings were cancelled: it had few meetings, and such meetings as took place were poorly attended: see Burton 1 [62, 63] and Clarkson (T7/56/18 – T7/58/6). It follows that no fiduciary relationship can be established by reference to this Committee.

226. Mr Burton had a very limited role in respect of annual budgeting, sitting at a meeting on an annual basis setting out a list of renewal accounts did not give rise to a fiduciary duty. Other employees such as Mr Brewins and Mr Maginn did the same, and no fiduciary duty is alleged in respect of them. His involvement in hiring decisions was limited (he was involved in relation to four recruits, but this was in eight years of employment). He was not consulted in respect of the move of Mr Quelcutti (who reported to him) to Alesco Houston, nor as regards the engagement of Mr Neighbour in succession to Mr Brewins: Burton 1 [72,73].

227. Despite Mr Matson seeking to make a lot of it, Mr Burton had no more access to confidential information than other employees who are not alleged to be fiduciaries. If this was capable of giving rise to a fiduciary duty, it would have to be tailored to the specific information entrusted, which it has not been.

228. The final area alleged in support of a fiduciary duty was assertions about the autonomy of Mr Burton, but this seemed to mean being able to deal with his own clients without the supervision of a senior manager. This too does not give rise to a fiduciary duty, let alone a wide ranging one.

229. Without more, the position is no different in the event that in the context of discussions about a move of employment, a prospective employer agreed to provide a loan to help the employee with a domestic cash-flow difficulty. There is a clear breach of duty in the event that the employee in return for the loan is agreeing to act in breach of his duty of fidelity e.g. by soliciting staff or customers away from the employer to the lender. It might have been possible to infer that there was such a quid pro quo in the event that there was some evidence to suggest that that is what was occurring. However, in this case, there is no evidence to make that inference: on the contrary, the evidence is that this was not occurring.

230. The evidence from Mr Faraday is of importance here. This was not an arrangement which committed Mr Burton to the Corporate Defendants. On the contrary, it was in the context of recruitment and it was to increase the chance that Mr Burton would choose to go to Bishopsgate. Even in respect of a fiduciary, the law is that fiduciary duties about the no conflict rule and the no profit rule do not prevent such a fiduciary from considering and negotiating an opportunity to join a competitor. They do not have to terminate their employment relationship before having such a negotiation. *Goulding on Employee Competition 3rd Edition ("Goulding")* at 2.140 refers to an exception (of uncertain scope) to disclosure even of a fiduciary where a director or senior employee is unhappy or unsettled or attending interviews with a competitor. For a non-fiduciary, it is not a breach of the implied contractual duty of fidelity. This is all established on the basis of the freedom of an employee to pursue other opportunities. Otherwise, employees might find themselves shackled to an employer, unable to search for a new opportunity until after they found themselves without work.

231. In this case, the particular opportunity sought is not an opportunity for the benefit of the employer. The context is about future employment. If the negotiation was for a signing on fee, that would be entirely legitimate, notwithstanding that the enticement of such a fee is in order to induce the employee to leave their employer thereby potentially causing damage to their employer. Provided that matters entrusted to the employee are not abused or corporate opportunities belonging to the employer are not diverted (e.g. to obtain contract renewals or maintain the confidence for employees answerable to him), the law recognises that the opportunity to obtain further employment belongs to the employee and not to the employer.

232. A question then exists as to whether it is different where the payment is not part of the contract of employment with the next employer, but where there is a loan which provides a benefit in kind for the employee at a time when they have not committed themselves to that employer, and when indeed, they may decide not to be employed by that employer.

233. In the course of the trial, at the Court's request, the parties researched whether there was any law to the effect that the loan agreement amounted to a breach of a duty of fidelity or a breach of fiduciary duty. Despite the researches of teams of Counsel, no relevant case law was found. The Claimants, whilst accepting that there was no law directly in point, drew attention to the case of *Tullett Prebon v BGC* [2011] EWCA Civ 131; [2011] IRLR 420 on appeal from a decision of Jack J [2010] EWHC 484 (QB). There was consideration of forward contracts under which an employee would agree to leave employer 1 and join employer 2, a competitor of employer 1, when free to do so. The terms included:

i) A requirement to "take all such lawful action (including resigning from your current employment) as shall be necessary to comply with your obligations under this agreement and commence your duties with [BGC] at the earliest possible time."

ii) The provision of an indemnity should the current employer take action against its employee for resigning in breach of the contract of employment between them. A term of the indemnity was 'It is a condition precedent that the company has given prior approval to all and any steps taken in connection with this indemnity'. In evidence, it was said that employer 2 used an indemnity as a means of controlling the conduct of the employee with his current employer: it was almost a licence for wrongdoing by individuals. It was discussed in the context of employer 2 asking the brokers to walk out at one.

iii) The provision of substantial salary and commission payments together with substantial signing-on payments (a half at the time of the signing of the contract and a half on commencement of employment).

iv) The obligation of the employee to pay a very substantial sum in liquidated damages (including a year's salary and bonus and other benefits) should he not resign from his current employment when he was legally entitled to do so.

234. Mr Justice Jack had found that the forward contracts were lawful. Maurice Kay and Tomlinson LJJ did not comment about this, and it did not arise for consideration. Hooper LJ stated that he viewed with concern the cumulative impact of these terms, and that he did not wish it to be thought that he necessarily agreed that the terms of the forward contracts and associated agreements were compatible with the employee's duties to employer 1.

235. The case before the Court of Appeal involved consideration of whether employer 2 had repudiated the forward contract such as to entitle brokers to remain with employer 1, and findings of Jack J to that effect were upheld by the Court of Appeal. It is not necessary to set out the actions required by employer 2 which would, if followed, have amounted to flagrant breaches of duties owed by employees to employer 1.

236. Simply a recitation of this summary indicates how different the *Tullett Prebon* case is from the instant one. In the instant case, there was expressly no requirement on Mr Burton under the loan agreement to take employment with the Corporate Defendants: on the contrary, there was no promise of employment. There was no relevant indemnity (the only indemnity was in respect of tax matters). There was no obligation on the Corporate Defendants to employ Mr Burton nor was there an obligation on Mr Burton to take such employment. There was no outright payment: the loan was repayable, but there was an interest free period and it was unsecured.

237. There was nothing in the loan agreement which indicated any obligation in return to act in breach of the duty of fidelity to Alesco. However, that is not conclusive. It is not difficult to imagine other circumstances in which it could be inferred that a loan agreement of this nature would be intended in return for breaches of the duty of fidelity. Everything in this area is highly fact sensitive.

238. In the case of Mr Burton, the evidence has not shown that the loan was in return for something unlawful. Mr Burton did not breach his duty of fidelity by soliciting employees or customers during the remaining period of his employment or garden leave, nor did he breach his post-termination restrictions. The inference is that the loan agreement was not in return for breaches of a duty of fidelity. It is therefore very different from the forward contract in *Tullett Prebon* (which Mr Justice Jack regarded as lawful, but as to which Hooper LJ had reservations). In the very different circumstances of this loan, the loan agreement did not involve a breach of a duty of fidelity, nor did it involve a breach of fiduciary duty.

239. It was, on its terms and in line with the evidence of Mr Faraday, not provided in connection with the obligations of Mr Burton to Alesco, but in connection only with his need for a loan and in expectation that it would encourage him to move to the Corporate Defendants (but without obligation to do so). It did not induce or encourage him to breach any duty to Alesco.

240. The effect of the above is that Mr Burton was not in a generalised fiduciary position. He was therefore in the position of a highly valued employee who was a very productive member of the team, which by itself did not give rise to a fiduciary position. Even if he had been a fiduciary in that general sense, it would be *"necessary to identify the respects in which he is a fiduciary and the duties which follow"*: per Arden LJ (as she then was) in *Item Software v. Fassihi* [2005] ICR 450 at [35]. This has not been done simply by the assertion that Mr Burton by the loan put himself into a position of conflict. The law in respect of fiduciary duties relevant to this case and the loan and more generally in respect of both Mr Burton and Mr Hasan, will be considered below in the consideration of the law and in particular fiduciary duties.

241. It was possible that Mr Burton would have fiduciary duties which employees might have in respect of certain designated part of their activities, but in accordance with the principles recited in *Fishel*, they would be very specific and would have to be particularised both in ambit and in allegations of breach. They have not been particularised, apparently because such a duty could not be formulated. The effect as regards the loan is that neither is there a more generalised prohibition, nor is there identified a specific duty or breach arising from it.

242. In the circumstances, absent a contractual duty and/or a generalised fiduciary relationship or a specific fiduciary duty in respect of the taking of the loan, the Claimants have not established a breach of duty arising out of the taking of the loan. To Mr Matson at the time following the resignation of Mr Burton, it smacked of bribery and corruption: by the time of Matson 2, [217], it had the potential for bribery and corruption. The pleaded case rests primarily on the APOC at [82] and the alleged inferences there and on the assertion at [80] about the loan causing a conflict of interest.

243. The Court has been astute to look for a corresponding breach of duty in return for the loan, and to test the inferences in APOC at [82]. The matters have been tested extensively in the course of the extensive disclosure, the written and the oral evidence, and very testing cross-examination. The length of this judgment in connection with those matters reflects how the alleged breaches of duty in connection

with behaviour subsequent to the loan were centre stage in the trial. That was relied upon by the Claimants to prove the conspiracy and to prove the unlawfulness of the loan by showing that it had the quid pro quo of subverting the interest of the Claimants to the Corporate Defendants. All of this has been rejected. Far from the inferences developing, the effect of all of this has been to show that the inferences turn out not to be well made. The loan therefore was not in return for anything unlawful, and the alleged inferences of such subsequent unlawful acts was not only not proven in the case of Mr Burton, but there was an answer to each of the points; indeed the loan itself was not wrong in itself, giving rise neither to a breach of fiduciary duty nor to a breach of a duty of fidelity.

244. If, contrary to the above, it was wrong, it follows from what has occurred subsequently, that it did not cause any loss to the Claimants. It was not a part of an arrangement involving soliciting of business or of employees. If it had not been taken, Mr Burton would still not have agreed to the terms of the seven-year retention offered by Alesco. On the contrary, he was about to leave the employ of the Claimant and he would still have been able to join the Corporate Defendants. If he did not, , he would have gone to another competitor such as RK Harrison who would have enabled him to pay the money required for the house purchase by a signing on fee. Further, if it is the case that there was any breach of contract in respect of the answers to the questions at the exit interviews referred to above, this too would not have altered anything as regards the departures.

(vii) Why a written offer was not made to Mr Burton at the time of the Burton loan

245. The Claimants' case is that that at the time of the loan, there was a commitment on the part of Mr Burton to transfer his employment to the Corporate Defendants. However, it is contended that as part of the conspiracy, Mr Burton would be able to assist the Corporate Defendants better from within Alesco than if he had to go on garden leave at that point. Mr Burton said that he did not wish to receive an offer at that stage, because he would have to disclose that to Alesco under his contract of employment.

246. In my judgment, Mr Burton, and it may have been Mr Ross, had identified that it would be better for him to remain with Alesco until after the renewals of his clients which would be in June and July 2017. Mr Ross's evidence that it was Mr Ross who '*certainly instructed Pete and Nawaf that they needed to renew their clients and once they had fulfilled their obligations, then they could leave*' (T10/107/2-4). The Claimants attach significance to the use of the word "instructed" as if Mr Ross was acting as an employer, although in my judgment in the wider context, this phrase was not evidence that Mr Ross had become a person from whom Mr Burton would at that stage have taken orders. Mr Burton said that he told Mr Ross that he did not want an offer until the summer - 'July' - because he did not want to disclose it to Alesco (T12/12/1-23). The Claimants are dismissive of this in view of the fact that the loan was not disclosed at the time. However, in the case of a job offer, there was a contractual obligation to reveal it. There is a common theme in the different accounts, namely that Mr Ross and Mr Burton wished the renewals to take place before Mr Burton was put on garden leave. In fact, an offer was made by the Corporate Defendants to Mr Burton on 27 June 2017.

247. The timing of the resignation might have enured to the benefit of the Corporate Defendants and Mr Burton in due course. However, in the meantime, there was no breach of contract or breach of duty for Mr Burton to continue in the employ of Alesco and to perform, as he did, his duties by procuring the renewals, even if there was an ulterior motive to ensure that the clients did not transfer their allegiance to some third-party broker.

XI The Bishopsgate Business Plan

248. The Claimants lay heavy emphasis on the Bishopsgate Business Plan (pages 6678 of the Closing). In his Defence, Mr Hasan accepts that he acted in breach of contract in providing the RFIB Business Plan to RFIB (Defence [59(d)], [61] and [93]). He accepts that he also provided to RFIB the target accounts list and the client list, and that he should not have done so: see Hasan 1, [147]. The attempts to understate the importance of the information and the extent to which he regarded these matters as unimportant are, in my judgment, unimpressive. I do not accept that Mr Hasan did not appreciate the sensitivity of the information and/or his duty to protect the same for the Claimants, contrary to his evidence at Hasan 1, [157] as regards the client list. There is no evidence that the provision of that documentation to RFIB caused loss to the Claimants.

249. Whilst I do not accept the suggestion in the statements to the effect that the documentation contained no substance, it was not so sensitive that the Claimants took any steps to retrieve the same. Thus, there is no evidence that more than minimal steps were taken vis-à-vis RFIB to restore all copies of the information. This was apparent from evidence given by Mr Matson (T6/77/20 – T6/78/20; T6/79/7-11), who said that it was more for Mr Chilton. Mr Chilton did have communications with Mr Mahoney of RFIB: he said that he had asked RFIB to destroy evidence, but there was nothing in writing to confirm this before such request or after. The inference is that that would have been the least required in the event that there was any concern of serious damage to the interests of Alesco.

250. The Bishopsgate Business Plan was based on a business plan which Mr Hasan provided to RFIB in the context of discussions in 2016 of Mr Hasan and Mr Maginn going to join RFIB, and in turn that was based on Alesco's 'Energy Far East Business Plan'. The only change was to alter RFIB to Bishopsgate. Just as there was a breach of contract in sending the RFIB Business Plan, so too there was a breach of contract in changing the heading from RFIB to Bishopsgate and sending the business plan to Bishopsgate. The RFIB Business Plan included narrative on the Asia market (Indonesia, Vietnam, Myanmar, Bangladesh, Cambodia, Sri Lanka, India, Thailand and China). This was taken from a separate document entitled "Energy Far East Business Plan", and this was confidential. There is no allegation that there has been loss of business by reason thereof whether to RFIB or Bishopsgate or Price Forbes or at all.

251. The Claimants contend that this shows the willingness of Mr Hasan to breach his duties in the course of his seeking new employment, the willingness of Bishopsgate to receive confidential information of Alesco, Mr Hasan's intention to solicit Alesco's clients immediately and the importance to Mr Hasan of moving with Mr Maginn and others.

252. Whilst a business plan can be provided to a prospective employer, that cannot be the case in the event that the information is confidential. The MENA section of the business plan and the five-year forecast may not have been confidential, but the provision of the Asia section was a breach of contract. Mr Hasan has admitted in his Defence at [59(d)] that he should not have provided the Bishopsgate Business Plan. However, he had previously sought to conceal that he provided it in that at his exit interview, he denied creating any such document for the purpose of his move. His account in his witness statement that *"I did not consider the document to be of particular significance"* (Hasan (1) [185]) could not have been true. He even chose to delete the RFIB Business Plan weeks prior to the exit interview, and in cross-examination he accepted that he had kept away this business plan from Alesco (T13/219/24 – T13/220/9). He was also not open in a second interview, nor was he transparent until a pre-action disclosure application was threatened.

253. Although Mr Hasan was thereby in breach of his contract by acting as such, the Claimants have not shown that Mr Maginn was in breach of contract. Despite detailed and persistent cross-examination of Mr Maginn, the Claimants have not shown that Mr Maginn was involved with or had knowledge about the business plan, client list or target account list being passed on by Mr Hasan to RFIB in about January 2017: (T13/8/2-14) is a small part of that cross-examination. Overall, I found him to be a plain-speaking witness, and I accept what he said about his absence of involvement and lack of knowledge.

254. Despite this, the inference that Mr Hasan disclosed other documents including the client list and the target account list to the Corporate Defendants does not follow. The evidence does not suggest that they were passed on, let alone concealed by Ms Walker whose evidence was credible.

255. The behaviour of Mr Hasan as regards the business plan does not reflect well on him. He was involved in cutting corners for his own gain, and he failed to consider properly or at all his confidentiality obligations under his contract of employment. He did not give honest answers in the exit interviews, albeit that as noted above, there are criticisms of the Claimants as well in connection with those interviews. However, looking at the case as a whole, this does not show that he was involved in a conspiracy to injure, nor that he was involved in an unlawful combination with the Departing Employees.

256. Mr Ross chose not to accept the plan, but there was evidence of manuscript notes on the plan from Ms Walker and Mr Bashir. There were two meetings between Mr Hasan and Ms Walker and Mr Bashir. There may have been another meeting between Mr Hasan, Ms Walker and Mr Ross. The annotations include information relating to geographical regions, anticipated client following and some information regarding renewals. There was information about the Land Rig Facility and identifying Mr Burton as the head of USA wholesale. This information was originally provided to RFIB. It did not mean there that Mr Hasan was looking to recruit Messrs Burton and Brewins to RFIB, but a land rig facility was put forward as a tool that a broker would have in an international market. There was identified a team of five including Gerald Maginn, 2 account holders and a property broker. It did not include a claims handler (Mr Game) or a junior former work-experience individual (Mr Hussein). The notion that it included a route map for the recruitment of a specific team consisting of Messrs Cohen, Game and Hussein is unsustainable.

257. Much of the country by country information was already in the public domain or was at least widely available within Alesco and not treated as highly confidential. The high-level financial forecasts or the general references to the possibilities of additional markets two years after any move were, if they were confidential, not the kind of material of sensitivity in the hands of a competitor. Information about commissions in the accounts list should not have been provided.

258. None of this information led to the hiring of Mr Hasan. Mr Ross knew how valued he was, having been privy to his recruitment by Alesco. He also knew what were the profitable parts of the business of Alesco. As he said in evidence:

    i) he was in a position to recommend the hire of Mr Hasan based on his own knowledge and experience of Mr Hasan, including when Mr Ross had been at Alesco: *"…he had a very prolific year in the time I was there and he was just a tremendously well networked producer, and he was continuously reported on as just having success after success… I told* [RemCo] *about my time with Nawaf at Gallagher, I told them what Nawaf had done when he was at JLT and how successful he had been, and I said he is a tremendous rainmaker"* (T11/162/7-21).

    ii) Further: *"I told Nawaf I didn't need it, because my endorsement of him as a producer was more than sufficient. I expected our office*

    iii) *to build a P&L projection, but I didn't need Nawaf to furnish me with any details. I knew who he was and how good he was."* (T11/4/18-22).

259. This does not mean that the information provided was not of interest or that it was not considered by Ms Walker and Mr Bashir or that there was any justification for its provision. It is simply that there is nothing to suggest that its provision caused the recruitment directly or indirectly in whole or in part. Further, there is nothing to indicate that any significant use has been made of the same.

260. The case of the Claimants is that there were referred to in the information provided a target accounts list and an accounts list, and the Claimants infer that these must have been provided. The Claimants have not proven that inferential case. Nothing has been disclosed, and Mr Hasan and Ms Walker confirmed that it had not been provided. The annotations did not indicate that they had been received, and the evidence about the annotations was to the effect that they had not been received. There was no reason to believe that Ms Walker, whom I found to be a reliable witness, was concealing the true position, or that the Defendants were concealing documents which they had.

261. There was no evidence that the Business Plan was used. I accept the oft repeated evidence of Mr Ross that he did not wish to receive the business plan (T11/4/16-22; p.11/2-10; p.24/24-25; p.25/1-3; p. 28/16-19; p.29/2-11; p.38/7-15; p.39/1-12; p.42/9-11; p.43/20-21; p.47/5-15; p.49/15). It may have been because others received it, that is Ms Walker and Mr Bashir. It may be that his reason for not taking it was because he could see that a case such as this one might arise. Whatever his motive, I am satisfied that he did not receive it.

262. The Claimants seek to infer from the content of the Bishopsgate Business Plan that the document was produced as part of an unlawful "team move". The business plan does not identify a team for RFIB or the Corporate Defendants. It only identifies Mr Maginn in addition to Mr Hasan, who were at all times identified as a pair in the market. There is no evidence that any of the other Departing Employees knew that Mr Hasan was preparing a business plan for RFIB or Bishopsgate, or that they helped in the process: see Burton 2 [73], Brewins 2 [14] and Maginn 2 [6] and (T13/7/17-25; p.8/1-22; p.27/19-25; p.28/1-25 - p.29/1). The Business Plan does not identify Mr Burton or Mr Brewins, and there is no suggestion that when Mr Hasan used it for RFIB that he was intending to move them or either of them with him. So likewise, it was not including them in the plan presented to Bishopsgate.

263. In summary, Mr Hasan was wrong to produce the business plan in the way in which he did, that is by using an existing Alesco document and pasting it into the plan. It does show a breach of his contractual/equitable obligations owed to the Claimants. Further, repeatedly, Mr Hasan did not give honest information about the Bishopsgate Business Plan, saying on 17 July 2017 that he had not created a document containing confidential information for the purpose of his move such as a business plan. In an email of 7 September 2017, he admitted to a business plan provided to RFIB, but said that he had not provided such a document to third parties in connection with his discussions about joining them. He also said through Mishcons on 29 September 2017 that the information provided did not contain Alesco's confidential information. On 14 December 2017, Mr Hasan provided a copy of the RFIB Business Plan saying falsely it did not contain proprietary information, and that he did not share this plan with third parties. This was a series of untruths to conceal the use of the same through the Bishopsgate Business Plan. Those lies evidence that he was concerned about being found out for his having been in breach of his contractual and equitable duties. It gives rise to suspicion about greater wrongdoing on the part of Mr Hasan, but in my judgment, it does not in the circumstances of everything in this case, evidence an unlawful team move, nor does it evidence a conspiracy as alleged against the Defendants. There is also no evidence that any of the wrongdoing of Mr Hasan in connection with the Business Plan and other documents vis-à-vis RFIB or the Corporate Defendants has caused any loss to the Claimants.

