Neutral Citation Number: [2010] EWHC 484 (QB)

Case No: HQ09X01231

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2010

Before :

MR JUSTICE JACK

- -

Between :

(1) TULLETT PREBON PLC
(2) TULLETT PREBON GROUP LIMITED
(3) TULLETT PREBON (UK) LIMITED

Claimants

- and -

(1) BGC BROKERS L.P.
(2) BGC BROKERS GP LIMITED
(3) ANTHONY NEIL VERRIER
(4) SHAUN DAVID CARL EDGAR LYNN
(5) JAMES ROBERT HALL
(6) ROBERT LESLIE SULLY
(7) PAUL JAMES BISHOP
(8) STEVEN HARRY HARKINS
(9) MARK ANDREW YEXLEY
(10) JAMES VINCENT BOWDITCH
(11) KEVIN CHARLES MAURICE COHEN
(12) PELHAM ASHLEY TEMPLE
(13) JAMES TERENCE WILKES
(14) GAVIN DAVID MATTHEWS

Defendants

- and -

BGC BROKERS L.P.

Part 20 Claimant

- and -

(1) TULLETT PREBON PLC
(2) TULLETT PREBON GROUP LIMITED
(3) TULLETT PREBON (UK) LIMITED

Part 20 Defendants

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- -

Mr Jeffery Onions QC, Mr Daniel Oudkerk and Ms Amy Rogers (instructed by **Rosenblatt**) for the Claimants
Mr Andrew Hochhauser QC and Mr Jonathan Cohen (instructed by McDermott Will & Emery) for 1st, 2nd & 4th Defendant
Mr Stuart Ritchie and Mr Christopher Newman (instructed by **Russell Jones & Walker**) for the **3rd Defendant**
Mr Selwyn Bloch QC and Mr Jeremy Lewis (instructed by **Berwin Leighton Paisner**) for the **5th to 14th Defendants**

Hearing dates: 14 October 2009 - 5 February 2010

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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.

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MR JUSTICE JACK

Mr Justice Jack :

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Introduction
Part A – Preliminaries

1. The principal parties to this action are rival companies in the business of inter-dealer broking. Their businesses involve the employment in London and other international centres of large numbers of brokers who act as intermediaries between traders in what can broadly be called financial products, including cash, foreign exchange, derivatives, commodities and equities. Tullett, as I will call the claimants, has its London offices at Broadgate in the City where it employs around 650 brokers. BGC, as I will call the defendant companies, has London offices at Canary Wharf where it employs around 600 brokers. Its revenue is about two thirds of that of Tullett and its profit margin is lower. Mr Anthony Verrier, usually called Tony Verrier, was formerly employed by Tullett as Chief Operating Officer. He was the company's second most senior executive. The Chief Executive Officer was and is Mr Terence Smith, usually known as Terry Smith. On 5 January 2009 Mr Verrier commenced work with BGC as Executive Managing Director and General Manager. He reported to Mr Shaun Lynn, BGC's President and senior officer in Europe, who in turn reported to Mr Howard Lutnick, the Chief Executive Officer, in New York. As soon as Mr Verrier joined BGC he put into action a plan to recruit brokers from Tullett to BGC. He had some limited success and thirteen signed contracts to come to BGC when their contracts with Tullett permitted. Three of these later changed their minds. This may be contrasted with BGC's raid on Tullett in New York the following autumn, in which approximately 80 brokers agreed to come to BGC.

2. On 25 March 2009 Tullett commenced proceedings against BGC alleging conspiracy, inducing breach of contract, and misuse of confidential information, all in connection with the recruiting by Mr Verrier from Tullett's London office. Mr Lynn and Mr Verrier were also defendants, as was Mr James Hall, the head of Tullett's forward cable desk. On 1 April I heard Tullett's application for interim relief, and on 2 April I delivered a judgment, [2009] EWHC 819 (QB), as a result of which undertakings were given. Soon after, the nine brokers who had signed contracts with BGC in addition to Mr Hall and had not changed their minds were added as defendants. They also gave undertakings.

3. Trial of the action commenced on 14 October 2009 and concluded on 5 February 2010. At the trial Tullett has sought to continue by way of injunction the effect of the undertakings, and they have sought to establish their rights to damages. The defendants have in the main denied any wrongdoing. They have denied that Tullett are now on any basis entitled to ongoing relief by injunction. BGC also counter-claims against Tullett for inducing the three Tullett brokers who changed their minds to break the contracts they had entered with BGC. The trial is limited to liability only: issues as to damages will be determined separately.

Mr Verrier

4. In order to set the events in context it is helpful to provide an outline of Mr Verrier's history. He began as a sterling deposit broker with MW Marshalls in 1987. In 1999 after Mr Verrier had spent a short period at EXCO, returned to MW Marshalls and been promoted a number of times, MW Marshalls merged with Prebon Yamane to form Prebon Marshall Yamane. Mr Verrier was appointed joint Chief Executive Officer for the UK and Europe, Middle East and Africa. In 2002 he became the sole Chief Executive Officer. In November 2004 Prebon Marshall Yamane merged with Collins Stewart Tullett. Mr Verrier was appointed Chief Executive Officer for Europe, Middle East and Africa of the money broking arm of Collins Stewart Tullett - called Tullett Prebon. Collins Stewart and Tullett Prebon de-merged in December 2006. On 1 September 2006 Mr Verrier had been appointed Chief Operating Officer of Tullett Prebon plc - the first claimant. Mr Smith had become Group Chief Executive Officer of Collins Stewart Tullett in May 2000. Mr Verrier reported directly to Mr Smith following the merger in 2004. In March 2008 Mr Verrier was approached by another inter-dealer broking company commonly called Tradition. Mr Verrier was by this time unhappy at Tullett. His unhappiness resulted from Mr Smith's style of management and actions taken by Mr Smith of which he disapproved. He was frank in his evidence before me saying that he did not like Mr Smith. I make no findings as to whether his unhappiness was justified.

5. On 15 April 2008 Mr Verrier informed Tullett that he would be leaving Tullett when his contract expired in March 2009. Negotiations with Tradition led to him signing a contract on 14 April 2008 to take up employment with Tradition. However some of the associated financial arrangements remained undetermined. He was approached by Mr Lynn on behalf of BGC, and he decided to join BGC rather than Tradition. On 22 August he signed a contract with BGC whereby he was to commence employment with BGC when free to do so. He was to be Executive Managing Director and General Manager. A substantial signing-on payment was made to him on 1 September. On 26 August Mr Verrier informed Mr Smith by e-mail that he would be joining BGC as soon as he was free to do so.

6. On 31 August 2008 the Sunday Times published an article about Mr Verrier including the fact that while recently on sick leave from Tullett he had been at a resort in Malaysia with, to use the familiar phrase, a lady other than his wife. It is Mr Verrier's case that the article was a 'plant' by Mr Smith in retribution against Mr Verrier for joining BGC, which is a company which Mr Verrier asserts Mr Smith dislikes. Mr Smith gave evidence before me as to his limited part in the article, which involved responding to a reporter's enquiries after the newspaper had discovered about Mr Verrier's trip with his companion. There can be no doubt that Mr Smith does not like BGC as a company. In the aftermath of the article Mr Verrier's marriage failed and he had to leave his home.

7. On 12 September 2008 proceedings were commenced by Tullett against Mr Verrier. Mr Verrier's position was that he had been constructively dismissed. The trial of the action was due to commence on 10 November 2008, but agreement was reached and

an agreed order was made by me on that day. By its terms Mr Verrier became free to enter the employment of BGC on 2 January 2009. He remained bound by provisions in respect of Tullett's confidential information.

8. The issues which arose in that action, primarily issues between Mr Verrier and Mr Smith as the alleged instigator of conduct directed to Mr Verrier, do not require determination in this action, and time has not been taken up with their investigation. Nonetheless the allegations as to what happened in 2008 and the animosity generated are an important part of the background to what happened in 2009.

9. Mr Verrier gave evidence before me over 5 days. He came across as a man of strong character, of intelligence and ability. He was originally a broker, and he has a personality which is attractive to brokers. He has a following among the brokers who have worked under him. A number of them are his friends. Some are members of syndicates which he runs, owning race horses. He has a wide knowledge of the inter-dealing broking business and of those who work in it, both executives and brokers.

Mr Marshall

10. Mr Marshall is not a party to the action, but he is alleged to have been party to the conspiracy against Tullett, and it is helpful to say something about him at the start. Mr John Marshall is a solicitor. He joined Russell, Jones & Walker in 2007 and became a partner in 2008. He specialises in employment law. Between 1999 and 2007 he was employed by Tullett or its predecessors as General Counsel for Europe, Middle East and Africa. In 2008 he advised Mr Verrier in connection with his negotiations with Tradition and then with BGC. He acted for Mr Verrier in the action brought by Tullett against him. Between January and March 2009 he gave advice to Tullett employees who were being recruited for BGC by Mr Verrier. In the latter part of March he ceased to act for the employees and from then he has acted for Mr Verrier. He has had the conduct of the present action on Mr Verrier's behalf.

Brokers, their contracts and the recruitment of brokers

11. Inter-dealer broking is a remunerative business. The sums which are dealt are huge, and the brokerage generated is large. The brokers are the business. It is a skill which may be difficult to understand without sitting in on a desk, which I have not done. I have been impressed by the intelligence and strength of character of the 26 brokers who have given evidence. Brokers are remunerated broadly in accordance with the amount of brokerage they earn for their employer. Typically a broker will have a salary and a discretionary bonus. The bonus will often be around 50 per cent of the brokerage earned. The excess over salary will be added to salary once the percentage brokerage exceeds salary. There will usually be a right to reduce salary if it exceeds the percentage of the brokerage the broker has earned for the company. A successful broker makes a lot of money for his company, and for himself.

12. Brokers are organised into desks in accordance with the products in which they deal. Desks vary in size according to the amount of business which the company has in the product in question. A large desk has a very substantial advantage over a small one, because of its greater 'liquidity'. Put in simple terms, that refers to the greater ease which a broker has in finding a buyer when he is instructed, for example, to sell $10 million 1 month forward, if he has ten others on his desk who may be receiving offers to buy dollars forward.

13. The evidence that I have heard shows that a successful broker will need three qualities among others. He must have a natural ability to broke. He must have experience. He must have relationships, or connections, with the traders at the banks and other financial institutions which trade in the particular market. It takes time to build up such relationships so that a trader has the trust and confidence in the broker to use him on a regular basis. If a broker has a good relationship with a substantial trader for a bank or other institution, he will earn a lot of brokerage. Without such relationships a broker can do little. A trader's relationships are often described as 'lines' because a vital step in establishing a relationship is to secure the trader's agreement to the broker having a direct telephone line to him. It appears that in the past relationships were everything, or nearly everything, but more recently the ability to quote a keen price has grown in importance. Such relationships are primarily relationships between the individual broker and the individual trader and so are the broker's rather than the company's. However, where a company has a strong reputation in a product, that will attract traders to the company with less reliance on an individual broker. I have referred to the individual trader. Brokers' relationships are primarily with individual traders rather than with the banks that employ the traders.

14. The brokers on a well run desk work as a team to secure business. On each line, that is for each established customer or trader, there will be a number one broker and a number two broker. The number one broker is the broker who has the primary responsibility for the trader. It is he who primarily has 'the relationship'. The number two has a back-up role, and will handle the trader's requirements when the number one is not on the desk, whether temporarily, or, for example, on holiday. By working as a team a desk increases its liquidity and the chances of putting together a deal between traders. The two brokers involved will then each earn brokerage for their company.

15. The working of the desk as a team is the responsibility of the desk head. He will be responsible for the allocation of lines between desk members. He is responsible for ensuring that the desk is adequately manned at all times, and so will normally deal with absences from work including holidays. He will be involved in discussions with the management about bonuses. He may have responsibility for the distribution of a discretionary additional bonus pool. He will often deal with minor disciplinary matters himself without the intervention of more senior management. The budget for

the desk will be discussed with him. A good desk head is looked up to by his desk, and he has their loyalty. In return they expect him to look after their interests. The desk head is a crucial figure.

16. The number of successful experienced brokers of a product is limited. They cannot easily be replaced. There are only eight inter-dealer broker companies which are members of the Wholesale Market Brokers Association, including Tullett and BGC. The companies therefore seek to protect themselves from having their successful brokers recruited by a rival. They primarily seek to do so by means of contracts of employment lasting initially for two years or more, after which period the employee may give 6 or 12 months' notice of termination, thus making a contract with a minimum term of, perhaps, three years, and that is followed by post termination restrictions or covenants which will prevent the employee working for a rival for a further period, typically 6 months. So, if an employee has just entered such a contract with a two year term, the contract may have the effect that he cannot work for a rival for 3 years and 6 months. The contract may also provide that he must inform his employer if he receives an approach from a rival or if he becomes aware that a fellow employee has done so. That gives the employer the opportunity of offering the employee a better deal and seeing off the rival. This may include a substantial sum by way of a 're-signing payment'. Contracts commonly contain a 'garden leave' provision, entitling the employer to require the employee to remain at home. This can be used to take an employee who has given notice out of the market with the advantages to his employer that his receipt of confidential information will cease, his connections cannot use him and so may be weakened, and that the employee will lose his feel for the market in the short term. All of that will make him less of a threat when he first joins his new employer. If a broker was not subjected to such restrictions, he could move from one employer to another with the strong likelihood of taking his connections with him.

17. The recruitment of a whole desk, or of the more successful brokers on a desk, by a rival would be a considerable blow for the employer. A step that may be taken towards preventing that is to stagger the contracts of the desk members so that they become free at different times. So, if they work out their contracts, they will arrive at the new employer on different dates and will be unable to transfer the desk's business with them at a stroke.

18. The device used to recruit employees who have long term contracts with their existing employers is called a 'forward contract'. The employee will sign a contract with the recruiting company by which he undertakes to commence employment with the recruiting company as soon as he is free to do so. The contract is likely to provide a substantial signing payment, which will usually be payable when the new employment actually commences.

19. The situation where an employee has signed a forward contract provides difficulties for both old and new employer. It is unsatisfactory for the current employer because he has a broker on a desk who will be leaving, aiming to take his connections with him, and who will be party to information that the employer would not want his rival to have. It is unsatisfactory to the new employer because he has to wait. It may well happen that, as events unfold, the employee does not have to wait until the full period has expired. An accommodation may be reached between the two employers, and the new employer will pay the current employer money. There may be a swap of employees – sometimes called 'a hostage swap'. The current employer may sideline the employee and treat him in ways which enable him to claim constructive dismissal. The employee will then accept the alleged repudiation of his contract, and treat himself as free to join the recruiting company. That may result in litigation, which will often end in a settlement. The broad concept of constructive dismissal and the role it may play in the recruitment of employees is well understood by the executives who are involved in this action.

20. Transfer to a new employer may carry a financial risk for the employee. He may receive less bonus from the existing employer, particularly if he is put on garden leave. He may have to spend a period unemployed. Brokers may ask for, or be offered, indemnities by the recruiting employer against financial loss arising from a transfer. The ambit of the indemnity varies. It is possible for it to include an indemnity against loss resulting from a claim for constructive dismissal advanced by the employee which fails. It is likely that the terms of the indemnity will entitle the recruiting employer to approve, and so in effect to direct, the employee's conduct in relation to matters which may give rise to liability under the indemnity. The indemnity is likely to cover legal costs as well as financial losses.

The course of the litigation

21. The action was commenced on 25 March 2009. An application was issued the same day for interim relief by injunction. The proceedings were served that day or the following day on the two BGC companies, on Mr Lynn and Mr Verrier, and on Mr Hall. Mr Hall was served at the offices of Tullett at 2 pm on 25 March and he was suspended from duty. That was the first step taken by Tullett.

22. The application for interim relief came before me on 1 April. Tullett had served substantial evidence. BGC had not responded to it, taking the view that it was not possible to do so adequately in the time available. No adjournment was sought. As well as deciding what interim relief was appropriate, I had to decide on the course of the action. On 2 April I delivered a judgment which gave Tullett much but not all of what they sought. I also held that it should be possible to hold a trial in July, which was what had been requested on behalf of the defendants. The estimate for the trial was 3 weeks. A case management conference was held before Simon J on 10 June, when it was ordered that the trial should commence on 6 July. It became apparent that three weeks was substantially too short a time and on 30 June an order was made that the trial date be vacated and that the trial should begin on 12 October to be

concluded by 27 November (7 weeks or 35 court days). The trial commenced on 14 October, but had to be adjourned soon after by reason of the illness of one of the leading counsel. It resumed on 4 November.

23. The representation was as follows. Mr Jeffery Onions Q.C., Mr Daniel Oudkerk and Miss Amy Rogers instructed by Rosenblatt Solicitors appeared for the claimants, Tullett Prebon PLC, Tullett Prebon Group Limited and Tullett Prebon (UK) Limited. The two BGC companies, BGC Brokers LP and BGC Brokers GP Limited, and Mr Lynn were represented by Mr Andrew Hochhauser Q.C. and Mr Jonathan Cohen instructed by McDermott Will & Emery. Mr Hochhauser stepped in to replace BGC's previous leading counsel who had been taken ill at the start of the trial. Mr Stuart Ritchie and Mr Christopher Newman instructed by Russell, Jones & Walker in the person of Mr Marshall represented Mr Verrier. Mr Selwyn Bloch Q.C. and Mr Jeremy Lewis instructed by Berwin Leighton Paisner appeared for the fifth to fourteenth defendants, namely Mr Hall and the nine other brokers who signed forward contracts with BGC and who have asserted that they have been constructively dismissed by Tullett. The defendants were represented in this way not because they were advancing conflicting cases (they were not), but because it was considered necessary, first, by reason of the different roles of the defendants and, second, because the professional obligations of those representing them required it. The three brokers who signed forward contracts with BGC but decided to remain with Tullett, called the Tullett Three, are not parties to the action, although Tullett faces a counterclaim for having induced them not to perform those contracts. The Tullett Three are advised by Edwards Angell Palmer & Dodge. Edwards Angell attended most of the trial.

24. It became apparent early on that close control of the time the trial might take was required. A tight timetable was agreed between counsel which provided for the conclusion of Tullett's evidence by 27 November, and for the defendants' evidence to be concluded by 18 December. The first was achieved. The defence witnesses began on 30 November but progress was interrupted by the need for a further disclosure exercise to be conducted by the defendants. The outcome was the prolonging of the cross-examination of Mr Verrier, and the need to recall Mr Lynn. Further disclosure by Tullett also required the recall of Mr Potter. The result was that the evidence was not concluded until 15 January. Written submissions totalling 922 pages were delivered on 26 January. Oral submissions occupied the week commencing 1 February. By the delivery of this judgment the employees will have been not working pending the resolution of their position for a little under 12 months.

25. The court sat on a total of 45 days. Nine counsel appeared, instructed by four firms of solicitors. It may be thought that a dispute involving the employment of 13 individuals which required a speedy resolution, should have been determined more quickly and at less expense. I would certainly have liked to achieve that, and it was my object in directing a trial in July. On the other hand the trial involved numerous issues, some of complexity, and detailed examination of the evidence in some areas was essential. To meet the timetable compression was necessary, and corners were

properly cut. The timetable placed a great burden on counsel, which was willingly accepted. The separate representation of defendants must have added to the time taken, but I avoided overlap wherever possible. If the issues were to be properly investigated in accordance with the standards of English litigation, I do not think that it could have been done in an appreciably shorter time. I was told that the raid by BGC on Tullett in New York has resulted in arbitration proceedings between the companies. They are progressing. No injunctions have been sought by Tullett because, I was told, it is not the practice in New York to grant injunctions in such situations: the parties are left to financial remedies. So there is there less pressure of time.

26. The main undertakings which have been in effect since the order of 2 April 2009 are as follows.

(a) Tullett undertook to treat the employee defendants as if they were on garden leave and to pay them their contractual entitlements. That has meant they have received their salaries but no bonus. They may not be required to perform any work. (The employees will look to BGC to reimburse them under the indemnities provided by BGC.)

(b) BGC, Mr Lynn and Mr Verrier undertook not to encourage any employee of Tullett to cease working for Tullett prior to the expiry of the minimum term of the employee's contract and period of notice; not to encourage any employee of Tullett to terminate his contract with Tullett, or to cease working for Tullett, nor to enter any forward contract with a Tullett employee; not to approach any Tullett employee to negotiate a forward contract; not to encourage any Tullett employee who had entered a contract with BGC to breach his employment contract with Tullett; and not to permit any defendant employee to do any work for BGC.

(c) Mr Hall undertook not to work for BGC; not to encourage any Tullett employee to breach his contract with Tullett; and not to do any work for a business competitive with Tullett.

(d) The sixth to fourteenth defendants (the other employee defendants) undertook not to do work for BGC or any other competitor of Tullett.

These undertakings were anticipated to be in effect until approximately the end of July 2009, that is for 4 months. As it has turned out they have been in effect for the best part of 12 months. During this time the defendant employees have been on garden leave, not working and out of the market.

27. In accordance with my order of 2 April 2009 the trial is limited to issues of liability and injunctive relief. All claims for damages must await a further hearing if they cannot be resolved by agreement.

<u>The defendant employees' contracts and those of the Tullett Three</u>

28. I will next summarise the terms as to length of employment and remuneration in the contracts with Tullett and BGC of the brokers who signed forward contracts with BGC including the Tullett Three.

The Forward Cable Desk

29. There were seven members of the desk including the desk head, Mr Hall. All signed forward contracts with BGC. Three, Mr Comer, Mr di Palma and Mr Stevenson decided to remain with Tullett and not to perform those contracts – the Tullett Three. They entered further contracts with Tullett.

30. Mr Hall. Prior to 23 June 2008 Mr Hall was employed by Tullett under a contract dated 12 May 2006. His job title was desk manager for the forward cable desk. His basic salary was £150,000 with a discretionary performance and loyalty bonus. 25% of the bonus was attributed to past performance and 75% was in respect of his continued loyalty. A schedule of standard terms was attached, which included provisions as to Mr Hall's duties and further provisions as to bonus. By a contract in the form of a letter dated 23 June 2008 addressed by Tullett to Mr Hall and countersigned by him, the 2006 contact was extended for a minimum of 36 months from 1 July 2008 until terminated by notice of 12 months by either party not to be given before the end of the minimum term, 30 June 2011. That would be followed by 6 months of post termination restrictions as set out in the standard terms. So the earliest Mr Hall could work for another inter-dealer broker in accordance with these provisions was 1 January 2013. The letter provided that Mr Hall should receive a retention payment of £500,000 at the end of July 2008. This was stated to be repayable immediately if during the 36 month period his employment was terminated or if notice to terminate was given. A separate letter increased Mr Hall's salary to £200,000.

31. Mr Hall's forward contract with BGC is dated 5 February 2009, but was signed by him on 30 January. It provided that his employment under it should commence as soon as he was free to do so but no later than 31 January 2013. As with all the BGC forward contracts in the case the employment was initially for 5 years and then might be terminated by notice of three months given in the last 2 weeks of the 5 year period or any subsequent year. If Mr Hall worked out his contract with Tullett, his employment with BGC under this contract would take him up to 2018 at a minimum. Mr Hall was to be employed by BGC as the head of the forward foreign exchange desk. His salary was £200,000 guaranteed for two years. He was to have a bonus of 55% of net revenue less employment costs. For the first 2 years the bonus was guaranteed at £225,000. (That was taken because it was his bonus from Tullett for the calendar year 2008, which had been a record year.) There were separate terms and conditions. A separate agreement entitled 'loan agreement and promissory note' provided for a signing payment of £413,000, one half to be paid within 14 days, and one half following the commencement of employment. The loan was to be repaid by distributions from partnership units in BGC Holdings. Provided all went well, it was Mr Hall's to keep. This was the scheme which applied to all the brokers who entered

into forward contracts with BGC and I will not refer to it further in this review of the contracts. BGC also provided an indemnity to Mr Hall. I will deal with the history in relation to all brokers and indemnities separately.

32. Mr Sully Mr Sully's contract with Tullett is dated 23 May 2007. It provided that it might be terminated on 12 months' notice. There was no limit on when notice might be given. The basic salary was £185,000. There was also provision for bonus. There was a 25/75% provision for the attribution of bonus between past performance and loyalty as with Mr Hall. Mr Sully gave notice on 11 February 2009, which has now expired and so he is into the period covered by the 6 month period of post termination restrictions.

33. Mr Sully's forward contract with BGC dated 5 February 2009 provided for him to commence with BGC as soon as he was able to and no later than 19 months from its date. Like Mr Hall's (and all the other forward contracts) it provided for an initial period of 5 years. He will be employed as a broker on the forward cable desk. His salary, guaranteed for the first two years was £185,000 – as at Tullett. He was entitled to a guaranteed bonus of £150,000 for those two years, and then a discretionary bonus. (As with Mr Hall and all the other brokers who entered forward contracts with BGC £150,000 was taken as the guaranteed bonus because it was his bonus paid by Tullett for the calendar year 2008, a record year.) His signing on payment provided as a loan under the same arrangement as Mr Hall was £177,000, to be paid in two tranches like Mr Hall.

34. Mr Bishop was employed by Tullett under the terms of a letter dated 20 November 2006. It was for an initial minimum term of 15 months from 1 December 2006, and was terminable by 9 months' notice not to be given before the end of the minimum term, 28 February 2008. He was employed as a broker on the forward cable desk. His basic salary was £75,000 and provision was made for bonus. By letter of 18 October 2007 the employment was extended for 15 months from 1 March 2008 to continue unless terminated by notice of 9 months not to be given before 31 May 2009. By a letter dated 23 July 2008 the employment was extended for 13 months' from 1 June 2009 terminable by not less than 9 months notice not to be given before 30 June 2010. With a 6 month period of post termination restriction that gave 1 October 2011 as the date Mr Bishop would be free. Salary was increased to £90,000.

35. Mr Bishop's forward contract with BGC is dated 5 February 2009. His salary was £90,000 and the bonus guaranteed for the first two years of the five year contract was £60,000. He was to receive a signing on payment of £132,750 payable half within 14 days and half on taking up employment.

36. Mr Harkins' contract with Tullett is contained in a letter dated 17 July 2007. The employment was for a minimum of 24 months from 1 August 2007, terminable on 6 months' notice not to be given before 31 July 2009. Salary was £105,000, with provision for bonus. With a 6 month period of post termination restriction this gave 31 July 2010 as the date Mr Harkins would be free.

37. Mr Harkins' forward contract with BGC is dated 5 February 2009. The salary guaranteed for the first two years was £105,000, and the guaranteed bonus was £70,000. The signing on payment was £132,750 payable in two halves as before.

38. Mr Comer's original contract with Tullett is found in a letter of 20 November 2006. It ran for a minimum term of 15 months from 1 December 2006 thereafter terminable on 9 months' notice not to be given before 28 February 2008. Basic salary was £95,000 with provision for bonus. There were 12 month post termination restrictions. By letters of 24 July 2007 and 1 May 2008 the employment was extended, by the latter for 24 months from 1 May 2008 terminable on 9 months' notice not to be given before 30 April 2010, and basic salary was increased to £115,000. So, under those provisions, Mr Comer might have become free on 1 February 2012.

39. Mr Comer's forward contract with BGC is dated 5 February 2009. Basic salary was £115,000, and the bonus guaranteed for the first two years of five was £155,000. The signing on payment was £177,000 half payable on signing, and half on taking up employment.

40. Mr Comer's further contract with Tullett dated 7 October 2009 provided for a signing payment of £150,000 which had been paid at the end of May 2009. It covers a minimum term commencing on 1 March 2010 ending on 28 February 2013 .

41. Mr di Palma's original contract with Tullett is found in a letter dated 20 November 2007 providing for employment starting on 1 December 2006 to run for 15 months and until terminated by notice of 9 months not to be given before 28 February 2008. Basic salary was £110,000 with provision for bonus. There were post termination restrictions of 12 months. By letter of 28 February 2008 his employment was extended for 12 months from 1 March 2009. Salary was increased to £125,000. Under these provisions Mr di Palma might become free on 1 March 2012.

42. Mr di Palma's forward contract with BGC is dated 5 February 2009. Basic salary was £125,000, and the bonus guaranteed for the first two years of five was £275,000. The signing on payment was £191,750, half payable on signing and half on taking up employment.

43. Mr di Palma's further contract with Tullett is dated 19 May 2009. The minimum term runs from 1 March 2010 to 28 February 2013. It provides for a signing payment of £175,000 payable at the end of May 2009. By letter of the same date his salary was increased to £150,000 from 1 June 2009.

44. Mr Stevenson's original contract with Tullett is found in a letter dated 2 April 2004 with a minimum term of 30 months terminable by 6 months' notice not to be given before the expiry of that period. Basic salary was £85,000 with provision for bonus. The period of post termination restrictions was 3 months. A new contract was entered into by letter of 20 November 2006 to commence on 1 December 2006 with a minimum term of 12 months terminable on notice of 9 months not to be given before 30 November 2007. Salary was £85,000 and the period of post termination restrictions was 6 months. By letter of 10 July 2008 salary was increased to £110,000 and the employment was extended for a minimum of 24 months from 1 December 2008 and thereafter terminable by notice of 9 months not to be given before 30 November 2010. Under these provisions Mr Stevenson might become free on 28 February 2012.

45. Mr Stevenson's forward contract with BGC dated 5 February 2009 had a basic salary of £110,000, and the bonus guaranteed for the first two years of five was £90,000. The signing payment was £132,750, payable half on signing and half on taking up employment.

46. The forward cable desk had all been together and with Tullett for many years, far more than my review of the contracts shows. Thus, to take the first three, Mr Hall's 'continuous employment' had begun on 3 April 1989, that of Mr Sully on 1 September 2003, and Mr Harkins on 18 November 2002. It was a long-established team.

The short term sterling OBS desk

47. There were ten members of the desk, including the desk head, Mr Bowditch. Three signed forward contracts with BGC.

48. Mr Bowditch's contract with Tullett starts with a letter dated 15 February 2005. The employment was for a minimum of 24 months from 1 March 2005 terminable on 6 months' notice not to be given before 28 February 2007. Basic salary was £250,000 with provision for bonus. The period of post termination restrictions was 3 months. By letter of 6 July 2006 this was extended by 36 months terminable by 12 months' notice not to be given before 28 February 2010. There was a signing payment of £300,000 and a guaranteed bonus of £400,000 per annum. The post termination

restriction period was increased to 6 months. So Mr Bowditch might become free on 31 August 2011. His 'continuous employment' had begun on 5 May 1998.

49. Mr Bowditch's forward contract with BGC is dated 5 February 2009. Basic salary is £400,000 guaranteed for 2 years with a signing payment of £649,000 payable within 14 days. The payment of the whole of the signing payment following signing was unique to Mr Bowditch – G 1847.