XII Meetings in late May 2017 of Mr Hasan

264. On 24 May 2017, Messrs Hasan and Maginn met with Mr Ross. At that time, Mr Maginn was wanting to appraise for himself the figures, that is to have a *'better feel for the P&L figures.'* There is serious reason to doubt Mr Hasan's evidence that he did not see the Project Tesla spreadsheet sent to his solicitors. It seems probable that although the interests of Messrs Hasan and Maginn were not entirely allied, they did consider the position at the same time. It was unnecessary for them to act in this way because if they had considered the matter separately, they both would have left. Mr Hasan had a settled intention to leave. Mr Maginn was extremely likely to follow Mr Hasan, given that this is what they had done in the past.

265. At the same time, Mr Hasan organised (unusually through Ms Cooke) a meeting of Basil El-Baz, a chief executive officer of Carbon Holdings, the parent company of OPC. Mr Ross claims that the purpose was not to pitch for a client, but *"to try and explain to the Ardonagh Group who we were"*: see (T10/141/1421). Mr Hasan said

that the '*big client meet'* was '*absolutely not'* for the purposes of introducing a client to the senior management at Ardonagh: '*it certainly wasn't meant for the purposes of introducing Mr Ross to a client, absolutely not'* (T13/182/6-19). I am satisfied that this meeting involved a breach of Mr Hasan's duty of fidelity in that he should not have introduced a client of Alesco to a competitor of his employer during the currency of his employment, even if it was not an act of solicitation at that stage and even if he had reason to believe that wherever he was, the client was likely to follow him. The Claimants seek to infer from this that there must have been other instances of wrongdoing, but in this highly documented case, I am not prepared to draw this inference.

XIII 3 June 2017 meeting of Mr Matson with Mr Ross at Mr Ross's home

266. There was considerable evidence about the 3 June 2017 meeting where Mr Matson attended the home of Mr Ross – their respective sons were spending time together. It is not necessary to rehearse the evidence of the meeting. Having heard the evidence of Mr Matson and Mr Ross, I am satisfied that Mr Ross contrived the meeting for his own commercial purposes. There were two versions. The first is recounted by Mr Matson to the effect that Mr Ross wanted to recruit Mr Matson to create Alesco 2, with Mr Matson to run the new business (Matson 2 [82]). Mr Ross is alleged to have wanted to *"put the team back together".* It is said that, consistent with that account, Mr Ross's text of the next day is that they should stay in touch because they were '*a powerful pair and it would be a shame to let that fall away*'.

267. Mr Ross's account of the meeting was that it was uncomfortable, but he hoped to foster a better relationship with Mr Matson so that they could arrive at an equitable arrangement about the departures when they occurred. He gave the rather odd response in evidence that he was '*trying to get the friendship back on track so that if we were in a position to and if I knew the guys were coming, I could have called him'* (T11/72/3-6). When cross-examined to the effect that he was concealing the recruitment of the Departing Employees, he said that he did not know that they were coming. He may not have known for sure, but he knew that it was very likely. It is difficult to see how Mr Ross could have thought that the friendship could have come back on track in the event that he had a convivial meeting and thereafter Mr Matson found out that not only had some Alesco people gone over to Bishopsgate, but that had not been mentioned at the meeting.

268. In my judgment, the probability is that the orchestration was by Mr Ross. If it was uncomfortable, it was caused by his springing a meeting about business on Mr Matson in a family context. It is not clear how far Mr Ross went in seeking to interest Mr Matson in coming to join the Corporate Defendants. Mr Matson had many opportunities to mention the approach to his colleagues at Alesco, but there is no record of his having done so at the time.

269. It is difficult to know precisely what occurred given the oddities of Mr Ross's account about equitable arrangements and Mr Matson's account of receiving an offer and not mentioning it in a way that is recorded in a contemporaneous document. The overall impression is that there was something falling short of a job offer in which Mr Ross was 'dipping his toe in the water' to see if Mr Matson might become interested in joining forces with him/the Corporate Defendants. This reflects his expansionist nature.

270. It seems apparent that he did not get very far and that the meeting at once became uncomfortable. It seems likely that Mr Matson has exaggerated how far the approach went. It is much more likely that it fizzled out before it went very far because of how inappropriate the approach was and due to the reaction of Mr Matson. However, I do accept that the possibility of some move was at least mentioned, contrary to the evidence of Mr Ross.

271. The Claimants say that the attempt to recruit even Mr Matson evidences an attempt on the part of Mr Ross and the Defendants to inflict very serious damage to the Claimants, and evidences a conspiracy to injure. They say that its coincidence in time with the recruitment of the Departing Employees is telling.

272. In my judgment, the approach says something about Mr Ross and his ambition. However, there was nothing unlawful in Mr Ross forming a strategy of recruitment of this kind for the benefit of the Corporate Defendants so long as he was not inducing or assisting the Departing Employees to act unlawfully vis-à-vis their employer or acting with them in a conspiracy to injure the Claimants. Mr Ross was able to follow this through by himself and his recruiters.

273. Mr Ross's determination may have been fuelled by the 2015 Proceedings brought against him and others. It seems more likely that it was brought about not predominantly by a desire for revenge, but predominantly by a general expansionist approach to the new business to create a truly international brokerage with a vast amount of recruitment on an audacious scale. He knew that he had to be careful as regards Alesco because of the 2015 Proceedings and the proactive conduct of Alesco/AJG in these matters. He was not dependent on any of the Departing Employees to act as recruitment sergeants or to facilitate a team move. He knew that he could do the work of recruitment himself with the assistance of recruitment agents.

274. It was possible that whilst doing this that there would be errors on the way in the sense that he might not be meticulous to avoid matters which should not have occurred. Thus, he could have done more to keep separate Mr Hasan and Mr Maginn, so as to avoid the possibility of a breach of duty on their part to the extent that they acted together. However, that is not to say that they were combining together to injure Alesco. Mr Ross achieved the moves by targeting them individually and by his own actions rather than by the actions of the Departing Employees amongst themselves. To this end, he used recruitment agents and procured solicitors to act for them, namely Doyle Clayton.

(i) Timing of the notices of resignation

275. The Claimants contend that the timing of the departures was synchronised to cause maximum damage to Alesco. The chronology is emphasised. At the start was Ms Cooke chasing Mr Ross for paperwork for Mr Maginn *"given proposed time frame pre pulling trigger"*. The Claimants say that this is a reference to the resignations which were designed to cause maximum disruption. They refer to the fact that Mr Matson was about to be away for an operation. They say that the resignations were not all at once, but over a period of a few weeks. The sequence was Mr Brewins on 9 June 2017, Mr Hasan on 30 June 2017, Mr Maginn on 3 July 2017 and Mr Burton on 11 July 2017.

276. It is a curious allegation for a number of reasons. First, the numbers involved were not so great relative to the number of employees as a whole. This was four people out of a company or group of thousands of employees, and in circumstances when in the insurance broking industry, moves of even a number at a time was common. Even with the three auxiliary employees who followed, seven employees were relatively a small number. Secondly, the resignations were not all at once. It is slightly contrived to suggest that it was staggered to add to the alarm: if the move had been all at once, this would be said to induce panic, and when it is not all at once, it is said to be to induce panic. Mr Clarkson went so far as to say (Clarkson [42]) that disclosure of each of the offers from Bishopsgate when they arrived would have been worse in terms of destabilisation, saying that *"multiple resignations at a senior level in a short period tend to create a sense of panic amongst others left in the team, and that is made worse if those individuals are all going to the same place".* Thirdly, the allegation is that the resignations were *"plainly co-ordinated by Mr Ross"* (Closing of Claimants [160]). As noted, Mr Ross did not owe duties, and his co-ordination without a conspiracy or dishonest assistance or wrongful inducement of others did not give rise to a cause of action.

XIV Resigning without having committed to join Bishopsgate

277. The Claimants point to common features which, they say, show that there was coordination between the Departing Employees. One feature is that they each resigned in circumstances where they contend that they had not committed to join Bishopsgate at the time of termination of employment, and only signed up to join Bishopsgate at a later point in time. The evidence here is that Mr Burton signed his contract on 21 August 2017; Mr Maginn on 5 September 2017 with Bishopsgate and on 18 December 2017 with Price Forbes; Mr Brewins signed his contract on 6 September 2017 and Mr Hasan signed with Price Forbes on 9 February 2018.

278. Mr Thompson commented that it does seem unlikely that any person would resign without having organised the new place of employment (Thompson 1 [22]). The suggestion of the Claimants is that the Departing Employees did this in order to enable the Corporate Defendants to carry out their recruitment without detection, to cause clients to transfer their loyalty to the Corporate Defendants and to cause maximum disruption and damage to the Claimants.

279. I am satisfied that at the point of termination of the respective Departing Employees, especially Mr Burton who had taken on the loan, there was an almost settled intention to join Bishopsgate. However, there were a number of features which militated in favour of suspending the final commitment to the move. From the perspective of each employee, he would wish to know about whether there were offers from another competitor, either in order to join that company, or to ensure that the offer from Bishopsgate was commensurate with that which could be achieved in the market. For example, in the case of Mr Brewins, he had at the time of termination two offers, one from RK Harrison and one from Bishopsgate: see Brewins 1, [34]. Whilst it would be safer to have terms from the new employer in place before the termination, they each had a sense of their own value and a confidence of being able to match that which they were achieving elsewhere. The expansionist agenda of Mr Ross was such that they must have been confident that the offers from Bishopsgate would not go away.

280. I am satisfied that as said, this was planned and co-ordinated by Mr Ross. However, if it had not been arranged in this way, the four Departing Employees would still have left Alesco. The consequences as regards whether business would have been retained by Alesco would have been no worse: on the contrary, if the Departing Employees had resigned before the renewals of the clients, the position might have been worse because the clients or some of them might not have renewed with Alesco.

XV Withholding information and telling untruths about their employment intentions

281. It appears that the intent of each of the Departing Employees was to give as limited information to the Claimants as possible. However, there is no reason to believe that this was because of some conspiracy. The Claimants had a reputation for being litigious, as evidenced by the 2015 Proceedings in the wake of the departure of Mr Ross in 2015. When informed by Mr Maginn of an offer from RFIB in about December 2016 or January 2017, there were communications by the Claimants to RFIB which could have interfered with the opportunity for Mr Maginn. There was reason for concern that the Claimants would be extremely aggressive. The aggression was manifested by the abuse in the internal communications immediately following the resignations of the Departing Employees: they did not know about them, but they would be likely to have known about the aggressive culture.

282. Part and parcel of the level of aggression was the exit interviews. They were conducted as follows:

i) 17 July 2017 Hasan (1)

ii) 25 July 2017 Burton (1)

iii) 25 July 2017 Brewins (1)

iv) 4 August 2017 Maginn

v) 7 August 2017 Hasan (2)

vi) 17 August 2017 Brewins (2)

vii) 22 August 2017 Burton (2)

283. The Claimants would say that they were simply seeking to protect their legitimate commercial interests. Nonetheless, the meetings went beyond usual questions for departing employees, but were choreographed meetings with a succession of highly detailed questions, apparently prepared at least by an inhouse lawyer. The questions appear to have been crafted with litigation firmly in mind.

284. The Departing Employees acted in breach of contract. It is probable that Mr Burton and Mr Hasan respectively were in breach of their respective contracts in failing to disclose offers made to them. In this regard, I find that the Corporate Defendants were in a position to make offers in May 2017. That is evidenced by the fact that a draft offer had been prepared dated 18 May 2017 for Mr Burton and for Mr Hasan dated 30 May 2017. They were not sent: it is likely that this was because an offer

would have to be reported to the Claimants, and this was not desired. The question is whether there was a non-formal offer which was made at that stage. The inference that one was made is based on the following. First, by this stage, Bishopsgate was keen on recruiting both or either of Mr Burton and Mr Hasan. Secondly, the Departing Employees did not wish to have a formal offer, but they would have wanted to know informally that an offer was metaphorically on the table. There is reference in the documents to a 'formal' offer not being wished because of the reporting obligation. In context, this seems to involve a concept that an informal offer might not have to be reported, or in any event, could operate under the radar. In any event, an offer was sent to Mr Burton on 26 June 2017.

285. In the course of the exit interviews, some of the information provided was misleading. At the time of the resignations and in subsequent meetings, they stated that they had not made a decision about moving to a new employer. At his exit interview on 17 July 2017, Mr Hasan said that he had not accepted any offer of employment, but that he had offers from three entities: Jardine Lloyd Thompson, RFIB, and a start-up platform managing agent. He said on 7 August 2017 that he did not know whether the other Departing Employees were going to Bishopsgate. This must have been with the intention of concealing an offer of Bishopsgate: it was also misleading in that he and his colleagues were at least likely to be moving to Bishopsgate.

286. At a meeting on 25 July 2017, Mr Burton said that he had been approached by 9 employers including Bishopsgate, but had not yet accepted an offer: he had attended 6 interviews. He said that he was not aware of other employees who were leaving or considering leaving, which must have been untrue. He had not accepted any offers. On 22 August 2017, he said that he had received a verbal offer of employment with Bishopsgate "around July sometime" and a first written offer received in mid-July. I have concluded that it is likely that he received an informal verbal offer from Bishopsgate in May 2017. He said that he did not know that the other Departing Employees were joining Bishopsgate. At a meeting on 25 July 2017, Mr Brewins claimed to have received multiple offers and not to have made up his mind about them, whereas in fact he had an almost settled intention to join Bishopsgate.

287. Mr Hasan mentioned those offers on 17 July 2017, but he missed out the Corporate Defendants. I am satisfied on the balance of probabilities that by the time that he resigned, he received an offer from the Corporate Defendants, but he did not disclose it. That judgment is based on the following features. First, he would be unlikely to resign without the knowledge that he would be likely to be able to secure employment elsewhere: an offer would be the clearest indication of that ability. The other offers or expressions of interest were worth pursuing at least as negotiating counters with the Corporate Defendants. Secondly, the Defence of Mr Hasan repeatedly referred to the absence of a formal offer from the Corporate Defendants: in context, that connotes that there was an informal offer. On the basis of his construction that the Disclosure of Offers Clause referred only to an offer in writing, that would help his case, but as noted below, in my judgment, it did not have to be in writing to require disclosure. Thirdly, Mr Ross wanted Mr Hasan to join, so an offer would have been likely to have been made.

288. It therefore follows on this basis that in my judgment, Mr Hasan was in breach of the contractual duty under the Disclosure Offer clause. His answer at the exit interview about the offers of the other competitors was misleading in omitting reference to the

Corporate Defendants and therefore amounted to a breach of contract. Even if the questions at the exit interviews went beyond what was reasonable for an employer to ask, that did not entitle Mr Hasan to give misleading answers in respect of whether he had an offer, bearing in mind the contractual obligation to disclose an offer. He maintained his breach of contract in not disclosing an offer until 12 January 2018 despite by that time having received an offer on 19 September 2017 from the Ardonagh Group.

289. Mr Hasan was also in breach of the Disclosure of Offers Clause in failing to disclose that Mr Brewins and Mr Burton had received offers from Bishopsgate and/or were planning to move there. His answer is that he did not know about that, but I do not accept that evidence. It is in my judgment more likely than not that he found out about this from Mr Ross or Bishopsgate. It seems inherently improbable that it was not mentioned if only to attract Mr Hasan to move, albeit that I accept that he was not part of a team move, and his move was not dependent on their moves.

290. It is also alleged by the Claimants that on 17 July 2017 Mr Hasan misled when he said that he had not made a decision to move to the Corporate Defendants. In my judgment, he had an almost settled intention to move, but it fell just short of a decision to move. He wished to preserve his ability to take an offer from another company, and he saw this as giving him greater bargaining power.

291. There is an additional alleged breach of contract in respect of Mr Hasan, namely that he used a personal phone for personal discussions about prospective employment. It is not proven. The submission on behalf of Mr Hasan at [55] of his Closing Submissions that there is nothing inherently unusual in this or in breach of contract is accepted.

292. On 17 August 2017, Mr Brewins said that he had not received anything in writing or verbal, but that was not the case because he did receive paperwork from Bishopsgate on 8 June 2017, the day before he resigned. At a meeting on 4 August 2017, Mr Maginn said to the Claimants that he was "absolutely not" going to join Bishopsgate, that he had not received an offer of employment from anyone else and that he had not *"even started job hunting "*, and he had *"no idea"* whether any of the other Departing Employees were going to join Bishopsgate. He also said that he had no idea whether the other Departing Employees were joining Bishopsgate. This information must have been false, at least to the extent of his statement that he was absolutely not going to join Bishopsgate.

293. It is easy to understand the motivation of Mr Brewins. Those concerns must have been exacerbated by the terms of the exit interview that he *"felt incredibly under pressure in that meeting"; "it felt like an interrogation",* and *"I literally- I felt under threat"*, and *"I was being interrogated, so I generally gave them whatever answer I wanted to try to give them. I didn't really want to get into a discussion about it, I just wanted to move on."* (T9/198/10 – T9.198/18; T10/24/8-9). The agenda of the Claimants appears less as one question suggested "to build an effective risk management", but more to have early pre-action disclosure without a lawyer being there to represent the employee's interests. Any allegations of concealment are to be seen in that context. In that context, the untruthful answers are not evidence of a conspiracy to injure, but simply reflect the concerns of each of the Departing Employees about the level of aggressive questioning. In my judgment, even to the

extent that untruthful answers and failure to provide information amount to breaches of contract, they do not establish or evidence a conspiracy to injure.

294. As regards Mr Maginn, he accepted that he had given false answers at the exit interviews. He explained that he had been concerned from his experience of disclosing his contact with RFIB and was concerned that his potential recruitment would be disrupted by Alesco.

295. Both Mr Burton and Mr Hasan denied that there was a plan to conceal their true intentions as to where they were going: see (T12/152/21-25) (Mr Burton); (T14/135/16-23; T14/137/13-25, T14/138/1-8) (Mr Hasan). However, they knew about the Disclosure of Offer Clause and they were in breach of the same.

296. As regards the exit interviews, the questions were scripted, apparently by an inhouse lawyer, and the Departing Employees received no advance warning of them, nor did they have the opportunity to bring somebody with them to the meetings or to have legal advice. The Corporate Defendants in their Closing put it further than this, by saying that exit interviews are designed to elicit information about reasons for leaving so that the business can be improved in the future, whereas *"These meetings were not exit interviews. They were early cross-examination and plainly designed to gather evidence of wrongdoing for planned litigation."* In my judgment, the reference to early cross-examination for planned litigation was apposite. Mr Thompson reported to Mr Matson and Mr Raven on 25 July 2017 that nothing came of his meeting with Mr Burton because *"he absolutely denied any wrongdoing"*. Mr Thompson in cross-examination accepted that the Departing Employees were under investigation (T8/52/24-25).

297. The Departing Employees described their respective meetings as hostile and more like an interrogation. It is possible that there was no requirement on employees to answer each question in view of the evident nature and purpose of the questions. Another reason not to answer was that the Claimants had shown themselves capable of using information received to seek to put off third parties. That happened in respect of RFIB in the recruitment of Mr Maginn. As Mr Maginn expressed it at T12/198/4-9:

> "I had disclosed an approach from RFIB in late December/early January to Mr Matson and I had quite an embarrassing situation arise from that disclosure to him and during this process I thought well, I'm not going to do that again, and that is clearly outlined in my first witness statement."

298. To like effect was what Mr Brewins said in July 2017, when asked to disclose who had made him an offer of employment: *"I am not comfortable telling you who has offered me a role as I don't want it to disappear".* In oral evidence, he said the following (T9/176/9 -177/1):

> "'A. …I'd explained to Stuart I was particularly sensitive about where I was potentially going to or any discussions I was having coming out. Because in my experience I have had -- there was potential for Alesco to disrupt that movement and that is why I felt it was important for them not to know.

> Q. But you have not told the court of any experience you have had of that in the past?
>
> A. That was my feeling, that they were capable of doing that.
>
> Q. Sorry, can we just clarify this. Was it your feeling --
>
> A. Yes.
>
> Q. -- or was it, as you said a moment ago, your experience? A. Yes, sorry, I should have said my feeling was that they were capable of that, yes.
>
> Q. Feeling, right. Not based on any experience?
>
> A. Yes. Having worked there for seven years, yes.
>
> Q. But you have nothing to say that they would be difficult about you moving anywhere?
>
> A. I can't name particular examples, but I know potentially that they have spoken to other people that might be being employed, or the employers, prospective employers potentially.'

299. Mr Hasan's breaches of contract and the breaches of the other Departing Employees have not been shown to have given any loss to the Claimants. There has not been articulated any specific loss which would have been avoided if correct answers had been given and/or if the required information had been provided. There was nothing which the Claimants could do by this stage to prevent the Departing Employees from leaving. They had decided to go, and the only question was where they would go. There was nothing which the Claimants could do to prevent the moves to the Corporate Defendants. As above found, the Departing Employees were dissatisfied with their employment and would have left anyway at the time when they left.

XVI Recruitment made individually not to a team

300. The recruitment was made individually. That may well have resulted from the knowledge of Mr Ross that any substantial recruitment from Alesco would be likely to lead to litigation. That is a point in favour of the Defendants rather than against them. I did not regard the engagement of different recruiters as a sham or a device or window dressing. As noted above, it was a precaution against the background of the earlier litigation when Mr Ross left Alesco. The source of recruitment was Mr Smith of RK Harrison and not the Departing Employees. That has been demonstrated in cross examination of Mr Ross (T10/80/22 – T10/81.4; T11/48/11-25 – T11/49/3, and T11/49/16-22). The evidence has been considered above of the extent of the approach of RK Harrison to the Departing Employees in February 2017. This did not amount to a team preparing to move to RK Harrison, and there is reason to believe that more is made of the extent to which they were considering that move than was actually the case. However, I am satisfied that the evidence of Mr Ross was correct about Mr Smith being his source of information as regards the Departing Employees.

301. Mr Ross said in his first witness statement at [49]:

> "At that time, we were in discussions with Jonathan Smith (known as 'Smudger'), an Executive Director at RK Harrison who led their upstream business at the time (and has now moved to Alesco). I asked Jonathan whether he had heard anything about Pete. He told me that RK Harrison were in discussions not only with Pete, but also with James Brewins, Nawaf Hasan and Gerard Maginn, and they were hopeful of recruiting all four. I was astonished. Pete and Nawaf were very successful and well-regarded producers. I knew James and Gerard also from my time at AJG and rated them highly."

Mr Smith, who by the time of trial, was working for Alesco/the Claimants, could have been called to contradict this evidence, but he was not. I accept this evidence, and that this was the source of the readiness of the Departing Employees to engage with the Corporate Defendants in discussions. They did not require the solicitation of their fellow employees.

302. This evidence could have been contradicted by Mr Smith, who is now the Claimants' employee, but he was not called to rebut this evidence which was contained in Mr Ross's first witness statement.

303. Similarly, the approaches were made to Messrs Sambrook and Baker individually, and without involvement of the Departing Employees. When the contrary was put to Mr Brewins, he denied it at (T10/26/16-22). When it was put to Mr Burton, he denied it at (T12/100/15 – T12/101/8). Messrs Sambrook and Baker were not called to give evidence to contrary effect, despite remaining employees of Alesco. As regards Messrs Cohen and Game, as noted above, their absence of knowledge that they would be employed by Price Forbes is evidence that they were recruited independently of the Departing Employees.

304. The contemporaneous documents do not indicate that the four Departing Employees were being recruited as a single team. It was expected that Mr Burton and Mr Brewins would work together; likewise, Mr Hasan and Mr Maginn. No document evidences a combination of Mr Ross, Mr Burton and Mr Hasan. There have been about 30,000 pages in the original trial bundle. There is no evidence to suggest that Mr Burton and Mr Hasan met together, or communicated about the move. There is also no evidence of communications of Mr Burton with Mr Maginn, or Mr Hasan and/or Mr Maginn with Mr Brewins. In the context of a case about a team move, this is telling.

305. The evidence has thus depended upon suggestions of what might have been said in telephone calls and of documents which have been concealed or destroyed. As regards calls, there was heavy concentration on calls between Mr Burton and Mr Brewins on 25 April, 4 May, 9 and 11 June 2017. The cross examination about these calls was circular: the questions were based on inferential speculation that the calls were about recruitment: inevitably, the denials were also about speculation as to some other purpose of the calls. It is possible that the calls were about recruitment or did touch upon recruitment and it is possible that they were about the business of the

Claimants. It is quite likely that they were about both, but in my judgment, this does not give rise to an inference that

306. Mr Burton was soliciting Mr Brewins: rather that information was being shared, but that the recruitment process was still individual. As regards Mr Hasan and Mr Maginn, it was suggested that Mr Hasan was negotiating on behalf of Mr Maginn. This was denied by Mr Maginn, Mr Hasan and Mr Ross. Mr Maginn did negotiate for himself. It is possible that Mr Hasan did include Mr Maginn in his discussions. It is possible and indeed more likely than not that Mr Hasan did mention matters to Mr Maginn, given that they were perceived to be an item. None of this takes the case of the Claimants any further because, even if Mr Hasan went beyond what was permitted in terms of the duty of fidelity and was guilty of non-disclosure and even misrepresentation, Mr Maginn was intending to move and would have followed Mr Hasan in any event.

XVII Destruction of evidence

307. The Claimants have made allegations of destruction of evidence. None of the allegations have been proven to the extent that the Court is satisfied that there has been concealed any valuable information. This comprised:

i) destruction of personal/pay as you go phones to conceal evidence of a conspiracy: There was not located a SIM card of Mr Ross's phone for records of his calls to Mr Payne. However, Mr Payne located records from his 'pay as you go' phone to Mr Ross, from which nothing was sinister;

ii) allegations about Mr Ross having deleted texts. However, he has given disclosure of texts and WhatsApps, in particular with Ms Cooke. Many of the messages said to have been deleted were disclosed by others (including Mr Matson and Mr Payne). Such disclosure as has been recovered has not advanced the case against the Defendants;

iii) allegations that Mr Brewins had deliberately destroyed evidence. This included evidence of communications with the recruiter Mr White, but these were disclosed by Mr White. It included communications with Mr Cohen which turned out to be anodyne;

iv) an old corporate phone of Mr Newman which could not be recovered, but Mr Newman did provide disclosure of his personal phone which he used to use for work;

v) an allegation that Ms Cooke had concealed various WhatsApp messages, but she disclosed documents which are said to be damaging to the Defendants' case;

vi) an allegation of deletions on Mr Maginn's phone, but these included anodyne messages. Mr Maginn denied deleting messages to avoid disclosure, and despite the Claimants' case, I am not satisfied that his evidence was untruthful (T12/180/15 – T12/184/14).

vii) as regards Mr Burton, he has produced almost 150 pages of phone records for the relevant period. There were no apparently relevant text messages of Mr Burton during the period (none to Mr Ross, Mr Hasan or Mr Maginn). There were two messages to Mr Brewins, one before February 2017 and one after Mr Brewins' resignation from Alesco. He lost texts to other employers (other than to the Corporate Defendants), but, if anything, that would have tended to assist rather than to damage the case of Mr Burton. There is a concern about the loss of text messages of Mr Burton on 12 September 2017. The Defendants wished to introduce anecdotal evidence that such messages can become lost, but there was no evidence of how often and in what circumstances this occurs. Without admitting this anecdotal evidence because it was so late and of little or no probative value, the Court has to consider whether it has been proven that Mr Burton did deliberately conceal this evidence by deleting it on purpose. I have had regard to the evidence in this case as a whole, the overall behaviour of Mr Burton and the view which I formed of his evidence (his response to the suggestion that he erased these messages is at T12/135/12 – T12/136/24). Taking into account all of this, the Claimants have not proven that the loss of this evidence was deliberate or due to an attempt to suppress evidence;

viii) as regards Mr Hasan, he admitted to having deleted a document from Mr El-Kishky because he was told not to have any involvement in the OPC business at the time (Hasan 1 [235, 239]). The case of deliberate deletions appears in an Appendix to the Opening, but this was not put in any detail to Mr Hasan in cross-examination. Whilst understanding that time made this difficult, the Court cannot allow such an allegation to proceed without having had it investigated in detail in examination. The reason for the matter only being put in the most general terms is likely to have been that the Claimants must have recognised that it was unlikely to get their case further. In the context of the other evidence which did not prove deliberate deletions for the purpose of this or an apprehended case, this was understandable.

ix) Even if it had been found that there were documents which had been deliberately destroyed, it would still be necessary to consider whether they were likely to advance the case. The Latin maxim that everything is presumed against a person who destroys the evidence *(contra spoliatorem)* has no application in this case, because it has not been proven that to the extent that anything has been destroyed, that any person is a deliberate destroyer (spoliator).

XVIII Consideration of other points alleged to found inferences about conspiracy

308. First, the suggestion that the Departing Employees were a team at Alesco is demonstrated to be false as set out above. Secondly, the suggestion that it is a mark of unlawful conduct for a number of employees to move at the same time is not the case. Thirdly, the fact that there may have been a plan for more than one employee to work with the Corporate Defendants is unsurprising. As the Defendants rightly say, that says nothing as to whether the recruitment will be lawful, and whether the employees will be recruited independently. Fourthly, the fact that there would or might be equity sharing arrangements does not advance the Claimants' case to the

extent that there would be separate equity vehicles for North America (Bishopsgate Energy) and MENA (Price Forbes). That at least was the plan at the time of trial, and it was not suggested at some point that there was a change in plan. That would mean that the two most significant employees Mr Burton and Mr Hasan would not be involved in sharing the same equity. That is evidenced by separate equity plans for Mr Hasan and Mr Burton where there are separate figures for the respective MENA and North American sides of the business. Fifthly, contrary to that alleged, they were not going to a start-up business in that at Bishopsgate, Mr Burton and Mr Brewins joined Robin Todd and Darren Conlon who were highly experienced energy brokers working under market leading figures, Gordon Newman and Neil Pearce. When Price Forbes became the company which Mr Hasan and Mr Maginn would join, that had a very substantial energy division with a long pedigree.

309. Further points include the Business Plan, which has been addressed above. Mr Hasan was wrong to use the Business Plan both for RFIB or for Bishopsgate. The suggestion that it assists in the conspiracy case is not proven for the following reasons. First, the evidence is that its use was not known about by the Departing Employees other than Mr Hasan and that it was not sought by the Corporate Defendants. Second, the reference to Mr Maginn in the plan is unsurprising because Mr Hasan hoped that Mr Maginn would be recruited in due course, but that did not mean that he took steps to solicit or recruit him (T13/162/6 – T13/165/24). The plan did not name any other employees, and I do not accept that he must have had in mind the other Alesco employees who moved, since it would be illogical to mention Mr Maginn, but not to mention the names of the others. Third, there were also general statements about business two years after a move and a five-year forecast, but this is all generalised and does not indicate any conspiracy. Fourth, the reference to having a land rig facility does not point to recruitment of Mr Burton: rather that such a facility would be required to compete in an international market (T14/8/4-6).

310. As regards the suggestion that the resignations were within one month of one another, this does not evidence a conspiracy. The employees were each free to resign at a timing of their choice, and there would be nothing wrong for Bishopsgate, who owed no duty to the Claimants, to cause them to resign at a time inconvenient to the Claimants. In any event, as noted above, the resignations were not on the same day which is a frequent incident of team moves. The attempt to prove that it was around the time of Mr Matson's medical procedures has failed: the timings were unclear, but there is no reason to believe that this was factored into the thinking of Mr Ross (T11/148/2-22) or anyone else. Similarly, the evidence that there was a determination to cause maximum disruption on the departures is not borne out by the evidence. I accept the denials made when this case was put, by Mr Burton at (T12/151/1-16) and (T12/34/3-14) and by Mr Hasan (T14/135/24 – T14/136/6).

311. There is an allegation made in APOC [71] that within Bishopsgate Mr Todd wrote an email to Mr Conlon on 14 June 2017 that Mr Brewins *"was supposed to be part of the second wave ... all getting a bit frantic ... see you Monday when we can find out a bit more about the plans and order of same "*. The Claimants infer from this that by this time, there were at least two "waves" of departures from the Claimants. The answer in the Defence of the Corporate Defendants [44] is that there were no waves of employees, and Mr Todd was not involved in recruitment. On the contrary, Mr Todd wrote to Mr Conlon that until 14 June 2017, he knew nothing about the attempt to

recruit Mr Burton saying *"What's the position on this....I 've had more this afternoon mention it it's quite tricky - not to mention a 1ittle embarrassing - to try and deal with it when one is in the dark as to whether it has happened or not...."* Mr Conlon had been informed that this was above his pay grade.

312. The suggestion that there were indeed two waves is reduced by the fact that there was no other evidence to suggest that there were two waves and by the contemporaneous evidence that Mr Todd and Mr Conlon were not involved in the recruitment. The Defendants' case is that Mr Todd and Mr Conlon were mischief making by causing this to be sent to NMB (now Ed Broking): it was sent to two addresses and on 16 June 2017, Mr Todd wrote saying to Mr Conlon that it was "time to f*** with their minds a bit.": see Ross 1 [118-120]. The Court has considered whether to draw an inference against the Defendants because neither Mr Todd nor Mr Conlon were called. In fact, no inference is drawn because although the hearsay evidence of Mr Ross on this point is less satisfactory than direct evidence, there is objective evidence that Mr Todd and Mr Conlon were not involved in recruitment, and in any event, the recruitment of Bishopsgate does not evidence any planning of the Departing Employees among themselves as part of an unlawful means conspiracy.

313. As regards the feature that the employees had not committed themselves to a new employer, this enabled them to see whether a better offer would come elsewhere or indeed from Bishopsgate/Price Forbes. It is not evidence of a conspiracy to injure. There has been referred to above the lies told during exit interviews, and this too does not form a basis to infer a conspiracy, especially having regard to the concerns which prompted the employees to be untruthful about their concern that Alesco would interfere with their ability to be employed by a competitor. The Burton loan is not evidence of a conspiracy having regard to the findings above concerning the loan, including that it was not known to the other employees, and there was no unlawful quid pro quo for the loan. The common instruction of Doyle Clayton does not advance a conspiracy for the reasons above discussed.

XIX Legal framework

(i) Express obligations

314. The Hasan and Burton Employment Contracts contained materially identical express terms (see APOC [18] and [25]); so too did the contracts of Messrs Maginn, Brewins, Game and Cohen. They included obligations:

> "During your employment you shall:
>
> use your best endeavours to promote, protect, develop and extend the business, reputations and interests of the Company and any Group Company (
>
> 1.1.1); unless prevented by illness or accident, devote the whole of your time, attention and abilities to the performance of your duties and the business of the Company
>
> and any Group Company (1.1.2)."

> to use best endeavours **"**to promote, protect, develop and extend the business, reputations and interests of the Company and any Group Company (1.1.1);
>
> unless prevented by illness or accident, "to devote the whole of your time, attention and abilities to the performance of your duties and the business of the Company and any Group Company (1.1.2)."
>
> not to be concerned or interested in any other business; not directly or indirectly to solicit clients or take any steps to divert business or opportunities, and not to use or disclose trade or business secrets or Confidential Information (as defined)."

(ii) Express Obligations: disclosure of offers

315. Both Mr Hasan's and Mr Burton's employment contracts (and those of the other Departing Employees) contained what is referred to as the Disclosure of Offers Clause: (Hasan Employment Contract, Schedule A, para 1.1.5; Burton Employment Contract, cl. 2.3.9; Mr Brewins' retention award, Schedule A, para. 1.1.5; Mr Maginn's employment contract, cl. 2.3.9, in the following terms:

> "'During your employment you shall…report your own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee or director of the Company or any Group Company to the Company immediately on becoming aware of it. This obligation shall include reporting any knowledge of an offer of work or employment made by a competitor (or potential competitor) to you or any employee or director of the Company or any Group Company, and any knowledge that you or any employee or director of the Company or any Group Company is planning to work in a business in competition with the Company or any Group Company'

316. On its true construction the Disclosure of Offers Clause required an employee to disclose any knowledge, immediately on becoming aware of it:

    i) of an offer, verbal or written, that was capable of acceptance or capable of acceptance subject to contract (apart from in respect of the time within which such disclosure must be made, that is precisely the construction Mr Burton gives to the clause and accepts is enforceable in his Defence, at 20 on [A1/8/148]). '*Any knowledge*' encompasses the identity of the offeror.

    ii) that the employee is planning (by himself or other employees or directors) to work in a competitive business. Again '*any knowledge*' encompasses the identity of the competitive business.

317. The Defendants say first that the obligation to disclose only arises when an offer amounts to wrongdoing (Hasan Opening, [35(a)] and orally Corporate Defendants (T2/16/5 – T2/17/2). This submission is based on the assertion that '*[T]he reporting obligation is expressed to be part of the obligation to report actual or proposed wrongdoing*.' I reject this submission. Whilst in some contexts, the words preceding "including" may limit the words thereafter, it would not make sense here. The construction is contrived. The words of the second sentence are extending rather than limiting of the first sentence. If it were otherwise, the second sentence would be virtually meaningless, since it is difficult to imagine circumstances in which the mere sending or receipt of an offer could be a wrongdoing. It is said that this would apply to an offer made in the context of an unlawful team move. I regard that construction as unnatural, and it would not need information about an offer because the wrongful conduct that would have to be disclosed would be far wider than the offer itself. Such a construction would be at odds with the purpose of the clause, namely to give the opportunity to the employer to persuade an employee to stay or to take steps to mitigate any damage to client relationships and confidential information at an early stage. The Defendants also say that if it is so limiting to be limited to an offer founded in wrongdoing, the Claimants are to blame because they drafted the clause: if it is ambiguous, the Defendants seek to invoke the contra proferentem rule so as to apply their construction. It follows from the above that these arguments too fail because there is not a sensible other construction, and so the obligation to disclose an offer does exist, and it does not depend on wrongdoing.

318. The second point made by the Defendants is that the obligation in respect of offers does not require disclosure of the identity of the offeror-employer. The clause requires disclosure of *'any knowledge of an offer*'. That is broad enough to encompass the identity of the offeror. It also gives effect to the very purpose of the clause itself, that is to enable the employer to deal with the issue caused by the offer. There is a question as to the meaning of planning to work. In context, it appears to me to refer to a settled intention to work at the competitor rather than considering the possibility. There will be times when parties make an agreement without an offer and acceptance being staggered. Planning in this context could also include an agreement having been made: it could also an understanding that an agreement would be made, even falling short of a legally enforceable agreement, but it would not include parties who are simply in negotiation without such an understanding.

319. Third, it is said that the obligation only applies to written offers (Hasan Opening [35(c)]). Such a position is not to be found in the Defences and has no basis in the drafting of the clause. The clause would lack effectiveness if it could be got around by simply making the offer verbally. There is also no difference in effect between a written offer and an oral offer, and so no reason to distinguish between two kinds of offer.

320. Fourth, it is said that the clause may be insufficiently certain to be enforceable (Hasan Opening [36]). That submission has no proper basis. An offer is readily intelligible: it does not include preparatory steps to the making of an offer. So is planning to work for the reasons set out above.

321. Finally, it is said that the Disclosure of Offers Clause is unlawful as a restraint of trade ([Hasan Opening [37], and indirectly Burton Opening [61]); Hasan Defence [15]. That has been contended for on the basis that it acts as an inhibition on the

employee doing something lawful, namely to search for other employment before terminating their employ. That it would be lawful despite the duty of fidelity is discussed in *Stafford and Ritchie on Fiduciary Duties: Directors and Employees* (2nd Ed, 2015) at [4.30-4.31]:

> "A competent employee who wishes to leave his current employment and is exploring the possibility of working for a competitor is, on one level, acting in a manner which is inconsistent with the interests of the employer. Nevertheless, this would not constitute a breach of the duty of fidelity. Employment carries with it a stream of income. If an employee were faced with an absolute prohibition on taking any preparatory steps prior to competing, he would have to resign from paid employment and risk, if not starvation, at least short rations whilst taking those preparatory steps...The result of interpreting the duty of fidelity so widely would be to reduce the status of an employee to that of a serf…
>
> It is submitted that these inherent limitations on the scope of employment provide a principle which may be used to describe the extent to which an employee may act otherwise in the interests of his employer and thereby provide a limit upon the duty of fidelity. An act should not be held to be a breach of the duty of fidelity if the employee goes no further than reasonably required for the purpose of exploring his employment prospects elsewhere. This is so even if the employee contemplates setting up in competition."

322. Despite the above, it has been held that it is not in restraint of trade to have a clause requiring a disclosure of an offer. This was held by Jack J in *Tullett Prebon Plc v BGC Brokers* [2010] IRLR 648 at [67], and followed by Snowden J in *Dyson Technologies Ltd v Pellerey* [2015] EWHC 3000 at [148 – 151]. These decisions are highly persuasive to a Court of co-ordinate jurisdiction, and should be followed unless there is a powerful reason not to follow them. There is no such reason on the basis that the clause refers to offers and plans to leave based on an agreement to leave. In *Brearley and Bloch: Employment Covenants and Confidential Information* (4th Edition, 2018) ('Brearley and Bloch'), it stated at [11.227] 'An increasingly common feature of modern employment contracts is to include a clause requiring the employee to inform the employer of the receipt by him of any job offers … The better view is that such clauses are not subject to the restraint of trade doctrine at all, since they do not in themselves prevent or inhibit the employee from taking up new employment'.

323. If, contrary to the foregoing, planning to leave included something far short of an offer or an agreement or an understanding that there would be an agreement, such as encompassing mere discussions or negotiations with a competitor, then in my judgment, there might then be scope for saying that there was a restraint of trade because such a clause might prevent or inhibit the employee from entering into such discussions at all. A clause which would have such width was not ruled upon in the first instance decisions referred to in the previous cases. In that event, the part of the

clause starting with "*and any knowledge that you or any employee or director of the Company or any Group Company is planning to work etc"* might then be struck down as being in restraint of trade. If it were a restraint of trade, then such selective striking down of the clause would be permitted applying the three criteria for partial striking down of a clause in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32; [2019] ICR 1223. An alternative route to the same end might be that if the word "planning" does not have the meaning ascribed, then it might be too uncertain to be given effect, albeit that it is more usual for a court to work out what it does mean rather than to strike down that part of the clause for uncertainty. In the event, it is not necessary to decide whether this part of the clause would be subject to being struck down for restraint of trade or uncertainty, because of my finding that it bears a meaning referable to an agreement and not mere discussion or negotiation.

324. In a draft list of issues (there was no final agreed list), it was asked whether the Disclosure of Offers Clause was unenforceable as a restraint of trade. On the construction which I have adopted, it is not unenforceable as a restraint of trade.

(iii) Express obligations: confidential information

325. Both Mr Hasan's and Mr Burton's employment contracts (and those of the other Departing Employees) contained provisions preventing the disclosure both during and after the termination of employment of confidential information which was defined in some detail. It is not necessary to go through this in any detail.

326. The question was asked in a draft list of issues of the Claimants: what is the scope of the express contractual duty of confidence after the termination of employment? There are issues about misuse of confidential information during the employment referable to the business plans and underlying lists and information. Mr Burton contends that they are unenforceable as being in restraint of trade (Burton Defence [21]). Nothing turns on the use of confidential information after the termination of employment, and in any event, the equitable duties which would be broad enough to provide full protection would have effect even if aspects of the express covenant were excessive. It is therefore not necessary to consider this aspect further.

(iv) Implied Obligations

327. There is implied in every contract of employment an obligation to serve the employer with '*good faith and fidelity*': *Robb v Green* [1895] 2 QB 315 at p. 320; *Ranson v Customer Systems Plc* [2012] IRLR 769 (CA) ("Ranson") at para. 30-31.

328. The general principles relating to employees' duties of good faith and fidelity are summarised by Haddon-Cave J (as he then was) in *QBE Management Services Ltd v Dymoke* [2012] IRLR 458, at paras.169-185. At para. 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 Greene
>
> MR in Hivac v Park Royal Scientific Instruments Ltd [1946] Ch 169 at 174).
>
> [A fuller quote is "The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends...it must be a question on the facts of each particular case"]
>
> 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 [10]).
>
> 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 [32]).
>
> 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 [28]).
>
> 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).3
>
> Attempts by senior employees to solicit more junior staff constitutes particularly serious misconduct (Sybron Corp v. Rochem Ltd [1984] Ch 112).
>
> 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).
>
> 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 [131]).

329. In *Customer Systems plc v Ranson* [2012] IRLR 769 at [30]-[35], Lewison LJ made clear that:

> "It is not disputed that an employee has an obligation of fidelity towards his employer. If the obligation is not express, it will invariably be implied. […] What is clear, however, is that an analysis of the employee's contractual obligations (including his job description) is an essential foundation for determining the scope of the obligation of fidelity. […]
>
> …both the content of the contractual obligation of fidelity and also the existence and content of any fiduciary duty are determined, in the first instance, by the terms of the employee's contract of employment."