50. Mr Cohen's contract with Tullett starts with a letter dated 23 March 2005. The employment was for a minimum of 24 months from 1 March 2005 terminable thereafter on 6 months notice not to be given before 28 February 2007. Basic salary was £100,000 with provision for bonus. This was extended by letter of 6 July 2006 by 36 months from 1 March 2007 and the notice period was increased from 6 months to 12. There was a signing payment of £300,000 and a guaranteed bonus combined with salary of £350,000. Six month post termination restrictions were included in place of 3 month restrictions. So Mr Cohen might become free on 1 September 2011.

51. Mr Cohen's forward contract with BGC is dated 5 February 2009. Basic salary was £500,000 with a signing payment of £472,000 payable half on signing and half on taking up employment.

52. Mr Temple's contract with Tullett is found in a letter dated 10 May 2006. The employment ran from 1 June 2006 for a minimum of 24 months then terminable on 6 month's notice not to be given before 30 May 2008. Basic salary was £130,000 with provision for bonus. The period of post termination restriction was 6 months. By letter of 27 July 2007 it was extended for a minimum of 24 months commencing on 1 July 2008, thereafter terminable on notice of 12 months not to expire before 30 June 2010. So under these provisions Mr Temple might become free on 31 December 2010.

53. Mr Temple's forward contract with BGC dated 5 February 2009 provided for a basic salary of £175,000 and the bonus guaranteed for the first two years of five was £200,000. The signing payment was £236,000, payable in the usual two halves.

The sterling cash desk

54. There were 11 full members of the desk including the desk head, Mr Wilkes. Mr Wilkes and Mr Matthews signed forward contracts with BGC.

55. Mr Wilkes' contract with Tullett is found in a letter dated 15 March 2006. That provided a minimum term of 24 months commencing on 1 April 2006, terminable on notice of 6 months not to be given before 31 March 2008. Basic salary was £166,000 with provision for bonus. There was a post termination restriction period of 6 months. By letter of 20 May 2008 the employment was extended for a further 24 months minimum, commencing 1 June 2008, terminable on 6 months' notice not to be given before 31 May 2010. So under these provisions Mr Wilkes might be free on 1 June 2011.

56. Mr Wilkes' forward contract with Tullett dated 5 February 2009 provided a basic salary of £175,000 with a guaranteed bonus of £185,000 for the first two years of five. His signing payment was £354,000 payable in the usual two halves.

57. Mr Matthews' contract with Tullett is found in a letter dated 6 March 2006. The minimum term was 24 months commencing 1 March 2006, terminable on 6 months' notice not to be given before 28 February 2008. The post termination restriction period was 6 months. By letter of 29 February 2008 the employment was extended for a minimum of 36 months from 1 March 2008, terminable on 6 months' notice not to be given before 28 February 2011. So under these provisions Mr Matthews might be free on 1 March 2012.

58. Mr Matthews' forward contract with BGC dated 5 February 2009 provided a basic salary of £150,000 and a guaranteed bonus of £250,000 for the first two years of five. The signing payment was £354,000 payable in the usual two halves.

The US Dollar Desk

59. Mr Yexley was the head of the desk and was the sole member to sign a contract with BGC. His contract with Tullett starts with a letter dated 5 February 2007. It was for 12 months terminable on 12 months notice not to be given before 28 February 2008. He was included in the desk's flexible pay scheme, with provision for bonus. The post termination restriction period was 6 months. By letter of 8 November 2007 he was given a guarantee of salary not less than £115,000. By letter of 28 February 2008 the period was extended for 12 months terminable on 12 months' notice not to be given before 28 February 2009. By letter of 23 June 2008 it was extended again for 36 months terminable on 12 months' notice not to be given before 28 February 2012. He was also given a retention payment of £250,000. His period of 'continuous employment' had commenced on 21 April 1981.

60. Mr Yexley's forward contract with BGC is dated 16 March 2009 – though it was signed by him on 26 February. He was to be employed as the head of the dollar cash

and dollar IRS desks. His salary was £115,000 guaranteed for 2 years. His signing payment was initially £750,000 gross or £442,500 net, later reduced to £354,000 net.

61. All the BGC forward contracts provided that the employees should:

> "take all such lawful action (including resigning from your current employment) as shall be necessary to enable you to comply with your obligations under this agreement and commence your duties with the employer at the earliest possible time."

Part B – the Facts in Detail

62. In a case of this complex nature the burden of proof is effectively on the party who relies on a fact to establish it. It must be established on the balance of probabilities, that is to say it must be established that its occurrence is more probable than not. I should have in mind the dictum of Lord Nicholls in *re H* [1996] AC 563 at 586 where having stated that the civil standard was to be applied consistently in civil proceedings, he went on to say:

> "When assessing the probabilities the court will have in mind as a factor to whatever extent is appropriate in the particular case 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."

63. The purpose of this section is to set out the events which may be relevant to the parties' contentions. The story involves the simultaneous recruitment or attempted recruitment of a large number of individuals, and the documentation is limited on some aspects. The detail is important because the issue is the civil lawfulness of what was done. That requires a comprehensive narrative, which has to carry forward the events on a number of fronts. Where necessary I will set out what I deduce from particular documents. Some of the key documents are brief attendance notes or messages. Care must be taken in deciding what they show. There will be some aspects which I will need to revisit in further detail subsequently. Because the contemporary documents are spread through a number of files I will give their references where appropriate. All documents prefixed R or R2 were disclosed during the course of the trial, either in December 2009 or January 2010.

2008

(1) Mr Verrier was employed by Tullett under a contract dated 17 May 2004. He was employed as chief operating officer and was number two in the company to Mr Smith, who was and is the chief executive. Mr Verrier gave notice of his resignation on 15 April 2008. The earliest the contract could be terminated

was 31 March 2009, and then there were three months of post termination restrictions. So he was not free to join a competitor until 1 July 2009. He signed a contract with Tradition on 14 April 2008 covering his employment by Tradition from July 2009. But the terms of a loan agreement in relation to the signing payment were not agreed. Mr Verrier was being advised on his arrangements with Tradition by Mr Marshall. Tullett knew that Mr Verrier was transferring to a competitor, but did not know to whom.

(2) On 9 May 2008 Mr Verrier informed Tullett that he was moving to Tradition. On 14 May Mr Verrier and Mr Lynn had lunch. They discussed Mr Verrier moving to BGC instead of to Tradition. Mr Lynn had heard of Mr Verrier's move to Tradition and considered that BGC had missed an opportunity. If Mr Verrier moved to BGC it would help fill the space created by the move of the then co-chief executive officer, Mr Lee Amaitis, from London to Las Vegas. I am satisfied that Mr Lynn also saw that it would give BGC an opportunity to recruit from Tullett which was strong in sectors where BGC was weak.

(3) It was apparent to the senior management of Tullett that when Mr Verrier was working for a competitor he would be looking to recruit from Tullett. Mr Potter, the managing director of the treasury division of Tullett, had meetings with a number of brokers close to Mr Verrier following the resignation to sound them out. One of these was Mr James Hall, the head of the forward cable desk. Mr Hall is a close friend of Mr Verrier and is a member of a horse-owning syndicate run by him. Mr Potter had dinner with Mr Hall on 13 May 2008. Mr Potter told Mr Hall that he was considering recommending that Mr Hall be made a director. That is an executive position and would have made Mr Hall in effect the number two to Mr Potter in the treasury division. Mr Potter told Mr Hall that he did not, at that time, trust Mr Verrier. He said he did trust Mr Hall. I reject Mr Hall's evidence that Mr Potter told him that he did not trust him, Mr Hall. One reason for doing so is that Mr Potter would not have raised the question of Mr Hall being a director if he had not trusted him. I should make clear that I am also satisfied that it was Mr Potter who asked Mr Hall to dine with him, and that this occurred in the context of Mr Verrier having given notice.

(4) At about this time, or a little after, Mr Hall had also been approached by Tradition. He decided to stay with Tullett. He said in evidence that he did not discuss moving to Tradition with Mr Verrier. I cannot accept that: it is obvious that the two friends would have discussed it particularly as Mr Verrier was moving to Tradition, which Mr Hall knew. The lie is unimportant in itself, but shows a preparedness to put a distance between himself and Mr Verrier where there was none. Mr Verrier's evidence was that he did not remember Mr Hall being approached by Tradition. In my view he would have remembered.

(5) On 24 June Mr Hall had lunch with Mr Potter and Mr Duckworth. Mr Duckworth was at that time Mr Potter's direct superior and was number three in Tullett. From 1 January 2009 he moved to the number two position formerly occupied by Mr Verrier. Unlike Mr Potter, he did not give evidence. The minimum term of Mr Hall's contract had expired, and it was open to him to give 12 months' notice to leave. At the lunch Mr Hall was offered a signing

payment of £500,000 for an extension of a minimum of 36 months plus 12 months' notice. Mr Hall was very pleased with the offer. Mr Potter also told Mr Hall that he was still looking to recommend that Mr Hall be made a director. In the context of discussion of the consequences of Mr Verrier's departure Mr Hall raised the possibility that Mr Angus Wink might be promoted to Mr Duckworth's position. Mr Wink was then head of the rates division and level with Mr Potter in the company hierarchy. Mr Hall considered Mr Wink abrasive and had clearly formed a dislike of him. He was told that Mr Wink was by no means certain to get the job and that he, Mr Hall, did not really know Mr Wink. The idea that either Mr Duckworth or Mr Potter gave an assurance to Mr Hall that Mr Wink would not be promoted is far fetched. Likewise a suggestion that Mr Wink would not have any responsibilities as regards Mr Hall's desk. Neither Mr Duckworth nor Mr Potter were in a position to give such assurances. I reject Mr Hall's suggestion that such assurances were given to him.

(6) That night Mr Hall spoke to Mr Verrier about the offer and Mr Verrier recommended him to accept it. Mr Verrier so informed Mr Duckworth and Mr Potter of this by e-mail the next day – G 1618. Mr Verrier said that Tullett was the number one company for forward cable, and that Tullett was the right place for Mr Hall economically and managerially.

(7) On the next day, 25 June, Mr Hall came in to Mr Potter's office to sign the extension to his contract. He raised the position of Mr Verrier. He was anxious that Mr Verrier should not be 'crucified' for his decision to leave. Mr Potter was in no position to give any assurance. He responded that he would pass on Mr Hall's concern, but so far as he was aware Tullett simply wanted Mr Verrier to work out his contract. It was Mr Hall's oral evidence that Mr Marshall advised him on the terms of the contract. But Mr Hall cannot have had the draft extension prior to the lunch on 24 June, if even he was provided with it then. What happened is clear from his witness statement, namely that for the purposes of the approach from Tradition Mr Hall had taken advice from Mr Marshall on the terms of his Tullett contract – he never got as far as seeing a contract from Tradition, and had received advice that the effect of the post termination restrictions might be to keep him out of work for 6 months without pay. When he came to sign his new contract with Tullett, Mr Hall therefore asked Mr Potter that the relevant provisions should be taken out. Mr Potter had no authority to make a decision, and asked Mr Duckworth to come over, which he did. Mr Hall's evidence was that when told of the request Mr Duckworth answered "Yes, fine, done." As I have said, Mr Duckworth did not give evidence. Mr Potter's evidence as to Mr Duckworth's response was somewhat unclear. I refer to Day 13, pages 12 and 13, where he said on the latter page 'I believe he was relaxed on the whole issue but I do not believe he said categorically: your PTRs will be taken out.' Mr Potter said that after Mr Duckworth had left he reminded Mr Hall that he had said he was very happy at Tullett and did not wish to leave, he asked him if it was really an issue. Mr Hall said 'no' and signed the variation – which provided that subject to its contents all the terms of his contract remained unchanged. I am satisfied that if Mr Duckworth had agreed that the post termination restrictions should be taken out of the contract Mr Potter would have communicated that to Tullett's

legal department for an appropriate variation to be drawn up. As Mr Potter was well aware Tullett put considerable store on the termination provisions of their contracts. Further I do not think that Mr Hall would have signed the contract without some record of this important agreement being made. Lastly, when Mr Hall gave his contract to Mr Marshall in January 2009 so it could be considered by Mr Marshall and BGC to see, in particular, when he might become free to join BGC, he did not tell Mr Marshall that he had an agreement that the post termination restrictions did not apply. I refer to Mr Marshall's e-mail to Mr Mohammed Arif, a solicitor who was BGC's employment counsel for continental Europe and Asia-Pacific, of 20 January 2009 – R 6890.1.1. (Mr Arif's title suggests that he was not employed to deal with non-continental Europe – but he dealt with all the recruitments involved in this action.) I conclude that despite the unsatisfactory evidence on Tullett's side as to Mr Duckworth's response, no assurance was given to Mr Hall that he should not be bound by the post termination restrictions. I think that Mr Duckworth must have given a non-committal response, such as that if Mr Hall was really determined on the point, it could be considered by the legal department. That would tie in with how Mr Potter says that he concluded the matter after Mr Duckworth had left, and I accept Mr Potter's evidence.

(8) On 11 August a meeting was held at Russell Jones & Walker's offices, which was in part set up by an e-mail from Mr Arif to Mr Marshall of that day. The e-mail was only disclosed on 11 December 2009. The reason why it was disclosed so late appears to have been that Mr Arif had considered that it was covered by legal privilege when he carried out the disclosure exercise on behalf of BGC before he left BGC's employment in July 2009. This error appears to be why the majority of late disclosed documents were not disclosed by BGC until December 2009 and January 2010. That does not explain why the same or other documents which were in the possession of Mr Marshall and Russell Jones & Walker were not disclosed earlier. The subject of the e-mail was stated as 'BGC contract review meeting'. The meeting appears in Mr Lynn's diary with the same description. It was submitted for Tullett that the meeting was to conduct a general review of the BGC contract because Mr Verrier wished to agree a new form of contract to be used by him in his recruitment exercise on behalf of BGC before he agreed to join BGC, it being accepted that the BGC contract had a poor reputation in the market. It was the evidence of Mr Verrier and Mr Lynn that the meeting was to consider the terms of the documents to constitute the agreement with Mr Verrier. It was to be attended by Mr Bartlett, BGC's general counsel for Europe and Asia and Mr Lynn on BGC's side. The e-mail stated that, if Mr Verrier, referred to as 'your client' was to attend, the meeting should be at Russell, Jones & Walker, otherwise at BGC. It stated that drafts would be circulated later in the day. Tullett's submission is based on the description of the subject matter of the e-mail. I do not think that this bears the weight Tullett seek to put on it. I think the reason why it was headed in that way was that Mr Arif did not want to refer to Mr Verrier by name. He was no doubt conscious that it was important that other parties should not know of the negotiations with Mr Verrier until a contract had been signed and the move made public. Further, on 14 January 2009 Mr Arif's assistant sent Mr Marshall a draft contract for his consideration which was to be entered into by the brokers recruited by Mr

Verrier for whom Mr Marshall was acting. This has improvements on some of the clauses in Mr Verrier's contract. The exercise is inconsistent with the whole question having been resolved the previous August.

(9) On 22 August 2008 Mr Verrier signed a contract with BGC. It provided that employment under it should commence as soon as Mr Verrier was free and able to do so, but no later than 11 months from the agreement's date. It was for an initial period of 5 years terminable on 6 months' notice then or at the end of each subsequent year. He was to have a substantial salary, a bonus, and a substantial signing payment. The figures have been agreed by the parties to be confidential. Mr Verrier was also given an indemnity by BGC against any claim that might be made against him by Tullett or Tradition in respect of his accepting, commencing, or carrying out any duties in connection with employment by BGC. There was an exclusion of any prior inducing of a breach of any contract of employment of any other employee of Tullett or Tradition, save as might have been disclosed to Mr Lynn. Mr Lynn said, and I accept, that there was no such disclosure.

(10) Between 6 and 22 August Mr Verrier was on sick leave from Tullett. During this period he went to Malaysia where he was photographed at a resort with a female companion.

(11) On 21 and 22 August Ms Clare Howell, Mr Verrier's long-standing personal assistant at Tullett, removed three boxes of material from his office. It was subsequently found that the material related to Mr Verrier's private affairs, namely a property portfolio, equity investments and horse syndicates, which Ms Howell managed for him while acting as his personal assistant at Tullett.

(12) On 26 August 2008 Mr Verrier informed Mr Smith by e-mail that he was moving to BGC. Mr Smith stated in evidence that he did not trust BGC. It is plain that he regards BGC as an aggressive rival, and that he dislikes the company. The news that Mr Verrier was moving to BGC instead of Tradition must have been most unwelcome.

(13) On 27 August Tullett suspended Miss Howell and obtained a without notice order from the court for the delivery up of what she had removed together with her blackberry. On the same day she resigned from Tullett. Subsequently she was unable to locate the blackberry.

(14) On 31 August 2008 the Sunday Times published the article about Mr Verrier, to which I have already referred. It was preceded by two telephone conversations between Mr Smith and the journalist. Mr Smith gave evidence before me as to his limited part in the article and apologised for releasing some information about Mr Verrier to the journalist. It would have been Mr Verrier's case in the proceedings between Tullett and himself that the article was, or was largely, a plant by Tullett. That is denied by Tullett. It appears that one outcome of the article was the break down of Mr Verrier's marriage and his having to leave his home.

(15) On 3 September 2008 Mr Verrier informed Tullett that he considered that he had been constructively dismissed.

(16) On 12 September 2008 Tullett commenced proceedings against Mr Verrier seeking injunctions to prevent him working for BGC until 1 July 2009. By an order made by MacDuff J on 15 September 2008 directions were given for the speedy trial of the action, estimate 5 days, and Mr Verrier undertook that he would not until trial commence employment with, or carry out work for, or assist the business of, BGC. He had offered undertakings by his solicitor's letter of 3 September – O2 4721.1.

(17) On 24 September 2008 Mr Lynn had dinner with Mr Hall at a restaurant in Ongar. He got Mr Hall's number from Mr Verrier, and I find that the purpose was, as Mr Verrier knew, for Mr Lynn to build a relationship with Mr Hall so he would come to BGC. Mr Lynn knew that Mr Hall was a close friend of Mr Verrier and I am satisfied that, as he accepted with Mr Bowditch – Day 22.137, he knew that when Mr Verrier came to BGC Mr Verrier would try to recruit Mr Hall. I refer to Mr Lynn's cross-examination on Day 22.138,139. The telephone calls that were made around this dinner were investigated in the cross-examination of Mr Hall on Day 31.90 to 97. Mr Lynn's first approach to Mr Hall was on Sunday, 14 September. It is plain that, whatever else the three men had to talk about, the object of the dinner was a step in the recruitment of Mr Hall by BGC and that Mr Verrier and Mr Hall were in close communication as to that. Mr Marshall was also involved in the calls on 19 September. When instructing his wife as to his claims for expenses Mr Lynn told her that the dinner was with Mr Verrier. It is not obvious why Mr Lynn would not want to record Mr Hall's name. It is possible that it was a mistake, but unlikely: Mr Lynn would remember his first meeting with Mr Hall at a restaurant in Ongar. The concealment is in line with those carried out by Mr Verrier when he entertained other Tullett brokers, to which I will come to in paragraph (42).

(18) On an occasion which cannot be dated but was probably in late September 2008 Mr Hall asked a member of his desk, Mr Louie di Palma, one of the Tullett Three, in the street how he would feel about moving jobs. Mr di Palma responded that he was always open to offers. I accept Mr di Palma's evidence that this happened and as to approximately when.

(19) Between 10 September and 10 October 2008 there were telephone calls between Mr Lynn and Mr Bowditch. Mr Bowditch was the head of Tullett's short term sterling off balance sheet desk, which I will call simply the sterling OBS desk (although there was also a medium term sterling OBS desk). He is a close friend of Mr Verrier, and is a member of a horse-owning syndicate with him. Whereas Mr Lynn accepted that he had got Mr Hall's number from Mr Verrier, he said he could not remember how he got Mr Bowditch's number. I am satisfied that he must have got it from Mr Verrier, and I am also satisfied that he told Mr Verrier what he was doing. In his third witness statement made during the course of the trial on 24 November 2009, Mr Lynn stated that he had contacted Mr Bowditch because he hoped Mr Bowditch would reconsider an earlier decision in 2006 not to come to BGC. In evidence he said that it was a foregone conclusion that Mr Verrier would try to recruit Mr Bowditch – Day 22.137. But it is unclear from the telephone records what meaningful contact

occurred. Mr Bowditch said that he did not know it was Mr Lynn who was calling him. But he could not explain why on 17 October he had made three very brief calls to Mr Lynn. I am satisfied that Mr Bowditch knew from Mr Verrier that Mr Verrier and Mr Lynn wished to recruit him to BGC, and that he knew Mr Lynn was calling him about it. In the same witness statement Mr Lynn stated that he had likewise called Mr Lee Page, head of Tullett's euro medium term desk.

(20) On 2 October 2008 there was a meeting between Mr Lynn and Mr Verrier which included solicitors. Neither could remember what the meeting was about. It may well have been to discuss Tullett's action against Mr Verrier. It is not shown to be significant in the present case.

(21) The trial of Tullett's action against Mr Verrier was due to commence on 10 November 2008, but a settlement was reached on the Friday before. By an order made by me on 10 November by consent the action was stayed on terms. Mr Verrier undertook inter alia not to commence employment or assist the business of BGC until 2 January 2009. So Mr Verrier's possible start date with BGC was in effect brought forward by 6 months. Tullett's action against Ms Howell was settled at the same time.

(22) At some point in November or early December 2008 Mr Hall informed Mr Potter that he did not wish to become a director. Mr Potter had had two further discussions on this topic with Mr Hall after Mr Hall had signed his further contract with Tullett on 25 June. One was a few weeks after the signing when Mr Potter had told him how he was considering re-organising the treasury division, and one was probably in the first part of September when Mr Hall dropped into Mr Potter's office and had said that he was having second thoughts about being a director. The reason which Mr Hall gave Mr Potter for not wanting to be a director was the Sunday Times article about Mr Verrier and the manner in which he perceived that Mr Verrier had been treated by Tullett. Later Mr Duckworth had a meeting with Mr Hall to repeat the offer. It was left that Mr Hall could take it up at any time he liked. It is clear from Mr Hall's evidence that he knew that he was going to get an offer in early 2009 from Mr Verrier to join BGC: Day 31.48,49. It is clear that he wished to leave Tullett because of that opportunity and because of the manner in which he considered Tullett had treated Mr Verrier and other matters. He considered that he had no further duty to Tullett in the situation: Day 31.52,107,122 and 124.

(23) In December 2008 Mr Bowditch asked Mr Bradley St Pierre, a member of his desk, whether he would be interested in receiving an offer from BGC. Mr St Pierre said he would not. He had in fact signed a further contract with Tullett in September 2008. During the last quarter of 2008 Mr Bowditch had told his desk that once Mr Verrier joined BGC he expected an offer to join himself. This was freely talked about on the desk.

(24) From 1 November 2008 Ms Howell worked at BGC and kept an electronic diary for herself and Mr Verrier. She had become employed by them earlier but her actual start was delayed.

2009

[all dates hereafter in this section refer to 2009 unless otherwise stated]

(25) Mr Verrier became free to work for BGC on 2 January, but as that was a Friday he delayed his start at BGC until Monday, 5 January.

(26) Mr Verrier's job title in his contract with BGC was 'executive managing director and general manager responsible for the BGC London and European offices' and such other business as might be assigned to him. Asia was additionally assigned to him. He reported to Mr Lynn and Mr Lynn reported to Mr Howard Lutnick in New York. Thus Mr Verrier was number two in the company in London. His duties included recruitment but went much wider than recruitment. It is however apparent that a major part of his initial effort on BGC's behalf was directed towards recruitment from Tullett. He knew that BGC was weak in treasury and sterling products. There are two leading companies in those fields, Tullett and ICAP, of which Tullett is probably the leader. He intended a substantial recruiting exercise from Tullett. Tullett was the company he knew and where he had friends and familiarity. He also had considerable animosity towards Mr Smith. The exercise was in part revenge for the way he felt he had been treated by Tullett. On 29 January 2009 at a party in a Bishopsgate bar for a Tullett broker who was leaving, Mr Verrier chatted with Mr Robert Osborne. On 1 December 2008 Mr Osborne had been promoted to be managing director of Tullett's rates division in place of Mr Wink. The conversation included a remark by Mr Verrier to this effect: 'I am going to kill Tullett Prebon if it is the last thing I do.' It may seem an unlikely remark because unwise, but Mr Osborne was aware of Mr Verrier's recruiting, and Mr Verrier knew that. Bravado can sometimes result in unwise comments. On 27 or 28 January Mr Comer received a call from Mr Verrier urging him to sign the BGC contract. When Mr Comer said he was waiting for the advice of his own solicitor as BGC had a bad reputation, Mr Verrier responded in words I will not quote that Mr Comer was the one working for the bad lot, and Tullett had ruined his marriage. I also accept the evidence of Mr Tonkin, a broker on Tullett's dollar cash desk, that when Mr Tonkin turned down his offer Mr Verrier told him he was making a mistake saying 'By the time I have finished there will not be much left around there.' In an e-mail of 5 March – I 2560, Mr Verrier wrote 'I may be a little too keen on turning the tables on TP … '. These were casual remarks, and they are consistent with lawful intentions on Mr Verrier's part. Nonetheless they offer an insight into his mind.

(27) Mr Verrier originally named his recruitment exercise 'Project Go Get'. This name was dropped on 15 January 2009 because Mr Lynn thought that it might give a false impression – R 6823.1. 'Go Get' covered the whole recruiting operation as far as it had got when the name was dropped – the evidence of Mr Verrier on Day 25.148. A series of names were invented. The recruitment of the forward cable desk was Project Wire (cable – wire). The recruitment of the sterling OBS desk and the sterling cash desk was Project Phoenix. The recruitment of the dollar cash desk was Project Toscana named after the restaurant where Mr Verrier dined with Mr Yexley, the desk head. The recruitment of the euro cash and arbitrage desks was called Project Mist. The

recruitment of the forward yen desk was called Project Antique. The recruitment of the spot FX desk was called Project E9 (spot – acne – Hackney – E9). Mr Verrier did not intend in every case to recruit the whole desk or desks, but this list of projects gives an idea of the scale of the exercise. It was going to be very expensive. Each broker was to be offered a signing payment, usually payable half on signing and half on taking up employment. Salaries and bonuses were to be guaranteed for the first two years of employment at the brokers' 2008 levels at Tullett – which was generally a record year. That was a necessary part of recruiting brokers because of the difficulties there would be for them in developing business at BGC in areas where the company was weak. The brokers were also to be offered indemnities against financial loss occasioned by their leaving Tullett. The signing payments agreed by Mr Verrier with the seven members of the forward cable desk totalled £2,300,000. Mr Bowditch had a signing payment of £1.1 million. Mr Cohen and Mr Temple's totalled £1,200,000. Mr St Pierre was offered a signing payment of £1 million. Mr Verrier was successful in recruiting only thirteen brokers including the Tullett Three. Had his plans been carried out as he hoped, the numbers would have been very much higher. I have mentioned the signing payments because they are the easiest way to focus on the scale of the costs which the exercise might have involved for BGC. Before the exercise was embarked on, or at least before each project, a calculation was to be expected of what costs might be involved. It would also be expected that the approval of Mr Lutnick and Mr Lynn would be secured. But very little has been disclosed by BGC. Tullett assert that over 80 brokers were approached by Mr Verrier either directly or through their desk head. There are 96 names in a table prepared by Mr Ritchie but approximately 10 of these should be disregarded.

(28) Mr Lynn's evidence was that when Mr Verrier joined BGC he identified to him what he saw as the weaknesses and gaps in BGC's services, and instructed Mr Verrier to meet with the BGC managers concerned, and to work with them to rectify matters. He said that, until Mr Verrier had done this, it was not clear to him on which areas Mr Verrier would focus. I cannot accept this evidence. Mr Lynn knew quite well where BGC's gaps and weaknesses were, as did Mr Verrier. Each knew where recruitment was needed. Mr Lynn stated that early in January he discussed with Mr Verrier parameters within which Mr Verrier would be free to recruit. According to Mr Lynn's evidence these were briefly expressed, namely that Mr Verrier could offer salary and bonus of up to 55 per cent of revenue plus a signing payment of between 5 and 15 per cent of the revenue over 5 years: Day 23.11. But Mr Verrier's witness statement makes clear in paragraph 85 that the 5 year term, the split of the signing payment, the guarantee of 2 years earnings, and an indemnity were also agreed. I am satisfied that when Mr Verrier arrived on 5 January he had already formulated a plan as to which Tullett desks he would seek to recruit, and in general terms at least it was known to Mr Lynn. Mr Verrier could not otherwise have moved as swiftly as he did. The recruitment must have been discussed between them in 2008.

(29) On 6 January Ms Howell made contact on behalf of Mr Verrier to eight Tullett desk heads, namely, in order, Mr Mirza – one forward euro desk, Mr Yexley – dollar cash desk, Mr Badini – the other forward euro desk, Mr Hine – co-head

on the forward yen desk, Mr Wilkes – sterling cash desk, Mr Pullen - arbitrage, Mr Hope co-head on the forward yen desk, and Mr Page euro medium term desk in the rates division. This was the start. Tullett allege that in all Mr Verrier approached 24 desk heads.

(30) On 5 January Ms Howell telephoned Mr Marshall. Mr Verrier said he could not remember why she might have done so. It may have been unconnected with the raid on Tullett, but there is a very real possibility that it was to confirm that Mr Verrier had started at BGC and would be approaching Tullett employees and recommending Mr Marshall to them. I am satisfied that Mr Marshall must have known that Mr Verrier was going to recommend him to Tullett employees to advise them, and that he had agreed to do so. I will return to the question of what further conclusions should be drawn as to Mr Marshall's knowledge.

(31) On 29 December 2008 Mr Verrier had instructed Ms Howell that he wanted to have dinner with Mr Bowditch, head of Tullett's sterling OBS desk, on Thursday, 8 January. In a witness statement Mr Verrier stated that he had intended the meeting to be a social one. That was untrue. It was plainly part of the recruitment exercise. Before Christmas Mr Bowditch had had a meeting with Mr Page, head of the euro medium term desk, rates division and Mr Brown, head of the medium end sterling desk, rates division. They had told him not to make any rash decisions if Mr Verrier approached him. It may be that Mr Bowditch had a first meeting with Mr Verrier over lunch on 5 January, and there is some support in the telephone records for that. But it was Mr Verrier's first day at BGC, and the dinner had already been arranged. On 5 January Mr St Pierre, a broker on the desk, sent Mr Bowditch a text message 'Can I upgrade the asti spumante for my 40th.' This was sent on the basis that Mr Bowditch was off the desk and thought to be having a meeting with Mr Verrier. The message shows the atmosphere.