330. Further, a duty of fidelity is not to be equated with the duties owed by a fiduciary: see Lewison LJ in Ranson supra at [41]:

> "As Elias J pointed out in Fishel, the hallmark of a fiduciary is a single-minded duty of loyalty. The duty of loyalty in that context has a precise meaning: "namely the duty to act in the interests of another". **As mentioned, this is not a feature of an employment relationship. In the employment context the duty of loyalty, although given the same label, "is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other**". …" [Emphasis added.]

331. At [43], Lewison LJ said of Helmet Integrated Systems Ltd v Tunnard that it "shows that the obligation of loyalty is no more than an obligation loyally to carry out the job that the employee agreed to do." At paras. 170-174 of *QBE* Haddon-Cave J (as he then was) set out guidance in relation to team poaching in extracts from Shepherd Investments Ltd v Walters [2007] IRLR 110, *Tullett Prebon Plc v BGC Brokers LP* [2010] IRLR 648, *UBS Wealth Management (UK) Ltd v Vestra Wealth LLP* [2008] IRLR 965 and *Kynixa v Hynes* [2008] EWHC 1495. Those cases show that it will be a breach of good faith and fidelity to participate in a team move by encouraging employees to leave the employer's employment, whilst failing to divulge knowledge of the threat of departures to a competing business. In certain circumstances, the latter by itself might be a breach of duty. See *Goulding* at para. 2.179:

> "A third incident of the contractual duty of good faith is that it will almost invariably be a breach of that duty for an employee to recruit, encourage, or solicit other employees to leave the employer's employment. This is especially so where the solicitation is with a view to forming a competitor collectively'

332. *Brearley and Bloch* say this at [3.60]: 'Further, without directly soliciting other employees to leave, an employee would act in breach of the duty of fidelity if the employee assisted that other employer to recruit a colleague by providing information for that purpose to another employer.' Thus, in Thomson Ecology Limited v Apem Limited [2014] IRLR 184 at para. 16, the High Court held (even on the basis of a summary judgment application) that it was a breach of the duty of fidelity for the departing employee to discuss with the prospective new employer how they might go about recruiting other staff from the current employer because: *'It cannot be*

consistent with [the duty of fidelity] to assist an actual or potential competitor to entice away the employer's staff.' See also Jack J's analysis at paras 66-68 of BGC.

333. Many of the team move cases have stark facts. Although these cannot be cited as a minimum required for a team move case, it is useful to be reminded about the same by contrast with the more limited facts of the instant case (involving 4 key Departing Employees working in two different teams, and resigning over a period of weeks, when they had each been unhappy, and where there was every opportunity to persuade them to stay which Alesco was unable or unwilling to do). Some are usefully brought together in the Defendants' Closing submissions at [211] as follows:

> *"(1) UBS Wealth Management (UK) Ltd v Vestra* [2008] IRLR 965 per Openshaw J: unlawful plan to poach staff and clients from UBS that had been, at every stage, assisted and encouraged by senior staff involved in "secret plotting to go together en masse and to join en masse a new start-up competitor", involving a "mass defection" of some 75 employees with simultaneous resignations, in identical or near identical terms, of 52 employees. Openshaw J recognised that it would have been a different thing: "if these members of staff had independently and separately decided to go at times of their own choosing, as they are entitled to do".
>
> *Tullett Prebon Plc v BGC Brokers LP* [2010] IRLR 648, which involved the cynical use of 'desk heads' as 'recruiting sergeants' to recruit the employees for which they were responsible, the near-simultaneous resignations of some 13 employees (and approaches to far greater numbers), and an 'early exit strategy' involving manufactured complaints of constructive dismissal.
>
> *QBE Management Services (UK) Ltd v Dymoke* [2012] IRLR 458, which involved senior employees being involved, over many months, in a concerted and covert campaign of unlawful behaviour with the illegitimate aim of acquiring British Marine's people and business, including the solicitation of key underwriting and claims staff, the solicitation of customers and the misuse of confidential information. Per Haddon-Cave J:
>
> *"...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 turnkey' basis, with all the requisite financial backing, security and even offices fully negotiated, signed and sealed.*
>
> *... They were actively trying to destroy British Marine and recreate it elsewhere for their own benefit."*

> In *Willis Ltd v JLT Group plc & ors* [2015] IRLR 844, interim injunctive relief was granted where some 30 employees resigned from Willis' Fine Art, Jewellery, and Specie division - 22 on the same day - in order to join JLT, said to have been choreographed by the Global Managing Director of that division.
>
> In *Thomson Ecology Limited v APEM Limited* [2014] IRLR 184, the Operations Manager with overall responsibility for the conduct of the business, including the management of staff, went about effecting a wholesale transplantation of Unicomarine's business to APEM. The plan, so Cs alleged, included taking over Unicomarine's premises; incorporating a new company; registering domain names including www.unicomarine.co.uk; and the transfer to APEM of "a substantial section of Unicomarine's workforce".

334. As to the duty to disclose competitive threats, that arises as an incident of the duty of good faith and fidelity (although in this case there is an express duty in the Disclosure of Offers Clause, which might be understood as circumscribing the relevant duty). *per* Popplewell J in *Imam-Sadeque v BlueBay Asset Management LLP* [2013] IRLR 344 at para.133:

> 'The duty of fidelity may also require an employee to report to his employer a competitive threat of which he becomes aware, irrespective of whether he or any fellow employees are involved in that competitive threat. Whether it does so is again fact sensitive, and will depend upon the terms of his contract of employment, the nature of his role and responsibilities, the nature of the threat, and the circumstances in which he becomes aware of it. A senior manager who becomes aware of a competitive threat to an aspect of the business for which he is responsible will normally come under such a duty, whereas a junior employee without such responsibility would not. The manager of a branch of a supermarket in the high street would normally be obliged to tell his superiors if he learned that a rival supermarket chain was proposing to open a store next door; whereas a junior employee working in the unloading bay would not."

335. There is no general obligation, absent an express obligation, at any time during employment, for an employee to disclose his or her wrongdoing. To imply such a duty, per Lord Atkin in *Bell v Lever Brothers Ltd [1932*] AC 161 at 228, *"would be a departure from the well-established duties of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned."* Rather, per Lewison LJ in *Ranson* at [55*]: "any such obligation [to disclose the employee's own wrongdoing] must arise out of the terms of his contract of employment".* There is no general obligation to disclose the misconduct of fellow-employees, although it may arise in certain circumstances, and even where so to do might give rise to incriminating oneself. It therefore follows that whether or not there is an obligation to divulge threats of departures to a competing business is intensely

fact dependent: see Sybron v Rochem Ltd [1984] Ch 112 at 125-126, citing Swain v West (Butchers) Ltd. [1936] 3 All E.R. 261.

(v) Incidental obligations

336. There were pleaded at [21] of APOC a whole raft of what were called incidental obligations. These were not pleaded to on the basis that they were unparticularised and their precise scope was fact and circumstance dependent (Defence of Corporate Defendants at [18]). An issue in the draft list of issues is whether these incidental obligations exist. It is not necessary to consider any of these obligations in abstract, and they are almost entirely for practical purposes covered in any event by consideration, as has taken place, of the express terms of the duty of fidelity. Since the matters are fact dependent in this way, it is not of any utility to examine these matters in abstract. In any event, they are contrived shoe-horns to deal after the event with the specific issues relating to the recruitment of the Departing Employees and the exit interviews. The obligations in question are to be governed by the express contractual terms and with the established implied obligation of fidelity. Crafting so-called incidental obligations retrospectively to deal with the facts of the case after the event is not a helpful exercise.

337. The first obligation referred to in the draft list of issues is (APOC [21a.]) to *"take all reasonable steps to protect and promote the Legitimate Business Interests"* and to *"refrain from taking any steps that would or might prejudice them"*.

338. The second obligation referred to in the list of issue is APOC [21d], which reads as follows:

> *"d. would disclose to the Claimants, as soon as reasonably practicable following the discovery of the same and in any event in sufficient time to allow the Claimants a reasonable and proper opportunity to take steps to protect their Legitimate Business Interests: i. all information that he learnt which was relevant and material to the successful conduct by the Claimants and AJG of their business, including any information about nascent or actual competitive threats and any information about nascent or actual threats posed to the Legitimate Business Interests; ii. all matters relevant and material to the tasks entrusted to him and/or the tasks for which he was responsible and/or involved in the course of his employment, even if such disclosure would reveal his own wrongdoing or the wrongdoing of others; and iii. all he knew about the misconduct and/or wrongdoing of other employees and/or his own misconduct or wrongdoing."*

339. The third obligation in the list of issues is APOC [21e.] to "act honestly, and, in particular, would answer the Claimants' questions honestly, fully and to the best of his knowledge and belief." (APOC [21e.]).

340. The approach of the incidental obligations is open to question. It is not apparent what they add to the express obligations and to the implied duty of fidelity and good faith. There is also a danger in going outside that which the parties have agreed and the duty of fidelity. If the concern is that they might be too vague to deal with the issues which arise after the event (the vagueness was referred to in the case of *Hivac v Park*

Royal above) the position is made no better by reverse engineering some so-called incidental obligations tailored to deal with the issues which have arisen. A better and more satisfactory approach, which I adopt, is to consider whether the events which have occurred have given rise to breaches of the express and established implied duties. The alleged incidental obligations are also subject to the legitimate criticism of the Defendants of the fact that they are unparticularised and their precise scope being fact and circumstance dependent. For example, as to the duty in respect of answering questions, honestly, fully and to the best of knowledge and belief is in abstract far too broad. What if the questions go broader than that which an employer may reasonably require? This in turn begs the question as to what an employer may reasonably require. This is why the issue is to be determined by reference to the express and established implied obligations and not incidental obligations. This Judgment will return to consideration of this in the context of the exit interviews and the recruitment of the Departing Employees.

341. Mr Burton seeks to qualify his duties in his Opening at [59] by relying on *Searle v Celltech* [1982] FSR 92 per Cumming Bruce LJ who said obiter that "there is nothing in the general law to prevent a number of employees in concert deciding to leave their employment and set themselves up in competition with him" and *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 QB at [151] per Hickinbottom J (as he then was) that there was no prohibition against "informing another employee of his plans to do so and offering him a potential job in that competitor in the future". These dicta do not reflect the modern law for the reasons explained by Haddon-Cave J (as he then was) in *QBE* at paras. 176-182. The broad principles relied upon are also disapproved by the leading textbooks: *Goulding* at paras. 2.179 to 2.181 and *Brearley and Bloch* at paras. 3.56 and 3.61. *Goulding* does posit tentatively at 2.181 that *"it remains possible that"* close friends at a similar level may discuss the potential of working together without giving rise to a breach since neither would be soliciting or encouraging the other to terminate. In particular, in *QBE*, Haddon-Cave J, stated:

> "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" (3.54) and will not often reflect the true position because of "the way team moves are generally planned and effected " (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)"

342. As regards answering questions, the Opening of Mr Burton at [61] contends by reference to *Goulding* at paras. 2.190 to 2.191 that the law does not require an employee to answer all questions asked by an employer, in particular, as regards his life outside work, or to tell his employer that he needs time off work to go for a job interview. The passages from *Goulding* show that there is a general duty to answer questions truthfully, albeit subject to '*potential exceptions'.* A reading of the text shows that such circumstances may be quite limited:

> 'First, an employee may be entitled to tell a 'white lie' to his employer in certain circumstances. By way of example, an employee who is attending a job interview whilst taking a half day's holiday for the purpose need not tell his employer the true reason for taking his half day's holiday even if asked. The employee has is [sic.] entitled to look for alternative employment, even if his departure would harm the interests of the employer, so long as he is not in breach of any covenants or other obligations. It may be that if the interview is pursuant to what seems to the employee to be a recruitment campaign by a competitor that may involve fellow employees, he will have to disclose that attempted recruitment even if this tends to disclose the fact that he is interested in being recruited. This is a more likely result, the more senior the employee is.
>
> Secondly, and similarly, in most cases an employee will be entitled to refuse to answer questions about his private life or life outside work. The authors consider it unlikely that an inaccurate or untruthful answer in relation to such illegitimate questions would necessarily be considered to be a breach of duty. It would depend on the precise facts, and, in particular, on the reason for the employee telling the lie.'

(vi) Fiduciary duties

343. The Claimants contend that Mr Burton and Mr Hasan – but not Mr Maginn or Mr Brewins – owed fiduciary obligations. They are said to be of a generalised nature.

344. As a matter of general principle:

i) "The employment relationship is not itself a fiduciary one: see *Nottingham University v Fishel* [2000] ICR 1462 per Elias J (as he then was) at 1490-1491. Its purpose is not to place the employee in a position where he is obliged to

pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. As he said there: *"*

> "…the essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision making powers. This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken."

ii) In *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126, Moses LJ stated at [36]-[37]:

> "36. It is commonplace to observe that not every employee owes obligations as a fiduciary to his employer. An employee owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not in his own, which is the hallmark of any fiduciary duty owed by an employee to his employer. The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty. The decision of Elias J in *University of Nottingham v Fishel & Anr* [2000] ICR 1462 provides the clearest analysis of the distinction between the duty of fidelity which every employee owes and a fiduciary duty which requires an employee to act solely in the interest of his employer and not in his own interest, still less the interests of anyone else….
>
> 37. Elias J's decision is not only of importance in distinguishing between an employee's implied duty of loyalty and a fiduciary obligation but also in identifying how a fiduciary relationship

> might be established. I can do no better than recite Elias J's statement of principle:- …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 interest of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached" (p.1494)."

iii) There is an oft cited statement of Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97:

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

345. An example of a case where the above has been approved is *Generics (UK) Ltd v Yeda Research & Development Co Ltd* [2012] EWCA Civ 726 per Etherton LJ (as he then was) at [80] where it was said that "the nature and scope of the fiduciary obligations are coloured and restricted by, that is to say they must reflect, the contract between the employer and the employee."

346. The Claimants rightly therefore point to the contractual obligations as the starting point of the analysis, and point to duties of the kind identified above such as to *"use best endeavours to promote, protect, develop and extend the business"*, as giving rise to fiduciary duties: see Closing of the Claimants at [34]. However, as stated in *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 [QB], a clause requiring an employee to *"use his best endeavours to promote the general interests and welfare of the Company…"* was wholly inadequate to give rise to generalised fiduciary duties. Were it otherwise, then most employment contracts involving anything other than junior employees would give rise to such fiduciary duties.

347. Thus, in *Reuse v Sendall* [2015] IRLR 226 (QB), a "highly trusted, well-remunerated and longstanding senior employee" was found not to owe any specific or general fiduciary duties to his employer: per HHJ Stephen Davies at [62], [65]. Similarly, in *Threlfall v ECD Insight Limited* [2013] IRLR 185, the Head of Media, a "senior employee" contractually obliged to keep the Board informed of his conduct of the business, was held to owe no fiduciary duties to his employer: per Lang J at [111 - 114].

348. In this case, there is nothing in the terms of the contract which could give rise to a fiduciary duty, and the case is in this sense similar to the three cases immediately quoted above.

349. The fact that there was a significant amount of trust put in Messrs Hasan and Burton and that they had some amount of autonomy and interaction with clients and junior employees does not in my judgment make them fiduciaries in a generalised sense. On the contrary, they were like many employee producers not taking any great part in management. Mr Burton and Mr Hasan in that sense were not different from Mr Maginn, yet the Claimants do not suggest that Mr Maginn had general fiduciary duties. As with many such employees, Mr Burton and Mr Hasan, as Mr Maginn enjoyed a high degree of autonomy, they received confidential information, they were highly trusted and valued, and they had general contractual terms about promoting and protecting the business of Alesco. However, none of this is analogous to the position of a director or even a senior management employee. At most, it gave rise to potential specific fiduciary duties as regards that which was entrusted to them, but it did not give rise to the kind of generalised fiduciary duties for which the Claimants contend.

350. It is said of Mr Hasan that he was responsible for leading energy business in MENA and had significant autonomy in developing and maintaining relationships with clients and developing Alesco's MENA energy business for the benefit of Alesco, without any material supervision or oversight (Matson 2, [24]). Mr Hasan accepted that he had autonomy about how he went on doing his work in MENA (T14/48/9-12), and he worked largely unsupervised.

351. However, he too was a highly valued producer rather than a manager of others. His work was limited to the energy sector and did not relate to all of Alesco's activities in MENA. As part of their roles, Mr Burton and Mr Hasan had access to a significant amount of the Claimants' confidential information (Matson 2, [66–72]), a point Mr Hasan accepted at (T14/48/22). He also accepted that he worked with his support team in a largely unsupervised way (T14/49/7).

352. It is suggested that where an employer entrusts an employee with confidential information that that might give rise to a generalised fiduciary duty. That cannot be the case since many employees are entrusted with confidential information despite not having any managerial function: at highest, this point alone might give rise to a specific fiduciary duty in respect of the information entrusted. Similarly, it does not follow from the fact that there is a clause where there is an obligation to disclose one's own wrongdoing or information concerning the intended departure of other employees that this gives rise to generalised fiduciary duties. Such clauses are quite common in employment contracts, and the notion that the result that any employee subject to such a clause would have generalised fiduciary duties goes too far.

353. As noted above in respect of Mr Burton, he sat in the Alesco Energy ExCom. So did Messrs Hasan and Maginn. This committee had little power. It is not alleged that Mr Maginn was a fiduciary despite the fact that he sat on that committee and he too was entrusted with confidential information and just as Mr Hasan was allowed to get on with his work as regards Africa, so Mr Maginn was allowed to get on with his work as

regards Asia. Indeed, Mr Hasan made a positive case about Mr Maginn's autonomy, responsibility, access to confidential information and unsupervised interactions with more junior members of the team, put to Mr Matson at (T6/62/25 – T6/63/22) with which Mr Matson agreed. Yet the Particulars of Claim plead specifically as regards Mr Hasan and Mr Burton fiduciary duties in addition to contractual duties of fidelity and the like, whereas as regards Mr Maginn and Mr Brewins, there is no plea of fiduciary duties, but only contractual duties of fidelity and the like. Despite these features of Mr Maginn's work, it is not alleged that he had a fiduciary duty, and it is difficult to discern the difference between his position and that of Mr Hasan and Mr Burton. The features referred to in respect of Mr Maginn are common to many employees in a sales and marketing role, and they do not usually bring with them a generalised fiduciary duty. Just as with Mr Maginn, so with Mr Hasan and Mr Burton, the foregoing features of autonomy, responsibility, access to confidential information and unsupervised interactions with more junior members of the team do not give rise to fiduciary duties.

354. Further, the Court of Appeal has stated that it does not flow from the fact that an employee who encounters conflicts of interest in their employment is thereby a fiduciary. In *Ranson v Computer Software plc* above at [60-61], Lewison LJ found force in a submission that reasoning based on reverse engineering was false:

> "60. In addition, in his analysis of the law the judge did not refer to the terms of Mr Ranson's contract of employment. In 77 of his judgment the judge said that he was "satisfied that the situation with Mr Clothier was one in which fiduciary duties arose". Mr Stafford submitted that the judge had, in effect, approached the question from the wrong end. He had started with the facts; finding inferentially that Mr Ranson was in a position where there was a conflict between his interests and those of CS, and had reasoned backwards to find from that conflict the existence of a fiduciary duty on the part of Mr Ranson. Having decided that fiduciary duties arose as a result of "the situation with Mr Clothier" the judge reasoned that Mr Ranson was "thereby in breach of his contractual duty of loyalty". There is undoubted force in these submissions.
>
> 61. In my judgment, therefore, the judge's analysis got off on the wrong foot."

355. A draft list of issues asks whether Messrs Hasan and/or Burton owed fiduciary duties to the Claimants. For the reasons set out above, I have concluded that Mr Hasan and Mr Burton did not stand generally as fiduciaries to the Claimants and so did not owe general fiduciary obligations, but they were constrained by their contractual express and implied obligations. As in *Fishel*, that did not exclude in certain circumstances having imposed upon them some specific fiduciary duty, but even where that occurred, it would not extend beyond the contractual obligations. There has been set out in detail above under the heading "Mr Burton was not a fiduciary and the loan was not inherently unlawful" the relevant factors as regards whether Mr Burton respectively had general or particular fiduciary obligations to the Claimants,

particularly as regards the Burton loan. For the reasons there set out, he did not have general or particular fiduciary obligations to the Claimants. Nor in the circumstances set out above was it different as regards Mr Hasan.

(vii) The contractual and equitable duty of confidence

356. There is no apparent controversy as regard duties of confidence in this case. The source of the obligations are the contractual covenants and also the equitable duty of confidence. As to the latter duty, the same is set out in detail in *Coco v Clark* [1969] RPC 41 per Megarry J, cited with approval by the Supreme Court in *Vestergaard Frandsen A/S v Bestnet Europe Limited* [2013] ICR 981.

357. A duty of confidence arises as regards those without a contractual duty (here the Corporate Defendants) where 'confidential information comes to the knowledge of a person … in circumstances where he has notice… that the information is confidential.' Attorney General v Guardian Newspapers Limited (No 2) [1993] 3 All ER 545. This was articulated more broadly in Vestergaard per Lord Neuberger at para. 23 when he referred to the case of an individual breaching confidence in respect of information he 'had agreed, or ought to have appreciated' was confidential.

(viii) Post-termination restrictions ("PTRs")

358. Mr Hasan's and Mr Burton's contracts also contained post-termination restrictions as set out in Schedules 1 and 2 of the APOC. There is no dispute as to the PTRs. The Defendants gave Court undertakings through to their expiry, and there is no claim in these proceedings for damages for breach of the PTRs.

359. The claims relate to breaches of duty (and torts) prior to the termination of the relevant former employee's employment.

(ix) Torts: lawful means conspiracy

360. A lawful means conspiracy is 'actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant' *Kuwait Oil Tanker v Al-Bader* [2000] 2 All ER (Comm) 271 at para. 108 (see also *JSC BTA Bank v Khrapunov* [2018] 2 WLR 1125 at para. 10). Whether or not there was a 'combination' is answered according to the same test as with an unlawful means conspiracy.

361. In *Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260 at p. 278 ("Jarman"), the Court of Appeal (Megaw LJ) said:

> "If the predominant purpose or object which the persons together have in view is the promotion of their own interests, no action will lie. If they are shown to have no real or substantial interests to pursue, it will be much easier to infer that their true purpose was to inflict harm on the other party.

> Similarly, if it is shown that they had malevolent or vindictive feelings towards the plaintiff, it will be easier to infer that their predominant purpose was to injure."

362. The Defendants have been critical about the absence of supporting particulars, save for an allegation made against Mr Ross alone, about the alleged predominant purpose to injure, and especially as regards Mr Hasan and Mr Burton to explain why they would wish to injure the Claimants as an end in itself.

363. In *Jarman*, the Court of Appeal emphasised that a plea of conspiracy is a serious charge engaging the requirement of clear pleading and convincing proof. As Megaw LJ stated (at 267-268):

> ". . . a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge; and that, particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be satisfied before a court can properly hold that the charge is established is a high one, commensurate with the seriousness of the charge . . . Unless for some good reason on the particular facts an allegation of conspiracy in civil proceedings is to be treated, substantially, only as a technical matter, such an allegation, equally with an allegation of fraud, must be clearly pleaded and clearly proved by convincing evidence."

364. This is all subject to the line of cases confirming that the standard of proof remains on the balance of probabilities even in a case of fraud or conspiracy, subject to the requirement that it is more difficult to prove fraud or the like because people are more frequently incompetent than dishonest.

365. *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 is generally held to be the leading authority on the burden of proof in sexual abuse cases, but it also referred to dishonesty being harder to prove in practice than negligence because people are more usually honest than dishonest. At 586C, Lord Nicholls held:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is... the balance of probability. ...
>
> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor […] that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. **Fraud is usually less likely than negligence…** [emphasis added]
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof

> required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

366. As subsequently emphasised by Lord Hoffmann, this does not mean that there is a higher civil burden of proof, but that cogent evidence is required to prove something less likely such as fraud. Lord Hoffmann sought to clarify this issue in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 at [55]:

> "some things are inherently more likely than others...[it] would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. **On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner.** But the question is always whether the tribunal thinks it more probable than not. [emphasis added]"

(x) Torts: unlawful means conspiracy

367. There are five ingredients in an unlawful means conspiracy referred to in the skeleton opening on behalf of Mr Burton at [43] as "(a) there must be an agreement or combination; (b) that agreement must be to use unlawful means; (c) there must be a common intention to injure the claimant by the use of those unlawful means; (d) unlawful means must have been carried out pursuant to the combination or agreement as a means of injuring; and (e) there must be loss to the claimant by the use of those unlawful means." The five requirements are derived from *Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271 at para. 108 per* Nourse LJ*:*

> "… A conspiracy to injure by unlawful means is actionable where the claimant proves that [1] he has suffered loss or damage [2] as a result of [3] unlawful action [4] taken pursuant to a combination or agreement between the defendant and another person or persons [5] to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."
>
> (internal numbering added)."

368. 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 (No 3)* at 132). The requirement for knowledge includes 'blind-eye' knowledge (see *Bank of Tokyo v Baskan Gida* [2009] EWHC 1276 (Ch) at paragraphs 837-840).

369. The Defendants must intend to injure the claimant. That can be as an end in itself or as a means to an end: see *OBG v Allan* [2008] 1 AC 1. However, if intention to injure

is not the predominant purpose (as it need not be for the purpose of unlawful means conspiracy), the defendant's intention must be to "inflict damage as the means whereby to protect or promote his own economic interests." *OBG* at [164], per Lord Nicholls. Foreseeability or probability of loss is not enough. At [166], Lord Nicholls stressed that *"a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose".*

370. 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 [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."

The intention "must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue": see *JSC BTA Bank v Khrapunov* [2018] 2 WLR 1125 at [13].

371. There is no need for an express agreement, whether formal or informal. It suffices if two or more persons deliberately but tacitly combine to a common end. The parties must be sufficiently aware of the surrounding circumstances and share the same object to have a sufficiently similar objective before it can be properly be inferred that they acted in combination: *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at para. 111. Something more than a "mere association" is required: see the authorities summarised in *Stobart Group Limited v Tinkler* [2019] EWHC 258 at 545-546.

372. Breaches of contract, breaches of fiduciary duty and inducing breaches of contract may all amount to '*unlawful means*' for the purposes of the tort: see, for example, *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at para. 172 and *JT Stratford & Sons Ltd v Lindley* [1965] AC 269 at p. 298C. The claimant must prove each unlawful act relied upon as a freestanding wrong and that it was carried out pursuant to the conspiracy: see *Kuwait Oil Tanker* above at [132]. The unlawful acts must be the means by which the relevant loss is inflicted on the claimant and must therefore be causative of the loss in the sense of being *"the instrument for the intentional infliction of harm": see Revenue and Customs Commissioners v Total Network* SL [2008] UKHL 19; [2008] AC 1174 at [119] per Lord Mance. The instrumentality requirement was explained in *Khrapunov* in that it required that the unlawful means be objectively directed towards the claimant: per Lord Sumption and Lord Lloyd-Jones at [11].

373. The defendant does not need to be the one who takes the relevant action (lawful or unlawful) provided that they are a party to the combination: see *Twentieth Century Fox Film Corp v Harris* [2014] EWHC 1568 (Ch) at para. 158.

374. *Clerk and Lindsell on Torts* (22nd Edition, 2018) states at para. 24-96:

> 'A company, being a separate legal person, can conspire with its directors; and the knowledge of the company may be found in the person (usually a director) who has management or control
>
> (as its 'alter ego') for the transaction or act in question. It has been held that a criminal conspiracy between a 'one-man' company and its sole controller is an impossibility because it is not possible to find an agreement between two minds. This might not be the case in a civil action where the controller had used the corporate machinery in what was alleged to be a conspiracy to damage the claimant.'

375. There is a controversy, which I doubt that I have to resolve, as to whether it is a requirement of the tort, as the Corporate Defendants say (6 and footnote 8 of the Schedule to their Opening) that it must be proven that a defendant knew that the means employed were unlawful and would cause harm to the claimant. This is derived from the Court of Appeal's judgment in *Meretz Investments NV v ACP Limited* [2008] Ch 244 (s 124, 127 and 146). The Claimants say that this is not a requirement by reference to *Stobart Group Limited v Tinkler* [2019] EWHC 258 (Comm) at paragraphs 548 – 573 per HH Judge Jonathan Russen QC, applying the Court of Appeal's judgment in *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (pp. 404-405) and contending that *Meretz* was obiter and contrary to high authority. If a conspiracy is otherwise established, this does not seem to be a case where the Defendants will be able to say that they were unaware that the acts performed pursuant to the conspiracy were unlawful.

376. In the instant case, the conspiracy is alleged to be dishonest. In particular, in APOC at [109], it is alleged that *"The conduct of the Defendants referred to at* paragraphs *112-115 below was dishonest and/or unconscionable, in that honest persons would not have acted as the Defendants did in the circumstances. In support of that plea, the Claimants rely upon the totality of the facts and matters set out in* paragraphs *46-108 which disclose such dishonesty."* There are also express pleas of dishonesty and concealment in APOC at [46d], [49a] and [49e]

(xi) Torts: inducing / procuring breach of contract

377. The five steps necessary for a finding of inducing a breach of contract were summarised by Morgan J in *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) at para.163:

> '[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)."

378. The breach must be procured by *'inducement, incitement or persuasion'*: see *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] AC 1229 *per* Lord Toulson JSC at para. 19. What amounts to inducement is, however, broad and fact-specific. Even silence or calculated inaction can suffice: *Premier Model Management Ltd v Bruc*e [2012] EWHC 3509 (QB) at para. 57 (citing *Lonmar Global Risks Ltd v West* [2011] IRLR 138 (QB)).

(xii) Attribution

379. When dealing with a company (e.g. each of the Corporate Defendants) the Court needs to determine which individual(s) knowledge/intention are to be attributed to the company. The Supreme Court held in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 (per Lord Mance at [41], with whom Lords Neuberger, Clarke and Carnwath JJSC agreed in this regard at [9]) that:

> 'As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company?"

380. In 15 of the Schedule to the Corporate Defendants' Opening, they refer to the 'primary rule' of attribution by reference to 67 of Lord Sumption's judgment in *Bilta* as being '*a company will have attributed to it the state of mind of its directing organ under its constitution, i.e. generally, the board of directors acting as such'*. Lord Sumption's summary in 67 requires fuller consideration in the context of the present case:

> "The question what persons are to be so far identified with a company that their state of mind will be attributed to it does not admit of a single answer. The leading modern case is *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, i.e. the board of directors acting as such or for some purposes the general body of shareholders. Lord Hoffmann, delivering the advice of the Privy Council, observed that the primary rule of attribution together with the principles of agency and vicarious liability would ordinarily suffice to determine the company's rights and obligations. However, they would not suffice where the relevant rule of law required that some state of mind should be that of the company itself. He explained, at p507:

> 'This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself' as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself.'
>
> The directing organ of the company may expressly or implicitly have delegated the entire conduct of its business to the relevant agent, who is actually although not constitutionally its 'directing mind and will' for all purposes. This was the situation in the case where the expression 'directing mind and will' was first coined, Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705. Such a person in practice stands in the same position as the board. The special insight of Lord Hoffmann, echoing the language of Lord Reid in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, 170, was to perceive that the attribution of the state of mind of an agent to a corporate principal may also be appropriate where the agent is the directing mind and will of the company for the purpose of performing the particular function in question, without necessarily being its directing mind and will for other purposes."
>
> 'This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.' (p 507, and see pp 509-511)'..

381. As referred to above, *Clerk & Lindsell* makes clear, at 24-96, that for the purposes of determining whether there has been a combination in respect of a conspiracy '*the knowledge of the company may be found in the person (usually a director) who has management or control (as its 'alter ego') for the transaction or act in question.'* .

382. Here, not only was Mr Ross a statutory director of both Bishopsgate and Ardonagh throughout the period relevant to this claim, he was clearly the person who had management and control of the recruitment exercise on behalf of those entities: indeed, his evidence was that the Ardonagh Remuneration Committee would take his endorsement as '*more than sufficient'* (T11/4/18 - T11/5/11). Mr Ross' knowledge and intentions are to be attributed to Bishopsgate and Ardonagh.

383. In footnote 69 of the Corporate Defendants' Opening, in respect of attribution, they state that '*for most of the period at issue, Price Forbes was not a part of the Ardonagh/Bishopsgate group'*. Price Forbes did not join the Ardonagh Group until

June 2017, and the Claimants know from disclosure that discussions about Messrs Hasan, Maginn, Cohen, Game and Hussain Hussein joining Price Forbes rather than Bishopsgate appear to have commenced around late Summer 2017 (although the exact date remains unclear).

384. It is not alleged that Price Forbes were a party to the alleged conspiracy, or induced any breach of contract, prior to the Summer of 2017 (i.e. prior to Messrs Burton, Brewins, Hasan and Maginn resigning). However, *Clerk & Lindsell* makes clear at 24-97 that conspirators can join at a later time provided that they were aware of the plan and then joined in the execution of it. On this basis the Claimants contend that Price Forbes became aware of the plan, and its agents joined in the execution of it through encouraging and taking advantage of Mr Hasan's breaches of contract, and enabling Mr Hasan to orchestrate the move of Mr Maginn and '*Nawaf's men'* to Price Forbes. Whilst Mr Ross was not a statutory director of Price Forbes, he was the CEO of its parent company (Ardonagh) from June 2017 onwards, and is contended to be Price Forbes' agent for these purposes masterminding the recruitment. It is thus contended that his knowledge, intentions and actions are to be attributed to Price Forbes from the date that Price Forbes became involved.

(xiii) Accessory liability in equity: dishonest assistance in breach of fiduciary duty

385. In *Barlow Clowes International v Eurotrust* [2006] 1 WLR 1476 (PC), Lord Hoffmann summarised the law relating to dishonest assistance of breach of trust/fiduciary duty: 'In summary…liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge…Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.'

(xiv) Financial remedies - general legal principles

386. The general principle, in tort as in contract, is that the Court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25 at para. 39.

387. Damages for conspiracy and inducement are 'at large', meaning that 'the Court is not limited to awarding that amount of loss which can be strictly proven; and that, in coming to a view as to the level of damages which a defendant ought to pay, the Court will consider all the circumstances of the case, including the conduct of a defendant and the nature of his wrongdoing' (*Noble Resources SA v Philip Gross* [2009] EWHC 1435 (Comm) at para. 223).

388. Where a claimant's loss depends on the actions of a third party (such as a client), all that the claimant has to show is that there is a real or substantial chance that the counterparty would have acted in a particular way: e.g. *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at para. 99.

389. As to equitable compensation for breach of fiduciary duty: *'If a director is disloyal and acts in breach of fiduciary duty he can be required to pay equitable compensation in respect of loss which is proved to have been caused, calculated on a common-sense basis and with the benefit of hindsight; remoteness and mitigation will not be relevant concepts.' Stafford and Ritchie on Fiduciary Duties* (2nd Edition, 2016) at para. 9.163. This accords with the approach articulated by the Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co* [2015] AC 1503.

XX Applying the law to the facts

(i) Lawful means conspiracy

390. As noted above, it is necessary to prove that any parties to a lawful means conspiracy had a predominant purpose to injure. It will not be such if their predominant purpose or object was the promotion of their own interests. The primary person in the alleged lawful means conspiracy is Mr Ross.

391. The identification of the predominant purpose in the APOC is very limited and is almost confined to a conversation between Mr Ross and Mr Payne to which this judgment shall return. However, by the end of the evidence in the Closing, the case of the Claimants in this regard is as follows:

> *"The predominant purpose of the conspiracy was to harm Alesco:*
>
> *When Mr Ross left Alesco to move to Towergate, taking with him a team of employees, he was sued by AJG in a claim that was compromised with a £20 million payment [C2/8/52]. His relationship with many senior Gallagher employees soured (Matson 2, [80-81]). That experience left him determined for retribution.*
>
> *In July 2017 Mr Ross described his plans in aggressive terms to*
>
> *Mr Payne: a 'loaded truck' was heading for Gallagher (Payne 1, [10]).*
>
> *Mr Ross told Mr Thompson he had a 'war chest' for legal fees in respect of any dispute (Thompson 1, [49]). It appears his strategy was to deal with the legal consequences of the team raid by outspending the Claimants.*
>
> *As set out above, the timing and execution of the plan was designed to cause maximum disruption to Alesco: in the phased nature of the resignations; in the concealment of Departing Employees' intentions; and in the timing of events to coincide with Mr Matson's absence for health reasons.*
>
> *For these purposes, Mr Ross' motives are to be attributed to Bishopsgate and Ardonagh and to Price Forbes from the date that they joined the Conspiracy….*

The Claimants' case is that it is to be inferred that Messrs Burton and Hasan knew of and countenanced Mr Ross' vindictive purpose because he told them of that fact: Mr Burton certainly knew that Mr Ross resented the Claimants because of the previous litigation (T12/151/12 – 16)."

392. In my judgment, the case of predominant purpose is not established. Even if all of the above is established, even if there was a desire for revenge, the predominant purpose was not retribution. In this case, I am satisfied that the predominant purpose was to advance the business of the Corporate Defendants.

393. The evidence is that Mr Ross had very ambitious recruitment and business plans for the Corporate Defendants, recruiting literally tens of employees including 21 brokers from Ed Broking and 8 from Miller in the period from January 2017 to December 2018. In evidence, he told the Court that the Corporate Defendants had recruited 350 in 2 years, whilst losing 200 in the same time: see T11/71/812. He sought such recruitment because this generated business. He looked widely and did not confine himself to Gallaghers: on the contrary, there is no evidence of his recruitment being from the Claimants prior to 2017.

394. The Claimants suggest that Mr Ross wished to cause untold damage to the Claimants. Hence, he was not only seeking to recruit the Departing Employees, but Messrs Matson, Payne and Thompson, and was prepared to pay many millions of pounds per person, in the knowledge that such recruitment would or could cause enormous damage to the business of the Claimants. The notion that he would cause the Corporate Defendants to spend potentially tens of millions of pounds for such recruitment for the predominant purpose of getting his own back on the Claimants does not withstand scrutiny or analysis. The obvious purpose was that he believed that such recruitment would be for the benefit of the Corporate Defendants.

395. The offers of millions of pounds (including the discussions with Messrs Matson, Thompson and Payne) were not because of some vendetta. Mr Ross came over as far too shrewd a businessman to be guided predominantly by spite and retribution. He had what was described by the Corporate Defendants in their Closing at [280] as *"a legitimate commercial imperative."* Further at [282], his predominant motive was *"to further the interests of Bishopsgate."* If that analysis were wrong, and a significant part of his purpose or object was to wreak havoc on the Claimants, it was not his predominant purpose to injure the Claimants.

396. In the factors summarised above from the Closing of the Claimants was the desire to send a loaded truck heading towards Gallaghers. Even if that was said, it does not affect the analysis above. That remark, even that objective, would not have been the predominant purpose or object of the recruitment and the intended recruitment.

397. In any event, I am not satisfied on the evidence that Mr Ross even made the alleged remark. If it were said, it would have been at the centre of a conspiracy case. As it is, in the Amended Particulars of Claim it did not feature, and that cannot have been because it is an abbreviated account: it is a 57-page document. On the contrary, the allegation first appeared in January 2019, 18 months after it was alleged to have been said. It was not referred to in Mr Matson's first witness statement in support of injunctive relief in January 2018, even though he referred to the conversation between Mr Ross and Mr Payne at [58b]. Nor was it referred to in Mr Matson's statement for

trial. In a letter from Clyde & Co to Lewis Silkin of 22 December 2017, the expression used was that Mr Ross had told Mr Payne that he was *"set on retribution".* It was not referred to in any contemporaneous documentation of Mr Payne. In Mr Payne's witness statement, what was said was *"words to the effect that a loaded truck was heading towards Gallagher".* Either those words were used or they were not. There are no words to that "effect". In cross-examination, Mr Payne explained the phrase in an entirely anodyne way (T2/105/15 – T2/106/1) to the effect that what was intended would be entirely lawful and business driven as follows:

> "Q. The question was whether you are telling the court that when Mr Ross said that he was driving a loaded truck towards Gallagher, you did not understand him to be saying that he was intent on damaging Gallagher?
>
> A.I would take the phrase to mean that the intention was to transfer key staff from Gallagher and/or Alesco to the Ardonagh Group.
>
> Q. There would be nothing wrong with him doing that, would there?
>
> A. It is up to him.
>
> Q. It is a competitive market for employees, isn't it?
>
> A. Yes."

398. That suffices for the analysis, but there are other reasons to be unconvinced by the evidence of Mr Payne. He said that he spoke to Mr Matson within an hour of being contacted by Mr Ross on 18 July 2017, but in fact he did not speak to Mr Matson about it until 25 July 2017, as to which he had no explanation in his cross-examination (T2/100/13-24). He also referred in his witness statement at [10] to learning that the Departing Employees were going to join the Ardonagh group from Mr Ross on 18 July 2017, but later in the statement at [13d], he said that he learned this information at least as regards Messrs Burton, Hasan and Maginn only on 31 July 2017.

399. It follows that the most telling statement in support of a lawful means conspiracy, namely about the loaded truck, was probably never said: if it were ever said, it would simply have been a reference to recruiting in a competitive market rather than indicating that the object was to destroy Alesco.

400. As for Messrs Burton and Hasan, it was never put to them that they had a predominant purpose or object to cause damage to the Claimants. This does not matter because they were simply pursuing their own careers. Even if they knew of an illegitimate objective of Mr Ross, they were acting for a legitimate purpose, and it is their purpose which matters in the case against them. In any event, both Mr Burton and Mr Hasan denied that Mr Ross was after revenge (T12/151/12-23) and (T14/136/10-23).

401. In the circumstances, the case as put in lawful conspiracy must fail. The answer to the draft issue is that there was no predominant purpose to injure the Claimants.

(ii) Unlawful means conspiracy

402. The case concerning the common design is largely inferential. They each left Alesco within a few weeks of one another. They each went to Bishopsgate/Price Forbes. They each did not enter into their contracts with the new employer at the time of the termination of their respective contracts with Alesco. They each were not forthcoming about their intentions and said untruthful or misleading things at the exit interviews. On the basis of this common behaviour, it is sought to say inferentially that there was a common design. The nature of the common design is set out in the APOC at [46]:

> *"a. solicit, assist in soliciting and/or encourage one or more of Messrs Hasan, Burton, Brewins and Maginn (the "Departing Employees"), Messrs Game and Cohen and/or other members of the Claimants' staff to terminate their employment with the Claimants and to join the Corporate Defendants;*
> *b. provide the Claimants' business sensitive and/or confidential information to one or more of the Corporate Defendants, and for the Corporate Defendants to use such information for the purposes of diverting Alesco's business, clients, suppliers and/or workforce to one or more of the Corporate Defendants;*
>
> *c. solicit, encourage and/or induce Alesco's clients and/or suppliers to divert their business to one or more of the Corporate Defendants;*
>
> *d. conceal the above until the Conspiracy gained sufficient traction that the Claimants would be unable to take any, or any adequate, steps to protect their business and/or their Legitimate Business Interests. Such concealment is to be inferred from:*
>
> *i. active misrepresentation of the true position by, at least, Messrs Burton and Hasan (including by the provision of false information to the Claimants);*
>
> *ii. non-disclosure of material facts by each of the Departing Employees and Mr Cohen; and*
>
> *iii. the use of private communication devices;*
>
> *e. accordingly and in any event (through their own acts or the procurement of other employees of the Claimants so to act) to:*
>
> *i. divert the Claimants' clients and/or suppliers to one or more of the Corporate Defendants;*

> *ii. secure for the Corporate Defendants the Claimants' client and supplier relationships and business;*
>
> *iii. damage the Claimants' business as the necessary and only means of carrying the Conspiracy into effect; and/or*
>
> *iv. proceed as above in the hope and expectation that the reward to be made from their wrongdoing would exceed any recompense that they may be ordered to pay by the Court."*

403. The inferential case has to be set against other matters which go against the alleged conspiracy. They have been dealt with at length in the statement of the facts, and the application of the law to the facts is not intended to recite again those facts, but simply to refer back to the same.

404. The conspiracy as pleaded is too broad to work, and it has to be understood in a more confined way. It is important to recognise at the outset that assuming that there is not a combination with a predominant intention to injure, as I have found that there is not, there is nothing wrong with the Corporate Defendants and Mr Ross combining to seek to recruit staff lawfully. Thus, they could recruit individually. They must not use confidential information or use target employees to recruit others, that is as recruiting serjeants. They must not use target employees to solicit or transfer customers to them.