(32) On 5 January Mr Pelham Temple, a broker on the sterling OBS desk, forwarded a number of e-mails to his home computer. Tullett allege that on this and subsequent occasions when Mr Temple forwarded other material he was anticipating a swift move to BGC. Mr Temple's conduct is consistent with that but there is other more persuasive evidence. I will return to the issue of the screen print forwarded by Mr Temple on 9 March 2009 in paragraph (96).

(33) Mr Bowditch said that at the dinner with Mr Verrier on 8 January Mr Verrier told him of his plans but mentioned no money, and said he would come back with a firm offer for him and the other brokers on the desk in a week or so. In his witness statement Mr Verrier said that he concluded from the conversation that Mr Bowditch was unhappy at Tullett and might be willing to listen to an offer. He said that subsequently, on a date he could not remember, he made an offer of £1.1 million to Mr Bowditch and said that he would be making approaches to the other members of his desk. Mr Verrier had to correct this because he accepted that at the dinner he had obtained a figure for the desk's revenue from Mr Bowditch. Following the dinner there was telephone contact between Mr Bowditch and other desk members. The next day Mr St Pierre

sent Mr Bowditch a text message, saying 'I've messed up big time it seems. I will bell you at w/e.' The context in which this was sent was that Mr Bowditch had been suggesting to Mr St Pierre that Mr Verrier would offer him a signing payment of £750,000. The figure was then raised to £1 million. 'Messing up' referred to Mr St Pierre having signed a further contract with Tullett. Mr Bowditch replied with a text which read 'OK mate. TV will call you later and so will I. May be all is not lost. Upfront dosh could be a tad more. Working hard to set us all up.'; see I 2712.44 and .45. Mr Bowditch tried to explain this text at Day 38.132 – 134. But its meaning is plain. He was negotiating with Mr Verrier to arrange a deal which would carry his desk to BGC, and figures were under discussion. That is not to say that Mr Verrier was not dealing direct with the desk members as well. But it shows where Mr Bowditch stood, namely that he was working to negotiate terms for the whole desk, and thereby assisting the move. In cross-examination Mr Verrier admitted that Mr Bowditch had given him figures for the desk's revenue. Mr Bowditch continued to try to persuade Mr St Pierre to move by tempting him with scribbled figures for a signing payment. When Mr St Pierre had received an offer from Mr Verrier, Mr Bowditch called Mr St Pierre to ask what he thought. So Mr Bowditch knew that the offer was coming.

(34) Following his dinner with Mr Verrier Mr Bowditch went to see Mr Osborne and told him that he had seen Mr Verrier and would tell him when he knew any more. That was not an honest report. Mr Verrier was trying to recruit the desk, and figures were being considered.

(35) Mr Brooks is a broker on the desk. His evidence was that the initial offer to him came from Mr Bowditch, and when he said that he was not interested at those figures Mr Bowditch sent him a text message with an increased offer. Then Mr Verrier spoke to him. I accept that evidence.

(36) Mr McBride's unchallenged evidence was that when he told Mr Bowditch he did not want to be included in any plans for a move to BGC, Mr Bowditch said that he was disappointed.

(37) It was Mr Bowditch's evidence that it was on Wednesday 14 or Thursday 15 January that Mr Verrier came to his house and made him a detailed offer. Mr Verrier offered him a signing payment of £1 million. Mr Bowditch succeeded in getting this increased to £1.1 million. It was not to be paid in two halves but was all to be paid following signing. It may well be that this was the occasion that Mr Verrier and Mr Bowditch reached an agreement. But it was not the first time figures had been discussed.

(38) The telephone records for 14 January – Q2 5834, show that following a call from Mr Verrier to Mr Bowditch Mr Bowditch put Mr Temple in touch with Mr Marshall

(39) Mr St Pierre reported the offer he had received to Mr Page, probably at the beginning of the week commencing 12 January. On Saturday 10 January Mr McBride, another broker on the sterling OBS desk told Mr Brown, Tullett's director of the sterling area that Mr Verrier was making offers. The result was

that on Tuesday, 13 January, meetings were held individually with all of the sterling OBS brokers save the desk junior. The meetings were headed by Mr Wink and Mr Osborne. Mr Brown, Mr Page and Mr Simon Clark, the head of Tullett's legal department also attended. So from the brokers' view it was a formidable team. Mr McBride was thanked for his loyalty and signed a new contract with Tullett at the meeting with a signing payment of £150,000. Mr St Pierre signed a new contract with signing payments of £150,000 payable at the end of the year and £200,000 payable by the end of April 2009. Mr Terry was the first of the brokers as to whose loyalty Tullett were uncertain. Mr Terry told the meeting that he had received an offer from Mr Verrier and outlined it. He, like those who followed, was given a 'presentation' by Mr Wink which extolled the commercial success of Tullett. He was told that the BGC bonus pool might not be all that it seemed; he was told to take independent legal advice; he was warned as to the indemnity offered by BGC. The outcome was that Mr Terry signed a new contract the following day with a signing payment of £150,000. The meeting with Mr Dixon followed broadly the same lines, and he too signed a new contract the next day with a signing payment of £400,000 to be paid in 3 tranches. Likewise with Mr O'Meara although he did not sign his new contract with a signing payment of £50,000 until 22 January. That was also the day that Mr Brooks, who followed Mr O'Meara, signed. His signing payment was £150,000 payable in two tranches. Mr Kevin Cohen was seen next. He was the first of the three who had meetings that day who were later to sign contracts with BGC. Mr Cohen had been with Prebon prior to the merger with Tullett, as had Mr Bowditch and Mr Temple. The others had been with Tullett. The presentation was made to him. Mr Wink told Mr Cohen that, if a broker left, Tullett would enforce the terms of his contract against him. He was asked to give Tullett an opportunity to make a counter-offer before he signed with BGC. Mr Cohen said he would. No counter-offer was made before Mr Cohen signed on 26 January. Mr Pelham Temple was next. Mr Temple wanted to leave Tullett. Mr Temple was given a presentation which was similar to that given to Mr Terry, though it probably concentrated more on the figures, Mr Temple having a reputation as a figures man. Mr Temple also has a reputation for standing up for himself verbally. Mr Temple said in his witness statement 'Although they rubbished BGC and told me I should stay with them, they didn't make a big song and dance about it. I think they knew it was pointless to try to influence my decision.' Mr Temple was not offered a new contract. However, he knew that, if he decided to stay at Tullett, he could have negotiated one. He knew because that is the way it works. Mr Bowditch was last. He said that he had had an offer from Mr Verrier but had not yet decided whether to accept. Mr Osborne played a greater part in this meeting and emphasised to Mr Bowditch his contractual obligations to Tullett. It was made clear to Mr Bowditch that, if need be, Tullett would sue him. Mr Bowditch refers to that as a threat. It was, but it was the reality. In his witness statement Mr Bowditch referred to the meeting as 'a bit of a grilling' and said that he was very annoyed at the way he was being treated. He said that he decided then and there that he would serve out his time with Tullett but would not sign a further contract, and said so. I am sure that the stance taken by the Tullett management at the meeting was a firm one, but there was nothing objectionable about it. I will say here that I was impressed by the independence and strength of character of the brokers who gave evidence – on

both sides. During the trial much use was made of the expression 'a shrinking violet'. The brokers are not shrinking violets. I do not accept that Mr Bowditch decided at the meeting that he would go to BGC because of the way he had been treated at the meeting. He had made up his mind well before the meeting, perhaps long before. The outcome thus was that Mr Verrier succeeded in recruiting three of the nine senior brokers on the desk as part of Project Phoenix.

(40) Because of the overlap in trades between the two desks Mr Verrier also treated the sterling cash desk in Tullett's non-banking division as part of Phoenix. The non-banking division is headed by Mr Alan Mead. The head of the desk was Mr James Wilkes. Mr Verrier sought to recruit him and Mr Gavin Matthews. (I mention here that he also had dinner on 10 March 2009 with Mr Nigel Dawes, a broker on the desk, but decided not to pursue the approach because of Mr Dawes' uncertainty about moving.) At the start of Mr Wilkes' career in 1987 Mr Verrier was his desk head. They became close friends. Mr Wilkes was on one of Mr Verrier's horse-owning syndicates. Mr Matthews and Mr Wilkes live close to each other and are friends. Soon after Mr Verrier announced his resignation from Tullett, Mr Wilkes was asked by Mr Mead to ensure that the key members of his team were signed up and he helped Mr Mead to achieve that. On Mr Mead's assurance that Mr Mead was staying put at Tullett and was not retiring, Mr Wilkes too signed an extension to his contract. Mr Verrier approached Mr Wilkes by telephone soon after he had started at BGC, probably on 6 or 7 January, and then met him for a drink. Mr Verrier suggested that Mr Wilkes should move to BGC and join the OBS desk. They next had dinner in the week of 12 January when Mr Verrier made an offer to him. He also told him that he would be approaching Mr Matthews, and Mr Wilkes passed that on when he called on Mr Matthews at home on Saturday 10 January. During the next week, on 15 January, Mr Matthews met with Mr Verrier for a drink and Mr Verrier made him an offer. Soon after, Mr Matthews was approached by Mr Page and Mr Osborne. They said that if he stayed at Tullett they would make him an offer, and suggested that he might become head of the OBS desk – which was Mr Bowditch's position. Under his contract with Tullett Mr Bowditch might not become free until 1 September 2011. But Mr Matthews was to decide to move to BGC.

(41) On 19 January a problem arose within BGC as to the draft documentation for the Phoenix brokers - G 1853.1. It provided that partnership units, part of the arrangements relating to the sign-on payments, should be issued to the brokers which would enable the repayment of the loans which their signing payments were expressed to be. The loan agreement provided in clause 2(a) that the loan should be repayable if the brokers did not receive any partnership units within 120 days. They would only receive the units on actually joining BGC. So unless they left Tullett early that was a problem. BGC's American lawyers wanted the 120 days left in, 'with an understanding that the parties will re-visit this timetable, if necessary.' The 'if necessary' indicates that it is thought that it is likely not to be necessary. Mr Verrier e-mailed to Mr Lynn 'Hi Shaun not sure the guys will go for this'. Mr Lynn's reply on 20 January was 'I don't see why they would care' – G 1867. The explanation for this otherwise surprising response must be it was known that the brokers would soon be leaving Tullett

and coming to BGC with a BGC indemnity – so why, indeed, should they care about the 120 days? The outcome was, however, that the 120 day provision was removed.

(42) The recruitment of the forward cable desk – Project Wire, overlapped with that of the sterling OBS desk and of Mr Wilkes and Mr Matthews – Project Phoenix. On the night after his dinner with Mr Bowditch, that is on Friday, 9 January 2009, Mr Verrier had dinner with Mr Hall in Hornchurch. This dinner was not referred to in their witness statements and emerged only through the late disclosure of expenses claims after Mr Hall had given evidence. Mr Verrier's diary entry was simply '18.00 – 22.00 keep free'. The entry for the evening before, Mr Bowditch, was 'private dinner'. The names of those whom Mr Verrier was entertaining for the purpose of recruitment were never given. Further the names were written onto restaurant bills and then obscured. This is somewhat 'cloak and dagger', but I do not think that in the end it assists me as to whether Mr Verrier's conduct towards Tullett was unlawful. But the concealment by Mr Verrier and Mr Hall of the dinner itself is more significant. For it was the occasion when Mr Verrier was able to put into motion his plan to recruit the forward cable desk assisted by Mr Hall. Mr Hall was by this stage a disaffected employee of Tullett. Mr Verrier wanted Mr Hall to be head of forwards, cash and arbitrage at BGC. The evidence of the two men was that they met over the weekend 10/11 January. In his evidence Mr Hall accepted giving Mr Verrier figures as to salaries and bonuses. He accepted that he had assisted Mr Verrier with the information which went into a schedule listing the seven forward cable brokers, created on 16 January – G 1808: Day 31.51. Mr Verrier also accepted Mr Hall's role. The schedule was updated and corrected on 20 January. It does not refer to the different termination dates of the brokers' contracts with Tullett, but does have a column headed 'Projected revenue once all started'. Mr Verrier accepted that he told Mr Hall what he was proposing to offer members of his desk – Day 25.19. In an affidavit sworn on 7 April 2009 Mr Verrier had stated that Mr Hall had not provided him with any confidential information after 1 January 2009. That was not so.

(43) It was submitted for Tullett that the schedule G 1808 and the up-dated version of 20 January at G 1882 showed that Mr Verrier was assuming that all the brokers would start together. They certainly do not refer to different starting dates, and they are consistent with the brokers starting together. But neither do they establish that this was Mr Verrier's assumption.

(44) Of the other members of the forward cable desk, I will take first the recruitment of the Tullett Three. Mr Stevenson was asked by Mr Hall on about 12 January whether he would be interested in moving to another company. He said he might be if the money was right. There can be no doubt that at this time Mr Stevenson knew that Mr Hall was referring to Mr Verrier and BGC. Later that day Mr Hall came to see him and discussed the package he might have if he moved. Mr Stevenson was challenged about that but I accept his evidence. Mr Hall also told him that, if he discussed the offer, he, Mr Hall, would deny knowledge of it. Mr Stevenson said that it was on a later occasion that he was told the company was BGC. I find that surprising, but in any event

Mr Stevenson must have guessed which it was. It became plain to Mr Stevenson over the next few days that the others on the desk had had offers from Mr Hall. On Saturday 17 January Mr Hall telephoned Mr Stevenson at home and asked him what he thought. Mr Stevenson said that he thought the offer a good one, and that if the others went he would have to go too. Mr Hall told him to contact Mr Marshall and that he should say that it was 'in relation to what Mr Verrier is sorting out.' Mr Stevenson telephoned Mr Marshall the next week and had a brief conversation. Although Mr Stevenson has waived privilege no attendance note by Mr Marshall has been disclosed. On Friday 23 January Mr Marshall e-mailed a draft contract to Mr Stevenson. It was put to Mr Stevenson on behalf of Mr Verrier that Verrier had by then spoken to Mr Stevenson, but no occasion was identified : Day 20.151. I find that Mr Stevenson had not spoken to Mr Verrier about his recruitment at this point.

(45) During the week of 19 January Mr Comer received on his mobile a text message from Mr Verrier asking to meet him for coffee. Mr Comer suggested in evidence that Mr Hall must have given Mr Verrier his number. Mr Hall said Mr Verrier already had the number. As Mr Comer had been in the habit of making bets with Mr Verrier on football, it is very likely that Mr Verrier did have the number. I here compare paragraphs 9 and 11 of Mr Comer's second witness statement. Over coffee Mr Verrier made his offer to Mr Comer, and Mr Comer expressed interest.

(46) Mr di Palma's evidence was that on a date in mid January Mr Hall caught up with him in the street after leaving Tullett for the day and said the move that he had previously mentioned was back on. He told Mr di Palma that he would get a signing fee of £350,000 and a guarantee of earnings for two years. I found the idea of this meeting in the street somewhat unlikely until I appreciated that it was not suggested that Mr Verrier had communicated with Mr di Palma on any particular occasion to make him an offer. I refer to Mr Verrier's first witness statement at paragraphs 174 to 182 and to the cross-examination of Mr di Palma on Day 19.128 and 159,160. So I accept Mr di Palma's evidence.

(47) Mr Sully had known Mr Verrier since 2001 and had come to regard him as a close personal friend. He was on a rolling contract with Tullett and in September 2008 had been refused a fixed contract. He wanted to leave Tullett and to work under Mr Verrier. His evidence was that he met Mr Verrier for lunch on 22 January, when Mr Verrier had made him an offer. Apart from setting up the lunch he said that this was his first contact with Mr Verrier relating to his recruitment. He was challenged about that and was referred to the fact that on 20 January Mr Arif's assistant sent to Mr Marshall draft contractual documentation for all the forward cable brokers, save Mr Hall whose documentation had already been sent. Calls are recorded from Mr Sully to Mr Marshall on 23 January just after two o'clock. But by 11.07 that morning Mr Marshall already had a copy of Mr Sully's contract with Tullett: see his e-mail to Mr Verrier telling him the relevant terms – G2 2069.2. For the reason I give in paragraph (57) I accept that no offer was made to Mr Sully until the lunch on 22 January. His name was included in the schedule and a draft contract prepared in anticipation of his being recruited. He must have

delivered his contract with Tullett to Mr Marshall that day or the next morning. In his e-mail timed at 11.07 Mr Marshall said that he did not have authority to release the contract. That is consistent with Mr Sully having dropped it in without seeing Mr Marshall. Having had the opportunity to observe Mr Sully both in the witness box and over numerous days at the back of the court it does not seem unlikely that Mr Hall would leave him alone and that Mr Verrier would take his time.

(48) The evidence of Mr Harkins was that he was telephoned by Mr Hall on Saturday, 17 January, a call which the records show to have lasted 12 ½ minutes, and Mr Hall talked to him about various matters but asked him if Mr Verrier had been in touch: he said no, and Mr Hall said it was likely he would get a call because Mr Verrier was looking to get some of them to BGC. He said Mr Verrier rang him on the Monday and asked if they could meet for a quick coffee: they met soon after 5 pm at Jamie's Bar. Mr Verrier told him that he wanted the whole team to move and asked if he was interested. Mr Harkins said he was, but it depended on the others. Mr Verrier then made an offer to him. Tullett's case was that Mr Harkins did not meet with Mr Verrier but received an offer through Mr Hall during the conversation on 17 January. Mr Verrier's diary suggests that he was not in the City on Monday, 19 January. Mr Verrier's witness statements and oral evidence made no reference to any meeting with Mr Harkins. I conclude that in his evidence Mr Harkins was trying to shield Mr Hall and that he received his offer from Mr Hall and not Mr Verrier.

(49) Mr Bishop's evidence was that during the morning of Saturday, 17 January, Mr Hall came to his house to discuss various matters and that as an aside Mr Hall mentioned that he had been approached by Mr Verrier and Mr Bishop would be approached shortly. He said Mr Hall gave him Mr Marshall's number and he telephoned Mr Marshall to introduce himself. He said he was telephoned by Mr Verrier on 19 January, and that Mr Verrier made him an offer. Tullett's case was that the offer was made by Mr Hall on 17 January. On 17 January Mr Hall sent a text to Mr Bishop at 10.19 and again at 11.45 having called him at 11.42. Mr Bishop sent a text back also at 11.45. Mr Hall sent a further text at 12.22. At 12.24 Mr Bishop called Mr Marshall. The length of the call is redacted on the ground of privilege, but Mr Bishop thought that it was very short and that he may just have left a message. On Sunday 18 January Mr Marshall e-mailed Mr Verrier at 12.32, saying that he had just spoken to Mr Bishop, who had told him that his contract ran to March 2011. There is no record of the call in the case telephone records. That may be because it involved Mr Bishop's land line. Mr Hall had known Mr Bishop since he was 8 years old. Mr Bishop started broking at 17. Mr Hall had helped him get the job and he has mostly worked with Mr Hall. I think it most unlikely that Mr Bishop would have had communications with Mr Marshall before an offer had been made to him. I conclude that Mr Hall was seen as the right person to approach Mr Bishop and to make an offer to him, the converse of the situation with Mr Sully.

(50) It had been suggested to all the brokers who had been approached on the sterling OBS and sterling cash desks that they should be advised by Mr

Marshall. BGC were to pay. It is inconceivable that Mr Verrier would have done this without asking Mr Marshall if he would be prepared to advise the brokers. That would involve him telling Mr Marshall at least something of the circumstances in which he was to act. Mr Verrier said he had not discussed the prospect with Mr Marshall. That cannot be true.

(51) On 14 January Mr Verrier telephoned Mr Marshall. This appears to have been the occasion on which Mr Marshall was instructed by Mr Verrier as to what he would be required to do for specific clients. Mr Marshall made a rough one page attendance note in manuscript – G 1768.1. He headed it 'Project Go Get'. The note refers to a standard contract which Mr Arif had produced, which Mr Marshall was to review and then to speak to Mr Verrier and Mr Arif. He was to provide an estimate of cost to Mr Arif, and he appears to have written '£5K + vat approx'. The fee is clarified by e-mails the same day – R 6821. It was to be £5,000 plus vat for negotiating and reviewing 7 sets of documents. The draft contract containing tracked alterations was sent to Mr Marshall that evening. It has overlaps with the contract Mr Verrier had entered into with BGC, and differences. There are tracked changes in passages which overlap. On 15 January Mr Marshall e-mailed Mr Arif that the draft contract represented 'a fair starting point, subject of course to my clients' views' – G 1771. He had been informed that morning – R6823.2, that Mr Lynn had changed the name of Go Get to Phoenix, and his e-mail was headed Phoenix. So his potential clients at this point were the Phoenix recruits. Mr Lynn was asked about his knowledge of the involvement of Mr Marshall. It is plain that he knew that Mr Marshall had been instructed though exactly when he knew that he was to be instructed is uncertain. Mr Lynn said that he was surprised at the choice because Mr Marshall was Mr Verrier's lawyer – Day 23.57. Mr Lynn was involved in finalising the standard contract – called the template contract, for the brokers – Day 23.103. On 16 January Mr Marshall opened client account forms for Mr Bowditch, Mr Cohen, Mr Brooks, Mr Temple, Mr Terry, Mr Wilkes and Mr O'Meara.

(52) The broker defendants, the fifth to fourteenth, are now represented by Berwin Leighton Paisner, 'BLP'. By letter of 9 December 2009 – P3.5196.276, BLP stated that the firm had been instructed by the defendant brokers save Mr Temple on 26 March 2006, and by Mr Temple on 30 March. By letter of 14 December – P3.5196.291, BLP stated that the firm had been instructed on behalf of BGC 'on 29 January 2009 by Mohammed Arif of BGC following some preliminary discussions on 13-14 January for which no charge was made.' So BLP's involvement in whatever capacity commenced in mid January.

(53) E-mails to Mr Lynn from Mr Arif's assistant on 16 January – G 1797, G 1801.001, G 1802, show that Mr Lynn was taking an interest in the drafting of the contractual documents, which was proceeding between Mr Marshall and Mr Arif at this time.

(54) On Friday, 16 January, Mr Marshall made one of his rough manuscript attendance notes – G 1801.5. It shows that Mr Bowditch asked Mr Marshall if he could see two members of his desk (unidentified) at lunch that day. It

shows that Mr Verrier wanted to get Mr Bowditch's desk signed up with BGC as soon as possible. Mr Marshall listed the work he had to do. At 6.50 pm that day Mr Arif left a message for Mr Marshall. Part was 'Can you please e-mail or send by courier all the [Tullett contracts of employment] to mine or [my assistant's] home addresses so we can forward to [Shaun Lynn] and formulate our strategy over the weekend.' – R 6823.22. The contracts had also been asked for earlier that day at 12.42 – G 1797. In cross-examination Mr Lynn suggested that Mr Arif was simply using his name to encourage Mr Marshall to provide the contracts quickly – Day 37.85. I think that is a far-fetched suggestion. I conclude that Mr Lynn wished to see the contracts over the weekend so he could consider BGC's 'strategy'. I am satisfied that among other possible matters he would have been particularly interested in the termination dates so he could consider how BGC were placed in getting the brokers to start at BGC. As is obvious, it would be to the considerable benefit of BGC, not least financial, if the desk moved as one rather than coming one by one as each became free. BGC have always accepted that, and accept that it was their object to achieve that aim. The issue is whether they used unlawful means to that end. Mr Lynn's false explanation for Mr Arif's message does not assist BGC. Mr Verrier said that he was probably aware of the request – Day 38.5. In fact Mr Marshall had not got the contracts and so could not send them.

(55) On Sunday, 18 January Mr Verrier asked Mr Marshall by e-mail if he had heard from the Phoenix brokers that day – R 6857. On Monday, 19 January, BGC sent to Mr Marshall the individual contractual documentation for the Phoenix brokers. The brokers were to see Mr Marshall that day, and he was to obtain their current Tullett contracts and forward them to BGC for review – G 1809. Next on that day BGC sent to Mr Marshall Mr Hall's contract with Tullett. Mr Hall must have provided it to Mr Verrier direct rather than giving it to Mr Marshall. Mr Marshall was told that Mr Hall was a priority – G 1814. It is clear that Mr Verrier wanted to get him signed to encourage the rest of his desk. On 19 January Mr Marshall saw Mr Cohen and Mr Bowditch and as a result raised points on the proposed contracts in an e-mail to BGC – R 6886. He was also seeing the other brokers involved in Phoenix. On 20 January Mr Verrier informed Mr Lynn that Project Phoenix was slipping. That was because Tullett had re-signed a number of them following the meetings on 13 January. Mr Verrier said that the others were concerned about liquidity flow, meaning that at BGC with a new and reduced desk there would be less liquidity in the special sense in which the term is used in this market.

(56) On 21 January Mr Marshall saw Mr Matthews. He sent an e-mail to Mr Arif, which included 'His concerns are: 1. Time out of market + loss of client connection and what the release plan is. 2. …..' – G2 1978.1. The e-mail recorded that Mr Matthews would not be free until 31 January 2012. The question as to a release plan must be as to what plan BGC had to get the brokers released early. Mr Matthews did not accept that he had asked Mr Marshall how he was to get out early – Day 40.175. Unlike Mr Marshall he may have been unfamiliar with the phrase 'the release plan', but I am satisfied that this is what he was concerned about. On 21 January Mr Marshall also spoke to Mr Hall who raised points on his contract and 'He wanted also to

know what the exit strategy was, and I told him we were working on that, but in the meantime, he and others should sign up to a binding 'join when free but asap' contract with BGC' – email 22 January from Mr Marshall to Verrier and Mr Arif – G2 2067. The reference to 'exit strategy' is another reference to the plan to get the brokers out early.

(57) The next event in Mr Verrier's recruitment of the forward cable desk was to be a dinner on 26 January at the Bleeding Heart Restaurant. In anticipation of the dinner Mr di Palma led the way in setting up a meeting on 21 January to discuss the move to BGC in the absence of Mr Hall. Mr Hall was to be excluded because of his close relationship to Mr Verrier and because he was plainly in favour of the move. The meeting was held at the City House Bar. When Mr Sully received an e-mail from Mr di Palma informing him of the meeting at the City House Bar in anticipation of the dinner with Mr Verrier, he told Mr di Palma that he did not know about the dinner. If he had not met with Mr Verrier or been made an offer, that makes sense: it also has the ring of truth. At the meeting brokers raised a number of questions that they wanted to put to Mr Verrier. Mr Stevenson typed these up – H 2128 et seq.

(58) On 22 January contract documents were sent by BGC to the Phoenix brokers.

(59) On 23 January there was a substantial meeting of the Phoenix recruits at Mr Marshall's offices, which Mr Verrier attended. Mr Verrier described it as a question and answer session. It would seem inevitable that questions would have been asked about how and when the brokers might start at BGC, but there was no evidence as to that.

(60) On 25 January Mr Verrier began Project Toscana by dining with Mr Yexley, the head of the dollar cash desk, at a restaurant of that name in Billericay. Mr Yexley is a close friend of Mr Verrier from their working together over the years. Mr Yexley had been re-signed by Tullett on 23 June 2008 in anticipation of recruiting by Mr Verrier, and was due a signing payment of £250,000 on 31 March 2009, which he has not received. At the dinner Mr Verrier said that Tullett's dollar cash desk was weaker than that at BGC. He wanted Mr Yexley to become head of BGC's US dollar division, a significant promotion. The next morning Mr Verrier sent him an e-mail describing the two desks of 26 brokers that Mr Yexley might head – H 2138,9. Mr Yexley replied that it was a great opportunity – H 2138. He also set out the dates provided by his contract with Tullett saying that, if that was not a problem, he would like to move things on. Mr Yexley then went to Dubai with Mr Potter and Mr Tonkin, a broker on the dollar cash desk who was responsible for substantial business. During the visit Mr Potter asked Mr Yexley if he had been approached by Mr Verrier. Each time he said no but he would tell Mr Potter if he was. Mr Yexley met Mr Verrier again on 3 February and accepted his offer. This included a signing payment of £750,000 gross. Mr Yexley was only to be indemnified by BGC against the loss of half of his signing payment of £250,000 due on 31 March.

(61) On 26 January the five remaining Phoenix brokers signed contracts with BGC, save Mr Matthews who signed on 29 January. As I have said Mr Cohen had

raised points with Mr Marshall on 19 January, and on 22 January he had raised more – G2 1926. Mr Cohen struck me as a thoughtful man and he was being careful. Mr Cohen's appointment with Mr Marshall was at 12.00, and he was the first – R 6918.1. It is apparent that before he signed he raised further questions. Mr Verrier was there – see Day 26.86 and I2 2755. Mr Marshall made one of his rough manuscript attendance notes – R 6918. It is misdated 24 January which was a Saturday. It is timed as between 12 and 1. With the abbreviations set out in full it reads:

'Attending Kevin Cohen and Tony Verrier
Resignation 2nd February
- Release within 6 weeks
- Cannot put in writing
- Put in writing too dangerous
- take it on trust = not binding

Indemnity
not prepared to lie in court
kicks in when sign employment contract.'

There was more to the note but the rest was redacted on the grounds of privilege. What I have set out must refer to the question of starting at BGC, the exit strategy. It must record what passed between Mr Cohen and Mr Verrier. Mr Marshall thought it sufficiently important to make a record. The exit strategy would have been a matter of very real concern to Mr Cohen because if the brokers could not come across together, they were going to be considerably disadvantaged. Mr Verrier's explanation given at Day 29.27 et seq was that the date of 2 February might have been when Mr Cohen might give notice to Tullett and that Mr Verrier would have said that within four to six weeks something would break: maybe Tullett would breach his contract, maybe there would be an agreement, or may be there might be an exchange. It could not be put in writing because then it would be binding and it was uncertain what would happen. He said that if it was a constructive dismissal situation the threat of litigation was there and Mr Cohen said he would not be prepared to lie in court. Mr Cohen said at Day 35.148 et seq that he did not know what 'resignation' and the date referred to. He said he wanted some sort of time line, and Mr Verrier could do no more than suggest a period, and say 'Who knows?'. He said that not being prepared to lie in court referred to a constructive dismissal situation. I am very conscious here that the note is a very brief record of a longer conversation, and that there is a risk of reading too much into it and misconstruing it. But if the conversation had been as Mr Verrier suggests, the note would hardly have taken the form it did: it would not have referred to being too dangerous to put in writing. The note suggests that Mr Cohen was effectively asking for a guarantee that he would be moving from Tullett to BGC in the near future, and that Mr Verrier gave him an assurance that, one way or another, he would be out in 6 weeks from his resignation: but he was not prepared to put that in writing. The reference to lying in court must have come up because Mr Cohen said that he would not lie to support a trumped up constructive dismissal claim. The note does not have to be considered on its own and it is supported by other documents and by what happened.

(62) On 26 January Mr Verrier went from Mr Marshall's office to have lunch with Mr Marco Badini in Smithfield. Mr Badini is head of Tullett's forward euro desk. Mr Badini told Mr Bolton to whom he then reported that he was going to the lunch. At the meeting Mr Verrier told him of his plan to set up a forward euro desk at BGC. Mr Verrier made Mr Badini an offer for his desk. The figures do not matter, but it was to be left to Mr Badini to divide up the cash and stock on offer as he saw fit. I am satisfied by Mr Badini's evidence that it was an offer for the team made to Mr Badini. Mr Badini later rejected the offer, and that was the end of the attempt to recruit his desk.

(63) Prior to the Bleeding Heart dinner with the forward cable brokers on 26 January Mr Verrier had time for coffee with Mr John Hine, head of Tullett's forward yen desk. This was the start of Project Antique, and I will deal with this attempted recruitment at this point. There were seven people on the desk. Mr Verrier told Mr Hine that he was interested in building a treasury business at BGC and wanted Mr Hine's desk. He said that there would be a sum to be distributed by the desk among the desk. Mr Hine informed Mr Potter of the meeting. On 3 February, as he was not available for the dinner the next day to which I will come, Mr Hine met Mr Verrier again. The process was not taken further. On 4 February Mr Verrier met with two other members of the desk, Mr Hope and Mr Tarplett, for dinner. Towards the end of the meal Mr Verrier explained his plan. He wanted the whole desk to move, and it would be for the desk to decide how the money and stock which was available was split. The dinner was reported to Mr Potter. On 6 February there was an e-mail exchange between Mr Hope and a friend of his, Mr Spencer, at BGC Tokyo. Mr Hope wrote; 'We have had meeting[s] all week here regarding BGC Tony trying to lift the whole of treasury ro[o]m here 80–100 people. I had dinner with him Wed and seeing him again Monday' – H 2273. This gives an insight into how it was within Tullett at that time. Mr Hine together with Mr Hope and Mr Tarplett later decided to reject the approach and the three signed further contracts with Tullett in the latter part of February.

(64) That night, 26 January, Mr Verrier hosted the dinner held in a private room at the Bleeding Heart Restaurant for the forward cable brokers. Mr Marshall attended. Some of the text messages from Mr Verrier on 21 January setting up the dinner are found in the telephone record at Q2.5863. I reject Mr Comer's evidence that he was invited by Mr Hall. Mr Sully could not attend. Mr Verrier made an address first. Then he left the room and Mr Marshall fielded questions from the brokers. Then Mr Verrier returned. Then they ate. It began at 7 and the bill was paid at 9.47. (The brokers are early people. They arrive for work between 6 and 7 am and tend to leave at 5 pm.). There was a dispute about how long Mr Marshall spoke and how long Mr Verrier. It is likely, in my view, that Mr Marshall did not speak for as long as was submitted by BGC, but spoke for longer than was submitted for Tullett. If BGC were right, there was inadequate time for the meal to be eaten. What is more important is what Mr Verrier said about the possibility of the brokers leaving Tullett before their contracts were up. Mr Stevenson recalled Mr Verrier saying that the brokers should make a note of any bad behaviour on the part of the Tullett management, and should tell Mr Marshall; and that Tullett had 'fouled up'

with him and they would foul up with the brokers, and BGC would have them out of Tullett. Mr Comer had a similar recollection, as did Mr di Palma. I accept that evidence. There was a show of hands, and all indicated they were in on the move save Mr Harkins and Mr Bishop who reserved their position. In fact they wanted an increase in their signing payments. On 29 January they met Mr Verrier at 6.30 am in a café on London Wall. Mr Verrier told them the desk had to arrange the money itself. Mr Hall later spoke to Mr Verrier and was told no more money was available. Mr Hall then arranged adjustments between the members of the desk, which were acceptable to them, and Mr Hall took a cut in his signing payment himself.

(65) On the morning after the Bleeding Heart dinner Mr Verrier e-mailed Mr Marshall: 'Thanks for your help last night with project wire, I believe that it went very well and you certainly gave the guys a lot of comfort.' – H 2143. This says something about Mr Marshall's equivocal position.

(66) On 29 January Mr Hall informed his desk that contracts would be signed the next day, Friday, 30 January. That occurred. On 28 or 29 January Mr Marshall made a calculation of some of the sums for which BGC might be liable to the forward cable brokers under their indemnities. The total assessed for claw-back by Tullett of bonuses was £320,000 – R 6931. Claw-back of signing payment was referred to but not calculated.

(67) On 30 January Mr Verrier e-mailed Mr Marshall to say that there was no intention that the forward cable brokers should give notice to Tullett that they were leaving before the next bonus due in February – H 2230. There was here a divide of interest between the brokers and BGC. The brokers wanted to be paid their bonuses. Mr Verrier wanted them to give notice as soon as possible so that Tullett might refuse to pay the bonuses or otherwise behave in a way which might found a claim for constructive dismissal. There was no contractual need for the brokers to give notice at this time. It was simply a way of stirring things up with Tullett. It was not unlawful but it is relevant to the consideration of the brokers' claims to have been constructively dismissed. Mr Marshall and Mr Verrier cooperated to this end.

(68) On Sunday night, 1 February, Mr Verrier informed Mr Marshall of Project Antique, as Mr Marshall confirmed to Mr Arif on 2 February – R 6932.2.

(69) Mr Verrier's attempted recruitment of the Tullett spot foreign exchange desks – Project E9, began on 2 February. On that day he had lunch with Mr Gary Harris who is joint director of all the spot desks with Mr Russell Parkes. Mr Harris is desk head of the spot sterling desk. That desk consisted of 4 brokers including Mr Harris and there were 23 brokers in the division. Towards the end of the lunch Mr Verrier said that he would like Mr Harris to bring the majority of the spot brokers to BGC. There was a discussion of revenue and Mr Harris gave him the approximate figure for 2008. Mr Verrier offered £3.5 million in cash and £1.9 million in shares or stock for the whole team. As Mr Harris accepted in cross-examination he also mentioned figures for Mr Harris himself. Mr Harris also accepted that at this or the next meeting he had told Mr Verrier that he could not entice his own staff, and Mr Verrier had said he

would make the approaches himself. Mr Harris said he would speak with Mr Parkes. In his e-mail to Mr Lynn of 4 February referring to Projects Antique, E9, Mist and Toscana Mr Verrier said of E9 '23 guys doing spot fx. Conversations at an early stage but main guys very positive.' – H 2266. Mr Verrier and Mr Harris met again at a bar in the evening of 12 February with Mr Parkes. During the discussion Mr Parkes raised the problem that a number of brokers were contracted to Tullett for substantial periods. The witness statements of Mr Parkes and Mr Harris were made together. They both state as follows:

> 'Tony said that once a sufficient number of brokers had been signed we would get a call one day asking us to get up and walk out. He didn't say when this might be and at the time we were not sure whether he meant that we would be expected to walk out en masse during the day or simply all just not turn up to work at Tullett one morning. Either way the effect was the same. He said that once we had all walked out together we could expect to spend about six months in the garden while the legal's were settled and then we would be able to start at BGC. He said Tullett would sue BGC and that BGC would expect to lose the court case and pay Tullett some money but it would mean that we could start at BGC much sooner than our contracts would normally allow. Tony was very confident about this exit strategy and that this was how it was going to work.'

Mr Verrier was asked about an indemnity, and said that if there was a court case BGC would pay any losses. This evidence which I have quoted was challenged on behalf of Mr Verrier. At Day 15.51 et seq. Mr Harris accepted that Mr Verrier had referred to breach of contract by Tullett, but he said that it was to 'a breach of contract' – which echoes the evidence of Mr Lynch. Otherwise Mr Harris stood by the passage in his witness statement. He said that he was very concerned about it because, if he refused the offer, he could not see how he could stop BGC ripping his staff out of the company. He also said that he did not want to be involved in a court case and so decided not to move and had to find a way to protect his team. In his cross-examination at Day 21.20,21 Mr Parkes stood by the passage quoted, but enlarged on it stating how the discussion had developed. He said that he had read the transcript of Mr Harris's evidence but did not believe that Mr Verrier had referred to breach of contract at all. It was put to him that that was a lie. I am satisfied that it was not. I find that Mr Harris and Mr Parkes were both honest witnesses and that the passage I have quoted is essentially accurate. It is possible that Mr Verrier referred to a breach of contract by Tullett, or that he used another phrase such as messing up by Tullett. But, if he did, I am satisfied that it did not feature large in the scenario he described. The outcome of the meeting was that both men were concerned that, if they signed contracts with BGC, they would find themselves involved in litigation, but if they did not they faced losing their staff. They decided to reject Mr Verrier's offer. On 27 February they had a review meeting with Mr Duckworth and Mr Potter. At the end of it they were asked if there was anything else and then they informed Mr Duckworth and Mr Potter what had occurred. The outcome was that the desks were offered new contracts with signing payments. Mr Harris and Mr

Parkes were offered £500,000 each by Mr Potter, which they refused, then £400,000 which they refused. They said they would take £275,000 and Mr Potter made it £300,000. Mr Harris and Mr Parkes had lunch with Mr Verrier on 5 March, when they told him their decision. Mr Verrier made no further approaches as part of Project E9. 27 February was the first time that Tullett had clear evidence that part of Mr Verrier's plan involved what both sides called an 'exit strategy', although Tullett may have had grounds for suspicion before.

(70) On 3 February at 10.02, H 2248, also 2254, Mr Marshall e-mailed Mr Arif's assistant that he had checked the contractual documentation for Mr Matthews and was happy to recommend that he sign. The signing payment was increased from £500,000 to £600,000. Mr Verrier replied to Mr Marshall at 10.07 – H2254, as follows:

> 'John, thanks. Gavin [Matthews] is on his way in to work. John if you could liaise with him as to what might be a convenient time to come to your offices. Also John can you and Mo [Mr Mohammed Arif] keep me in touch with wire/phoenix re your exit chats with them.'

Mr Verrier said that 'exit chats' referred to when the brokers would give notice to Tullett that they would be leaving Tullett at the end of their current contracts – Day 26.182, day 27.76,77. 'Exit chats' is a curious choice of phrase for that unless it is to be seen in the wider context of a plan to get the recruits out of Tullett as soon as possible. It is that plan the phrase referred to.

(71) On 3 February at 16.24 Mr Verrier e-mailed to Mr Marshall, copied, inter alios, to Mr Lynn, that bonuses had not been paid to Mr Wilkes and Mr Matthews: 'I think a chat with you and those two gents may be advisable as to what action they should be taking.' – R 6933. This was the beginning of the actions taken by Mr Verrier to try to provoke Tullett into action which would, or could be argued to, constitute constructive dismissal of BGC's recruits, which would enable them to come to BGC together and without delay. Mr Lynn was kept informed of these actions and it is apparent that he was taking a close interest in the process. That evening, at 19.18, Mr Arif's assistant e-mailed to Mr Lynn and Mr Verrier the contractual bonus payment dates by Tullett for the Phoenix and Wire brokers – R 6935.

(72) On 4 February at 9.54 Mr Wilkes sent Mr Smith an e-mail asking why the sterling cash desk's bonuses due at the end of January had not been paid. Mr Verrier said in cross-examination – Day 29.41 that the e-mail was not sent on his instructions. He said that the background was that Mr Wilkes had been chasing Mr Mead who had said that the problem was that Mr Smith would not sign them off, so Mr Wilkes decided to go direct to Mr Smith. Mr Wilkes gave the same explanation – Day 40.41,42. I accept that this was the background, but Mr Verrier's evidence shows that he knew what was happening and I have no doubt that he encouraged the sending of the e-mail. Mr Smith replied at 10.54 – H.2262.2, that he had authorised the payments and explaining why there had been a delay. The delay had been just over 2 working days – 4 February being the Wednesday. The non-payment of bonuses when due was a

matter that Mr Verrier had referred to when telling brokers that Tullett might breach their contracts or 'mess up' or 'foul up'.

(73) On 4 February Mr Verrier sent Mr Lynn an e-mail referring to Projects Antique, Mist, E9 and Toscana. With reference to Toscana he said that he was looking for 5/6 recruits and that the key man, ie Mr Yexley, was involved in the project – H 2266. That e-mail further stated: 'I will be producing a more detailed report on each project covering revenue cost and business plan going forward.' In his evidence on Day 22.67 on 30 November 2009 Mr Lynn said he had no knowledge of any such reports. Mr Verrier said – Day 26.36, 4 December, that no reports had been produced because Mr Lynn had told him that, unlike Tullett, BGC did not require such paperwork but dealt with such matters orally. Mr Lynn had also given evidence to that effect about BGC's lack of paperwork. But on 15 December BGC disclosed a copy of a report headed 'Project Toscana'. The single copy had been found filed in BGC's legal department – R 6954. No other copies were located. It would have been typed by Ms Howell from Mr Verrier's manuscript. There was no copy to be found kept by her as a hard copy or saved electronically on BGC's computer system. I do not find it credible that she would have typed up the report and handed it to Mr Verrier without saving it on the computer system. I conclude that the other copies and copies of any further reports as foreseen by the e-mail were destroyed. They were also deleted from BGC's computer system.

(74) The report stated under the heading 'Estimated/recommended cost':

> '7 brokers
> Pre paid divs [ie signing payments] £2,250,000
> 2 year guarantees total £1,950,000'

The total is £4,200,000. That does not include any indemnity costs. A later paragraph reads:

> 'Broker A [Mr Yexley] receives a sign on bonus on 1st March of £250k this to extend his term by 3 years. This was agreed in June last year and starts from when his present term ends. I have informed him that we will only cover him for 50% of the amount if Toscana becomes live. He is in agreement with this.'

The clear inference is that, if Toscana became live, Mr Yexley would lose his sign-on payment, which is to say he would not be working out his Tullett contract. The report ended 'Once/if this is approved I will move to engage the personnel and get their contracts for review.'

(75) I will continue for the moment with the recruitment of Project Toscana. Five witnesses were called by Tullett from their dollar cash desk, Mr Burgess, Mr Tonkin, Mr Freese, Mr Murphy and Mr Lynch. Mr Camp's witness statement was in evidence, but it was agreed that he need not be cross-examined. On 10 February there was a meeting in the evening at the Andaz Hotel, formerly the Great Eastern Hotel, between Mr Verrier and Mr Yexley, Mr Burgess and Mr Freese. Mr Verrier had previously made Mr Burgess an offer by telephone,

likewise Mr Freese. During the meeting Mr Freese expressed concern at the time out of the market which a move might entail. The next meeting was a dinner on 23 February at the Rendezvous Bar. It was attended by Mr Verrier, Mr Yexley, Mr Burgess, Mr Freese, Mr Lynch, Mr Murphy and Mr Camp, and also by Mr Marshall. It was a more formal meeting with tables and spreadsheets. Mr Freese thought that Mr Marshall was too closely linked to BGC. The question was raised as to how any move would work because the brokers were all on different contracts. Mr Verrier answered that Tullett would probably break their contracts, as Tullett had with him: he would 'blow the whistle' and everyone would walk out. I accept that the phrase 'blow the whistle' was used. In cross-examination Mr Freese said that Mr Verrier had said, breach of contract or not, there would be an opportunity to move early: Day 17.19. Mr Burgess said that Mr Verrier said that once they had signed, Tullett would not pay a bonus or something like that, and they could walk out. Mr Lynch, Day 17.37 recalled Mr Verrier saying that they would mess up with someone and they could all walk out: Mr Lynch privately wondered how, if it was not him who was messed, he could walk. Mr Murphy, Day 17.52 et seq, remembered Mr Lynch raising the question of staggered contracts and how they could leave together and Mr Verrier answering that something would happen and they would all get up and leave: Mr Murphy thought how difficult that would be to do. I accept this evidence as honest and I think that taken together it gives a fair impression of what Mr Verrier said. Mr Yexley had already reached an agreement with Mr Verrier and I am satisfied that his presence at the two meetings was to support Mr Verrier in the recruitment. Mr Tonkin had a brief meeting with Mr Verrier on 10 February. He found that Mr Verrier knew particular terms of his contract which he considered confidential. Because of the business he did Mr Tonkin was an important recruit. I am satisfied that the information must have come from Mr Yexley. Mr Yexley had been party to negotiations between Mr Potter and Mr Tonkin on their Dubai trip. Shortly after his meeting with Mr Verrier Mr Tonkin signed a new contract with Tullett. The other members of the desk including Mr Yexley had meetings with Mr Potter on either the afternoon of 24 February or the morning of 25 February. Mr Potter's brief notes of the meetings are at O 4587,8. There was a further meeting with Mr Yexley on 6 March. I will deal with Mr Yexley's meetings when I consider his claim for constructive dismissal. The outcome for the others was that they decided to remain with Tullett and entered extensions to their contracts with signing payments.

(76) Following the meeting at the Rendezvous Bar on 23 February Mr Marshall sent Mr Verrier an e-mail the next morning which began 'Phew, that was hard work last night – those guys were really pumping us.' He suggested that BGC should as soon as possible prepare the loss memo of understanding in respect of sums they were required to repay to Tullett and the amount of compensation they lost while 'out'. He said: 'I have a feeling these guys are going to want to see this comfort early on. I can at least confirm I have it.' The e-mail evidences the equivocal position of Mr Marshall.

(77) On 6 February Mr Potter held meetings with each of the forward cable brokers save Mr Hall. He asked them if they had been approached. They said they had not. He asked them to tell him if they were. The brokers had in fact signed

contracts with BGC on 30 January. Mr Potter ran through a number of points on BGC's standard contract and said that if they were thinking of going to BGC they should have their contracts checked by an independent lawyer. He reminded them of their contractual obligations to Tullett. He said that if they did not honour their contracts Tullett would have to bring legal action. When he was leaving Mr Comer said 'Anyway, its nothing personal, just business.' This made Mr Potter suspect they had been approached. He arranged a meeting for Mr Hall with himself and Mr Duckworth on Monday, 9 February. Mr Potter made a brief note of the meeting – O 4585. At the meeting Mr Hall said that Mr Verrier was 'all over him' and had been for some time. He did not say that any of the others had been approached. On being asked why he was unhappy at Tullett, Mr Hall referred to Mr Verrier's departure from Tullett Prebon, saying he thought Mr Verrier had been persecuted. Mr Duckworth said he should be careful not to get caught up in somebody else's agenda. Mr Hall was warned that, if he broke his contract with Tullett, Tullett would take legal action. I reject the suggestion that Mr Duckworth told Mr Hall that he had instructed Mr Wink to stay clear of Mr Hall's division – the treasury division. Mr Wink was Mr Potter's superior and responsible for the division. Following the meeting Mr Potter took Mr Hall out for coffee. Both Mr Potter and Mr Hall deal at some length with the meeting and the coffee in their witness statements. I need not decide the differences further than I have. There was nothing in what happened at the meeting or over coffee to which Mr Hall could take exception. In contrast he did not tell his superiors what had happened to his desk.

(78) On that day, 9 February, Mr Lynn signed the forward cable contractual documents – H2287, and BGC had paid out £1.03 million – H 2289,2290. A separate BGC e-mail records the total signing payments for Phoenix as £2.065 million, and for Wire £1.375 million – H 2293.

(79) On 9 February there was a video conference call meeting between 1500 and 1530 between Mr Lutnick, Mr Lynn, Mr Arif and two others. The subject was 'Project Wire/Phoenix'. Mr Verrier was not included, though he had a meeting with Mr Lynn at 1630 at which it may be presumed that he was informed as to the meeting in so far as appropriate. Tullett rely on this meeting to show the involvement of Mr Lutnick. Certainly it shows that, as one would expect with projects of this importance and financial consequence, Mr Lutnick was aware of them. It shows at least that he must have been aware of their general progress. But it does not show that he was aware of any unlawful intent.

(80) On 10 February Mr Verrier requested 10 colour copies of a list of six points he had made concerning BGC's contracts. This was because following Mr Potter's meetings with the forward cable brokers on 6 February he had received calls from Mr Sully and probably Mr Harkins about the points Mr Potter had made on the BGC contract – Day 26.186. Mr Verrier was then in Monaco with Mr Hall and Mr Pullen.

(81) On 11 February at the remarkable time of 0438 Mr Verrier sent Mr Lynn an email about notices to be given to Tullett by a number of brokers saying that they were joining BGC when they were free to do so. The e-mail was about

the internal and external marketing of the situation. Mr Verrier asked for instructions as to how to proceed, and whether he should draft an internal announcement. Mr Lynn replied at 0441 that they could talk that morning, just the two of them. During the course of the day Mr Hall, Mr Stevenson, Mr Bishop, Mr Sully, Mr Bowditch, Mr Temple, Mr Cohen, Mr Wilkes and Mr Matthews all gave notice to Tullett that they were moving to BGC but would fulfil their contracts with Tullett. Mr Comer gave his notice that day or the following day. The letters were in slightly different form, but were based on a draft prepared by Mr Marshall. Mr Sully said that some of the desk wanted to wait till they had their bonuses, but he thought Mr Hall wanted the notices in – Day 33.48. Mr Cohen said that once Mr Wilkes and Mr Matthews had their bonuses, the Phoenix brokers wanted the notices in – Day 35.169. Mr Hall said that he consulted with Mr Marshall and there was a good chance he had discussed it with Mr Verrier. I am satisfied that he had. Mr Verrier was taking a very close interest in this, because until the brokers had given notice he could not bring things to a head with Tullett. That is a reason why the letters stated that the brokers were moving to BGC, something which it was otherwise unnecessary to say. The letters asked that any questions would be referred to the broker's lawyer, who was identified in some instances as Russell, Jones & Walker. On that day Mr St Pierre sent e-mails to Mr Hall, which have no legal significance. But they are a comment on the whole saga which is worth recording. Together they read 'Sorry if I was rude James I'm just down about it all. Because we have a nice set up that will be torn apart.' Mr di Palma had not given notice, so early on 12 February Mr Potter offered him a new contract with a sign-on payable in a year and an increased bonus. But Mr di Palma was uninterested. When Mr Comer handed in his notice. Mr Potter recorded that he seemed upset and to be unsure he had done the right thing – e-mail to Mr Clark, head of Tullett's legal department, H 2349. Mr Harkins and Mr di Palma gave notice on 13 February.

(82) At 17:09 on the evening of 12 February Mr Arif's assistant sent an e-mail – R 6937.1, to Mr Lynn's p.a. asking for assistance saying:

> '1. Shaun was supposed to speak to Tony at 14.30 today about John Marshall ceasing to act for the 12 Phoenix/Wire brokers – please could you check with Shaun whether this conversation has been had?
>
> 2. If so, does Shaun authorise us to formally instruct BLP [Berwin Leighton Paisner]? Or does he want us to wait until Tony has spoken to John Marshall?
>
> Apologies for hassling you but BLP want to proceed with their money laundering checks etc. so that they are all ready to go.'

At this time Mr Verrier was engaged in a video conference including BGC's counsel in the United States about Wire and Phoenix – R 6937.2. The meeting at 14.30 had in fact been cancelled because Mr Verrier said that it was unnecessary – see e-mail at 14.11 on R 6937.07. But the quotation shows that the instruction of BLP in place of Mr Marshall was being considered at this point, and that raises the question why. Mr Lynn was asked about the

instruction of BLP on Day 37 at page 93. It was suggested to him that Mr Marshall was to act during the recruiting period and that BLP would act in constructive dismissal claims. Mr Lynn answered:

> 'I think that it may be fair to say that according to how the whole situation played out, you know, you don't know what is going to happen. It wasn't in our hands as to how Tullett were going to treat, or what was going to happen – unfold over the course of the next weeks, months.'

Later, at page 106 he was referred to R 6937.1. He said that he was going to have a conversation with Mr Verrier about Mr Marshall but because of a privileged conversation with his lawyers – I presume with Mr Arif, he did not. He said that it was to be a general conversation with Mr Verrier, not one directed to the 12 brokers. He said that Mr Marshall's work load was the major concern – page 112. I found this evidence unconvincing. Mr Verrier said that he had no recollection about the idea at this time that BLP might act in place of Mr Marshall – Day 38.32,33. I cannot accept that. I deduce that both Mr Lynn and Mr Verrier did not wish to state the true reason why this was being considered.

(83) On 12 February a meeting took place between Mr Lynn, Mr Verrier and others at BGC and Buchanan Communications. Its purpose was to consider the 'media strategy for the current project'. On 13 February Buchanan sent BGC by e-mail – H 2356, a paper headed 'Media strategy re: new recruits' – H 2358, which begins:

> 'Following Tony Verrier's arrival at bgc and subsequent notification to Terry Smith by 12 Tullett staff of their intention to join bgc, we believe that it is difficult to predict with any degree of certainty how Terry Smith will react in terms of possible media briefing.'

The paper considered four possibilities: (1) that Tullett did not brief the media, (2) that Tullett applied for an injunction, (3) that Tullett were awarded an injunction and (4) that Tullett carried out pro-active media briefing. It was recorded that at the meeting it had been thought quite likely the Tullett would apply for an injunction, but that Mr Marshall thought an application unlikely to succeed. The paper makes no reference to any early departure by the Tullett employees, but on the contrary included advice that, if Tullett kept silent but the story nonetheless got into the media, BGC should do no more than confirm that offers had been accepted and that people would only start at BGC when they were contractually free to do so. Tullett sought to rely on the involvement of Buchanan at this point to show that BGC knew Tullett would have grounds to apply for an injunction. I do not think that the Buchanan paper and e-mail provide that support. Although the material I have already covered shows that BGC were working towards an early exit for their recruits from Tullett, there is nothing to establish that this was communicated to Buchanan.

(84) On 18 February a meeting took place between Mr Osborne, Mr Brown – head of Tullett's medium end sterling desk, and Mr Bowditch. Mr Bowditch reported to Mr Brown. The purpose was to discuss some of the consequences

of Mr Bowditch having said that he would be leaving. His contract ran until 28 February 2011. Following the meeting Mr Osborne sent a file note as a note of the meeting to Tullett's human resources department, copied to Mr Clark, head of Tullett's legal department. Mr Osborne said that he wanted Mr Bowditch and Mr Brown to work more closely together, and Mr Osborne asking Mr Bowditch some questions about how he ran his desk. Mr Osborne said that Mr Brown's greater involvement was necessary as 'a succession plan for the area'. It was put to Mr Osborne that he foresaw that Mr Bowditch was unlikely to serve out his contract. While I accept that Mr Osborne wanted Mr Bowditch to work out his contract, an early departure is always a possibility in these situations. I think that Mr Osborne had justified concerns as to how the desk would operate under Mr Bowditch whether he left in 2011 or earlier, concerns which required protection for both Mr Bowditch and for Tullett.

(85) Sometime about 20 February Mr Comer met Mr Potter casually in the office and said that he would buy him a drink when it was all over. Mr Potter said there was no need to wait. Mr Comer said he could not go for a drink with Mr Potter then because Mr Hall was watching him closely. Mr Potter said they could go somewhere they would not be seen. Mr Potter deduced rather more of the role that was being played by Mr Hall. He said to Mr Comer that he should send him an e-mail. Mr Comer did send him such an e-mail on 23 February, and on 26 February they had a drink, which turned into dinner, at Sophie's Steak House. This was the start of the events on the Tullett side which led to Mr Comer deciding not to join BGC as he had contracted to do, but stay at Tullett and to give evidence for Tullett. I will continue with the events which led to that in the separate section relating to BGC's Part 20 claim. For they require close analysis.

(86) On 24 February Mr Marshall and Mr Verrier discussed the tactics as to when Mr Yexley should sign his contract – R 6937.8. The purpose in doing so must have been to decide when would have the most effect in encouraging the rest of his desk to join BGC. A further attendance note by Mr Marshall on the same day – R 6937.9, shows a discussion with Mr Verrier concerning Toscana and in particular shows Mr Marshall listing points which might be relied on by Mr Yexley to support a claim for constructive dismissal. On the second page of the note Mr Marshall listed points which Tullett was making in its meetings with brokers. On 24 February Mr Potter had seen Mr Yexley, Mr Lynch, Mr Camp, and Mr Freese, and he saw Mr Burgess on 25 February. The extension to the Tullett contracts were not signed until 4 and 5 March.

(87) On 25 February Mr Marshall sent to Mr Arif's assistant and to Mr Verrier an e-mail – I 2436, which shows the role Mr Yexley was playing. Mr Marshall wrote:

> 'I have just spoken to mark [Yexley] and he has asked that the contracts with their numbers be prepared, including his, so he can make the next move. I think he is contemplating signing! Tony – I also referred him to the text I have sent all the guys (which he had not read) and asked him to get them moving on it and refer any queries on the contract to me asap – he said he would.'

Mr Yexley said at Day 39.120,121 that he did not receive the text and was simply doing what his desk were asking him. An e-mail the next day from Mr Marshall to Mr Arif – I 2440, records Mr Freese and Mr Yexley as being positive about proceeding.

(88) Although Mr Verrier's email to Mr Lynn of 4 February, H 2266, referred to Project Mist as '17 guys covering Arb[itrage], Euro cash, Yen cash, Aussie cash/IRS Canadian $cash/IRS', his witness statement shows that the recruitment did not actually begin until 26 February when he had lunch with Mr Pickup of Tullett's euro cash desk and Mr Pullen, head of the arbitrage desk. Mr Marshall also attended. On 6 March Mr Pullen and Mr Pickup went to Mr Marshall's office with their contracts, and BGC sent Mr Marshall draft documents for the project. On 16 March Mr Verrier and Mr Marshall had dinner with Mr Pickup, Mr Pullen and Mr Lovett, head of Tullett's euro cash desk. Over these meetings money was discussed with Mr Pickup and Mr Pullen, but not with Mr Lovett. Mr Verrier states that when Mr Lovett said that he did not wish to move, the project lost its momentum. I heard no evidence from Tullett relating to the project. The papers also contain an e-mail from Mr Verrier to Mr Lynn dated 23 February timed at 06.39 – H 2411, which read 'Morning Shaun, just got a summons from mist. Wants an early coffee so seeing him in city, just thought I would let you know.' Whether there was such a meeting is unimportant. But the e-mail shows Mr Verrier keeping Mr Lynn informed as to his recruiting.

(89) On 26 February Mr Verrier sent Mr Lynn an e-mail – R 6940.2, to say that he needed to speak to him urgently about Project Toscana.