405. Indeed, the essence of the conspiracy by unlawful means is the unlawful means of the Departing Employees, and principally soliciting employees and/or customers to leave in breach of their duties of fidelity. There is nothing wrong with the solicitation of employees without the use of unlawful means, or for employees once recruited after their garden leave and the expiry of post-termination restrictions to seek to recruit employees or customers (provided that confidential information is not misused). It does not suffice for there to be unlawful means, but the unlawful means has to cause loss. APOC [46] in part confuses a lawful with an unlawful combination. For example, APOC [46a] does not differentiate between lawful solicitation by the Corporate Defendants/Mr Ross and unlawful solicitation e.g. inducing breaches of the duty of fidelity. I shall revert to the particular allegations in APOC [46] after referring to the factors which are relevant in showing that there was no unlawful combination.

406. First, there was knowledge on the part of Mr Ross and indeed all concerned of the fact that in the event of the departure of a number of employees from Alesco, very strong legal action was likely to be threatened and/or to follow whether the departure was lawful or unlawful. The consequence was that it was necessary to be careful not to transgress the law. It is to be taken as a given that something, at least, in outline was known about by Mr Ross as to the likely legal challenge that would follow. That had the effect that he was keen to recruit individually, and not to use any of the target employees to act as the recruiting sergeant of Bishopsgate or the Corporate Defendants. To this end, he used more than one recruiter in Ms Cooke and Mr White. He conducted interviews with one of the employees at a time.

407. This has led to the counter-allegation of the Claimants that this was in effect a device or a sham so as to pretend that this was not an unlawful team move. In fact, when the

externals were removed, there was, in the submission of the Claimants, a concerted and unlawful team move. The Defendants say that when the process of disclosure took place, and the evidence was gathered and adduced, the inferential case was not taken any further: it only went backwards.

408. That will be appraised in the paragraphs which follow.

409. Secondly, the Departing Employees did not need to have a combination with one another and did not have the same. The recruitment was organised by Mr Ross and the Corporate Defendants. It was a recruitment which did not have to involve all four Departing Employees, let alone Messrs Cohen and Game. Mr Cohen and Mr Game were not part of their move: that came later. They did not know anything until they had heard about the resignations, and they took their own steps with the Corporate Defendants directly.

410. Thirdly, there was very little interaction between the two key employees, Mr Hasan and Mr Burton, and likewise between Mr Hasan and Mr Maginn of the one part and Mr Burton and Mr Brewins of the other part. The absence of such interaction would not prevent a team move, but it does make such a move unlikely, which is a significant factor against the Claimants' inferential case.

411. Fourthly, the Departing Employees were looking for other employment before contact from the Corporate Defendants. Reference is made to the extensive sections above in this judgment to the effect that the Departing Employees were dissatisfied for different reasons and that they were intending to leave. Although that applies also to Mr Maginn, if he had not left independently of Mr Hasan, his career history shows that he would have followed Mr Hasan. The case of the Claimants is that the Departing Employees have manufactured or embellished a case to the effect that they were each about to move. On the contrary, they would not have moved without the others into a new venture for commercial reasons, being dependent upon the others in order to have stability and the ability to share profits and earn bonuses with a new employer. However, I am satisfied that each of the Departing Employees was intending to move from the Claimants for different reasons, and that they each would have moved when they did, and without the others, save for Mr Maginn who would have followed Mr Hasan in any event. That is an important factor against a combination of the kind pressed by the Claimants, and, in any event, is relevant to the absence of loss from any such alleged combination.

412. Fifthly, there has not been a witness who has been able to give direct evidence of attempts of recruitment by one of the Departing Employees. Thus, Mr Payne and Mr Thompson and even Mr Matson gave evidence of approaches from Mr Ross, but nobody gave evidence of approaches from the Departing Employees. Further, a part of the inferential case of the conspiracy was that approaches had been made to Mr Sambrook and Mr Baker, who remained with the Claimants. They did not come to Court to allege that there had been an approach from the Departing Employees to them. There is therefore no basis for an inference that they were approached by the Departing Employees. If there had been evidence of solicitation by the Departing Employees, that would provide some support that there must have been solicitation of the Departing Employees amongst themselves. However, the absence of evidence of unlawful solicitation is a pointer to the solicitation of the Departing Employees being from the Corporate Defendants and their recruitment agents and not from within.

413. Sixthly, this case has been highly documented. There has been extensive electronic disclosure of emails and social media communications, but the documents do not contain clear evidence to support the inferences. Usually, it amounts to suggestions of the context or meaning of the documents which are not evident on the face of the documents.

414. Seventhly, whenever documents have not been forthcoming or have been lost or destroyed, the allegation has been that this has been intentional, and that all available inferences should be against the Defendants or the Departing Employees. The inferences have been charged by the strength of feeling on the part of the Claimants. Thus, the Burton loan has been characterised by Mr Matson as smacking of bribery and corruption, as being worthy of report to the regulators, but this characterisation has not been followed through in the case either by citation of authority or by the case being pitched that high. The vilification of the Departing Employees on their departures, for which witnesses have apologised, has impacted on the objectivity of the witnesses vis-à-vis the events which have occurred. The level of aggression has reflected itself in the exit interviews which go beyond ordinary questioning and was in effect an attempt to prepare for litigation under the guise of the requirement of an employee to obey an employer by answering all of its questions.

415. Eighthly, the Burton loan does not fuel a conspiracy. Since the loan has given rise to suspicion, there has been extensive analysis above of the Claimants' case that the loan was in return for various promises on the part of Mr Burton which would have amounted to breaches of contract and/or equitable obligations. None of these allegations against Mr Burton have been substantiated.

416. Ninthly, other factors have not indicated that the combination has been unlawful. There has been considered above and discounted the fact that the Departing Employees left proximately one to the other, but also in a staggered way. Similarly, there has been considered the commonality of the fact that they did not commit to join Bishopsgate at the point of resignation, but this too does not evidence or found a conspiracy. Similarly, the breaches of the Disclosure of Offers Clause and the untruthful information provided in the Exit Interviews have been examined above, and they do not in the context of everything prove or evidence an unlawful combination. Likewise, the Bishopsgate Business Plan was an activity of Mr Hasan without the other Departing Employees: it has also had no effect at all.

417. Tenthly, if there had been a conspiracy, one would expect the Departing Employees to be finding a pretext to leave Alesco immediately and to compete. They each had their grievances against Alesco including promises from Alesco which had not been honoured in the case of those who were promised chief executive or other senior management roles, and Mr Brewins could have sought to rely on his grievances relating to Mr Byatt. However, there was no attempt to allege that there had been a constructive dismissal and to seek to avoid the restrictions of garden leave or the post-termination restrictions. On the contrary, they remained subject to these restrictions. Although there were some exceptions in respect of Mr Hasan as regards the solicitation of clients, the covenants against solicitation were in general observed: for example, there is no evidence at all of Mr Burton soliciting any customer throughout the remaining period of his employment or during his garden leave or the post-termination restrictions. It is another indicator against a conspiracy (albeit not

conclusive) that there was no attempt to remove the shackles of the restrictions in 2017 and to wait for months or a year ahead.

418. The Departing Employees themselves did not come out of this without criticism. First, whilst the Burton loan has been found not to be unlawful following exhausting consideration in the light of the trial, it did give rise to suspicion, which in the circumstances of competitors with a history is not surprising. Secondly, whilst the exit interviews went beyond reasonable conduct on the part of the Claimants, the employees did fail to disclose offers in breach of contract and added to that by giving untruthful answers to questions about the same subject. Thirdly, the evidence of the Departing Employees was extreme, namely that they had had no discussions between them about the departure, and in the case of Mr Burton that he did not even know about their intentions to go to Bishopsgate until August 2017. The Departing Employees did not enter into contracts with Bishopsgate at or about the time of their notices to resign from Alesco, but it does seem unlikely that they did not have an almost settled intention to move to Bishopsgate.

419. However, none of these points individually or cumulatively show in the context of the case as a whole that there was an unlawful combination. The cross-examination of the Departing Employees has not led to evidence that supports the Claimants' case. It is perhaps not surprising bearing in mind the polarised nature of the case, but each of them vigorously denied that they were encouraging the others to go. Examples include per Mr Burton (T12/150/20T12/153/24), Mr Hasan (T14/135/4-T14/137/8), Mr Maginn (T12/191/15-23) and (T13/24/25 – T13/25/8). Mr Brewins also denied it throughout his evidence. It was in respect of Mr Brewins that the matter was the starkest. The Claimants' Closing submits that *"Mr Brewins exaggerated the extent of the rift between him and Mr Byatt".* However, as noted above, the evidence of Mr Brewins and Mr Byatt demonstrated clearly that Mr Brewins found it distressing to work with Mr Byatt and Mr Byatt's ambitions did not accommodate sensitivity to their effect on Mr Brewins.

420. Whilst I do not accept the details of some of their evidence, there was no conspiracy in connection with the recruitment of the Departing Employees and Mr Game and Mr Cohen. There was no procurement by Mr Hasan and/or Mr Burton to procure and induce each other and other Alesco employees to leave the Claimants and join the Corporate Defendants. I am satisfied that the cause of their respective moves was the recruitment of Mr Ross/the Corporate Defendants which was not unlawful. Further, if and to the extent that there was any breach of duty (e.g. by not disclosing offers or by not being honest in the exit interviews or by any discussions between any of them which were not consistent with the duty of fidelity), the case that the Corporate Defendants induced the Departing Employees to conceal the fact of their recruitment and discussions has not been established. In any event, even if such a case had been made out, this did not cause them or any of them to move to Bishopsgate/Price Forbes.

421. There have been findings about the meeting of 3 June 2017 as regards the approach to Mr Matson by Mr Ross. I have considered the evidence as regards approaches to Mr Payne and Mr Thompson and Mr Emkes. The Departing Employees were not concerned in these moves and they were not unlawful nor do they evidence a conspiracy. Further, there is no document to the effect that any of those approaches were anything other than individual approaches.

422. As to a combination, the allegation of a combination is at 46 of APOC, but in the different ways an unlawful combination is alleged, none is made out. In particular, contrary to APOC 46:

i) *[46a.] Whilst the Corporate Defendants and Mr Ross did wish to encourage various employees of Alesco to terminate their employment with the Claimants and to join the Corporate Defendants, it was not their intention to do so by unlawful means e.g. by encouraging any of the Departing Employees to solicit among themselves. Further, they recruited individually rather than as a team, albeit that they were desirous of having more than one employee. They would have taken any one or more of the Departing Employees if they did not each come to the Corporate Defendants.*

ii) *[46b.] The Defendants did not combine to obtain business sensitive and/or confidential information for the purpose of diverting Alesco's business, clients, suppliers and/or workforce to one or more of the Corporate Defendants. Mr Hasan acted in breach of confidence in providing the Bishopsgate Business Plan (but he did not provide a client list or target accounts list to the Corporate Defendants). The context of providing the Bishopsgate Business Plan was that Mr Hasan wished to demonstrate that he could provide value to the Corporate Defendants, and no doubt that he should be remunerated accordingly. However, there is no evidence of such confidential information having been used for the purposes of diverting*

iii) *Alesco's business, clients, suppliers and/or workforce to one or more of the Corporate Defendants or elsewhere. Mr Hasan previously misused confidential information to RFIB and findings above have been made about that.*

iv) *[46c.] There has been solicitation by Mr Hasan of various customers, not systemically, but by failing to refuse to engage with them when approached. Here too, this does not found some alleged conspiracy to solicit or encourage or divert Alesco's clients and suppliers to divert their business to the Corporate Defendants.*

v) *[46d.] There was non-disclosure of the intentions to move to the Corporate Defendants, but this was not until after each of the Departing Employees had formed an intention to leave the Claimants, and an almost settled intention to go to the Corporate Defendants. The motivation was that the individuals each were concerned that their lawful desire to move to the Corporate Defendants would be interfered with by the Claimants. There was no combination about this non-disclosure and it did not evidence a wider conspiracy. If in fact there was such a combination, in my judgment, the failure to provide information or the provision of misleading information caused no loss to the Claimants, and none has been established or proven. The Departing Employees were each separately intending to leave the employ of Alesco at the time when they did: nothing could or would have been done to persuade them to stay in the event that fuller disclosure had been made. If it was unsettling that they were leaving, it would have been no less unsettling if the offers of Bishopsgate/Price Forbes had been disclosed.*

vi) *[46e.] This does not advance the position any further in that there was no general combination to solicit employees or customers. There was no combination to damage the Claimants' business or hope and expectation that the reward would exceed any damages ordered.*

423. The Claimants refer to a schedule of numerous acts of the Defendants in connection with the Burton Loan, in each month between June 2017 and January 2018, which have been referred to in this Judgment. They do not give rise to a conspiracy, and they were not acts committed pursuant to an unlawful combination.

424. For all of these reasons, I have come to the conclusion that there was no unlawful combination in this case. It is still necessary to consider the allegedly unlawful means. It would not be unlawful means for Mr Ross or for the Corporate Defendants to solicit or encourage the Departing Employees or Messrs Game and Cohen or anyone else to terminate their employment with the Claimants and to join the Corporate Defendants. Similarly, it would not be unlawful by itself for Mr Ross or the Corporate Defendants to seek to solicit employees, even teams of employees of a rival company. The conclusion is that the solicitation was by Mr Ross and the Corporate Defendants and not by or in combination with the Departing Employees.

425. The unlawful means which are pleaded at APOC [49] comprise:

i) The making of knowingly false statements;

ii) Breaches of express and implied contractual duties and/or fiduciary duties;

iii) Breaches of the Equitable Duty of Confidence/the Corporate Equitable Duty of Confidence;

iv) Procuring breaches of contract;

v) Dishonest assistance in breaches of fiduciary duty; and/or

vi) Knowing receipt of confidential information."

426. I shall now consider each of these allegedly unlawful means. I am satisfied that there were false statements which were made. It has not been proven that such statements as were made were pursuant to a combination. Similarly, there were breaches of contractual duties in failing to provide information about contractual offers and also in providing false information in the respective exit interviews. Here too, it has not been proven that this was done pursuant to a combination.

427. Further, I am satisfied that Mr Hasan provided confidential information in the provision of the RFIB Business Plan and in the case of RFIB only in the provision of client and target account lists and further in the provision of the Bishopsgate Business Plan. He did not do this pursuant to an unlawful combination. It was not done with the other Departing Employees. There is no evidence that the information was ever used for the purposes of diverting Alesco's business, clients, suppliers and/or workforce to one or more of the Corporate Defendants or elsewhere.

428. Nobody procured the breaches of contract referred to above in connection with the failure to provide information and the provision of false information. Here too, it has not been proven that there was any unlawful combination.

429. There has been a receipt of confidential information, but there is no evidence of any use of such information.

430. I have not considered at this stage the solicitation of customers, and that will follow. However, I shall find there that the only solicitation which took place was by Mr Hasan and that it did not involve the Departing Employees. It has not been proven that there was an unlawful combination.

431. As noted above, it is part of the necessary ingredients of unlawful means conspiracy that there must be loss to the Claimant by the use of those unlawful means. Similarly, in a lawful means conspiracy, it must be proven that the Claimant has suffered loss by reason of the conspiracy to injure. In this case, loss has not been made out and therefore the claim in either form of conspiracy must fail for this reason in addition to the other reasons.

432. As regards the unlawful means specifically, and considering each of them, I have come to the following conclusions. Even if there had been a combination to make false statements and/or to act in breach of contract in failing to disclose offers and/or in giving false information, none of this has caused loss. For the reasons set out above, each of the Departing Employees was leaving in any event and entirely lawfully. If there had not been false representations and/or offers had been disclosed, the Departing Employees would still have left. So too would Messrs Game, Cohen and Hussein (although no losses are pleaded arising out of their departure: they were not client facing employees). They would all have gone to the Corporate Defendants.

433. Insofar as it has been said that retentions had to be made to secure employees, that is said to arise out of the alleged conspiracy of an unlawful team move. It is not a consequence of the provision of false information or the failure to provide earlier information. If there were losses, and if there was panic (which I do not have to determine), it was the consequence of a number of employees resigning lawfully and not pursuant to a conspiracy as alleged or at all. The only consequence of the earlier provision of information might have been that the garden leave would have started earlier with the possibility that some of the renewals obtained in May-July 2017 might not have been obtained, that is a worse position than the one of having acquired the renewals. Insofar as there have been breaches of contract, they have not caused loss to the Claimants.

434. Further, as already stated, there is no loss caused by breaches of confidence. There were no relevant fiduciary duties. The claim for account of profits is irrelevant because it is in respect of the breach of fiduciary duty claim which does not exist absent relevant fiduciary duties. It is also in respect of the confidential information claim, but no use of confidential information has been shown.

435. There is an issue which does not arise for my consideration, but which has been the subject of submissions since the conclusion of submissions. It is by reference to a case of Zacaroli J of *The Racing Partnership Limited & ors v Don Brothers (Cash Betting) Limited & ors* [2019] EWHC 1156 (Ch); [2019] FSR 33 ("*Racing*

Partnership"). In a note of 5 June 2019, it is alleged by the Corporate Defendants that knowledge of unlawfulness is a necessary element for the tort of unlawful means conspiracy. The Claimants in a responsive note of 28 June 2019 contend that there is no requirement of that knowledge. There is a conflict within the authorities in respect of this issue. Since I have not found that there was an unlawful combination or any loss, it is not necessary for the Court to decide this point.

436. This is a case where there has been no breach of fiduciary duty, and accordingly, there has not been any dishonest assistance to breach of fiduciary duty.

437. In each case save for the last, the concentration of the case as regards the unlawful act is on the relationships of the Departing Employees or other Alesco employees and the employer, Alesco/the Claimants. The involvement of Mr Ross and the Corporate Defendants is in masterminding the common design conspiracy and/or inducing or assisting direct wrongs of the employees vis-à-vis Alesco, whether of a contractual nature or a fiduciary nature. The various different ways of putting that case have been rejected. For the purpose of completeness, in respect of the receipt of confidential information, it would be possible for that to be the wrong committed by the Corporate Defendants alone in conspiracy through their own unlawful acts: however, such confidential information as was received was not used.

(iii) Breach of contract: solicitation of clients

438. The Claimants' pleaded allegations of solicitation at APOC [97-104;106-108] are as follows:

i) Oriental Petrochemical Company ("OPC"), which appointed Price Forbes in December 2017;

ii) Egyptian Styrene & Polystyrene Production Company ("E-Styrenics").

iii) The cedant insurer Arab Misr Insurance Group ("AMIG") asked Price Forbes to obtain renewal terms for E-Styrenics in December 2017. However, AMIG lost that business to one of its Egyptian competitors, so neither Price Forbes nor Alesco dealt with the renewal, Hasan 1, [249], (T3/20/18-24). The Claimants claim no loss in relation to E-Styrenics accordingly;

iv) Kuwait Drilling Company ("KDC"). KDC did not, in fact, appoint Price Forbes until 13 December 2018, long after Mr Hasan's and Mr Burton's restrictions expired , KDC having elected to renew with Alesco in December 2017 and

v) The Société Tunisienne d'Electricité et du Gaz ("STEG"). The cedant broker on the STEG account, Courtage en Assurances et en Reassurance

vi) ("ARCO") issued a broker of record letter in favour of Price Forbes in January 2018. However, Alesco could not, in fact, have continued to work for STEG thereafter (Crichton 1, [44]).

Each of these will now be considered.

(a) OPC

439. Mr Hasan has acknowledged in his statement and in his oral evidence that he should have done more to close down discussions with Mr Rahim El-Kishky, who was a third-party introducer whose service company had an introducer agreement in place with Alesco and AJG UK in relation to Egyptian business. Mr Hasan accepted in cross examination that he first started working with Mr El-Kishky at Alesco (T14/85/14 – T14/86/1).

440. In August 2017 while Mr Hasan was on garden leave, Mr El-Kishky sent to Mr Hasan a draft Proof of Loss/Form of Acceptance relating to OPC. Mr Hasan deleted that Form and the messages relating to it between Mr El-Kishky and Mr Hasan. Information relating to it is only available because the image of the Proof of Loss Form was captured from Mr Hasan's phone.

441. On 15 September 2017 Mr El-Kishky sent a copy of the AJG agreement to Mr Newman's personal address. Mr Newman forwarded this to Mr Pearce, saying '*This is from one of Nawaf's mates.'*. Mr Newman did not know Mr El-Kishky. No explanation has been provided as to how Mr El-Kishky came to be in contact with Mr Newman on his private email address. Although Mr Hasan denied it, the only plausible explanation is that Mr Hasan effected the introduction and provided that email address (T14/92/19-23). The inference is that there must have been liaison as regards Mr Newman taking the contact for the Corporate Defendants and Mr Hasan providing the same.

442. By 19 September 2017 Mr Newman, in an email to Mr Baxter, wrote *"our new best friend Rahim [El-Kishky] wants to talk aviation business, who should I put him in contact with".* Here again the inference is that this was due to Mr Newman taking the contact for the Corporate Defendants and Mr Hasan providing the same. Mr Newman must have known that Mr Hasan was on garden leave and had continuing duties of fidelity to Alesco.

443. On 5 December 2017 Mr Masterton emailed Mr Tim Baggott quoting a message he had received from Mr Newman; "James, I have just been talking to Nawaf about 1/1 renewals one of which is via Rahim [El-Kishky]. Could you get this agreement done as soon as you can?" This shows that Mr Hasan was willing to have discussions with Mr Newman about this renewal whilst he was on garden leave (T14/97/16-19). It also shows in the words of the Claimant's Closing at [288] that 'the Corporate Defendants through Mr Newman were content to induce Mr Hasan to breach his obligations to Alesco by assisting them with renewals...'

444. On 14 December 2017 Mr Newman was in email contact with Mr El-Baz of Carbon Holdings and with Mr El-Kishky about the drafting of a Broker of Record letter ("BOR") in favour of Price Forbes. This corresponds with the "1/1" renewals that Mr Newman had been talking about with Mr Hasan (in fact it was a 31/12 renewal). On 20 December 2017 Mr El-Kishky sent Mr Hasan the BOR but Mr Hasan deleted it,

and this too has been uncovered due to a search of Mr Hasan's phone (T14/102/6 – T14/105/17).

445. It is clear from cross-examination of Mr Hasan that he gave instructions to his solicitors to deny knowledge of the brokerage contract between OPC and Price Forbes and his involvement in the solicitation of the contract. Mr Hasan admitted that he knew that what he was telling his solicitors to say was not true (T14/108/1 – T14/109/19).

446. Following receipt of the BOR, on 20 December 2017 Price Forbes had to act with expedition to get the information from the market without having the relevant document. On 21 December 2017 Mr Hasan attended Price Forbes' offices for lunch and Mr Newman and Mr Masterton were there. It is likely that the assistance of Mr Hasan continued at that point, but it is not necessary to make a finding to that effect for the purpose of this judgment.