(90) On 26 February Mr Yexley signed his contract with BGC. The documents provided for him to have a net signing payment of £442,500. This was the equivalent of £750,000 gross of deductions, which is the figure originally offered to him by Mr Verrier. Mr Yexley and Mr Verrier said in evidence that Mr Yexley thought that this was too high a figure, which his work for BGC would not justify, and it would put too much pressure on him, and so a reduced figure of £600,000 had been agreed. A second document dated 16 March was signed which provided for a net figure of £354,000 equivalent to £600,000 gross. In his witness statement Mr Yexley said that he had agreed with Mr Verrier to sign a contract at £442,500 and to enter a contract at the right figure later. That explanation has the difficulty that the employment contract signed on 26 February – a separate document, has a number of amendments to it in manuscript which have been initialled. So the £442,500 could simply have been amended to £354,000. In his oral evidence on Day 39.132 Mr Yexley said that he had mistakenly thought on 26 February that they had changed the figure and initialled it. On 11 March Mr Verrier sent an e-mail to Mr Lynn – I 2586, in which he said: 'I spoke with Mark [Yexley] yesterday and we have agreed to reduce Mark's sign on from £750k to £600k. …. .' Mr Lynn replied 'Thank you, hopefully we will be ok here'. Tullett's case is that Mr Yexley's payment of £750,000 was agreed on the basis that he would bring his desk, or the majority, with him, and that when he failed to do

so, the payment was reduced. There is no other credible explanation for what occurred.

(91) On 27 February there was an important meeting between Mr Comer and Mr Clark, for which litigation privilege has been claimed – O 4586.1. Mr Stevenson and Mr di Palma also had similar meetings with Mr Clark at about this time. I will revert to these when I consider BGC's Part 20 claim.

(92) On 2 March Mr Yexley wrote to Tullett saying that he would not be renewing his contract and would be moving to BGC when he was free to do so – I 2523. He also spoke to Mr Potter giving him reasons why he would be leaving, which Mr Potter set out in an e-mail to Mr Wink – I 2524. Mr Yexley also sent a text message to the members of his desk saying what he had told Tullett and that in the meanwhile he would remain in charge of the desk – I 2525. Tullett suggest that he did so to encourage the others who were being recruited to sign with BGC. That may well be right, but I cannot say that it is more probable than not.

(93) On 5 March Mr Verrier sent an e-mail - I 2556, to Mr Lynn saying that he was due to meet the E9 brokers – spot FX, that night and would be making the offer which he and Mr Lynn had discussed. He also raised points as to Mist and said he would like Mr Lynn's guidance. He referred to the counter-offers which Tullett were making to the dollar cash brokers – Toscana. At 12:23 he sent a further e-mail to Mr Lynn – R 6943 in which he reported further on what he had learned about the Toscana brokers. He said that Tullett 'had finally woken up and smelt the coffee' and had decided that saying negative things about BGC was not enough to retain its staff and had got its cheque book out. He said five of the six Toscana brokers had re-signed with Tullett. After referring to Mr Yexley who he said was then being interviewed by Tullett, he ended; 'Fortunately for us we have acted totally professionally with each individual that we have tried to recruit and therefore I'm hoping that these individuals will say positive things about the company which in the long term should benefit us.'

(94) On 6 March Mr Hope sent an e-mail to his friend at BGC, Mr Spencer, saying 'We're all staying here, cos of the bgc name and also the contracts.' – I 2566. On 9 March Mr Hope sent an e-mail to another BGC friend in New York, Mr Whale, saying he had been close to joining BGC and 'I was round at Verrier's place at the weekend. We had a bit of a laugh about it.' – I 2576.

(95) On 6 March Mr Arif's assistant sent Mr Marshall draft documents for Project Mist – I 2570.

(96) On 9 March Mr Temple sent to his home computer a copy of his screen, a screen shot, showing the information which it contained and how it was laid out – Q8 6818. He accepted in his evidence in chief that Tullett would regard this as confidential information, although he argued that it was not – Day 36.61. He was cross-examined about it at Day 37.29 et seq, and said that he had only sent it because he was used to the colours used in the lay out and wanted to have a record of that. Mr Temple said that he e-mailed the screen

shot when he did because although he wanted to work his notice out, Tullett had not offered him a new contract and he thought they wanted him to leave. I am satisfied that he did think that he would be leaving Tullett in the near future and that was why he sent the e-mail. He thought he would be leaving because he thought that Mr Verrier was soon going to blow the whistle.

(97) On 11 March there were meetings between each member of the forward cable desk save Mr Hall and Mr di Palma and a management team consisting of Mr Wink, Mr Potter and Mr Clark. Because Mr di Palma was to be in Rome on 11 March, his meeting was on 9 March. At these meetings each member was given a presentation which had been developed at previous broker meetings and was called at the trial 'the white board presentation' because the points were written on a white board. A photograph taken by Mr Potter of the board for a presentation is at O 4602. Mr Potter said that the photograph was of the board for one of the first dollar cash presentations, and was made as a record for subsequent presentations. In essence it shows the advantages of employment with Tullett over the disadvantages of employment with BGC. The forward cable brokers were also told that if they did not perform their contracts with Tullett they would be sued. I will return to these meetings when I consider the position of the brokers individually in relation to the claims of Mr Harkins, Mr Sully and Mr Bishop against Tullett for constructive dismissal, and the claims of BGC against Tullett for inciting Mr Comer, Mr di Palma and Mr Stevenson not to perform their forward contracts with BGC. I will likewise cover the subsequent events concerning Mr di Palma and Mr Stevenson. I have already said that I will do that for Mr Comer. Mr Hall reported to Mr Verrier that the meetings were taking place – I 2582 and Day 31.159.

(98) On the evening of 11 March Mr Verrier gave a dinner at Rules in Covent Garden for all the brokers who had signed contracts with BGC. It was also attended by Mr Lynn and by Mr Marshall. Two other brokers from the Swiss OBS desk were also there. The main importance of the dinner in this action is in relation to events concerning Mr Comer, and I will return to them.

(99) On 12 March Mr Verrier sent an e-mail to Mr Lynn, Mr Arif and others setting out what he had heard as to Tullett's presentation to the Wire brokers – R 6947.

(100) On 13 March Mr Marshall sent to Mr Arif with a copy to Mr Verrier a draft of a letter which the forward cable brokers could send to Mr Potter – I 2598. He had discussed the idea with Mr Verrier the day before. The draft read:

> 'Following my meeting with you, Angus [Wink] and Simon [Clark], the company lawyer, I am becoming increasingly concerned about the aggressive tactics being used by Tullett Prebon to try to convince me not to move to BGC. First I have signed an agreement with BGC that I will move there when I am able to do so and second, your criticisms of BGC and those representing me are defamatory and extremely stressful, as I only want to get on with my job.

You should be aware therefore, that I will not be discussing my future with you again or anybody at Tullett Prebon. Should you fail to respect this, I will treat it as a breach of my contract.'

The purpose was, I consider, twofold. One purpose was to help build up a case of constructive dismissal. The other was to prevent Tullett putting any more pressure on the BGC recruits not to come to BGC. The draft was amended by the BGC lawyers – I 2600, so that it read – the material amendments are in italics:

'Following my recent meeting …… I am becoming increasingly concerned*, upset and stressed* by the aggressive *strong-arm* tactics being used by Tullett Prebon to try to convince me not to move to BGC.
Firstly, I have signed an agreement with BGC that I will only move there when I am able to do so *and I intend to abide by this*. Secondly, I find your criticisms of BGC and those representing me *offensive and extremely unsettling. I just want to get on with my job, so please leave me alone.*
I do not wish to discuss my future again with you or anybody else at Tullett Prebon. Should you fail to respect this, I will treat your actions as a breach of my contract.'

Mr Marshall spoke to Mr Hall and asked that letter should be sent by all save Mr Hall and Mr Comer. The reason why Mr Hall was excluded was that Mr Hall had yet to have a meeting with Mr Wink, and Mr Verrier hoped that this could be used to found a constructive dismissal claim. It was not going to be provided to Mr Comer because BGC were uncertain of his commitment to BGC. Mr Lynn accepted that he had seen the draft letter, and I am satisfied that he knew what was intended. Later on 13 March Mr Hall provided the letter to the relevant brokers by text - I 2602.2. Mr Hall also had a conversation with Mr di Palma about the letter. Mr di Palma's evidence was that Mr Hall said to him: 'I know exactly how you feel about this but I saw Tony yesterday and we are all thinking of leaving together…. This is only going to work if we all start together at BGC.' – Day 19.186 and paragraph 44 of Mr di Palma's witness statement. I accept that Mr Hall spoke to Mr di Palma along those lines, in particular saying that it would only work if they all started at BGC together.

(101) The Tullett management had wanted to hold a meeting with Mr Hall on 11 March, but after lunch he did not return to the office. He knew that the meetings were occurring because he reported them to Mr Verrier – I 2582. I deduce that he intentionally avoided a meeting that day. Mr Hall could not make a meeting on 12 March and one was held on 16 March. The meeting followed the form of the presentations given to the other brokers. I will return to it in the context of Mr Hall's claim for constructive dismissal. On 19 March Mr Hall sent Mr Potter an e-mail – I 2620, which had been drafted with the help of Mr Marshall. Mr Verrier's evidence was that he was aware that it was being sent but that he had not seen it. The telephone records make it clear that Mr Verrier had a close involvement. The e-mail was strongly critical of the

meeting on 16 March and ended 'This lying, bullying and intimidation of me and my staff is totally unacceptable. I expect a full response to the email by 4pm tomorrow.' Although he was away on holiday Mr Potter replied the next day – I 2624. He went through Mr Hall's points one by one, and suggested that they could meet the next week to clear the air. Mr Hall replied on 24 March – I 2630, saying that he had wanted to stay at Tullett until his contract expired but he 'did not reckon with all this happening.' He asked for a meeting at close of business that day.

(102) On 17 March, the morning after the dinner with three brokers from Project Mist, Mr Marshall sent an e-mail to Mr Arif – R 6947.1. It was copied to Mr Verrier. It said:

> 'Thinking about 'whistle blowing' costs, I have suggested to Tony that you may need to get a handle on Mist costs. These look a real prospect after last night, and I think if we can get these guys in the first wave, this would be the best route to go.
> Problem is, we do not have most of their details of their TP deals, so we will have to make an educated guess on the down side for them.'

The e-mail uses a number of expressions which could not be understood by any one unfamiliar with the scenario. It is plain that the expression 'whistle blowing' costs was something with which Mr Marshall, Mr Verrier and Mr Arif were familiar. They are the costs that Mr Marshall had raised with Mr Verrier before sending the e-mail. 'Blowing the whistle' was the expression Mr Verrier had used at the dinner in the Rendezvous Bar with the Toscana brokers on 23 February. Mr Verrier said that as far as he could recall 'I have never ever used that phrase.' – Day 29.34. That was untrue. 'Whistle blowing costs' can only refer to the costs which BGC might incur if the brokers walked out on Tullett on BGC's instruction and BGC became liable to indemnify them against their losses incurred in consequence. The 'first wave' must refer to the first wave of brokers to leave Tullett on the instruction of BGC. The e-mail shows that BGC were contemplating a first wave in the near future. At Day 38.50 Mr Verrier accepted that the reference was to the costs of BGC blowing the whistle. He said that the grounds for claiming constructive dismissal had been building up and it was in that context that the e-mail was sent.

(103) On 18 March BGC had a consultation with leading counsel then advising, at their offices – I2 2737.1. On 23 March a further brief telephone consultation was arranged at the request of Mr Arif to 'discuss next steps and to coordinate matters' – I 2627,8. The e-mails setting it up show that Mr Marshall and BLP were to be involved, and strongly suggest that BLP had been involved with the previous advice.

(104) On 20 March Mr Sully sent an e-mail to Mr Potter – I 2623, complaining about the meeting on 11 March. He said he had been told a lie about Peter Kilford, a broker at BGC who had been said by Tullett to be unhappy there, but as Mr Sully had found, was not. Mr Verrier said that he was aware the letter was to be sent. Despite the circulation by Mr Hall of the letters drafted by Mr

Marshall and BGC, no letters were sent by Mr Harkins and Mr Bishop complaining about their meetings.

(105) Over the weekend of 20 to 22 March Mr Verrier entertained Mr Hall, Mr Bowditch, Mr Wilkes, Mr Kilford and a broker from Tradition at his villa in Majorca. Mr Hall and Mr Verrier said that they did not discuss forthcoming events. That cannot be right. This is particularly so because while he was there Mr Verrier received a call from Mr Farrington of BGC telling him that there were rumours that Mr Stevenson, Mr di Palma and Mr Harkins would not be honouring their contracts with BGC.

(106) On 24 March Mr Yexley sent Mr Potter an e-mail – I 2631, complaining about his meeting on 5 March.

(107) On 24 March Mr Potter replied to Mr Hall's request for a meeting that day. He said that he was not in the office and asked that they meet the next day, 25 March. In his first witness statement dated 9 June 2009 Mr Verrier said this:

> 'However, it had become clear to me even before the March trip to Majorca that there was an opportunity for BGC to exploit Tullett's behaviour towards the employees we had recruited. They wanted to leave and we wanted them to leave. We felt that if Mr Hall were to meet in person with Mr Wink on 25 March, then Mr Wink would inevitably throw his toys out of the pram and provide a proper basis for Mr Hall to claim constructive dismissal.'

In his fifth witness statement sworn on 6 January 2010 Mr Verrier dealt with documents which had been the subject of late disclosure and dealt further with the events of 24 and 25 March 2009. He said there that after he had received Mr Farrington's call he got Mr Hall to ring Mr Stevenson, to see where he stood. Unknown to Mr Hall Mr Stevenson was at the offices of Rosenblatt at the time. Mr Hall asked Mr Stevenson whether he was '100% on side, and Mr Stevenson said that he was. Mr Hall spoke to Mr Stevenson about the letter he had sent to Tullett complaining about the treatment of him and his staff. Mr Hall said that the letter 'might move things to the next level, which can get us all out.' I accept Mr Stevenson's evidence as to the conversation. Mr Verrier's fifth witness statement continued:

> 'I mulled the issues over in my mind over the course of the weekend. Mr Farrington's information continued to trouble me as I thought, in the light of what I already knew about Mark Comer, that Tullett may well be about to "turn" other members of the Wire desk in breach of their BGC contracts. As a result of this, I wanted the Wire brokers and Mr Yexley to walk out of Tulletts claiming constructive dismissal in response to Tullett's conduct towards them as soon as possible, and preferably that week. If this were not to happen, I feared that Tulletts would "turn" the rest of the team and BGC's contracts would not be honoured.

> I also knew that Mr Hall was due to have a meeting with Tullett's management, and I hoped and anticipated that this meeting which we knew was shortly about to take place would be a volatile one. Assuming that this proved to be the case, and if Mr Hall was to walk out in response, I anticipated that, subject to the matters referred to in para 40(b) below the other members of his desk and Mr Yexley would also walk out at the same time relying on the conduct towards them to date and any further conduct which emerged from the meeting.
>
> Much as I personally would have liked the Phoenix brokers to join BGC at the same time, they had not been given the same recent management meeting presentations by Mr Wink and so did not have the same grounds for complaint.'

(108) On 24 March at 17.30 Mr Marshall sent an e-mail – I 2635.6, to Mr Verrier, Mr Arif and BLP, copied to Mr Lynn, subject Toscana and Wire projects, the first part of which is covered by privilege, but then stated:

> 'Mohammed, as discussed, in all cases I need your final confirmation that BGC agree to all those in Toscana and Wire projects claiming repudiation in the circumstances now known to us and as such, each individual is acting in accordance with and covered by the terms of the indemnity letters issued to them by BGC and the memo of understanding between you and I regarding 'loss' as referred to in the indemnity letters.'

In short, Mr Marshall wanted confirmation that four brokers involved in Wire, and the one in Toscana – Mr Yexley, would be covered by the indemnity against losses following from their leaving their employment with Tullett. The Phoenix brokers were not included. The confirmation could not be given by Mr Verrier. It had to come from Mr Lynn. Taken by itself the e-mail suggests that the decision had been taken that at least the Wire and Toscana brokers would leave in the very near future, probably after the meeting between the Tullett management and Mr Hall. However the plan for an early departure was not limited to them. Mr Verrier said that he had no recollection of the e-mail.

(109) By 25 March Tullett had prepared its application for an injunction against BGC. It was a substantial application supported by nine witness statements and it must have been some time in preparation. Mr Potter had arranged a meeting with Mr Hall at 4 pm. But he was called to Mr Potter's office at 2 pm because Tullett intended to serve the application on him and the other defendants – the first to fourth defendants, that afternoon, and to suspend Mr Hall under clause 19(10) of the standard terms attached to his contract. The ground of suspension was that he was in breach of his duties to Tullett by assisting BGC in the recruitment of his desk. The first relief sought in the application notice was an injunction preventing the defendants from inducing any employee of Tullett to breach his contract or to cease working before the expiry of the term of his contract with Tullett. The object was to prevent the implementation of the early exit strategy.

(110) At 2 pm in Mr Potter's office Mr Hall was served with the application and the substantial supporting documentation and he was told that he was suspended. He was given a letter setting out the circumstances of his suspension - I 2639. He then went to the toilet where he telephoned Mr Marshall and Mr Verrier. Mr Verrier himself immediately rang Mr Marshall. When he came back to Mr Potter's office Mr Hall asked if he could clear his desk. He was told that it was preferred that others should go. Mr Clark and Mr Mark Scally, head of human resources at Tullett, went to the desk, but Mr Hall's belongings were scattered about and difficult to identify. So Mr Hall went with Mr Scally to collect them. He was then accompanied out of the office by Mr Scally. I have visited the offices in question and I have twice watched the video recording which was available from a camera placed with a view of the forward cable desk and surrounding desks. What was done was done in a low-key, unostentatious manner and was wholly unobjectionable. The event attracted little attention. Some defence witnesses described Mr Hall as being frog-marched out of the office. That is not a description which is justified. Mr Scally stood behind Mr Hall while he collected his belongings and then they walked side by side out of the office by the shortest route.

(111) Following Mr Hall's suspension Mr Potter wanted to speak to the brokers present on the forward cable desk, Mr Sully, Mr di Palma, Mr Comer and Mr Stevenson to tell them that Mr Hall been suspended and that they should continue working normally, and so asked them not to leave until he had seen them. But he did not in the event have the time. At about 5.20 he apologised for keeping them past their usual leaving time and said he would speak to them the next day.

(112) At 18.30 on 25 March Mr Marshall sent an e-mail to Mr Arif, copied to leading counsel and BLP, subject Mark Yexley – R 6951, saying: 'Please in the circumstances, as previously requested, confirm that the indemnity issued to him and the loss memo between us is in full force and effect.' Three quarters of the e-mail are redacted on the ground of privilege. At 20.26 Mr Marshall sent an e-mail to Mr Arif, copied to leading counsel then instructed and to BLP, subject Phoenix, saying 'Please confirm as discussed the triggering of the indemnity for those that walk.' Again the greater part is redacted. At 21.07 Mr Marshall sent an e-mail to Mr Verrier, subject Phoenix – R 6955.9, saying 'Am still waiting for Mo's confirmation that BGC want to walk out and indemnity kicks in. I need to confirm this to the guys.' In fact, a minute earlier at 21.06 Mr Arif had sent an e-mail to Mr Marshall, copied to Mr Lynn and Mr Marshall – I 2635.7 saying 'Further to our discussion earlier this evening I can confirm that the indemnity provided to your clients (Phoenix, Wire et al) holds firm and will be honoured by BGC.' This was sent on the authority of Mr Lynn. BGC had decided that the time had come for their recruits to leave Tullett.

(113) At 23.09 on 25 March Mr Bowditch sent a text message to Mr Temple, Mr Matthews, Mr Wilkes and Mr Cohen – I 2638, saying 'Guys, that's another hurdle overcome. Say nothing until we know what the content of the letter says. Then we can discuss and contact our banks with our reasons for departure. ….' The hurdle was plainly their early departure from Tullett

enabling them to move to BGC as one. The letter must be the letter which was to be drafted by lawyers justifying their departure.

(114) On 25 March Mr Harkins and Mr Bishop went to Amsterdam on Tullett's business. They returned next morning landing at the City Airport at about 8 or 8.30. Mr Sully went into work at Tullett at his usual time. He had been told by Mr Verrier and Mr Marshall that he need not go back in. He spoke to Mr Potter at 7:53 am, and complained that he did not know what had happened to Mr Hall. Mr Potter told him that Tullett had issued proceedings against Mr Hall but that he could not say more because of confidentiality to Mr Hall – something which makes little sense, but there is no dispute that it was said. I accept that Mr Sully also went in because he wanted to speak to Mr di Palma, Mr Comer and Mr Stevenson, who, he considered, reneged on the deal and stabbed him in the back. It is probable that by this time Mr Sully had decided that he was leaving: he knew that was BGC's intention. While he was there he received a text from Mr Verrier, which was also sent to Mr Harkins and Mr Bishop – I 2665. It told Mr Sully that a car would take him to the City Airport. It asked Mr Harkins and Bishop to call Mr Verrier as soon as they landed and they would meet at the airport. When the four men met at the airport Mr Verrier told them that he did not want them to go back in – that is, to continue working for Tullett. Their decision was to return to Tullett's offices and to collect their belongings.

(115) At 8.15 am on 26 March Mr Osborne rang Mr Matthews at his home. Mr Matthews said that he was not coming in to work because of the way Mr Hall had been treated.

(116) Mr Sully sent an e-mail to Mr Potter at 18.31 on 26 March resigning from Tullett with immediate effect – I 2677. Mr Yexley sent a similar e-mail at 19.25 – I 2678. Mr Bishop sent a letter of the same date, resigning – I 2680. Mr Harkins sent an e-mail on 27 March – I 2681.

(117) On 27 March at 8.10 Mr Arif sent an e-mail to Mr Verrier copied to Mr Lynn – R 6952.2, saying 'Could you please speak with Gavin Matthews as he is wobbling. You must act as a shoulder to cry on only to find out where GM is emotionally.' Although this was denied by Mr Matthews it is apparent that Mr Arif had learnt from an unknown source, that Mr Matthews was uncertain whether he should come to BGC.

(118) On 27 March BLP sent a letter on behalf of Mr Bowditch, Mr Wilkes, Mr Matthews and Mr Cohen to Tullett – P2 5065, saying that they had been constructively dismissed, and were resigning with immediate effect. So Mr Verrier had steadied Mr Matthews' wobble. It is evident that Mr Marshall was still acting for the brokers on 25 March. BLP appear to have been substituted for Mr Marshall as of 26 March. This was something which was done by BGC without reference to the brokers.

(119) The switch from Mr Marshall to BLP had been planned and BLP were ready to step into Mr Marshall's shoes. The plan can only have been that once the time for the brokers to claim constructive dismissal and to 'walk' had arrived,

BLP should take over. It appears that in mid February Mr Lynn and Mr Verrier considered whether BLP should take over for the brokers who had been contracted, but decided not, probably because there was an advantage in having Mr Marshall in place while BGC was trying to build a constructive dismissal case.

(120) On 27 March BGC wrote letters to Mr Stevenson, Mr Comer and Mr di Palma – P2 5197 et seq. The letters referred to their contracts with BGC and their witness statements made in support of Tullett's application which suggested that they had reconsidered their decisions to come to BGC. The letters stated that, unless BGC heard from them by 5pm on 30 March, BGC would conclude that they were in anticipatory breach of contract and would take steps to protect its position including the recovery of the monies they had received and the enforcement of clause 12 of their contracts. The reference to clause 12 was probably to the provision in it for liquidated damages. These letters were not responded to until 1 May 2009.

(121) On 30 March BLP wrote to Tullett – P2 5080, saying that they had been instructed by Mr Temple. Mr Temple was at this time on holiday in Florida. The letter stated that Mr Temple regarded himself as having been constructively dismissed.

(122) Late on 30 March Mr Hall sent an e-mail – I 2686, to Mr Potter saying that events since June of the previous year, in particular the meeting on 16 March, the correspondence which followed, and his suspension had undermined all trust and confidence in their relationship, and that he had no option but to resign.

(123) On 1 April I heard Tullett's application, and I delivered judgment on the points that were in dispute as to interim relief the following morning. Following delivery of my judgment BGC issued a press announcement. It suggested that the hearing had been a success for BGC. The announcement included the following:

> 'BGC is free to continue discussions with Tullett employees about future employment though cannot agree to the terms of a contract until after the July trial. Tullett was unsuccessful in its attempt to prevent all communication between BGC and Tullett staff.'

In paragraph 16 of my judgment I had stated:

> 'I do not think that the Respondents can complain if pending trial they are prevented from approaching or entering negotiations with employees in respect of whom it may be argued that they have obtained no unfair advantage.'

The third undertaking given by the BGC companies, Mr Lynn and Mr Verrier was that they would not approach any employee of Tullett [as defined, but broadly limited to UK employees] for the purpose of negotiating or entering into any forward contract with the employee.

(124) By 29 April Edwards Angell Palmer and Dodge had been instructed by the Tullett Three, Mr Comer, Mr di Palma and Mr Stevenson. This had been arranged by Tullett, and Tullett is responsible for their costs. On 29 April Edwards Angel were preparing to write to BGC as to the position of the Tullett Three and returning the monies they had received from BGC. On that day Edwards Angell asked Tullett to transfer the sums to them for this purpose – I 2705.2. This required the approval of Mr Smith. According to Rosenblatt's letter of 8 January 2010 – P 4957.332, this was given by Mr Smith orally and then by e-mail. Mr Clark's e-mail – I 2705.1, stated that the payments formed part of a proposal on a pro forma which Mr Smith had already approved. Rosenblatt's letter said that this was an error by Mr Clark. No other documents relating to the arrangements between Tullett and the Tullett Three have been disclosed save for the contracts to which I will come. It is accepted that Tullett have agreed to indemnify them against any claims by BGC. No written indemnities have been issued. Although it was initially said that the pressure of the litigation and events had prevented this, plainly there has now been ample time.

(125) On 1 May Edwards Angell sent letters on behalf of the Tullett Three to BGC – P2 5203 et seq. After referring to BGC's letters of 27 March the letters stated that the BGC forward contracts were treated as set aside on the grounds of unlawful contract, breach of contract and misrepresentation. The monies paid by BGC were returned. The letters referred to the position of Mr Marshall, to pressure being put on the Tullett Three at the Bleeding Heard dinner to go to BGC, to Mr Verrier's aggressive conduct towards Mr Comer at Rules, and to their used as pawns "in an unlawful and unconscionable enterprise part of which involved BGC conspiring to carry out a strategy whereby [the brokers] would exit early from their contracts with Tullett Prebon, in breach of those contracts. Such unlawful and unconscionable conduct by BGC again entitles [the broker] to treat his BGC contract as rescinded."

(126) On 19 May Mr di Palma signed an extension to his contract with Tullett. He was entitled to receive a signing payment of £175,000 payable at the end of that month. On 7 October Mr Stevenson signed an extension to his contract with Tullett. He was entitled to a signing payment of £169,000 of which £112,500 had been paid at the end of May. Again on 7 October Mr Comer signed an extension to his contract with Tullett. He was entitled to a signing payment of £150,000 which had been paid at the end of May. The monies paid at the end of May are referable to the sums repaid to BGC through Edwards Angell.

(127) <u>Mr Potter's business initiative proposals.</u> I have left these to the end because of the difficulty of working them into the chronological narrative and retain a comprehensible flow of events. It will be remembered that the brokers who signed forward contracts with BGC gave notice to Tullett on 11, 12 or 13 February. Tullett understood from the notices that they had signed forward contracts with BGC: see, for instance, the evidence of Mr Potter at Day 35.31. Tullett's meetings with the forward cable brokers on 9 and 11 March were conducted on that basis, likewise with Mr Hall on 16 March. Between 27

February and 30 March Mr Potter caused Tullett's MID department to produce a number of business initiative proposals or BIPs. These are computer-generated documents of many pages which are used to make projections based on particular financial input. If the executive wants to take the proposal forward the BIP will then go to Mr Smith for his approval. But that may not happen: the BIP may be used just to see what the figures look like, and be taken no further. Mr Potter was recalled on Day 35, 18 December 2009, to give further evidence concerning in particular six BIPs – Q 5394.5 - .97, which had only been disclosed by Tullett shortly before, not having been earlier located. They were all projections for the forward cable desk based on differing scenarios. The first was made on 27 February. It is unclear how long it might take to produce a BIP after a request, but my impression was that it was a short time only. The BIP assumed that the members of the desk were unchanged but that all save Mr Hall signed new contracts with Tullett with sign-on payments totalling £1,650,000. The second and third dated 10 March were on the same basis save that the sign-on payments were reduced to £825,000. Mr Potter said that he had realised that the payments in the first were much too high. Mr di Palma had had his white board presentation on 9 March. The others save Mr Hall were seen on 11 March. Mr Comer, Mr Stevenson and Mr di Palma had all had meetings with Mr Clark in mid March. The fourth dated 18 March assumed sign-on payments for the Tullett Three which were the same as those agreed with them. Mr Sully and Mr Bishop were not included. The fifth BIP dated 30 March provided for the three remaining members, the Tullett Three, to have the same sign-ons. Likewise the sixth also dated 30 March. The objective of each BIP was stated as 'to defend our business which is under aggressive attack from BGC.' BGC rely on these BIPs for two purposes: first to show that Mr Potter contemplated resigning the brokers even though they were contracted to BGC; second as to when Tullett agreed figures with the Tullett Three. It was Mr Potter's evidence that all of these BIPs were done for his information and that none of them went forward for approval higher up the executive line, in particular to Mr Smith.

Indemnities

64. It was part of the agreement with each broker recruited by BGC that he should have an indemnity from BGC.

(1) On 16 January Mr Arif's assistant sent Mr Marshall a number of draft documents including a draft indemnity – G 1788, 1789. The first two paragraphs of the draft indemnity provided:

> 1. The Company hereby agrees to indemnify fully and keep you indemnified and hold you harmless against each and every claim, liability, cost, legal demand or expense (including reasonable legal expenses) which relates to or arises directly or indirectly out of any claim or legal proceedings (whether or not threatened, settled or successfully defended) brought by [Tullet Prebon ***–confirm employing entity name***] ("Current Employer") in respect of your accepting and/or commencing and/or carrying out any duties in

connection with employment with the Company or any Associated Company (as that term is defined in the Employment Agreement). It is a condition precedent that the Company has given prior approval to all and any steps taken in connection with this indemnity.

2. For the avoidance of doubt, this indemnity excludes any indemnity with respect to any claim or legal proceedings brought by your Current Employer for:

   (a) repayment of any bonus (or like payment) that you have received while in its employment; or

   (b) your inducing a breach of any contract of employment of any other employee or your Current Employer.

(2) Later that day Mr Arif's assistant sent Mr Marshall an e-mail –G 1797, which was copied to Mr Verrier among others, but not to Mr Lynn, though the omission of the latter does not matter given the opening words of the e-mail. It read:

'We have taken instructions from Tony [Verrier] and Shaun [Lynn]. Accordingly, I attach tracked version of the draft Contract, Terms & Conditions and Indemnity.
Please note that we have added the word "loss" to the first paragraph of the Indemnity to cover the loss of income point that yourself and Mo [Mr Arif] discussed. You can agree an appropriate file note with Mo at some point.'

The instructions of Mr Lynn and Mr Verrier had been taken. In evidence Mr Lynn stated that only he had authority to agree an indemnity.

(3) On 20 January Mr Marshall sent to Mr Arif his proposed wording as to the meaning of 'loss' in the indemnities for Project Phoenix – G2 1916.The e-mail was copied to Mr Verrier and to Mr Lynn. It read:

I need you to confirm our mutual understanding of that the 'loss that BGC is prepared to cover, as referred to in paragraph 1 of the draft indemnity letter for Messrs Bowditch, Cohen, Temple, O'Meara, Matthews and Wilkes (the Brokers), includes:

1. The full amount of any sums the Brokers are required to repay to their current employer by way of signing payments, bonus payments (whether guaranteed or not) or loyalty payments.

2. The total amount of compensation (salary and bonus in particular) that they loose as a result of being held out of the market by their current employer, prior to their starting work with BGC. This loss to be calculated by reference to the compensation they received from Tullett

> Prebon in the equivalent period of 2008, set against the monies they receive (if any) from Tullett Prebon whilst so held out.
>
> Mr Arif agreed it the same evening – G2 1917. The e-mails were copied to Mr Verrier and Mr Lynn.

(4) On 22 January it was agreed to include draft indemnities in the signing packs for the Phoenix brokers – R 6916.2. The Phoenix brokers signed their contracts on 26 January.

(5) On 29 January Mr Marshall confirmed to Mr Arif's assistant that following a lunch with Mr Verrier and Mr Arif it was agreed that clause 3(a)(ii) of the standard contract should not be in Mr Hall's contract and that there were '2 memo's of understanding for him and one for the others.' – H 2193. The e-mail was copied to Mr Verrier but not to Mr Lynn. Clause 3(a)(ii) related to the reduction of salary if after 2 years the broker's revenue fell below a level.

(6) On 30 January Mr Arif sent to Mr Marshall a revised version of the 'file note' for four of the Wire brokers (not Mr Hall) – H 2227. The e-mail was copied to Mr Lynn, Mr Verrier and others. It provided:

> Below is set out the 'loss' that BGC is prepared to cover, as referred to in paragraph 1 of the indemnity letter to Messrs Stevenson, Bishop, Harkins, Comer, Sully and di Palma (the "Brokers"). This includes.
>
> 1. The full amount of any sums (already disclosed to BGC by the Brokers as at today's date) which the Brokers are required to repay to their current employer by way of signing payments, bonus payments (whether guaranteed or not) or loyalty payments.
>
> 2. The total amount of compensation (salary and bonus in particular) that they lose as a result of being held out of the market by their current employer, prior to their starting work with BGC. This loss is to be calculated by reference to the compensation they received from Tullett Prebon in the equivalent period of 2008, set against the monies they receive (if any) from Tullett Prebon whilst so held out.
>
> The Brokers undertake that they shall give prompt notice to BGC of any offers of waiver made by the Tulletts in respect of any payments that they are required to repay pursuant to points 1 and 2 above and that they shall not accept any such offer, without the prior consent of BGC. The Brokers also undertake that should they recover any monies from Tulletts in respect of this after BGC have made a payment pursuant to this file note, the Brokers agree to pay to the Employer such of those proceeds as are required to reimburse BGC for its payments pursuant to this file note.
>
> This email only can be relied upon as evidencing the parties common understanding of what the said 'loss' includes and that this will

override any statement to the contrary in any of the BGC Partners documents provided to the Brokers.

A separate note was suggested for Mr Hall which only gave him half of such Tullett signing and bonus payments as he might have to repay. Mr Marshall agreed – H 2234.

(7) On 4 February Mr Marshall confirmed to Mr Comer that 'loss' had been defined as set out above in paragraph (3) – H 2265, 2267. That was the wrong note: it was the Phoenix note. Mr Marshall also said:

> 'Further you will not be breaking your own or inducing any breach of others contracts as you will all commit to serving out your [Tullett] contracts unless BGC ask you to do otherwise. In which case the indemnity will be expressly extended to cover this and I have discussed this with Tony.'

(8) This confirms that Mr Marshall and Mr Verrier had discussed the operation of the indemnity in the context that BGC asked the brokers to walk out of Tullett. It appears that there was then to be an extension of the indemnity to cover the situation. It is unclear what Mr Marshall had in mind. It may be that he meant no more than that BGC should agree that the indemnities applied to the situation. That is in fact what happened on 25 March in response to Mr Marshall's requests. No attendance note of this important discussion between Mr Marshall and Mr Verrier has been disclosed. Given the care that was taken in the further disclosure exercise in December 2009 and January 2010, the probability is that none was made. It is highly likely that the reason that it was not, is the sensitivity of the topic.

(9) On 9 February Mr Arif's assistant informed Mr Marshall that Mr Lynn had signed all the Phoenix documents – H 2287. This would include the indemnities.

(10) On 25 February Mr Arif's assistant sent to Mr Marshall the definition of' 'loss' for Toscana. It followed that for Wire – R 6939.

(11) I have already referred to Mr Marshall's requests on 24 and 25 March for confirmation that the indemnities applied.

(12) The indemnities which have been disclosed by BGC are dated 12 June 2009. It is said by BGC that the ones signed earlier by Mr Lynn have been lost within BGC's human resources department.

(13) In his evidence in chief Mr Lynn said that he had never authorised any extension to the form of indemnity signed by him and no one else had authority to do so – Day 22.32. In cross-examination he could not explain why the definition of 'loss' was not part of the indemnity, but he accepted that the brokers were entitled to be indemnified against loss of bonus. I refer to Day 23.98-101. It seems clear from the e-mail of 16 January referred to at (2) above – G 1797, that he was involved in the decision and may have been an

instigator. He was unable to explain the contradiction between clause 2(a) of the indemnities – exclusion of repayment of bonus, and the loss memo or note agreed between Mr Arif and Mr Marshall which defined 'loss' to cover bonus.

(14) There is thus no explanation for the separate e-mail definitions of 'loss'. It does not seem to me that it particularly assisted the 'common plan' alleged by Tullett. A possible explanation is that BGC London wished to conceal from BGC New York what the width of the indemnity was. However that was never suggested or investigated at the trial.

(15) The only broker to have been informed about the separate definition of loss was Mr Comer - 4 February, H 2265, paragraph (7) above. That e-mail was sent to Mr Comer in response to an e-mail from him setting out the points which Mr Comer's independent solicitor had made on the BGC contractual documentation. If Mr Comer had not raised the matter, he would never have known of the e-mail defining loss. The other brokers were in ignorance of the "loss memos" agreed for their benefit. So when the defendant brokers left Tullett, in order to claim an indemnity from BGC they had to rely on an agreement of which they had no knowledge and which, outside BGC, was only known to Mr Marshall and Mr Comer. Mr Marshall had at this point ceased to be their solicitor, and was acting for Mr Verrier. So if any dispute had developed, Mr Marshall was on the opposite side.

Telephones and blackberries

65. In paragraphs 699 to 768 of Tullett's closing submissions Tullett set out how mobile telephones or blackberries were lost or replaced by Mr Verrier, Mr Hall, Mr Bowditch, Mr Temple, Mr Wilkes and Ms Howell at crucial times. Between April 2008 and April 2009 Mr Verrier lost or disposed of eight blackberries. His last blackberry was found to be locked by password. Mr Verrier could not explain how that had happened and said he never used a password. Tullett assert that all this happened deliberately so that text messages which might reveal something about Mr Verrier's activities and intentions and those of the desk heads should be irrecoverable. Mr Verrier's response was that he has a history of frequently losing blackberries. The other defendants each had an explanation, some more persuasive than others. It was submitted on behalf of the defendants that some of the supposed text messages would have been available from other phones, and little has emerged. That is correct. It is however inconceivable that all these items went missing or became unavailable as they did, when they did, without an improper intention in at least some of the cases. I am satisfied that it was Mr Verrier's gambit to 'lose' blackberries whenever he thought they might contain inconvenient material, and that his instructions were the cause of at least some of the mobiles being lost. I am satisfied that the inaccessibility of the contents of his last blackberry due to a missing password was a deliberate ploy. When Ms Howell was ordered on 27 August 2008 to deliver up her blackberry, it disappeared. Her explanation as to how this had happened provided by her in witness statements was simply not credible. That was a forerunner of what has happened in the present case.

Part C - The position of a desk head in a recruitment exercise

66. An employee has an implied duty of fidelity to his employer, that is, to serve the interests of his employer in good faith. The converse is that he should not during the course of his employment act in a way which is intentionally contrary to the interests of his employer. On occasion an employee may come under a fiduciary duty. That is a different duty. It is a duty which arises in equity with the consequence of holding the employee liable as a fiduciary to account for monies, usually the profits or proceeds of his conduct: see among other authorities, *Bristol & West Building Society v Mothew* [1998] Ch 1 at 16 et seq, per Millett LJ, and *Attorney-General v Blake* [2001] 1 AC 268 per Lord Nicholls at 280 G-H and 287 F-H. The distinction was elaborated by Elias J in *University of Nottingham v Fishel* [2000] ICR 1462 in the context of a claim against an employee to recover sums he had received in situations which, it was said, rendered him accountable as a fiduciary. Directors and senior employees of a company are more likely to find themselves in situations where they will be held liable to account as fiduciaries than more humble employees. But the duty to account as a fiduciary arises from the factual situation in which an employee finds himself. So a junior employee in the accounts department of a company who steals, or a junior employee who is paid two months wages in one month in error and dishonestly retains the money, or disposes of it, may find himself treated as a fiduciary for the purpose of the application of equitable remedies. The duty that is relied on in the present case is largely the implied duty to serve an employer in good faith. Claims are also made against the defendant brokers to recover the signing payments paid to them by BGC on the basis that they are accountable to Tullett for those sums as sums received by them as fiduciaries in breach of fiduciary duty. I am not concerned with those claims on this hearing. They are for the future. I set this out because, in the opening submissions at least, there was some conflation and confusion between the duties.

67. So to the duties of desk heads in a recruitment situation. I start with the obvious – that there is nothing wrong in a desk head responding to an approach to recruit himself. If his contract obliges him to report that approach to his employer, in my judgment he is obliged to do so. I do not consider that such a provision operates in restraint of trade. This case has examples of where such reports were made without difficulty. Mr Bowditch told Tullett that he had been approached. Some brokers are very happy to inform their employer, because if the employer values the broker, he is likely to make a counter-offer. So the system works, and brokers may move or not move according to their advantage. There are a number of cases dealing with what employees may or may not do while still employed in preparation for their future activities. But I do not consider that they support the suggestion that an obligation to report an approach is a restraint of trade. I refer to *Balston v Headline Filters Ltd* [1990] FSR 385, *British Midland Tool v Midland International Tooling* Ltd [2003] 2 BCLC 523. *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126, *Foster Bryant Surveying Limited v Bryant* [2007] IRLR 425, and *Shepherds Investments Ltd v Walters* [2007] IRLR 1.

68. Where it is sought to recruit a desk as a whole, or the greater part of the desk, it is very likely that the desk head will be approached first with the object of sounding him out as to the desk. He is then in a difficult and sensitive situation. While the desk head may see his obligation to his desk as being to get the best for them, his duty in law as desk head is to act in the interest of his employer and not that of the desk. His employer's interest is to prevent the recruitment of the desk. He is obliged to inform his employer that the rival company is seeking to recruit the desk. He would be obliged to follow his employer's instructions to prevent that happening. I need not for the purpose of this case consider the position where such instructions are inconsistent with the desk head responding to the offer to himself. In *Kynixa Ltd v Hynes* [2008] EWHC 1495 (QB) it was held that a particular employee was obliged in the circumstances to report to her employers that she and other employees were moving to a competitor. I refer to paragraph 283 of the judgment of Wynn Williams J. That was a decision on its particular facts and it is of no particular assistance in considering the position of a desk head who knows that a rival company seeks to recruit his desk. But in my view the duty of a desk head in this situation is plain.

69. In addition the desk head must not do anything to assist the recruitment of his desk. Information may or may not be categorised in law as confidential. But where he provides information which he knows is requested for the purpose of furthering the recruitment, this is a breach of his duty to his employer. Where a desk head decides that he is in favour of the recruitment of his desk and thereafter assists the recruitment in such small or large ways as may arise, he is in plain breach of his duty: he has crossed the line between observing his duty to his employer and acting in the interest of his employer's rival. I appreciate that what I have set out may not be how some of those in the inter-dealer business commonly conduct themselves, but the legal principle is straightforward.

Part D - The claims of the fifth to fourteenth defendants for constructive dismissal
The law

70. The broker defendants allege that Tullett was in breach of the implied term of trust and confidence, and so they were entitled to determine their employment with Tullett. That term has been recognised as part of employment law comparatively recently. Its history was outlined by Lord Steyn in his speech in *Mahmud v BCCI,* often cited as *Malik v BCCI*, [1998] AC 20 at 45, 46. The appeal was the first occasion on which the House had had to consider the term. The appeal concerned the claims of two employees of the bank for damages because the bank had caused them to be disadvantaged in the employment market because, as was only discovered after the bank's collapse, the bank's business had been run in a dishonest and corrupt manner. The argument for the employees was that that conduct of the business was a breach of the implied term of trust and confidence and that they had thereby suffered damage by being disadvantaged in getting further employment. The House held that, as a matter of law, it was open to the employees to advance their claims. The case had four unusual features in that (1) the employees did not know of the dishonest way in which the bank had been run when their employment came to an end, (2) the dishonest conduct relied on was not directed at the employees unlike most conduct which is relied on in cases of constructive dismissal, (3) their employment ended not by reason

of their acceptance of a constructive dismissal but by reason of the bank's collapse, and (4) the compensation sought by the employees was not compensation for being dismissed, but compensation for being disadvantaged in the labour market because they had worked for BCCI.

71. Lord Nicholls stated at page 35 C:

> "The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in the employer. That requires one to look at all the circumstances.
> The objective standard just mentioned provides the answer to the liquidators' submission that unless the employee's confidence is actually undermined there is no breach. A breach occurs when the proscribed conduct takes place: here, operating a dishonest and corrupt business. Proof of a subjective loss of confidence in the employer is not an essential element of the breach, although the time when the employee learns of the misconduct and his response to it may affect his remedy."

72. At page 47 B Lord Steyn approved the following:

> "In assessing whether there has been a breach, it seems clear that what is significant is the impact of the employer's behaviour on the employee rather that what the employer intended. Moreover, the impact will be assessed objectively."

73. In *Meikle v Nottinghamshire County Council* [2005] ICR 1 the Court of Appeal had to consider a case where the employee relied on a course of conduct to establish constructive dismissal. The employment tribunal applied a subjective approach to whether the duty of trust and confidence was broken. She had lost before the tribunal. In his judgment with which the other members of the court agreed Keene LJ affirmed that the test whether the term has been broken is objective and not subjective. In paragraph 37 he stated:

> "However, [the Tribunal] patently erred when it did so. It rejected the "last straw" argument because it applied the subjective test of asking whether the employee's trust and confidence had in fact been undermined. Even if that had been the appropriate approach, the conclusion that Mrs Meikle's trust and confidence remained despite her relationship with the headteacher having broken down is an unsustainable one. But the test itself is wrong in law. As Lord Nicholls of Birkenhead said in the *Mahmud* case [1997] ICR 606 , 611b: "Proof of a subjective loss of confidence in the employer is not an essential element of the breach." As I have already noted, the employer does not now seek to argue to the contrary."

74. The objective approach means that the employee does not in fact have to show that in his case his trust and confidence in his employer was seriously damaged. While his reaction may be some indication as to the gravity of the employer's conduct in the circumstances, once the court decides that the conduct was, objectively, a breach of the duty, the employee's reaction becomes irrelevant to the question of breach.

75. Keane LJ also considered the issue as to whether the employees had to show that their resignation was as a result of the breach. He held in paragraph 33:

> "It has been held by the Employment Appeal Tribunal in *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The appeal tribunal there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the "effective cause" of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other: see the *Western Excavating* case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

76. The principle that the employee must leave in response to a breach of the implied duty committed by the employer is considered in Harvey's Industrial Relations & Employment Law at D1.508 and following, and appears well established in the law, at least up to the Court of Appeal. The court does not look simply at the reason given or not given by the employee: it looks to see whether the termination of the contract by the employee was in response to the breach and an acceptance of the repudiation by the employer. In *Weathersfield Ltd v Sargent* [1999] ICR 425 at 431 Pill LJ stated:

> 'I reject as a proposition of law the notion that there can be no acceptance of a repudiation unless the employee tells the employer, at the time, that he is leaving because of the employer's repudiatory conduct. Each case will turn on its own facts and, where no reason is communicated to the employer at the time, the fact-finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving. In each case it will, however, be for the fact-finding tribunal, considering all the evidence, to decide whether there has been an acceptance.'

77. *Meikle* was cited to me as authority for the position that an employee cannot rely on conduct unless he leaves by reason of it. That appears contradicted by *Malik.* For in *Malik* it was held that the employees could recover damages even though, when their employment ended, they did not know of the breach. The contradiction disappears once it is remembered that *Meikle* and the cases which went before it were concerned with situations where the employee is seeking compensation for unfair or wrongful dismissal. There the employee has to establish that his loss was caused by the conduct which he relies on as constituting the constructive dismissal, that is the employer's breach of the duty not seriously to damage the relationship of trust and confidence between him and his employee. If the employee had left for some other reason, he cannot establish the necessary causation. What Keane LJ was saying was that it was enough for the employee in such situations to show that he resigned in response at least in part to the employer's breach. Where he cannot establish that, he cannot claim compensation for constructive dismissal. So, if the employee would have left in any event because he wanted to live in another part of the country, he has suffered no loss by reason of the constructive dismissal. If he would have left anyway because of other conduct by his employer which was not part of the conduct constituting the constructive dismissal, he has likewise suffered no loss as a result of the constructive dismissal.

78. But as *Malik* shows, breach of the duty as to trust and confidence may have other consequences besides founding a claim for unfair or wrongful constructive dismissal. Even though the employee does not know of the breach when his employment terminates, he may have a claim for damages. It can also be used to justify his leaving, whether or not he left because of it. So if an employer asserts that the employee should not have left, the employee may show that he was entitled to leave because of the employer's conduct, regardless of why he in fact left.

79. It is well-established that an employer who dismisses his employee can rely on grounds of which he was unaware at the time of dismissal: Chitty on Contracts, 30th Edition, volume 2, paragraph 39-183, citing in particular *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch D 339. This is an application of the general principle that a party who refuses to perform a contract, giving a wrong or inadequate reason, may subsequently justify his refusal if there were facts in existence at the time of the refusal which would have provided a good reason for it. I refer to volume 1 of Chitty at paragraph 24-014. The application of other principles such as those relating to

waiver or estoppel may prevent him from doing so. Turning to the situation with which I am concerned, the converse of that in *Boston Deep Sea Fishing,* it follows that an employee may justify his refusal to perform his contract of employment by any grounds which existed at the time of his leaving. So, if he simply walks out without apparent justification, but later discovers that his employer was fraudulently deducting from his pay on account of tax more money than he should, his employer would fail in any action brought against him, whether for damages or for an injunction to restrain him on the basis that the employment was continuing. Likewise, taking some of the facts in *Malik*, if the employees had left to work for another bank before they were free to do so, and BCCI had sought to restrain them from doing so, it would have defeated BCCI's claim for the employees to show that the bank was run in a dishonest and corrupt manner even though the employees did not know that when they left.

80. I conclude that the defendant brokers can rely on any conduct by Tullett which, objectively considered, constituted a breach of Tullett's duty not seriously to damage the degree of trust and confidence which each was entitled to have in Tullett. It does not matter whether that conduct in fact caused the employee to leave because they are not seeking damages but solely to justify their leaving and to resist the claims made against them by Tullett.

81. Once the degree of trust and confidence which the employee is entitled to have in the employer is destroyed or seriously damaged, the employee is entitled to leave. It is in a sense circular to say that the employer's conduct must be serious enough to entitle the employee to leave. However, in considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in his employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough.

82. The employee may rely on a course of conduct, that is to say a series of actions, which taken together sufficiently damage the relationship, where taken individually they do not. The final act may need not be particularly serious – hence the cases dealing which what is called 'the last straw', where the leading case is *Omilaju v Waltham Forest London Borough Council* [2004] EWCA Civ 1493, [2005] 1 All ER 75. So where individual acts of the employer are relied upon, it is necessary also to consider the cumulative effect of all the acts relied on.

83. It was tentatively suggested in *RDF Media Group Plc v Clements* [2008] IRLR 207 at paragraph 140 that where an employee was himself in repudiatory breach of his contract of employment he could not accept a breach by his employer to bring the contract to end, citing *Bremer Vulcan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 and *Paal Wilson v Partenreederei Hannah Blumenthal* [1983] 1 AC 854. Those cases were concerned with the very different and difficult

situation which arises where no progress has been made in an arbitration for many years. I do not think that they are helpful in an employment situation. The ordinary position is that, if there is a breach of a contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of the contract. I refer to Chitty on Contracts, 30th Edition, Volume 1, paragraph 24-015, citing *State Trading Corporation of India v Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286 per Kerr LJ.

84. An alternative approach as to how the employee's own misconduct should be taken into account was suggested, and perhaps preferred, by Mr Bernard Livesey QC, the judge in *RDF*, namely that the employee's conduct may have so damaged the mutual relationship of trust and confidence that the employer's conduct is of little effect. I refer to paragraphs 120 and 141 of the judgment. But I think that this breaks down on analysis. I accept that the relationship is a mutual one, but that means only that the employer is entitled to have trust and confidence in his employee, and the employee is entitled to have trust and confidence is his employer. If the one is damaged it does not follow that the other is damaged. Nor does damage to the one party's trust and confidence in the other entitle him to damage the other's trust and confidence in him.

85. In my judgment the conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question. There may in practice be little difference with the approach suggested by Mr Livesey.

86. As is stated in Brearley & Bloch's Employment Covenants & Confidential Information, 3rd edition, paragraph 9.68:

> "The courts will, however, continue to scrutinise closely the arguments of employees (particularly highly paid individuals and teams moving to a competitor of their employer) who have already secured alternative employment prior to resigning, and who construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants. In such cases the argument will fail: (a) often at the first hurdle of whether there has been a repudiatory breach at all; or (b) sometimes, because any such breaches have been waived."

This is, if I may say so, but sound sense and is apt here.

Mr Hall

87. Mr Hall's claim for constructive dismissal has to be considered in the context that he was a disaffected employee of Tullett, was assisting Mr Verrier in the recruitment of his desk to BGC, and was working with Mr Verrier to provoke conduct which might be relied on in support of a claim for constructive dismissal.

88. In the defence of the fifth to fourteenth defendants the following matters are relied on in respect of the constructive dismissal of Mr Hall:

(1) Mr Potter telling Mr Hall in about June 2008 that he had not been promoted to be a director because as a friend of Mr Verrier he was not trusted.

(2) The assurance given to Mr Hall that Mr Verrier would not be 'crucified' for leaving Tullett; the Sunday Times article about Mr Verrier; the disclosure in the article of Mr Verrier's earnings, which gave Mr Hall problems over brokerage with some clients.

(3) The offer at the lunch on 24 June 2008 of a directorship, which Mr Hall later declined because of how he felt about the Sunday Times article.

(4) The appointment of Mr Wink as chief executive officer for Europe, with responsibility for the treasury division, which included Mr Hall's desk, contrary to an alleged assurance on 24 June to the effect that Mr Hall would not come under Mr Wink.

(5) At the meeting on 9 February 2009 with Mr Potter and Mr Duckworth Mr Hall confirmed that he had been approached by Mr Verrier, said he was unhappy about the Sunday Times article, the appointment of Mr Wink, and the handling of the departure from Tullett of Mr Farrington, and Mr Duckworth said he had instructed Mr Wink to stay clear of Mr Hall's division.

(6) Mr Wink subsequently conducted meetings with members of the forward cable desk at which he sought to disparage BGC.

(7) On 16 March Mr Hall was invited to a meeting. (a) He was told it would be with Mr Potter, but Mr Wink and Mr Clark were there. He felt ambushed. (b) Mr Wink's presence was contrary to assurances given to him that Mr Wink would not have anything to do with the treasury division. (c) At the meeting BGC was criticised, saying that they treated staff badly and 'ripped up' contracts. It was said that Mr Kilford was unhappy at BGC, which Mr Hall said was untrue, and Mr Wink responded 'strike him off the list then'. Mr Wink said he did not know why BGC offered forward contracts, and that Tullett did not. Mr Hall said Tullett did, and Mr Clark agreed. Mr Hall thought Tullett were giving him false information to manipulate him to go back on his contract with BGC. (d) He was told that the information he was given was that which had been given to the other brokers on the desk at prior meetings with them; he was concerned that they were being given false information with the same aim. (e) He was threatened that he might be sued for £3 million because he had three years left on his contract, and if he lied in court he could go to

gaol. (f) His e-mail to Mr Potter of 19 March about the meeting and (g) Mr Potter's reply of 20 March and Mr Hall's response of 24 March.

(8) The suspension of Mr Hall on 25 March was handled in an unnecessarily heavy handed and humiliating way, and his treatment constituted a public humiliation in front of his colleagues. He was informed that he was being suspended so the allegations against him could be further investigated, but that was not so: the real reason was to keep him out of work.

I will take these in turn.

89. Matters (1) to (4). The allegation that Mr Potter told Mr Hall that he was not trusted fails on the facts: I refer to paragraph 63(3) above. Likewise the alleged assurance that Mr Hall would not be 'crucified': I refer to paragraph 63(7) above. I was not invited to make any findings about the rights and wrongs relating to the Sunday Times article. If Mr Hall had problems with his clients because of the amount Mr Verrier had been paid, it was an ordinary part of his job as desk head to deal with them. The third allegation adds nothing to a claim for constructive dismissal. The fourth allegation relating to Mr Wink's promotion fails on the facts: I refer to paragraph 63(5) above. It emerged during the evidence that Mr Hall had been advised by Mr Marshall in early 2009 that these 2008 matters did not constitute grounds for constructive dismissal. These matters do not contribute anything to a claim for constructive dismissal.

90. Matters (5) and (6). I have made my findings as to the meeting on 9 February in paragraph 63(77) above. Nothing happened at the meeting that could contribute to any case for constructive dismissal. Mr Hall was not honest at the meeting: he concealed what was happening to his desk and his role. Mr Wink was entitled to have meetings with the forward cable brokers and express views as to BGC. While it is hardly relevant, Tullett's evidence was that Mr Farrington had been well-treated.

91. Matter (7). I have referred to the meeting with Mr Hall on 16 March and the two e-mails following it in paragraph 63(101) above. Mr Hall was not told the meeting would be with Mr Potter. He was simply asked to come up to the board room. He knew that the management wanted to have a meeting with him. He knew who had been at the earlier meetings with the other members of his desk. He was not ambushed. He knew broadly what might be said to him because, apart from any other conversations which he may have had with members of his desk, at the Rules dinner on 11 March Mr Sully had described to the assembly what had happened at his meeting. One reason why Mr Hall was given the white board presentation had been given to the brokers on his desk was so he could not say that he did not know what had been said to them. He was asked if he wanted to hear what had been said to the others and he said he was surprised that they bothered. He was told that the purpose was not to change his mind about going to BGC. I am satisfied that in his case it was not. Mr Wink and Mr Potter knew enough about the situation to know that there was no chance of that with Mr Hall. It is not alleged that one purpose of the meeting was

to get Mr Hall to break his BGC contract: defence paragraph 20.7 and defendants' closing submissions, paragraph 526. He was told that Tullett expected its employees to work out their contracts and that Tullett was aware that there was an early exit strategy. He was told that if he left early he would be sued and Mr Wink made a hypothetical calculation of what an employee might be sued for, and by multiplying revenue by years unserved came up with a very large figure. Mr Hall was also told that if he lied in court that would be perjury and punishable with gaol. This was in a sense a threat, but it was a threat which Mr Wink was justified in making. For Tullett were fully entitled to make clear to Mr Hall what the consequences might be if he did not keep to his contract. This was said in the context that Tullett believed, rightly, that there was an early exit strategy. Further, as a result of the evidence they were gathering for their application – see, inter alia, paragraph 63(91) above, Tullett must have been aware by this stage of something of the role Mr Hall had played in the recruitment of his desk. Mr Hall said that he had not taken advice from John Marshall but another lawyer, which was untrue. He was asked if he had a comprehensive indemnity from BGC and said he had. As Mr Hall accepted in his evidence, Mr Wink asked him to report if he received any adverse treatment because of his decision to join BGC, and that Tullett would not accept such behaviour. When Mr Hall complained about the inclusion of Mr Kilford among those alleged to be unhappy at BGC Mr Wink rubbed him off the board. It was not established that Tullett did not honestly believe that he was unhappy at BGC, nor whether he was or was not unhappy. BGC obtained a letter from Mr Kilford dated 19 March and addressed to Mr Clark at Tullett – R 6947.1.2, saying Tullett were wrong: but it was never sent. There is nothing in this point. There was a brief argument between Mr Clark and Mr Hall as to whether in September 2008 Mr Verrier had sued or Tullett had sued. Mr Clark said that who should be the claimant had been agreed between solicitors. Mr Wink was aware that Tullett used forward contracts. His point to Mr Hall was that BGC were using them so far forward. Mr Hall alleges that Mr Potter took notes at the meeting. I accept that on this occasion he did not make a note. I am satisfied that the meeting was conducted in an appropriate manner although there were hard things to be said. There was no bullying or intimidation. There was nothing that can serve to support a claim for constructive dismissal. Mr Hall's e-mail of 19 March was an attempt to make something out of nothing and to pick a fight with Mr Potter. Mr Potter's reply of 20 March was temperate and conciliatory.

92. Matter (8). I have dealt with the suspension of Mr Hall in paragraph 63 (110). I reject the allegations that are made about it without hesitation. The only reason which is advanced for saying that Tullett were not entitled to suspend Mr Hall, is that it was done to prevent him working. It was, of course, always open to Tullett to put Mr Hall on garden leave. Tullett has not in fact advanced disciplinary proceedings against Mr Hall, and while these proceedings are on-going, that is not surprising. Tullett was fully entitled to suspend Mr Hall by reason of the part he had played in the recruitment of his desk by Mr Verrier. The only reason why Mr Hall came back from Mr Potter's office to where his desk was situated was to collect his belongings. He had asked if he could do that. It was wholly appropriate that in the circumstances he should be supervised. Mr Hall had intended that the meeting at which he was served with proceedings and suspended should be one at which he and Mr Wink would have a row, and that he could use this as a ground to claim constructive dismissal. But it

did not happen. So in order to make any sort of case Mr Hall has had to make the unfounded allegations which he has about his suspension.