447. The Defendants point to difficulties in bringing together the relevant information between 20 December 2017 and New Year's Eve in order to complete the renewal. The Defendants submit that the renewal came to Price Forbes through Mr El-Kishky and not through Mr Hasan: they submit that it was not surprising that Mr El-Kishky, as a friend and contact of Mr Hasan, would wish the business to go to the company which was about to employ Mr Hasan. The Defendants submit that Mr El-Kishky and Mr El-Baz were unhappy with the way Alesco had been handling OPC's account in part because Alesco had gone to the market early without Mr El-Kishky's knowledge or permission, and that therefore that they had sought to move their business.

448. The Court has taken into account written and oral submissions made not only by the Corporate Defendants but also by Mr Hasan himself. It finds on the basis of the evidence as a whole that Mr Hasan did act in breach of his express and implied contractual duties operating during the period of his gardening leave and in particular that:

i) Mr Hasan communicated with Mr El-Kishky in relation to the renewal of OPC. He passed on to him Mr Newman's personal address so as to enable the business of OPC to go to Bishopsgate/Price Forbes:

ii) Mr Hasan did so in liaison with Mr Newman such that Mr Newman for the Corporate Defendants induced Mr Hasan to breach his duty of fidelity and pass on the business of OPC to Bishopsgate/Price Forbes;

iii) Mr Hasan spoke about at least the OPC renewal with Mr Newman as evidenced by the email of 5 December 2017 from Mr Masterton to Mr Baggott. Mr Newman continued to induce Mr Hasan's breach of his duty of fidelity:

iv) Mr Hasan deleted messages relating to Mr El-Kishky/OPC including his receipt of the document in August 2017 and the BOR of 20 December 2017, and he instructed his solicitors to deny knowledge of the OPC BOR.

449. I have considered the case to the effect that the late timing of the work on the renewal and the alleged dissatisfaction of OPC indicate that Alesco was not going to get this

renewal. I have come to the view that the evidence as to the lateness is immaterial and that dissatisfaction was insubstantial. Mr Hasan has admitted *"that he could have done more to close down discussions with his friends such as Mr El-Kishky and Mr El-Baz during the time of his garden leave"* (Mr Hasan's closing [59]). He did more than that. Instead of passing them on to his employer Alesco, he actively passed them on to Mr Newman and he set in train Price Forbes' ability to secure this work, and Mr Newman actively induced Mr Hasan to breach his duty of fidelity by agreeing to take the renewal and actively assisting with the same. Whilst I am satisfied that OPC would eventually have followed Mr Hasan to Price Forbes after his move on 17 January 2018 and particularly after the expiry of his post-termination restrictions later in the year, I find that this business was lost by Alesco and gained by Price Forbes because of Mr Hasan's breaches of contract. I also find that Price Forbes through Mr Newman induced the breach of contract by knowingly communicating with Mr Hasan in relation to the renewal of OPC and taking the benefit of that renewal.

450. The Claimants seek to take this further. They say that this conduct of Mr Hasan shows that there must be other instances of deliberately deleted documents such as this is "only the tip of the iceberg" (Claimants' closing submissions 289.1). They further submit that the court should be sceptical of any evidence or suggestions given by Mr Hasan unless corroborated by contemporaneous documents (Claimants' closing 289.2). I have throughout this judgment taken into account the need to be cautious about uncorroborated assertions of Mr Hasan because of the various findings which have been made in this judgment about his evidence and his conduct.

451. The loss arising to Alesco is by reference to the renewal of 31 December 2017/1 January 2018. I accept the submission made on behalf of the Corporate Defendants in their closing at [647] that if there was unlawful solicitation, any losses are to be limited to a maximum of 12 months. This business had followed Mr Hasan from AON to JLT and from JLT to Alesco. As they express it *"Given Mr Hasan's relationship with Messrs El-Kishky and El-Baz, Price Forbes would not have retained that business after the expiry of Mr Hasan's undertakings – just as Carbon Holdings, OPC's parent company, transferred the Tahrir Petrochemical account to Price Forbes after the expiry of Mr Hasan's undertakings."*

452. In addition to the foregoing, there is also claimed the loss of the business of Tahrir Petrochemical Corporation (Carbon Holdings). This goes beyond what has been pleaded. The allegation is that there was a close inter-relation between OPC and the Tahrir Project. In fact, it now appears that this business moved on 25 July 2018, the day that the Corporate Defendants' undertakings to the Court expired. This was despite the fact that such business on a construction project is normally for the duration of the project and that such moves, according to Mr Thompson, are extremely rare (Thompson 1 [67c.)). It is alleged that in this instance it happened due to the Defendants' unlawful activity. This allegation is rejected on the basis that (a) the links between OPC and Mr Hasan were very close; (b) so by extension from the Claimants' case must have been the links between Carbon Holdings and Mr Hasan; (c) just as the OPC business was ripe for the taking once the post-termination restrictions had expired, so similarly the Carbon Holdings business. Thus, it was fanciful to believe that such business would remain with the Claimants after the expiry of the post-termination restrictions.

453. As is apparent from the above discussion, it is to be inferred that Mr Newman must have had several communications with Mr Hasan about the passing on of OPC to Bishopsgate and eventually Price Forbes so as to cause this business to be transferred. The transaction of taking the business was inconsistent with the duties of fidelity of Mr Hasan under his garden leave which must have been known to the Corporate Defendants. In fact, the inference is that it went further than that in that there must have been conversations between Mr Newman and Mr Hasan so as to instruct Mr Hasan of how he could put OPC in touch with people within the Corporate Defendants, at first Bishopsgate and then Price Forbes so as to execute this business instead of Alesco. In so doing, and in actively taking the business, the Corporate Defendants through Mr Newman induced Mr Hasan to breach his obligations to Alesco by assisting them with the renewal of the OPC business, and taking it at the expense of the Claimants.

454. In respect of this matter, Mr Newman must have known that Mr Hasan was on garden leave and therefore would have been subject to a continuing duty of fidelity such that he could not pass on renewals to the Corporate Defendants. Such actions are to be imputed and/or attributed at least to Bishopsgate by reason of the position of Mr Newman being at the material time the chairman of Bishopsgate. He was also acting for Price Forbes when he facilitated the transfer of OPC's business to Price Forbes.

(b) E- Styrenics

455. The BOR, the broker of record letter, in favour of Price Forbes was on 26 July 2018, that is during the period of cover and as recently as two days after Alesco's cover of East Gas which was on 24 July 2018. There is room for suspicion in view of the history relating to OPC that the trigger of any move was Mr Hasan's communications with Mr Newman. There is particular suspicion about the evidence of Mr Hasan that Mr Zohairy, the CEO of Arab Misr, expressed disappointment in the service of Alesco after Mr Hasan had left and complained about the renewal terms: see Hasan 1, [244-249]. These conversations should not have taken place and should have been stopped by Mr Hasan, as he recognises [247]. However, there are two matters which militate against a finding that Mr Hasan has caused loss to the Claimants. First, Mr Hasan had a long-standing relationship with Mr Zohairy which predated his employment with the Claimants (Hasan 1 [245]) such that a transfer of the business to the new employer of Mr Hasan was probable even if this were to involve a BOR during the term of cover. Secondly, ultimately the business was lost to a local competitor and so Price Forbes did not obtain the long-term business such that Alesco would have lost it in any event. In these circumstances even if Mr Hasan should have done more to close down this contact during the garden leave and even if he spoke inappropriately with Mr Newman about this client, no loss has been proven in respect of this client.

(c) KDC

456. The claim as regards KDC is by reference to the fact that Alesco did not get the renewal in December 2018. Alesco did get the renewal in December 2017. By this stage the restrictions of Mr Hasan and Mr Burton had expired. It is alleged that Mr Burton solicited the business in December 2017 with a view to taking it over the

subsequent year (see Byatt 1 [37]) because he has seen a Bishopsgate slip for that client. This is contradicted by Mr Burton: see Burton 2[78] and (T12/109/15 - T12/110/13) from his own direct knowledge, whereas Mr Byatt's case is at best inferential subject to Mr Burton's direct evidence. There is no reason to disbelieve Mr Burton, especially in the light of the absence of evidence of his soliciting other accounts or employees during his garden leave period and the period of his post-termination restrictions. It is also relevant that the business was retained by Alesco in December 2017: not only does that show that there was no loss, but it indicates that Mr Burton did not seek to take the business. In any event, the business was acquired lawfully in December 2018 by Price Forbes, not Bishopsgate, on account of Mr Hasan's relationship with Mr Tamer Soudan, a senior manager of Al-Ahleia Insurance Company, the cedant insurer on the KDC account.

(d) STEG

457. No damages are here claimed. This is apparent from the Claimants' Closing which does not make any claim in this regard. That is because it is accepted by Mr Crichton at [44] (and T3/35/7-17) that Alesco could not have continued to work for STEG due to sanctions in place in Tunisia. There is a contest between the parties as to how it was that the business got to Price Forbes: having regard to the account in respect of OPC, the account of the Defendants and in particular that of Mr Hasan must be viewed with circumspection. In the context of the case as a whole, since it makes no difference as regards damages, it is not necessary to analyse which version is correct.

(e) Other business - Doha Insurance

458. The Claimants' case in respect of the soliciting of Mr Hussein junior is connected to the solicitation of the business of his father Bassam Hussein by the Defendants. The evidence is of great friendship between Mr Hussain senior and Mr Hasan. Doha followed Mr Hasan from AON to JLT to Alesco and then to Price Forbes: see Hasan [262d.]. Doha did not follow Mr Hasan until after the expiry of his post-termination restrictions. As the Corporate Defendants submit (Closing [660]) *"There is no basis for inferring that Doha appointed Price Forbes as its broker of record for any reason other than its senior executives had an extremely close and longstanding relationship with Mr Hasan and wished to continue that relationship."* Nothing else needs to be explored including the evidence alleging that Doha was in any event dissatisfied with Alesco.

459. There was a conversation which should not have taken place between Mr Hasan and Bear Maclean while he was on garden leave (Hasan 1 [222] and (T14/79/59), but no business was lost as a result (T14/144/11-17).

460. On 15 December 2017, Mr Baxter emailed to Mr Masterton saying "Gerard and Nawaf's business is to be considered as distinct and separate from a recognition point of view and wondered whether any consideration has been given to revenue coding" [sic]. This could have been as a result of Mr Hasan having contact with clients during garden leave or it could have been because clients had been getting in touch knowing by then that Mr Hasan was intending to join Price Forbes.

461. In addition to the foregoing, there was evidence of a strategy day for 26 September 2017 arranged according to the documents at the time for Mr Burton and with Mr Newman, Mr Pearce, Mr Conlon and Mr Todd in Rye which was intended to be a "Pete Burton strategy day…" This was denied by Mr Burton in oral evidence (T11/173/17 – 20]; (T12/112/1 – T12/117/13). However, the emphasis changed from being present only for social events (correspondence 7 December 2018) to not being certain that he was there at all (correspondence 9 January 2019) to a total denial that he had been there (T11/173/17-20). This is a case where the contemporaneous documents are to be preferred to this vacillating account, which state that there was such a meeting. It is more likely than not that Mr Burton did attend, and it is likely that there was some strategy that was discussed, albeit that some of the day was social, in particular at a restaurant. That would amount to a breach of contract on his part, albeit that no particular loss is proven in respect of the same.

462. There was also disclosed minutes of a meeting of 19 July 2018 in which Mr Burton gave a list of initial business targets. It is difficult to see without more what is wrong with that provided that it does not involve the disclosure of confidential information.

463. The Claimants have sought to expand the claim further in their Closing, to include alleged solicitation in respect of Project Tiger (Closing [318.2]) and a wider allegation of solicitation in respect of AMIG (Closing [318.6]). These allegations are too late, but in any event, fail on the evidence which shows that Mr Maginn, not Mr Hasan, provided information about Project Tiger to Bishopsgate (and he did not do so in breach of contract in any event); and (b) the Claimants' case in relation to AMIG is in direct contradiction to the case put to Mr Hasan in cross examination (T14/115/18 – T14/1/116/22). In those circumstances, the wider claim in relation to AMIG advanced in the Claimants' Closing is not open to them, nor that the move of EHC, East Gas and Suez Steel was "facilitated by [Mr Hasan's] breaches of his obligations to Alesco" (Claimants' Closing [342]) either procedurally (because it is not pleaded) or substantively (because it has not been established evidentially).

(iv) Inducement to breach of contract

464. As regards OPC, Mr Hasan's breaches of fidelity were induced by Mr Newman on behalf of the Corporate Defendants. It is to be inferred that Mr Newman must have had several communications with Mr Hasan about the passing on of this client to Bishopsgate and eventually Price Forbes so as to cause this business to be transferred. The transaction of taking the business was inconsistent with the duties of Mr Hasan under his garden leave which must have been known to the Corporate Defendants. In fact, the inference is that it went further than that in that there must have been conversations between Mr Newman and Mr Hasan so as to instruct Mr Hasan of how he could put OPC in touch with people within the Corporate Defendants, at first Bishopsgate and then Price Forbes so as to execute this business instead of Alesco.

465. In respect of this matter, Mr Newman must have known that Mr Hasan was on garden leave and therefore would have been subject to a continuing duty of fidelity such that he could not pass on renewals to the Corporate Defendants. Such actions are to be imputed and/or attributed at least to Bishopsgate by reason of the position of Mr Newman being at the material time the chairman of Bishopsgate. He also must have

been acting for Price Forbes when he facilitated the transfer of OPC's business to Price Forbes.

(v) Other breaches of contract: Mr Burton

466. There has been identified above and proven breaches of the contract of employment of Mr Burton as regards the following by way of summary, namely

i) His failure, in breach of the Disclosure of Offers Clause to disclose the offer made to him by Bishopsgate. It has been found that there was an informal offer made on or about 18 May 2017 and a formal offer on or about 26 June 2017.

ii) His failure, in breach of the Disclosure of Offers Clause to disclose offers of other Departing Employees, which by inference was before the time when he said that he first knew about it. There has been rejected the case that he did not know about the same until August 2017. It is more probable that he knew of an informal offer to Mr Hasan made at the end of May 2017, and that he knew about it well before August 2017. He is also likely to have known about such offers as were made to Mr Brewins and Mr Maginn well before August 2017;

iii) His giving untrue answers to questions at the exit interviews and especially as regards his intended move to Bishopsgate. He also did not provide information regarding what he must have known were offers to the other Departing Employees. To the extent that this overlaps with his contractual obligation to provide such information, there is no issue for this purpose as regards questions at exit interviews which went beyond his express contractual duties. (I accept that there may have been an error when it was written down that Mr Burton said that the other Departing Employees were not going "anywhere", and I do not find that Mr Burton said that);

iv) It is arguable that he gave untrue information relating to the Burton loan in the meeting of 22 August 2017, in an email of 20 September 2017, in a letter from Doyle Clayton dated 27 October 2017, and in a written statement made on 30 November 2017 and in a covering letter dated 14 December 2017 saying that it was not given in an employment-related context (it was in the context of discussions relating to future employment) and was on purely commercial terms (it was interest free in the early months and not secured). In any event, none of this caused any loss to the Claimants.

v) He did not disclose these breaches of contract to the Claimants.

467. There is no scope for incidental obligations as regards both Mr Burton and Mr Hasan. This is because matters are covered by the express terms and the established implied duty of fidelity such that retrospectively created incidental obligations have no application.

468. The breaches of Mr Burton were not induced by Mr Hasan or by the Corporate Defendants. If there was a tort of inducement to breach of contract, it requires proof

of loss, and no loss has arisen. Further, Mr Burton did not induce any breach of contract by other Departing Employees or any other employees (including Mr Cohen).

469. There are other alleged breaches which have not been proven. There was no breach of contract by entering into the loan. In my judgment, this did not amount to a breach of a duty of fidelity. It would not amount to a breach of a duty of fidelity to negotiate with a competitor a contract including a signing on fee. In my judgment, the Burton loan was about a private arrangement and it was offered in connection with the prospect of Mr Burton leaving the Claimants to join the Corporate Defendants. It would have been a breach of a duty of fidelity if it had been provided, as pleaded, to cause him unlawfully to solicit employees or customers, but I have found that those were not the terms, nor did he do that. In particular, there is no evidence that he was in breach of his contract of employment in this regard including during the period of garden leave nor was he in breach of his post-termination restrictions. Unlike Mr Hasan, he did not break his contractual duties as regards facilitating customers to transfer to the Corporate Defendants, and in particular the positive allegation as regards KDC has been refuted by Mr Burton.

470. The Claimant has failed to prove that Mr Burton informed Mr Rathmell on 6 June 2017 that he was about to leave Alesco. There is hearsay evidence to this effect from Mr Matson (Matson 2, [231]) about a conversation in January 2018, but this has been directly contradicted by Mr Burton.

471. The Claimants say that in breach of contract, the move was a team move. For all the reasons set out above, I have found that Mr Burton's move was his own move, and that it was not a team move. There was no concert of the parties in connection with their decisions and negotiations and timing of their activities or the failure to provide the information about the offers and the like or that they used private communication devices to prevent discovery of a conspiracy. I have rejected the case about the conspiracy, and it follows that the unlawful combination through the label of breach of contract also fails.

472. In respect of such of the breaches of contract as have been established, there is no loss. The core of the Claimants' case is the unlawful team move whether through a conspiracy or inducing breach of contract or breach of contract. In respect of the decision to move and the moving, I have come to the view that this came through a lawful approach from the Corporate Defendants, and that Mr Burton decided to leave himself. The timing of his decision was not by reference to the resignations of his colleagues. Thus, the information withheld about the offer and the untrue information provided as regards the loan and in the exit interview and in related communications had no effect on the Claimants. It did not affect the fact that he was leaving or the timing of his departure.

473. The case as regards the departures leading to possible panic within the Claimants and the need for retentions or salary increases and other such losses, if true, would follow from lawful resignations, and did not depend on the existence of a conspiracy or wrongful acts. If such losses were suffered, they arose because of the lawful departures, and not because of the breaches of contract of Mr Burton. The question of the losses more generally is considered further below.

(vi) Other breaches of contract: Mr Hasan

474. The breaches of contract on his part have been identified including the following:

i) The provision of the RFIB Business Plan (including as regards RFIB also the client list and the target account list) and of the Bishopsgate Business Plan (but not the clients list and the target account list), amounting to a breach of contract and a breach of confidence;

ii) The failure, in breach of the Disclosure of Offers Clause to disclose the informal offer made to him by the Corporate Defendants on about 30 May 2019;

iii) The failure, in breach of the Disclosure of Offers Clause to disclose offers of other Departing Employees, which I find he knew about before the Claimants found out about the same in August 2017;

iv) His giving untrue answers to questions at the exit interviews on 17 July 2017 and especially as regards the fact by implication that he had not received any offer from the Corporate Defendants, about his fellow Departing Employees, that he had not created a document containing confidential information and that he had not provided a list of clients (which he had to RFIB). He also made false statements to conceal his use of Alesco proprietary information to RFIB and Bishopsgate in communications dated 7 September 2017, 29 September 2017 (through Mishcon de Reya) and 14 December 2017.

v) Whilst the recruitment of Mr Hasan and Mr Maginn respectively was from the Corporate Defendants, it is more likely than not that Mr Hasan discussed the impending resignation with Mr Maginn given that they were like an item. This probably crossed the line and is likely to have gone further than simply the discussion between close friends of the kind tentatively referred to by *Goulding* at 2.181 and referred to above. Even assuming that there were such conversations, it had no consequence because the recruitment of Mr Maginn was still from the Corporate Defendants and in any event, Mr Maginn was going to follow Mr Hasan wherever he went within the industry.

vi) He acted in breach of his duty of fidelity in passing on OPC to Price Forbes causing loss to the Claimants.

vii) He also acted in breach of such duty as regards Arab Misr's business in relation to E-Styrenics for Price Forbes, but no loss was caused. He did not act in breach of duty as regards KDC. He might have acted in breach as regards STEG, but no loss was caused, and it is therefore not necessary to resolve a conflict of evidence in this regard in the context of all the other findings made in this case.

viii) He did not disclose these breaches of contract to the Claimants. The like points of construction and about implied terms apply as per the analysis in respect of Mr Burton.

475. In my judgment, Mr Hasan did not participate in a team move and there were no losses arising out of what he did. As regards the failure to disclose information and the untrue information which he provided, this did not cause a loss. I have found that he did not seek to solicit the service of Mr Agnew. I have considered the position in respect of the business which he should not have passed on, and for the reasons above stated have found that the sole loss was the 2017 premium in respect of OPC.

476. There was no inducement of the breaches of contract by Mr Hasan whether of Mr Burton or Messrs Brewins, Maginn and Cohen. As regards his failure to provide information and/or provision of untrue information, that was not induced by a third party. However, as regards OPC, his breaches of fidelity were induced by Mr Newman on behalf of the Corporate Defendants.

(vii) Other breaches of contract: Mr Brewins

477. The conclusions in respect of Mr Brewins are as follows. He was not a party to a conspiracy, nor he was a party to an unlawful team move amounting to a breach of contract. His contract did not require him to disclose an offer. In any event, he was not induced to do any wrong by the Defendants or any of them.

(viii) Other breaches of contract: Mr Maginn

478. The conclusions in respect of Mr Maginn are as follows. He was not a party to a conspiracy, nor was he a party to an unlawful move amounting to a breach of contract. He was in breach of contract by saying at the exit interview on 4 August 2017 that he had no offers from anyone and had not even started job hunting. As noted above, the Claimants have not shown that Mr Maginn was involved in or had knowledge about the documents which were passed by Mr Hasan to RFIB in about January 2017.

(ix) Inducement to breaches of contract: the Corporate Defendants

479. For the reasons set out above, the Corporate Defendants did not procure the above-mentioned breaches of contract of Mr Hasan and Mr Burton, save as regards OPC. Nor did they procure breaches of contract of Messrs Brewins, Maginn and Cohen. Nor did they procure the breaches of equitable duty of confidence as regards the RFIB disclosures. However, they knowingly received the confidential information in the nature of the Bishopsgate Business Plan (but which did not have with it the client list or the target accounts list). However, there is no evidence that it was misused or that the Claimants suffered a loss or that there was a profit to any of the Defendants. Since there was no relevant fiduciary duty, the claim for dishonest assistance does not run against the Corporate Defendants.