93. I find that Mr Hall cannot have thought that he had any genuine grounds to claim constructive dismissal, but has relied on manufactured grounds. Tullett did not conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence with Mr Hall.

Mr Sully, Mr Harkins and Mr Bishop

94. I take these together because of the similarities in their positions and because it is right to consider the evidence in respect of them as a whole.

95. The defence of the defendant brokers raises the following matters relied upon in respect of Mr Sully:

(1) The first relates to the meeting on 11 March. (a) Mr Sully attended at the invitation of Mr Potter and found the additional presence of Mr Wink and Mr Clark intimidating. (b) He was subjected to a grilling in an unpleasant atmosphere. (c) Mr Wink tried to discredit BGC, saying they treated their staff badly and would go back on their promises to Mr Sully. Mr Wink told Mr Sully that he was an idiot to consider working for BGC. (d) Mr Wink named 6 or 7 individuals who had been treated badly at BGC including Mr Kilford whose signing fee, Mr Wink said, BGC had tried to recoup. Mr Sully later contacted Mr Kilford who said Mr Wink was wrong. (e) It was emphasised to Mr Sully that if he left Tullett he could be sued and liable for all the money he would have made for Tullett if he had not left. Mr Sully felt this was to intimidate him. (f) It was wrong to call a meeting without notice that Mr Wink and Mr Clark would be there and to manipulate him by scaremongering and false allegations to break his contract with BGC.

(2) By an email on 20 March Mr Sully complained to Mr Potter about the meeting. He was later contacted by Mr Scally, saying it would be necessary to hold a grievance meeting and he would write to him: nothing happened.

(3) The treatment of Mr Hall when he came back from being suspended. It was heavy handed, unnecessary and designed to humiliate Mr Hall and to send a warning shot to the other brokers who had signed with BGC.

(4) Mr Sully was the most senior person on the desk after Mr Hall. He should have been kept informed as to what was happening so he could run the desk in the absence of Mr Hall. Mr Potter told those on the desk not to leave until they had had a meeting with them, but later said there would be no meeting.

(5) The next morning Mr Sully attended work and found the position on the desk untenable. Mr di Palma said he would only discuss the position in front of Mr

Potter. Mr Stevenson ignored Mr Sully. Mr Comer said that he, Mr Comer, had done nothing wrong.

(6) When Mr Potter did not come to the desk, Mr Sully went to see Mr Potter and asked what was happening. Mr Potter said he did not know, and asked why the brokers had not come to work. Mr Sully said he did not know about the brokers but needed to know about Mr Hall. Mr Potter then said that Mr Hall had been suspended but he could not say more due to confidentiality to Mr Hall.

(7) Mr Potter's delay and then his response showed that Mr Sully was not trusted and that his position was untenable.

(8) When Mr Sully telephoned Mr Potter at about 1 pm on 26 March and said he could not come in because of the events over the last two days and the lies at the meeting on 11 March, Mr Potter offered him no reassurance as to the situation on the desk but simply told him he would be in breach of contract if he did not return.

96. The defence of Mr Harkins raises two matters. The first is the meeting of 11 March. Among the complaints is that: 'The meeting was a transparent attempt to pressure and manipulate Mr Harkins to breach his contract with BGC.' The second is the suspension of Mr Hall – which occurred while Mr Harkins was in Amsterdam.

97. The defence raises the same two matters in respect of Mr Bishop. Sub-paragraph (f) of the paragraph relating to the meeting on 11 March is in similar terms to that quoted in the previous paragraph.

98. In paragraph 54 of the broker defendants' opening submissions (which was repeated in paragraph 528 of the defendants' combined closing submissions) the case was put more shortly:

> "Mr Sully, Mr Bishop and Mr Harkins each rely upon the conduct of Tullett in relation to the meetings with Mr Wink (including seeking to procure that they breached their contracts with [BGC] and the manner in which Tullett sought to procure this), and the conduct of Tullett in relation to the manner of Mr hall's suspension. Reliance is placed on the conduct of Tullett subsequent to this including the failure to explain the action taken against Mr Hall and the refusal to address Mr Sully's request to provide any reassurance or guidance as to the situation on the FC Desk. Further, they considered (realistically) that it was wholly untenable for them to continue working at Tullett given that they had lost all trust in their colleagues, Messrs Comer, Di Palma and Stevenson, whom they considered to have gone back on their word and "stabbed in the back" Mr Hall."

99. The alleged attempted persuasion of the brokers to breach their BGC contracts was an issue which featured strongly in the evidence. I refer to the cross-examination of Mr Wink and Mr Potter, where substantial time was spent on the issue. I refer to the evidence of Mr Sully at Day 33.67 – 69, and, as a second example, Mr Bishop at Day 34.36 and .73,74. It is covered in Tullett's closing submissions at paragraph 943 by the submission that there was no plan to induce the brokers to remain at Tullett on the expiry of their existing contracts. It was the first point in respect of the meetings raised by Mr Bloch on behalf of the defendant brokers – Day 44.93. I put the issue to Mr Oudkerk at Day 45.142 et seq in the course of his reply for Tullett.

100. The meeting of 11 March. The meetings with Mr Sully, Mr Harkins and Mr Bishop were on the same lines as that of Mr Hall on 16 March. Much of what I have said of Mr Hall's meeting applies to that of Mr Sully. However there is one important difference. I accept Tullett's evidence that at the start of each meeting the broker was told that it was not the purpose to get him to change his mind about going to BGC, that is, to persuade him to break his forward contract. I accept that because I accept that it was something which it had been decided on the Tullett side should be said at all such meetings. But the question has to be asked, why then did Mr Wink take time to run through the advantages of working at Tullett and the disadvantages of working at BGC; why did he do the whiteboard presentation? Tullett's case was that the main purpose of the meeting was to ensure that the brokers worked out their contracts with Tullett. The defendants accepted that was one purpose, but said there was a second purpose, namely to persuade the brokers to break their contracts with BGC and to remain at Tullett.

101. Following the meeting with Mr Bishop –who was in the same position as Mr Sully, Mr Potter made a note of the meeting. It was the only note he made of these meetings. It reads:

> 'JP opened meeting explaining we are not breaking PB's contract. We aren't trying to persuade PB to stay. Meeting about how we persuaded all out other staff to stay with TP having been offered jobs by BGC.
> Discussed litigation if Paul breeches either TP contract or if Paul breeches BGC contract.
> Discussed risks of leaving TP before end of contract.
> Angus [Wink] did his white-board talk which concentrated on TP pros and cons, BGC pros and cons. PB was invited to comment on anything he wished. PB was also told he was welcome to say nothing if he so wished. PB did not want to comment on TP cons.'

The last sentence reflects the fact that Mr Wink left it to the broker in question to provide the Tullett cons. The note must have been prepared with an eye on the future, but I think that it is essentially accurate. At these meetings Mr Wink and Mr Potter had the risk of providing grounds for constructive dismissal very much in mind, and one reason for Mr Clark's presence was to make sure that did not happen. The case

against Tullett has to be that it was said by Tullett that Tullett were not trying to persuade the brokers not to observe their contracts with BGC when in fact that was the real object of the white board exercise.

102. Mr Wink and Mr Potter were pressed on this in cross-examination, Mr Wink at Day 7.152, and .157, at Day 8.29, and at Day.9.61 and .96. I questioned Mr Wink on the point at Day 9.103, 104 and he said that the aim was to give, in this case to Mr Yexley, the same information as the others had received so Tullett could not be criticised for giving different presentations. By 'others' he was referring to the brokers who had not signed contracts with BGC to Tullett's knowledge. I do not find that reason credible. Mr Wink could simply have said to the broker in question that he had run through the advantages and disadvantages of the two companies with the brokers who had not signed contracts with BGC, but he was not going to go through that with him because he had signed a contract with BGC. Mr Potter's questioning on the point was at Day 12.76 where he said the purpose of the meetings was twofold – to ask if the brokers wanted to hear what had been said to the others, and to thank them for their notification that they were leaving and to say Tullett would honour their contracts with BGC as they were saying they would honour their contracts with Tullett. Also at Day 12.76, .81-.84 and 95.

103. Mr Sully's strong impression was that Tullett were trying to persuade him not to go to BGC. I think that he was well entitled to form that view. In his letter of 20 March to Mr Potter – I 2623, he wrote 'I have taken notice of your criticisms of BGC and that you would prefer me to remain in Tullett's employment.'. Mr Harkins said in cross-examination that he regarded his meeting on 9 March as a brain-washing exercise and did not pay very much attention. But he was adamant that he had been told at the end that, if he stayed with Tullett, BGC would sue him, but Tullett would do all it could to help him: Day 34.125,126. That had been in his statement. Mr Potter had been led to believe that Mr Harkins was uncertain about moving to BGC, and that would explain why this offer was made to him. He said that he decided not to send a letter of complaint following it because he wanted to leave on good terms. Mr Clark was not present at the meeting with Mr Bishop. In his evidence Mr Bishop said the only purpose of the meeting was to get him to change his mind about going to BGC – Day 34.36. He did too did not put in a letter of complaint as Mr Verrier and Mr Hall wanted.

104. Looked at objectively the second purpose of the meetings was to persuade the three brokers to renege on their contracts with BGC and remain at Tullett, the first purpose being to persuade them not to walk out early. I have also concluded that this must have been the actual intention of Tullett at the meetings with Mr Sully, Mr Harkins and Mr Bishop. I can see no other logical reason why the meetings took the form they did. I do not accept the evidence of Mr Wink and Mr Potter on this aspect of the case. The BIPs which I have considered at paragraph 63(127) show that Mr Potter was considering the possibility of re-signing the members of the desk. That supports my conclusion.

105. The next question is whether this conduct, considered objectively, was conduct likely to destroy or seriously damage the relationship of trust and confidence between Tullett and the brokers in question. Here Tullett was requiring the brokers to comply with their contracts with Tullett and threatening them with legal action and large claims if they did not. At the same time Tullett was trying to persuade the brokers not to honour their contracts with BGC. That is the high point of the brokers' case.

106. Tullett's conduct was not intended to attack the relationship between Tullett and the brokers, but was intended to strengthen it. The context in which it happened was that the brokers were expecting a call from BGC to leave Tullett, and were prepared to do so in reliance on BGC's indemnity. There is a further factor on which I was not addressed in this context. That is the question whether BGC's contracts were binding on the brokers, or whether it was open to the brokers to treat BGC's conduct in connection with the contracts as a breach of the same duty of trust and confidence. That question arises directly in connection with BGC's claim against Tullett for inducing breach of by the Tullett Three of their forward contracts with BGC. I deal with this in Part F, where I conclude that the Tullett Three were entitled to terminate their contracts by reason of BGC's breach of the term.

107. I conclude that in the particular circumstances Tullett's conduct at the meetings was not such as to seriously damage its relationship of trust and confidence with the brokers. I should say that I would reach this conclusion in the absence of the further factor which I have referred to in the previous paragraph.

108. As the conduct is to be considered objectively it may in a sense be irrelevant how the brokers reacted. But I think that the contemporaneous reaction of people to a party's conduct may be of assistance in judging its seriousness. The letter drafted by Mr Marshall and BGC referred to 'the aggressive tactics used by Tullett Prebon to convince me not to move to BGC.' But it said that the writer would not be discussing his future again, and if that was not respected, it would be treated as a breach of contract. I have already set out how the three brokers in fact reacted to the meeting. Perhaps the most important factor is that they delayed their resignations until after Mr Hall had been suspended and proceedings commenced. In their letters of resignation at least in part drafted by BLP Mr Harkins and Mr Bishop did refer to attempts at the meetings to persuade them to breach their contracts, but this must carry rather less weight in the circumstances in which the letters were written. These facts support my conclusion that there was no breach of Tullett's duty.

109. If it does have any relevance, it is difficult to know what part the many factors played in the three brokers' decisions to walk out on Tullett and resign. It was, of course, their decision. Mr Verrier wanted them to walk, but they had to decide whether they

would. Two major factors must have been that they wanted to join BGC with their co-defendants as soon as possible, and that they had indemnities from BGC if they did so. The decision was made in the context of the suspension of Mr Hall and the commencement of proceedings by Tullett. What had happened to Mr Hall loomed larger than what had happened on 11 March. No doubt they hoped that they had valid grounds for alleging constructive dismissal. In accordance with my analysis of the law, they do not have to show that the cause of their resignation was at least in part what happened at the meeting on 11 March. They are not seeking damages for wrongful dismissal. They are seeking to establish that they were entitled to bring their contracts with Tullett to an end.

110. I can take the remaining matters relied on by Mr Sully more shortly.

111. Because of what happened on and after 25 March the fact that no grievance procedure was pursued in relation to the 11 March meeting and Mr Sully's letter of 20 March counts for nothing.

112. The treatment of Mr Hall was not heavy-handed and designed to humiliate him. Nor was it a warning shot to brokers who were not breaking their contracts with Tullett: nor should it have been taken as one.

113. The complaint that in the short time available on 25 March and before Mr Sully left the office on 26 March Mr Potter did not find time to talk with Mr Sully about how he should run the desk in Mr Hall's absence, is a contrived complaint and without merit. This and the complaints which follow must be considered in the light of the telephone calls and text messages which were being exchanged between Mr Sully, Mr Verrier and Mr Marshall on the evening of 25 March: I refer to Mr Sully's cross-examination at Day 33.85 - .90 and .94 - .96. It is plain that Mr Sully must have found out at least in general terms what had happened to Mr Hall, and was communicating with Mr Verrier and Mr Marshall as to what should be done. He knew that Mr Verrier was blowing the whistle.

114. Mr Sully gave Tullett no time to attempt to restore discipline if not good relations on the desk, but walked out.

115. When Mr Potter said he did not know what was happening it was likely that he was referring to what was happening to the absent brokers. There is nothing in the complaint about Mr Potter's conversation with Mr Sully at 1 pm on 26 March.

116. Mr Harkins and Mr Bishop rely only on the meetings on 11 March and matters relating to Mr Hall's suspension. As I have said, they were in Amsterdam when the suspension occurred. I have rejected the claims based on 11 March. There is nothing in those based on the suspension.

117. Following their meeting with Mr Verrier at the City airport, Mr Harkins and Mr Bishop went into Tullett's offices and removed their belongings. Mr Harkins said in evidence that between the airport and the offices he decided that he could not work with the Tullett Three and that became a big factor to him. That must be because the Tullett three had made statements for Tullett and were not coming to BGC. It does not provide grounds for constructive dismissal.

Mr Yexley

118. Mr Yexley was head of the dollar cash desk, and was the sole recruit in Project Toscana. The matters pleaded in support of his claim for constructive dismissal are as follows, and in this instance it is convenient to deal with them as I refer to them.

119. At a meeting on 27 February between Mr Wink, Mr Potter and Mr Osborne, and Mr Yexley, Mr Yexley was lectured by Mr Wink and accused of leaking figures to BGC. I have found that Mr Yexley had in fact told Mr Verrier aspects of Mr Tonkin's contract with Tullett. He had agreed a signing payment with Mr Verrier on the basis that he would bring a number from his desk to BGC. At the meeting Mr Yexley complained that he was not being trusted. But he was reminded that the brokerage reporting system had been switched off for other members of the desk, but he had been left connected. I accept that the meeting was tough and was an unpleasant experience for Mr Yexley. He was the head of a desk which was under attack from BGC, and that was perhaps inevitable. His role in the recruitment was then unknown to Tullett. I do not consider that the meeting came near to a breach of duty on the part of Tullett.

120. Complaint is made that the presence of Mr Clark, the lawyer, at the meeting of 5 March with Mr Wink, Mr Potter and Mr Osborne was sprung on Mr Yexley, and that Mr Wink discredited BGC, and said that Mr Kilford was unhappy at BGC and had had to repay his signing-on money, which Mr Yexley said he knew to be untrue. In the circumstances Tullett had no need to inform Mr Yexley who was going to be at the meeting. When Mr Yexley said what he did about Mr Kilford Mr Wink said that he should come off the list. I have already said that I am not satisfied that Tullett were at fault in saying what they did about Mr Kilford. Complaint is made that Mr Wink told Mr Yexley he would be sued by Tullett if he left early. Mr Wink was entitled to say that. Complaint is made that Mr Wink told Mr Yexley he would not be indemnified. I do not think that Mr Wink went further than questioning whether any indemnity given by BGC would apply. It is said that Mr Yexley was angered by the meeting, and had previously complained to Mr Potter about how he had been treated

on 27 February. I do not consider that the manner in which Mr Yexley was treated at the meeting on 5 March by itself amounts to any sort of breach of Tullett's duty to Mr Yexley.

121. In my view the crucial aspect of the meeting with Mr Yexley on 5 March was that Tullett tried to persuade him to break his forward contract with BGC. Tullett had correctly deduced from his notification of leaving that he had entered such a contract and the meeting was conducted on that basis. His position here is no different to that of Mr Sully, Mr Harkins and Mr Bishop. Surprisingly the allegation that Tullett tried to persuade him to renege on his contract with BGC was omitted from the defence. It was raised in paragraph 55 of the opening written submissions for the broker defendants, which was repeated in paragraph 529 of the defendants' closing submissions, and I should not bar Mr Yexley from the point on the basis of the pleading. I have dealt with a number of complaints about the meetings in what I have said in respect of Mr Hall and more importantly, Mr Sully, Mr Harkins and Mr Bishop. For the reasons I have set out in relation to the last three I find that Tullett did try to persuade Mr Yexley not to go to BGC and to break his forward contract, but that this was not a breach of Tullett's duty.

122. The next matter relied on in the pleading is that Mr Potter declined to tell Mr Yexley the terms of Mr Tonkin's new contract on the ground that the terms were confidential to Mr Tonkin. That was a position which Mr Potter was entitled to take.

123. Then the suspension of Mr Hall is relied on. Mr Yexley's desk was some way from that of Mr Hall. What I have said in respect of the reliance by other brokers matters connected with Mr Hall's suspension applies here. It is a manufactured ground.

124. Mr Yexley's claim to have been constructively dismissed fails.

Mr Bowditch

125. I have dealt with Mr Bowditch's part in the recruitment of his desk by Mr Verrier in paragraphs 63(19), (31), (33) to (38) and (113). I refer in particular to paragraph (33) and his text message there set out. Once he had been approached by Mr Verrier in January 2009, Mr Bowditch was on BGC's side in the recruitment and in breach of his duty to Tullett. The defendants' closing submissions rightly accepted that there were difficulties in the way of the claims of the sterling OBS desk for constructive dismissal – paragraph 519(b)(v). Mr Verrier's fifth witness statement of 6 January 2010 suggests in paragraph 36 that as at the weekend on 21/22 March the Phoenix brokers did not have adequate grounds to walk out.

126. The matters relied on by Mr Bowditch in support of his claim for constructive dismissal are as follows:

(1) His treatment at the meeting on 13 January 2009.

(2) On 18 February he was instructed to report to Mr Brown and to give Mr Brown information as to when he saw clients, when he was taking holidays and details of his daily figures. It was in effect a demotion.

(3) His authority as desk head was subsequently undermined by on 24 February Mr Brown giving Mr Terry permission to take a holiday when Mr Bowditch had refused permission, and on 2 March Mr Brown asking Mr Bowditch about 3 client lunches he had been to that week.

(4) The treatment of Mr Hall on 25 March was outrageous and shocking. It was designed publicly to humiliate Mr Hall. It was designed to send a message to those who had signed forward contracts with BGC that they would be subjected to similar treatment if they remained at work.

This last ground was the primary ground relied on in the defence.

127. I have described Mr Bowditch's meeting with Mr Wink and others on 13 January in paragraph 63(39). I accept that there was some straight talking on the Tullett side at this meeting, but it was not improper. Mr Bowditch was in fact, though unknown to Tullett, disloyal to Tullett. Tullett were dealing with a situation where it had been reported to them that Mr Verrier was attempting to recruit desk members. Mr Bowditch was in the forefront because of his close friendship with Mr Verrier. He has nothing to complain about in the way the meeting was conducted.

128. Following Mr Bowditch's letter saying that he was moving to BGC it was appropriate that Tullett take steps to ensure that his loyalty to Tullett was not impaired. Mr Brown had previously been his superior although it was on a looser rein. Mr Osborne explained the line he took in his evidence : Day 17.107 et seq. I also accept Mr Brown's evidence as to the meeting. There was no demotion but closer supervision by Mr Brown which was appropriate to protect both Tullett and Mr Bowditch in the circumstances.

129. The inclusion of the complaint about Mr Terry's holiday shows the weakness of Mr Bowditch's case. The problem was dealt with by e-mails on 24 and 25 February – I 2432, in which Mr Bowditch's mandate was confirmed and which Mr Bowditch ended by saying 'ok, over to you, your decision'.

130. The above matters had very little if anything to do with Mr Bowditch's decision on 26 or 27 March to leave Tullett. BLP's letter of 27 March – P 5065, referred only to the

treatment of Mr Hall on 25 March and 'heavy-handed tactics' employed towards other employees who had signed with Tullett. It is clear that the decision to leave was made by the Phoenix brokers in consequence of Mr Hall's suspension and the commencement of proceedings by Tullett in the knowledge that BGC would indemnify the brokers against the consequences. The initial request as to the indemnity made by Mr Marshall on 24 March did not cover the Phoenix brokers. Mr Bowditch had reason to fear that he might be treated in a similar way because he too had assisted BGC in the recruitment of his desk: but he cannot complain about that. The description of the treatment of Mr Hall as outrageous and shocking and designed to humiliate Mr Hall has no foundation in fact. Mr Bowditch's claim to have been constructively dismissed is without foundation.

Mr Cohen, Mr Temple

131. The main ground relied upon by these defendants relates to the treatment of Mr Hall on 25 March. As I have said, there was nothing to be objected to in Tullett's treatment of Mr Hall. Further, Mr Cohen and Mr Temple had no real reason to fear that they would be treated as Mr Hall was treated. Their claims are without any foundation.

132. Mr Temple also alleges that he was cold-shouldered by other members of his desk once it was known that he would be moving to BGC. In the time scale of these events that cannot amount to a breach of contract by Tullett. It is not as if it had continued over a long period without any action being taken by Tullett. Mr Temple also complains that certain traders had been told that he and Mr Bowditch and Mr Cohen were not making an effort. It was not established by whom they were told. Again this does not show any sort of misconduct by Tullett.

Mr Wilkes

133. Mr Wilkes relies primarily on the treatment of Mr Hall on 25 March. He said – Day 40.72, that he made his decision to resign because of that. Mr Wilkes is in the same position as Mr Cohen and Mr Temple.

134. Mr Wilkes also relies on the reaction of Mr Mead, head of Tullett's non-banking and sterling cash division and Mr Wilkes' immediate superior, when he gave notice on 11 February that he was going to BGC. Mr Mead's reaction was one of anger that Mr Wilkes had signed a contract with BGC without coming to see him and talking about it: it was an act of disloyalty to Mr Mead personally. Mr Mead has a paternalistic attitude to those under him – Day 21.114. Given the close working relationship between the two men, Mr Mead's immediate reaction is understandable. Mr Mead was then abroad for much of the time between 11 February and 25 March or engaged in all day meetings. He and Mr Wilkes overlapped only on a few days. Mr Wilkes made no effort to see Mr Mead on those few days, nor did Mr Mead try to see him. There seems to have been a standoff. I refer to Mr Mead's cross-examination at Day 21.102. Mr Wilkes said that Mr Mead dealt with Mr Dawes and by-passed him as the

desk head. I am not satisfied that Mr Dawes was treated as the desk head by Mr Mead before Mr Wilkes resigned. I think that Mr Mead should have handled Mr Wilkes better but I do not think that what occurred seriously damaged the relationship of trust and confidence, and entitled Mr Wilkes to resign. What happened had no substantial part in Mr Wilkes' decision to leave. He left because he was asked to by Mr Verrier and had BGC's indemnity.

Mr Matthews

135. All that is relied on in respect of Mr Matthews is the treatment of Mr Hall on 25 March : see defence, paragraph 37, BLP's letter of 27 March 2009 – P2 5065, closing submissions paragraph 530. That provides no foundation for a constructive dismissal claim by him. Mr Matthews was quite straightforward in his evidence that as at the morning of 25 March he was expecting to continue at Tullett and it might take 6 months to arrange the move : Day 40. 145,6.

Part E – Tullett's Claims in Conspiracy and Inducing Breach of Contract
Tullett' Case

136. In the Points of Claim served on 21 April 2009 Tullett alleged in paragraph 8 that from August 2008 at the latest BGC, Mr Verrier, Mr Lynn and Mr Marshall entered into what the pleading called 'the common design'. This was:

(a) to recruit desks from Tullett by offering them sign-on payments and forward contracts;

(b) to use confidential information possessed by Mr Verrier, Mr Marshall or desk heads or brokers recruited, for example, as to the names, strengths and attributes of brokers, as to their contact details, as to their terms of employment;

(c) to procure Tullett desk heads to act as 'recruiting sergeants' for BGC in the recruitment of their desks by BGC;

(d) to provide such desk heads with pools of money to distribute among their desks as part of the recruiting;

(e) to indemnify recruits against the claims of Tullett;

(f) to use Mr Marshall to give ostensibly independent legal advice to recruits, relying on his past association with Tullett;

(g) to conceal the approaches until a critical mass of recruits had been achieved;

(h) to destabilise Tullett's work force by disparaging Tullett and using publicity as to the recruits it had gained;

(i) to contrive constructive dismissal situations, purporting to justify the recruits leaving, and to encourage them to walk out en bloc once the time was right – the early exit strategy;

(j) to use the court's reluctance to make extended garden leave injunctions to secure the release of recruits substantially before the end of their contracts with Tullett;

(k) to ensure BGC secured the business of recruits even before they were free of their contractual obligations to Tullett, using client sitters.

(l) To damage Tullett's business by securing the recruits and their business as the necessary and only means of carrying the common design into effect; and, in the case of Mr Verrier, as an end in itself;

(m) To proceed as above in the hope and expectation that the reward of their wrongdoing would far exceed any recompense ordered by the court.

It was alleged that the common design was first conceived by Mr Verrier by, at the latest, August 2008; that its scope and extent was subsequently developed; that, given its scope, the senior management of BGC, in particular Mr Lynn, must have been involved; that Mr Hall joined the conspiracy in September 2008; that the sixth to fourteenth defendants joined in January or February 2009.

137. This was all formulated before Tullett had had disclosure from BGC and before it had seen BGC's witness statements. In Tullett's closing submissions it was said that the evidence made out its case. It was said that Mr Lynn and Mr Verrier had entered into the common design in about August 2008 when Mr Verrier signed for BGC; that Mr Hall and Mr Bowditch joined by September or October and clearly acted in breach of their duties to Tullett in January and February in providing confidential information to Mr Verrier and assisting him in the recruitment of their desks. It was said that Mr Marshall had joined by early January or perhaps earlier. It was said that the other broker defendants joined when they were recruited to BGC and agreed to walk out on the basis of BGC's indemnities.

138. Tullett emphasised its claim in conspiracy because it was asserted that the claim assisted Tullett in obtaining continuing relief against BGC by injunction. It might otherwise be thought that Tullett could succeed equally on its case for inducing breach of contract. For the acts relied upon as having been done pursuant to the common plan all centre on the inducing of breaches of contract by the recruits including the desk heads.

139. There was separate representation for BGC and Mr Lynn, for Mr Verrier, and lastly for the broker defendants. The case made by each defence team emphasised its particular position. But, at my request, defence counsel made a single written closing submission, to which each team contributed. Putting it shortly, any 'common design'

was denied. It was accepted that there had been some breaches of duty by Mr Hall and Mr Bowditch in supplying information to Mr Verrier, but it was said that this was unimportant and immaterial. It was denied that Mr Hall, Mr Bowditch and Mr Yexley had assisted Mr Verrier in the recruitment, or attempted recruitment of their desks, and had acted as recruiting sergeants. It was accepted that Mr Verrier and the employees had wanted to establish grounds for constructive dismissal so they could move to BGC at the same time. It was accepted on behalf of Mr Verrier that he had worked to that end. It was also accepted on behalf of Mr Verrier that he had hoped that a meeting between Mr Hall and the Tullett management on 25 March 2009 would provide grounds for the recruits to leave Tullett. But, it was submitted, none of that was unlawful. It was submitted that the recruits had all been constructively dismissed by Tullett, and had valid grounds for terminating their employment with Tullett. It was denied that there was any plan to set up sham claims of constructive dismissal, that is to say, claims which it was known had no real hope of succeeding and were not believed in.

140. Thus one important factual issue is as to whether, and the extent to which, Mr Verrier used desk heads to assist him in the recruitment of their desks. In so far as confidential information was provided by the desk heads, that can be seen as one aspect of assistance. Indeed it may be a breach of an employee's duty to provide any information, confidential or not, to a rival of his employer if he knows that the information is to be used to assist the rival and to harm his employer. For his duty is to protect his employer's interests. In such circumstances it is immaterial whether or not the information is 'confidential' as the word is used in the law – in, for example, *Faccenda Chicken Ltd v Fowler* [1987] Ch 117.

141. A second important area of disputed fact, and probably the most important factual dispute in relation to Tullett's claim, is as to the early exit strategy and the alleged use of sham claims of constructive dismissal.

142. Tullett do not allege that each element of the common plan was unlawful in itself.

(a) There is nothing unlawful in the use of forward contracts to recruit employees. However here Tullett submitted that performance of the form of contract used by BGC was incompatible with the employee's duties to Tullett. I do not consider that to be so. Clause 1(a) of the BGC contract begins:

> 'The provisions of this Agreement, as appropriate, will come into effect on the date hereof. Your employment under this Agreement will commence as soon as you are free and able to do so …. .'

The context of the contract is that the employee has a current contract with another employer. The effect is that the terms which relate to employment by BGC commence when the employment with BGC commences. Other terms which are not inconsistent

with an existing employment come into effect immediately. I do not consider that there is any real conflict between the contracts.

(b) The use of sign-on payments is not in itself unlawful. Tullett pointed to the feature that part of the payments was payable on signing instead of on taking up the employment as is more usual. There is nothing unlawful in that, but it makes the contract more attractive to the recruit, and it ties the recruit more firmly to the contract.