(x) Losses

480. As noted above in respect of Mr Burton, the losses claimed follow from an alleged unlawful team move, but the Court has found that howsoever put, there was not an

unlawful team move. There have been proven breaches of contract including failing to disclose the offers made to Mr Hasan and Mr Burton, their failure to inform about offers made to other Departing Employees and the untruthful information given at the exit interviews and outside the interviews. There has also been proven a breach in the nature of the OPC renewal for 2017 which cost Alesco a loss of revenue for that year.

481. The question which then arises is what losses arise from these breaches of contract. The losses comprise (1) client losses; (2) additional costs incurred in particular retention payments, salary increases and sign on bonuses; (3) costs relating to additional wasted time and (4) forensic investigation costs. The question which arises is whether and to what extent those claims can be made despite the dismissal of the conspiracy claim and an unlawful team move.

482. The Claimants contend in the Closing at [372.2] that the false and misleading accounts of their plans contributed to uncertainty and anxiety and maximised disruption, and that if full information had been provided, there would not have been what was perceived as an emergency situation. In my judgment it was not the breaches of contract which have been found that caused the above losses. If and to the extent that losses were suffered, they arose because of the resignations of the Departing Employees which were lawful. If and to the extent that there was concern about the impact of their leaving on the business, the situation would not have been different materially if they had given accurate information about their departures and their intention to move to Bishopsgate. There would still have been the concern that their departures would be damaging to the business. If there was destabilisation, it was not because untrue information or no information was provided: it was because the Departing Employees were going to a competitor, and there was a concern that more employees might be recruited.

483. If and to the extent that there is a claim for loss, it is because of the alleged conspiracy by reference to an unlawful team move. The case of the Claimants is that but for the combination the employees would have remained. The Claimants contend that the Departing Employees would not have left Alesco other than as part of the alleged unlawful team move. Detailed findings have been made to the effect that they were going to move in any event and the move to Bishopsgate of each of them was lawful. The consequence of their moving was to cause a problem for the Claimants which they had to address. Thus, any losses of clients due to their resignations and/or retention payments, additional salaries and bonuses were the consequences, if anything, of their leaving rather than the breaches of contract which the court has found.

484. If, contrary to the findings which have been made, there was a conspiracy as regards the non-disclosures and/or the telling of untruths regarding in particular the loan, the offers, the intended departures and the like, I find that this did not cause loss because any disclosure would not have altered the fact that each of the Departing Employees would have left at the same time and to the same employers.

485. In the circumstances, it is not necessary to make alternative findings as to whether loss has been proven, and if so, which losses, in the event that he Court had found a conspiracy as regards an unlawful recruitment and/or team move. There would have had to be considered each of the heads of alleged loss and other matters including (1) the extent to which salaries saved should be credited against client losses, (2) the

extent to which retentions and increases in salaries and bonuses would have been paid in the ordinary course irrespective of such retentions as were paid, and in any event, (3) the extent to which the retentions paid were necessitated by these departures, (4) whether it should be set off against the retentions repaid following the resignations of the Departing Employees. This is especially so in a competitive environment where approaches were made regularly by competitors to employees. There have even been questions as to how valued the Departing Employees were, albeit that the communications of this nature may have been of a motivational nature to encourage those who remain to perform well for the corporate defendants. In the event, the Court does not have to decide these matters because of the finding that there was no conspiracy and that such limited breaches of contract which did take place were not causative of these or any losses.

(xi) Loss of OPC renewal

486. There is, however, a breach of contract which has caused loss that comprises the breach by Mr Hasan of his duty of fidelity during his garden leave period which caused the loss of the OPC renewal of 31 December 2017. That is treated in the books of account as the 2017 renewal. The amount of the renewal according to the amended schedule of loss was £126,458 for 2017 and £103,912 for each of the next two years. The figures were changed by the time of Mr Stern's report for the claimants. There are slightly smaller sums in Mr Waghe's report for the defendants'. The figure for the 2017 renewal (and also subsequent renewals) was £109,353 according to Mr Stern. I am satisfied that, but for the breach of the duty of fidelity of Mr Hasan, Alesco would have secured the 2017 renewal. The court will need assistance as to what is the appropriate figure bearing in mind the evidence of the experts, and, if necessary, will make a determination before this draft judgment is handed down.

487. It is also necessary to consider whether OPC would have stayed with Alesco beyond the time of the expiry of Mr Hasan's post-termination restrictions in July 2018. A part of the claim of the Claimants is for the loss of the renewal at the end of 2018 and at the end of 2019 comprising £109,353 per annum. The claim can be put in one of two ways. Either for the full sum, on the basis that on the balance of probabilities, OPC would have remained with Alesco or a loss of a chance that but for the breach of the duty of fidelity OPC might have remained with Alesco. I am satisfied that on the basis of the close personal relationships involved, OPC would not have remained with Alesco but would have followed Mr Hasan to Price Forbes. In that regard there is the evidence of Mr Hasan (Hasan 1 [232 – 233]) that he has a long-standing friendship with Mr El-Baz, the CEO of Carbon Holdings with whom he has worked since his employment with JLT. Further, Mr El-Kishky of OPC and Mr El-Baz have a very close personal relationship and common business interests. In those circumstances, even if Alesco had the opportunity to do a good job for them during the period of the post-termination restriction, there is not more than a fanciful chance that OPC would not have followed Mr Hasan to Price Forbes. In those circumstances, the claim for the loss of income referable to OPC for 2018/2019 fails notwithstanding the contractual breaches during the period of the gardening leave.

488. For reasons set out above, I have concluded that to the extent that there were other breaches of contract during the garden leave period of Mr Hasan that no loss has been

established in respect thereof. It therefore follows that the only loss is the sum for the 2017 renewal in respect of OPC. The same renewal has also been lost by the inducing of a breach of contract by Bishopsgate and Price Forbes.

489. Given the limited ambit of the damages, the question of exemplary damages falls away. This might have arisen for consideration in the context of a wider conspiracy claim having succeeded, but does not apply as regards simply a claim for one year of premium in respect of OPC where the damages of the loss of the premium reflect the actual loss.

(xii) Breach of fiduciary duty/dishonest assistance

490. As noted above, I have not found any relevant fiduciary duties or breaches of the same and it follows that the claims for breach of fiduciary duty and dishonest assistance fail.

(xiii) Breach of confidence

491. I have made findings of breach of confidence as regards the documents provided by Mr Hasan to RFIB, that is the RFIB Business Plan, the client list and the target accounts list. There is no evidence of any loss suffered thereby or profit made by RFIB. There was also breach of confidence by Mr Hasan in providing the Bishopsgate Business Plan to Bishopsgate (but the client list and the target accounts list were not transferred). Here too, there is no evidence of any loss suffered thereby or use made of the same by RFIB or use made of the same by the Corporate Defendants. Mr Burton did not provide any of the Corporate Defendants with business sensitive information or confidential information relating to KDC and did not misuse confidential information. As to whether an injunction is required in respect of confidential information, I shall hear the parties on the consequential hearing if required to do so.

XX Conclusions

492. The Corporate Defendants have made detailed submissions to the effect that this case has been brought by the Claimants to disrupt them and to discourage them and other employers from recruiting from the Claimants and to discourage other employees from leaving the Claimants. It is therefore submitted that the Court *"needs to guard with particular care against having dust thrown into its eyes":* see Closing submissions of Corporate Defendants [58]. I am satisfied that the claim was not conceived solely for that purpose or without any belief in its truth.

493. Points can be made about the demonisation of those who left and the internal communications at the time are so intemperate that they evince a lack of objectivity in the analysis of senior management at the time. Further, there was a background of anger reserved by Mr Pat Gallagher for Mr Ross, which went back to his departure, and which Mr Matson accepted in cross-examination: see (T6/41/8-21). On the other hand, it can be said that in view of the matters in the 2015 Proceedings and the scale of the ambition of Mr Ross, the attempts to protect Alesco can be understood

commercially. Further, the Departing Employees have not made matters any easier for themselves by making untrue statements in the exit interviews.

494. It is also evident that a part of this litigation has been fought out by the Claimants beyond the litigation itself. An example was that coincident in time with the annual conferences (Mariners in Houston and RIMS in Toronto), in September 2018, there was published in the Insurance Times an article (based on a longer piece in Re-Insurance), saying:

> "This case raises serious ethical questions about the payment of a loan by a competitor to one of our employees – and the failure of that employee to tell us about it – as well as the sharing of our confidential business information with other organisations in the market."

Mr Matson had been involved in briefings to the press as regards the Burton loan: see (T5/50/15 – T5/51/3).

495. This might explain in part why the litigation has been so hard fought on both sides. In the end, I have considered the evidence and the inherent probabilities and not by reference to the extent of the feelings and to the way in which it has been fought. Having undertaken the examination of the case, I have come to the conclusion that the claims must fail save for the claim for breach of contract by Mr Hasan as regards OPC and for inducement/procurement of breach of contract of Bishopsgate and Price Forbes. There has been found various breaches of contract, but where there was no loss, and this needs to be considered in any form of order.

496. Whilst dealing with general matters, there have been numerous points referred to throughout the submissions of the Defendants that matters were not pleaded with greater particularity and matters were not pursued adequately in cross-examination. These submissions might have had greater force if they had been made in a more discriminating way. I had said in an interim application that the Court would try the case on the pleadings, and in this judgment, that has been done. It is a very common incident in fraud and conspiracy cases for parties to make these allegations and for cases to be provided with dicta deprecating those cases where serious allegations of dishonesty are made without adequate pleadings or cross-examination (e.g. in the Claimants' Closing as regards pleadings [322, 325] and as regards cross-examination [327(1-3)].

497. In this case, the parties each know the case which they have to meet. As regards cross-examination, there is no profit in pointing out each and every allegation which was not put directly, where the substance of the case was addressed. If each of the literally tens of instances provided of the alleged shortcomings of the pleadings and cross-examination were analysed in this judgment, there would be found some specific criticisms. However, it has bordered on a point scoring exercise and a distraction from the big task. The Court has either to consider in each case whether the points made show a procedural unfairness of a party having to meet a case which has not been pleaded or particularised, and having to be judged in circumstances where the allegations have not been squarely put to him so that there is an opportunity to answer the same. Broadly, the case has been pleaded at length and adequately, and if there have been any shortcomings in what has been put to each witness (no doubt in

part caused by the need not to convert a 3-week case into a much longer case), they are not significant and/or they have not caused prejudice or procedural unfairness.

498. This is a case where there was no agreed list of issues. A Corporate Defendants' list of issues going to many pages including a detailed Schedule, and a draft list of issues provided by the Claimants. The lists were not agreed. This judgment has had in mind the lists of issues. In this conclusory section, reference is made to the list of issues of the Claimants and the answers are as follows (the different abbreviations from those adopted in the Judgment are because each issue is quoted from the Claimants' list of issues):

Express terms – enforceability

1. Is the Disclosure of Offers Clause unenforceable as a restraint of trade? POC §18 [A1/3/14], Defence 4 §15 [A1/7/111], Defence 5 §20 [A1/8/148].

   On the construction of the clause adopted above, it is not unenforceable for restraint of trade: see paragraphs 314-323 above

2. What is the scope of the express contractual duty of confidence in the period after termination of employment? POC §18 [A1/3/15], Defence 5 §21 [A1/8/148].

   In view of the findings, this does not arise for consideration beyond the findings about confidential information which have been made.

Fiduciary Duties

3. Did D4 and/or D5 owe fiduciary duties to the C1 and/or C2? POC §20 [A1/3/17]; Defence 1-3 §20 [A1/5/77]; Defence 4 §18 [A1/7/112].

   There were no material breaches: set out in more detail at paragraphs 218-244 and 343-355 above.

Incidental Obligations

4. What is the scope of the Incidental Obligations? POC §21 [A1/3/17-18], Defence 13 §21 [A1/5/77]; Defence 4 §19-23 [A1/7/112-113]; Defence 5 §24a-c [A1/8/149].

Specifically:

a. Was D5 subject to Incidental Obligation (a)?

b. Were D4 and D5 subject to Incidental Obligation (d)?

c. What was the scope of Incidental Obligation (e) (to answer the Claimants' questions honestly)?

Broadly, it is the more general and established implied terms which apply, and not the incidental obligations: see paragraphs 336-342 above.

CLAIMS AGAINST ALL DEFENDANTS

Conspiracy to injure / unlawful means conspiracy

5. Did the Defendants and Mr Ross (or any two or more of them) conspire / enter into a common design to do any or all of the acts set out at POC §46a-e [A1/3/23-24] ("the Conspiracy")?

There was not a conspiracy by lawful means (s 360-366 and 390-401) or by unlawful means (s 367-376 and 402-436).

6. Was the predominant purpose of the Conspiracy to injure the Claimants' business?

There was not a predominant purpose to injure the Claimants' business (s 390-401)

7. Alternatively, did the Conspiracy involve the commission of unlawful acts as set out at POC §49a-f [A1/3/25], as particularised at POC §50-108 [A1/3/25-41]?

There was not a conspiracy by unlawful means as set out at paragraphs 402-436 above.

8. Acts in furtherance of the Conspiracy POC §50-108 [A1/3/25-41]. In summary:

a. Recruitment of Alesco's Employees. POC §51-74 [A1/3/26-31].

i. Was the recruitment of the Departing Employees and Messrs Game and Cohen part of a coordinated team move planned by the Defendants?
ii. Did D4 and/or D5 procure and induce each other and other Alesco employees to leave the Claimants and join the CDs? iii. Did the CDs procure or induce them to do so?
iv. Did the Departing Employees conceal the fact of their recruitment and their discussions with the CDs (and those of other Departing Employees), and did the CDs procure or induce them to do so?
v. Did the Defendants attempt to recruit further Alesco employees in the circumstances alleged at POC §70 [A1/3/30]?

There was no conspiracy, and the acts were not in furtherance of the conspiracy. There was a failure of the Departing Employees respectively to disclose their offers and recruitment, but not as a combination: see paragraphs 402-437 above.

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b. The Loan. POC §75-82 [A1/3/31-34].

i. Did the Loan place D5 in a position where his own interests were in conflict with those of the Claimants? ii. Did D5 conceal the Loan from the Claimants?
iii. Prior to his resignation, and the commencement of garden leave, did D5 act in the interests of CDs by encouraging other Alesco employees to join the CDs, and encouraging clients and suppliers to transfer their business to the CDs?

The loan was not unlawful: the analysis includes a question as to whether it was unlawful due to a conflict of interest, and this is resolved in favour of the Defendants. The loan was not disclosed, but this was not a breach of duty. Mr Burton did not act in the interests of the Corporate Defendants in the manner referred to. This is set out in more detail especially at paragraphs 196-245 above.

c. Misuse of Confidential Information. POC §83-94 [A1/3/34-37].

i. In addition to the Bishopsgate Business Plan, did D4 provide the Client List and Target Account List (or any of the information contained in those documents) to the CDs?

It was not provided as set out in the section on the Bishopsgate Business Plan at paragraphs 248-263 above.

ii. What use did the Defendants make of the Bishopsgate Business Plan, the Client List or the Target Account List (or the information contained in those documents)?

None as set out in the above section at paragraphs 248-263 and at paragraphs 325-326 and 427-429 above.

d. Solicitation of Clients. POC §96-108 [A1/3/38-41].

i. Did D4 and/or D5 solicit clients on behalf of CDs during their garden leave period?

Mr Burton: no. Mr Hasan: some solicitation referred to in paragraphs 438 – 463 above

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ii. Did D5 do so after termination of his employment during the period of his post-termination restrictions?

No.

CLAIMS AGAINST D4

Breach of contract

9. Did D4 act in breach of contract by acting in the manner set out in the paragraphs referenced at POC §112a, d and e [A1/3/43]?

To the extent that he was in breach of contract, this is referred to at paragraphs 248-263, 438-463 and 474-475 above. It did not include being party to an unlawful team move.

Breach of fiduciary duty

10. Did D4 act in breach of fiduciary duty by acting in the manner set out in the paragraphs referenced at POC §112b, d and e [A1/3/43]?

No.

Breach of equitable duty of confidence

11. Did D4 act in breach of the equitable duty of confidence by acting in the manner set out in the paragraphs referenced at POC §112c [A1/3/43]?

Yes, to the extent referred to at paragraphs 248-263 above.

Procuring breach of contract by D5, and Messrs Brewins, Maginn and Cohen

12. Did D4 procure breaches of duty by Messrs Brewins, Maginn and Cohen as set out at POC §112e and the paragraphs referenced therein [A1/3/43]?

He did not.

13. Did D4 procure breaches of D5's obligations to the Claimants as set out at POC §112d [A1/3/43] and the paragraphs referenced therein?

He did not.

Dishonest assistance in breaching D5's fiduciary duties

14. Did D4 assist D5 in his alleged breaches of fiduciary duty set out at POC §113b, d and e. [A1/3/44]?

He did not.

15. In the circumstances, was any such assistance dishonest / unconscionable? See:

POC §109-110 [A1/3/41-42]; Defence 4 §90-91 [A1/7/135].

Not applicable.

CLAIMS AGAINST D5

Breach of contract

16. Did D5 act in breach of contract by acting in the manner set out in the paragraphs referenced at POC §113a, d and e [A1/3/43-44]?

He did to the extent referred to at paragraphs 466-471 above.

Breach of fiduciary duty

17. Did D5 act in breach of fiduciary duty by acting in the manner set out in the paragraphs referenced at POC §113b, d and e [A1/3/44]?

He did not.

Breach of equitable duty of confidence

18. Did D5 act in breach of the equitable duty of confidence by acting in the manner set out in the paragraphs referenced at POC §113c [A1/3/44]?

He did not.

Procuring breach of contract by D4, and Messrs Brewins, Maginn and Cohen

19. Did D5 procure breaches of the obligations owed to the Claimants by Messrs Brewins, Maginn and Cohen as set out at POC §113e and the paragraphs referenced therein [A1/3/44]?

He did not.

20. Did D5 procure breaches of D4's obligations to the Claimants as set out at POC §113d [A1/3/44] and the paragraphs referenced therein?

He did not.

Dishonest assistance in breaching D4's fiduciary duties

21. Did D5 assist D4 in his breaches of fiduciary duty set out at POC §112b, d and e [A1/3/43]?

He did not.

22. If so, at the time of such assistance, did D4 (sic – should be D5) have a dishonest / unconscionable state of mind? See: POC §109-110 [A1/3/41-42]; Defence 5 §64-65 [A1/8/163-164].

Not applicable

CLAIMS AGAINST THE CORPORATE DEFENDANTS (D1-D3)

Procuring D4 and D5's breaches of contract

23. Did any or all of the Corporate Defendants have knowledge of D4 and D5's obligations to the Claimants? See: POC §110a [A1/3/41-42]; Defence 1-3 §75.1 [A1/5/92-93].

Broadly, they did.

24. Did any or all of the Corporate Defendants procure the breaches of contract by D4 and D5 at POC §114a and the paragraphs referred to therein [A1/3/44]?

They did not, save for findings in respect of Mr Hasan as regards OPC at paragraphs 439-454 and 474-475 above.

Dishonest assistance of D4 and D5's breaches of fiduciary duty

25. Did any or all of the Corporate Defendants assist D4 or D5 in their breaches of fiduciary duty as set out at POC §112b, d and e [A1/3/43] and POC §113b, d and e [A1/3/44]? See: POC §114b [A1/3/45].

Not applicable

26. In the circumstances, was any such assistance by the Corporate Defendants, or any of them, dishonest or unconscionable? See: POC §109-111 [A1/3/41-42]; Defence 1-3 §74-75 [A1/5/92-93]; Defence 4 §90-91 [A1/7/135].

Not applicable

Procuring breaches of contract by Messrs Brewins, Maginn and Cohen

27. Did the Corporate Defendants have knowledge of the obligations owed to the Claimants by Messrs Brewins, Maginn and Cohen? See: POC §110a [A1/3/41-42]; Defence 1-3 §75.1 [A1/5/92-93].

Broadly, yes.

28. Did the Corporate Defendants procure the breaches of contract by Messrs Brewins, Maginn and Cohen at POC §114c and the paragraphs referred to therein [A1/3/45]?

They did not.

Breach of corporate equitable duty of confidence

29. Did any or all of the Corporate Defendants owe the Claimants an equitable duty of confidence as set out at POC §45 [A1/3/23]? See: Defence 1-3 §26 [A1/5/79].

They did.

30. Did any or all of the Corporate Defendants act in breach of the Corporate Equitable Duty of Confidence by acting in the manner set out at POC §114d and the paragraphs referred to therein [A1/3/45]?

They did not.

Knowing receipt of the Claimants' confidential information

31. Did any or all of the Corporate Defendants receive confidential information belonging to the Claimants in any of the circumstances identified in the paragraphs referenced in POC §114e [A1/3/45]?

They did, but not client lists or target account lists

32. Was the information received in circumstances where any or all of the Corporate

Defendants had knowledge that the information was traceable to a breach of fiduciary duty, such that it was unconscionable for the Corporate Defendants to retain the benefit of the receipt? See POC §109-111 [A1/3/41-42]?

Not applicable. Such information as was received was not used.

RELIEF

Injunctive relief

33. Were the Claimants entitled to interim springboard relief in the form given in the Defendants' undertakings contained in Schedule 1 1(c) of the Order of Yip J dated 23/2/18?

This is reserved for further argument in a cross undertaking as to damages.

34. Should the Court grant final injunctive relief to prevent the use or disclosure of the Claimants' confidential information?

Reserved for further argument if required.

Damages

35. What damages, if any, should the Court award the Claimants, and under what heads?

See POC §119 [A1/3/47].

Only in respect of OPC.

36. Should the Court make an award of exemplary damages?

No.

499. It is suggested that consideration needs to be given to injunctive relief in connection with springboard relief granted by Yip J and also to whether there is a need for final injunctive relief in respect of disclosure. It was left to the Court as to whether this issue would be tried. It is an issue about whether there should be an inquiry as to damages. The usual course is for a judgment to be given and for the question of the enforcement of a cross undertaking to be determined at a later date. That involves a two-stage process. The first stage is whether the Court ought to order an inquiry. In other cases, that would be quite straightforward. I apprehend that it would be not be in this case, bearing in mind (a) some of the findings particularly as regards Mr Hasan, (b) the question what the injunction added to the post-termination restrictions in any event, (c) the question as to whether any arguable loss was suffered, and (d) the question as to whether it was appropriate in any event for the discretion to be exercised in the unusual circumstances of this case to order an inquiry. I shall hear the parties further in respect of how this is to be dealt with, if at all.

500. It remains for the Court to thank all the advocates and the legal teams for the great industry which they have shown in this case, and for conducting a hard-fought case with civility, co-operation and conspicuous ability.