(c) The use of indemnities is not in itself unlawful and they are regularly requested and given in inter-dealing recruitment. But indemnities carry two dangers. A recruit who has an indemnity is more likely to break, or run the risk of breaking, his existing contract if he is covered by an indemnity. Second, the indemnity is likely to have a provision as here: 'It is a condition precedent that the company has given prior approval to all and any steps taken in connection with this indemnity', or to similar effect. While this does not enable the recruiting company to tell the employee what to do, it comes close to it. In cross-examination Mr Lynn accepted that BGC used an indemnity as a means of controlling the conduct of the employee with his current employer – Day 22.101. In his evidence Mr Smith said that he saw indemnities almost as a licence for wrongdoing by individuals – Day 11.108. In paragraph 64(8) above I have referred to the discussion which had taken place between Mr Verrier and Mr Marshall about the operation of the indemnity if BGC called on the brokers to leave Tullett.

(d) Concealment of approaches is not in itself unlawful, but it may be the first step towards an early exit strategy of an accumulation of recruits. Further, where as here, the recruit's contract with his employer requires him to report an approach, encouraging the employee not to do so in knowledge of the term, will be inducing a breach of contract and tortious. Mr Verrier was familiar with the terms of Tullett contracts.

<u>The law as to conspiracy</u>

143. I should approach this as a conspiracy to injure Tullett by unlawful means. It was not submitted that it was to be approached as a conspiracy to injure by reason of such desire as might properly be attributed to Mr Verrier to hurt Tullett because of how he had been treated by Tullett.

144. Disputes as to the law as to the tort of conspiracy to injure by unlawful means have provided the courts with ample work in recent decades. I refer to the authorities cited by Briggs J. in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1276 in paragraphs 826 and following. I will not seek to repeat the review of those cases made by Briggs J. It is sufficient to set out the conclusions to be drawn.

145. It is not necessary that a claimant establish that the defendant's dominant intention or purpose was to injure the claimant's business. It is sufficient that he intended to injure the claimant's business as a means to an end. So here BGC intended to advance its business by recruiting Tullett's employees. That would necessarily injure Tullett's business. That is a sufficient intention if the element of unlawful means is also satisfied. I refer to *Meretz Investments NV v ACP Ltd* [2008] Ch 244 (Court of Appeal) at paragraphs 125, 126 and 172, citing *OBG Ltd v Allan* [2008] AC 1. The unlawful means element is the real issue here. As I have said, the unlawful means alleged here all centre on the inducing of breaches of contract.

The law as to inducing breach of contract

146. In *OBG Ltd v Allan* [2008] AC 1 the House of Lords heard three appeals concerned with causing loss by unlawful means and inducing breach of contract. It was held that the torts were separate torts, and that the tort of inducing breach of contract was a tort of ancillary liability, that is, ancillary to the liability of the party alleged to have breached his contract: the defendant is an accessory to the liability of that party – paragraph 5, per Lord Hoffmann, and paragraph 172 per Lord Nicholls. The speeches deal with two aspects which must be kept separate. One is the intention of the alleged tortfeasor towards the claimant, which I have covered in the previous paragraph. One is the intention of the alleged tortfeasor in respect of the contract the breach of which he is alleged to have induced.

147. In paragraph 39 under the heading of 'Inducing breach of contract: elements of the *Lumley v Gye* tort' Lord Hoffman stated:

> "39 To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so. This proposition is most strikingly illustrated by the decision of this House in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 , in which the plaintiff's former employee offered the defendant information about one of the plaintiff's secret processes which he, as an employee, had invented. The defendant knew that the employee had a contractual obligation not to reveal trade secrets but held the eccentric opinion that if the process was patentable, it would be the exclusive property of the employee. He took the information in the honest belief that the employee would not be in breach of contract. In the Court of Appeal [1938] 4 All ER 504 , 513, MacKinnon LJ observed tartly that in accepting this evidence the judge had "vindicated his honesty … at the expense of his intelligence" but he and the House of Lords agreed that he could not be held liable for inducing a breach of contract.
>
> 40 The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a

consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 union officials threatened a building contractor with a strike unless he terminated a subcontract for the supply of labour. The defendants obviously knew that there was a contract—they wanted it terminated—but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said, at pp 700–701:

> "Even if they did not know the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."

41 This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 . It is not the same as negligence or even gross negligence: in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 , for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract. He negligently made the wrong inquiry, but that is an altogether different state of mind."

148. In dealing with the first appeal Lord Hoffman stated:

> "69 In my opinion this case comes squarely within *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 . On the finding of the judge, Mr De Winter honestly believed that assisting Mr Young and Mr Broad with the joint venture would not involve them in the commission of breaches of contract. Nor can Mr De Winter be said to have been indifferent to whether there was a breach of contract or not, as in *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 , or made a conscious decision not to inquire in case he discovered a disagreeable truth. He therefore did not intend to cause a breach of contract and the conditions for accessory liability under the *Lumley v Gye* tort are not satisfied. Nor is there any question of his having caused loss by unlawful means. He neither intended to cause loss to Mainstream nor used any unlawful means."

149. Under the heading of 'Inducing a breach of contract: the mental element' Lord Nicholls stated:

> "191. I turn next to the mental ingredient of the *Lumley v Gye* tort. The mental ingredient is an intention by the defendant to procure or persuade ("induce") the third party to break his contract with the claimant. The defendant is made responsible for the third party's breach because of his intentional causative participation in that breach. Causative participation is not enough. A stranger to a contract may know nothing of the contract. Quite unknowingly and unintentionally he may procure a breach of the contract by offering an inconsistent deal to a contracting party which persuades the latter to default on his contractual obligations. The stranger is not liable in such a case. Nor is he liable if he acts carelessly. He owes no duty of care to the victim of the breach of contract. Negligent interference is not actionable.
>
> 192. The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort. "

150. In dismissing the third appeal Lord Nicholls said this:

> "199 The relevant findings of the trial judge were these. Mr De Winter knew Mr Young and Mr Broad had contracts of employment, although not their precise terms. He knew sufficient to spot the conflict problem. He raised this issue with the others. In the light of what they told him Mr De Winter genuinely believed their participation in the Findern venture would not occasion a conflict between their duty and their interest. Accordingly Mainstream failed to establish that Mr De Winter intended to procure a breach of the others' employment contracts.
>
> 200 These are factual findings, which were not disturbed by the Court of Appeal. On these findings the appeal must fail. The burden of proving Mr De Winter intended to persuade Mr Young and Mr Broad to break their contracts lay on Mainstream. Mainstream failed to discharge this onus.
>
> 201 Mr Randall sought to avoid the difficulty posed by the judge's findings by drawing attention to Mr De Winter's written statements. These showed that Mr Broad told Mr De Winter that Mainstream was not interested in buying the land at Findern. Mr De Winter believed

> what he was told. On this basis he believed the joint venture would not entail a breach by the others of their contracts with Mainstream. This, submitted counsel, was not good enough. The matters on which Mr De Winter relied did not, as a matter of law, leave Mr Broad and Mr Young free to compete with Mainstream over the development of the Findern land while still working as full-time executives of the company in that area. Mr De Winter was relying on his own, erroneous, legal conclusion. He was not entitled to escape liability by relying on his own mistaken assessment of the legal position.
>
> 202 I cannot accept this. An honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract. He is not to be held responsible for the third party's breach of contract in such a case. It matters not that his belief is mistaken in law. Nor does it matter that his belief is muddle-headed and illogical, as was the position in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 . As Lord Devlin said in *Rookes v Barnard* [1964] 1129, 1212, the defendant must know of the contract "and of the fact that the act induced will be a breach of it". Counsel referred the House to several authorities where a contrary view seems to have been expressed; for instance, *Solihull Metropolitan Borough v National Union of Teachers* [1985] IRLR 211 , 213, paras 7–10, and *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148 , 179. If and in so far as observations in those cases depart from the principle outlined above they were wrong."

151. The passages quoted deal very clearly with the position where the defendant has an honest but mistaken belief that the contract will not be broken by the conduct he induces. They also cover the position where the defendant turns a blind eye, or is indifferent, and proceeds regardless. The blind eye or indifference may be as to the terms of the contract or as to whether particular conduct would be in breach of it. In either case he will be treated as having intended the consequence he brought about.

152. The position of the recruiting employer who takes a chance on constructive dismissal arose in a case closer to the present, *Cantor Fitzgerald v Bird* [2002] IRLR 867. There three employees claimed to have been constructively dismissed. Two made out their claim. The third, Mr Boucher, did not. The recruiting employer was ICAP. Cantor is the forerunner of BGC. In the course of his judgment McCombe J stated:

> "135. In the end, Icap, through Mr Spencer, made the decision that all three individual defendants should go down the avenue of alleging constructive dismissal by Cantor. The decision was taken after receiving legal advice. I do not speculate, of course, as to what legal advice was given. However, in my view, Mr Spencer took the view that such risks as there were in taking that course were worth taking, even though he was clear that it would be likely to lead to litigation

> with Cantor. He must have been conscious that, as with all litigation, there would be uncertainties in the outcome, but he hoped that Icap would prevail. As already indicated, however, Icap, as he must have known, had no knowledge of the true position between Cantor and Mr Boucher and yet subsequently persuaded him to leave regardless of that fact. While not intending to procure breaches of contract Icap decided to accept whatever risks there were. In Mr Boucher's case they had no grounds for considering that he had a constructive dismissal claim to make whereas in Mr Gill's and Mr Bird's cases they were prepared to take the risks and they have been fortunate in being vindicated in that choice.
>
> ……
>
> 143. ….. On the other hand, in the recruitment of all three individuals in this case, Icap "sailed very close to the wind" in its efforts to secure them. It took the risks of in its stride and, where that risk was unjustified, it seems to me that suitable injunctions should follow.
>
> 144. These are two organisations (Cantor and Icap respectively) for whom, as it has seemed to me, the interests of individual employees have been subordinated to a larger "game" (the word used regularly by one of Icap's officers in the course of the events related above). Cantor conducted its relations with staff at the borderlines of the employees' contractual rights and sometimes beyond them. Icap desired to recruit its targets as soon as possible and as soon as it was thought there was an arguable case that they had been constructively dismissed. The result as to whether the boundaries of legality were crossed, by either Cantor or Icap, in the case of any individual employee was largely fortuitous. In such circumstances, it seems only appropriate that, where the line is crossed, injunctions should be granted to fit the breaches of the law that had been established in any individual case."

153. Mr Onions submitted for Tullett at Day 45.54 that 'unless [a defendant] could establish that he believed that there were grounds for constructive dismissal, he has taken the risks and he is liable … .' I think that when Mr Onions referred to 'grounds' he did not mean 'some grounds' or 'arguable grounds' but 'good grounds'. Mr Ritchie submitted for Mr Verrier at Day 44.44 to .47 that what was required was actual knowledge or Nelsonian, turning a blind eye, knowledge; that it was not enough to establish that the defendant thought that there might or might not have been a constructive dismissal: for Tullett to succeed, Tullett had to establish that the belief was that there were no grounds on which constructive dismissal could properly be argued, or turning a blind eye. I will revert to the issue when I have made the relevant findings of fact.

154. Lastly I should mention that I raised the question whether any point was taken on behalf of the defendants arising from the primary defendants to the claim of conspiracy being BGC, Mr Lynn and Mr Verrier, and Mr Lynn and Mr Verrier being officers of BGC – Day 41.9,10. I was told there was not.

Findings of fact: the roles of Mr Verrier, Mr Lynn and Mr Marshall in the alleged conspiracy
Mr Verrier

155. A major part of Mr Verrier's initial role at BGC was to recruit brokers to build up BGC where it was weak. It was Mr Verrier's intention formed long before 2 January 2009 to recruit primarily from Tullett. There were two reasons. One was that it was the company which he knew and where he was known and where he had friends. Second, recruiting from Tullett was a way of getting his own back on Mr Smith. He identified Mr Hall and Mr Bowditch and their desks as prime candidates soon after signing with BGC, probably also Mr Yexley although that is less clear.

156. Mr Verrier intended to use desk heads to assist him in the recruitment of their desks as and when that would best achieve his aim and in so far as they were willing to do so. That included the provision of financial information. The provision of financial information by desk heads would speed the process and make it easier, but may not have been essential, because of Mr Verrier's knowledge of Tullett and because recruits would be required to provide their latest P 60 tax forms as part of their recruitment. Mr Verrier intended where the opportunity arose to use desk heads to divide among the desk the money he had decided was appropriate for the signing payments.

157. I do not consider that the information which Mr Verrier carried in his head from having worked at Tullett, such as the ability of brokers, the earnings of desks, the remuneration of brokers, was confidential information which Tullett was entitled to protect. This was information falling short of trade secrets, which he inevitably carried with him and could not put out of mind in carrying on lawful recruiting activity on behalf of a new employer. I broadly accept paragraphs 66 to 72 of the written opening submissions on behalf of Mr Verrier.

158. I am satisfied that at an early stage of this substantial recruitment exercise Mr Lynn and Mr Verrier must have discussed the problem that potential recruits had long-term contracts with Tullett with disparate termination dates. It would have been highly disadvantageous to BGC if they had trickled in over a period of years. As I have set out, there are various ways in which in practice that difficulty has been avoided in this industry in the past. But it may be rather different when there are a large number of brokers involved. First, the chances of some form of cooperation with the present employer is very much reduced, if not removed. Second, while it may be possible to find grounds on which it can be argued that some recruits have been the subject of

constructive dismissal, that is much less likely in respect of all of a large number. The conclusion to be drawn from what actually happened, from the oral evidence and from the documents is that Mr Verrier decided that, come what may, that is, whether or not the recruits and each of them had good grounds, weak grounds, or no grounds, to claim constructive dismissal, within a short period of their signing with BGC he would instruct his recruits to leave Tullett en masse. Among the documents I refer in particular to Mr Marshall's attendance note of the meeting on 26 January between Mr Verrier, Mr Cohen and himself – R 6918, and to the Mist e-mail of 17 March – R 6947.1. Those are two of the clearest. I refer also to his discussion with Mr Marshall as to the operation of the indemnity, which is referred to in Mr Marshall's e-mail to Mr Comer of 4 February – H 2265. Among the oral evidence I refer especially to the evidence of Mr Harris and Mr Parkes considered in paragraph 63 (69) above. It was Mr Verrier's plan to do what he could to induce Tullett to 'foul up' and to give grounds for alleging constructive dismissal. He tried that first with the bonus payments and last with the final meeting between Mr Wink and Mr Hall. He was very aware that the giving of notice by a broker creates difficulties for the employer. Nonetheless his plan was that, regardless of a particular broker's case for constructive dismissal, BGC would make the indemnities operative and ask the brokers to leave. When, instead of there being a row between Mr Hall and Mr Wink, Mr Hall was suspended and proceedings were commenced against BGC for injunctions, he had no choice but to put his plan into operation. With the cooperation of Mr Lynn as to the indemnities, that was done.

159. I found that in his evidence Mr Verrier stuck to the truth where he was able to, but departed from it with equanimity and adroitness where the truth was inconvenient.

Mr Lynn

160. Mr Lynn is president of BGC Partners and is the senior executive in Europe.

161. In his affidavit sworn on 7 April 2009 Mr Lynn said:

> 'My role in the recruitment … has been a limited one. The recruitment was conducted by [Mr Verrier], … . In so far as the activities of [Mr Verrier] are concerned I accept that these are activities of the First and Second Defendants but have no direct knowledge of them and did not direct them. I am reliant on what [Mr Verrier] has told me about them since his employment began and what he will say in his affidavit.'

162. In paragraphs 73 and following of his witness statement made on 9 June 2009 Mr Lynn said as follows. He left the recruitment process to Mr Verrier to conduct as he saw fit, subject to the parameters they had discussed. He was updated from time to time when Mr Verrier thought he needed to know something. He did not remember

seeing e-mails relating to the recruitment which were copied to him. None of the names save that of Mr Hall would have meant anything to him. He was told that all the employee targets were at Tullett Prebon, but he did not recall when he was told. Mr Verrier told him when contracts had been signed, but he did not recall specifics or when. He received hundreds of e-mails a day. It was his policy that all matters which needed to be brought to his attention must be done by video or phone. The sending of an e-mail did not count as bringing something to his attention. In early January 2009 he agreed an outline budget with Mr Verrier, for the purpose of deciding remuneration packages and sign-on payments. In cross-examination it emerged that this simply referred to the parameters which he described. In paragraphs 131 and following he dealt with his involvement in the resignations. He recalled a brief conversation with Mr Verrier once a number of brokers had signed, when they discussed the possibility of brokers joining BGC before their contracts came to their natural end. Mr Verrier thought it likely Tullett would behave in such a way that the brokers could claim repudiation. He believed that Mr Verrier might have told the brokers to be alert for such behaviour. He was not aware of the brokers being told that they would get a call one day to walk out. He did not authorise that, if it occurred. In his witness statement of 24 November 2009 made 6 days before his evidence began, Mr Lynn accepted that in addition to Mr Hall, he knew Mr Bowditch, Mr St Pierre, and Mr Page, and that he had telephoned Mr Bowditch and Mr Page in September 2008 with the idea in mind that they might be recruited by Mr Verrier.

163. In BGC's written opening submissions it was said:

> 'Turning next to Mr Verrier, it is admitted by BGC that Mr Verrier was relied upon by it to conduct recruitment for the benefit of BGC. In doing so, he was expected to use all lawful means at his disposal. BGC believes that Mr Verrier did so, though has little direct knowledge of the intricacies of Mr Verrier's dealings with the broker defendants. Given that lack of independent knowledge on BGC's part, together with the fact that [Tullett] makes extensive allegations of wrongdoing against Mr Verrier, he is separately represented before the court. BGC relies upon and adopts the submissions made on his behalf. BGC believes that Mr Verrier acted properly.'

164. During the course of the trial it became apparent that Mr Lynn was far more closely involved in aspects of the recruiting process than he had at first accepted. He had tried to distance himself, but gradually, through the examination of such documents as there were, his close interest in what was happening and in decision-making was revealed. I accept that he might not have looked carefully at every e-mail with which he was copied, but I do not accept that he would not read e-mails addressed to him. That stance, which disappeared in the course of his evidence, was part of the distancing. I did not find Mr Lynn a reliable witness. I have to ask why he wished to distance him himself from Mr Verrier, and the answer must be that he knew that some of Mr Verrier's conduct was unlawful.

165. I accept, however, that Mr Lynn had little direct involvement in the recruiting itself. In 2009 he only met with Tullett brokers face to face at the Rules dinner. Tullett did not suggest otherwise. The e-mail which Mr Verrier sent Mr Lynn on 4 February about Projects Antique, E9, Mist and Toscana shows that Mr Verrier's plans as to whom to recruit and preliminary discussions with them were being developed ahead of Mr Lynn.

166. In contrast, on 16 January Mr Lynn wanted to see the Phoenix contracts over the weekend so BGC could formulate its strategy – R 6823.22. I have rejected Mr Lynn's explanation for the document. On 20 January he was copied with the Phoenix spread sheet – G2 1914. On the same day Mr Verrier reported to him that Phoenix was slipping – G 1890. On the same day he was involved in discussing the Phoenix loan agreements – G2 1918, and 1918.2. On the same day he was involved with the problem of the 120 day requirement in the draft loan agreements – G 1867, and asked why should they care – see 63(41). On 21 January he was copied with Mr Marshall's e-mail referring to Mr Matthews' concern about the release plan – G2 1978.1. He was further involved with the contractual documentation on 28 January – H 2162, 2166. On 30 January Mr Verrier informed him of the 'small wobble' with Wire – H 2216. The tone of the e-mail shows that Mr Lynn was being kept in close touch as to progress. On 30 January he was insisting on changes, described as cosmetic, to the Project Wire contracts – H 2137.23.3. On 30 January Mr Lynn was asked to release monies for the Phoenix brokers - H 2226. He was copied on 30 January with Mr Verrier's e-mail to Mr Marshall about bonus payments – H 2230, also on 3 February with R 6933. On 3 February an e-mail – R 6935, setting out bonus payment dates was addressed to him. That must have been information which he had asked for. So he was fully involved in the plan to use the bonus payment situation as grounds for constructive dismissal, and so in the wider plan as to that. Going back to 30 January, on that day Mr Verrier e-mailed him that he needed to talk to him 'on issues surrounding certain projects we have on the go.' I am satisfied that this refers to recruitment from Tullett, but the issues were not identified by Mr Verrier or Mr Lynn in their evidence. On 9 February he reported on Projects Phoenix and Wire to Mr Lutnick. I reject his evidence that he did not. I have sufficiently dealt with the Toscana report already in paragraphs 63(73) and (74). Mr Lynn was involved in the question which arose around 12 February as to whether Mr Marshall should be replaced by BLP – R 6937.1. Mr Marshall's replacement hinged on the coming walk-out supported by claims for constructive dismissal. On 25 and 26 January Mr Verrier sent Mr Lynn e-mails saying he needed to talk to him about Project Toscana urgently. The 'smelt the coffee' e-mail of 5 March was addressed to Mr Lynn. It emerged from BGC's amendment to its defence served in January 2010 that Mr Lynn had had a discussion with Mr Marshall on 12 March by telephone. This must have been about the possibility of establishing constructive dismissal and the recruits leaving Tullett in anticipation of Mr Hall meeting Mr Wink and there being a row. Mr Lynn's authority was required to grant the recruits indemnities, and his authority was required to inform the brokers that, if they left Tullett, they would be indemnified. I have set out the history relating to the indemnities in paragraph 64 above, and I refer in particular to paragraph 64(2) and (13) in relation to Mr Lynn's involvement.

167. It may well be that Mr Verrier and Mr Lynn did not discuss and plan together in 2008 or early in January 2009 that Mr Verrier would use Mr Hall and Mr Bowditch to assist in recruiting their desks. But it is likely by reason of Mr Lynn's contacts with Mr Hall and Mr Bowditch in autumn 2008 that he would have anticipated it. It must have been clear to him when it happened that it was happening. In respect of Mr Yexley, Mr Lynn knew that he was to be paid the signing fee that was first agreed because he would bring his desk with him, and that it was reduced when that did not happen – see I 2586.

168. I am satisfied that at an early stage of this substantial recruitment exercise Mr Lynn and Mr Verrier discussed the problem of the potential recruits having long-term contracts with Tullett. As I have said under the heading of Mr Verrier, it would be highly disadvantageous to BGC had they trickled in over a period of years, and I will not repeat that passage. It was not a problem for simply Mr Verrier, it was a problem which affected the whole venture and a solution was essential to success. For that reason and by reason of Mr Lynn's close involvement day to day in the venture, I am satisfied that it must have been discussed between them and kept under review. I am satisfied that Mr Lynn was party to the plan that, whatever happened on the Tullett side, BGC would tell the brokers that the indemnities could be relied on and ask them to leave Tullett. This conclusion is strongly supported by Lynn's response to the 120 day problem in the draft loan agreements raised on 20 January – G 1867: see paragraph 63 (41) in the section above on detailed facts.

169. I am not satisfied that Mr Lynn was told in 2008 that Mr Verrier was going to use Mr Marshall to advise the brokers. His expression of surprise when told by Mr Verrier suggests not. But the role in fact played by Mr Marshall – which I describe in the next paragraphs, must soon have become apparent to him.

Mr Marshall

170. Mr Marshall is the third individual who is alleged to have been party to the common plan and conspiracy against Tullett. He is not a party to the action. He was not represented. He was not called by any of the defendants to give evidence. Much of what he did is covered by the veil of privilege, which has not otherwise been waived. Nonetheless he could have given substantial evidence. I was not asked to examine the adequacy of the advice which he gave to the Tullett Three as to the BGC contracts, they having waived privilege. I am asked to find that he was a party to a conspiracy to use unlawful means to recruit a large number of brokers from Tullett. I should be careful to make no more findings concerning him than are necessary to my decision.

171. It is a stark fact that until he began to act for the brokers at Mr Verrier's request he was Mr Verrier's solicitor having acted for him in his negotiations with Tradition, in his negotiations with BGC, and in the action between him and Tullett. (He had earlier been employed by Tullett as in-house counsel.) He then acted for the brokers in their

negotiations with BGC, that is, with Mr Verrier. So his task was to represent their interests and to advance their positions against BGC and Mr Verrier. Then, on 26 March he ceased to act for the brokers and acted for Mr Verrier, and he has represented him in the present action. Three of his former clients have been witnesses for Tullett, and have been at the centre of a claim made by BGC against Tullett. When it was put to Mr Verrier that he had a close relationship with Mr Marshall, Mr Verrier answered "Yes, we are friends." – Day 25.43.

172. I make no finding as to the quality of the advice which Mr Marshall gave to the brokers on their draft contracts. I record that Mr Stevenson said that he had received no advice (apart from what was said at the Bleeding Heart dinner) – paragraph 41 of his second witness statement and Day 20.166. I have not heard Mr Marshall, and I do not think that it is necessary or appropriate to decide whether that serious allegation is correct. But I do find that he was assisting Mr Verrier in the brokers' recruitment. That was the purpose of his attending the Bleeding Heart dinner, the Rules dinner and also the Toscana dinner at the Rendezvous Bar on 26 February. It can be seen from his reports to Mr Verrier on progress that his object was to aid the recruitment rather than to take an impartial stance. One of his functions was to 'provide comfort' to the brokers. Mr Stevenson described him as Mr Verrier's lapdog – second witness statement, paragraph 57. If he had said 'Mr Verrier's man' I would have agreed that this was in respects true. These findings are relevant both to the conspiracy claim and to the claim of the Tullett Three to terminate their forward contracts with BGC. This is not to say that he did not also look after the brokers' interests. An example is the work he did in connection with indemnities, and his insistence on getting BGC's agreement that the indemnities would apply before his clients left Tullett.

173. It is clear that the change of representation of the brokers from Mr Marshall to BLP was planned by BGC. I am satisfied that Mr Marshall must have been informed of that plan. Mr Lynn and Mr Verrier chose not to tell the court what the plan was. I deduce that the final plan was that BLP should act for the brokers as soon as they left Tullett: it had earlier been considered whether BLP should take over once the brokers had entered into contracts.

174. I am satisfied that prior to January 2009 Mr Marshall had been informed by Mr Verrier of a plan to make a large scale recruitment from Tullett, and that Mr Verrier had asked him if he would act for the recruits in negotiating the terms on which they would come to BGC. Mr Verrier had no need to tell Mr Marshall the objectionable parts of his plan – as I have found them to be. I am not satisfied that he did so. During the period in which Mr Marshall was acting for the brokers it must have become clear to him that Mr Verrier was using at least Mr Hall in breach of Mr Hall's duty to Tullett. It is very clear also that he was aware of the exit strategy. I refer in particular to the Cohen attendance note of 26 January, R 6918, and the Mist e-mail sent on 17 March – R 6947.1. Mr Marshall became involved in the plan to get the Wire, Phoenix and Toscana brokers to leave Tullett together and within a short period without regard to whether there were valid grounds for alleging constructive dismissals.

175. I have reviewed the surprising history of the communications between BGC and Mr Marshall in respect of the brokers' indemnities in the section on the detailed facts – paragraph 64 above. Mr Marshall's e-mail to Mr Comer of 4 February – H 2265, shows that Mr Marshall had at that point already had a discussion with Mr Verrier about what would happen if the brokers were called out: I refer to paragraph 64(7) and (8). At the end of that paragraph I have considered the position that left Mr Marshall as the custodian, as it were, for the brokers of the e-mails defining loss, of which they had no knowledge, while acting for Mr Verrier whose interest was potentially directly opposed to theirs.

176. In considering whether Mr Marshall is to be treated as a party to a plan to call out the brokers regardless of whether they had grounds to leave, it must be remembered that, as well as being the wish of BGC, it was the wish of the majority of brokers to leave Tullett quickly and to arrive together at BGC. As solicitor acting for the brokers Mr Marshall was representing the interests of his clients to that end. I have concluded that in the circumstances it would be wrong to hold that Mr Marshall should be treated in law as a party to the agreement which I have found between Mr Lynn and Mr Verrier to bring that about.

Liability for inducing breach of the brokers' contracts with Tullett

177. I have held that the defendant brokers were not constructively dismissed by Tullett. It was their decision to leave but it was essential to their leaving that BGC stated that they would be indemnified, and they all knew that BGC wanted them to go. Mr Verrier spoke to them all, and I am satisfied that he encouraged them to do so. They were induced to leave by BGC.

178. It is the case of BGC that it took legal advice as to the claims of the brokers for constructive dismissal. I have referred to the evidence as to this in paragraph 63(102), and I accept that BGC did so. Privilege could have been waived, and then BGC could say 'This is the advice we relied on.' But it was not, and I know nothing about the advice. I do not know the circumstances in which it was given, the detail in which it was given, or what it was. It may have been that in respect of a particular broker he had a good case for constructive dismissal. It may have been that a particular broker had no case for constructive dismissal. The advice may not have distinguished between brokers. Further, advice can be no better than the information on which it is founded. There is no evidence that BGC took further advice from counsel following the suspension of Mr Hall and the service of proceedings before deciding to make the indemnities operative. It was submitted on behalf of BGC that the taking of legal advice showed that BGC was acting responsibly. I do not accept that. It was sensible for BGC to take advice so it could judge the risks it might be taking by asking the brokers to leave. But no further deduction can be made.

179. Tullett do not have to show that BGC positively intended that the brokers should be in breach of their contracts with Tullett when they left. *OBG* shows that lesser states of mind will do. I refer in particular to the citation from the judgment of Lord Denning MR in *Emerald Construction Co Ltd v Lothian* which is quoted above, and its reference to being 'indifferent to whether it is a breach or not'. That fits the present case. For the intention of Mr Lynn and Mr Verrier was that the brokers should leave whether or not they had good grounds for claiming constructive dismissal. The situations which are referred to in *OBG* where there was no liability are very different to the present. There, as quoted above, Lord Nicholls stated in paragraph 202 "An honest belief by the defendant that the outcome will not involve a breach of contract is inconsistent with him intending to induce a breach of contract." BGC had no honest belief. I therefore hold that BGC is liable for inducing the defendant brokers to breach their contracts with BGC.

180. I likewise hold that the claim in conspiracy for conspiring to induce those breaches of contract is made out against BGC, Mr Lynn and Mr Verrier.

181. That covers what seems to me is the primary issue. I also hold that BGC, Mr Lynn and Mr Verrier conspired to use Mr Hall, Mr Bowditch and Mr Yexley to assist in recruiting their desks in breach of duty to Tullett.

182. I find that in acting as they did Mr Lynn and Mr Verrier considered that the commercial gain to BGC from their conduct would outweigh the damages and costs for which BGC would be liable. That conclusion is supported by the evidence of Mr Harris and Mr Parkes. It is also the fact that if the two executives had not considered the likely financial consequences of their conduct they would have been failing in their duty.

183. I consider the claims in conspiracy against the broker defendants separately in part H.

Part F – BGC's Claim in respect of the Tullett Three

184. BGC's claim against Tullett under Part 20 is for damages for inducing the Tullett Three, Mr Comer, Mr di Palma, and Mr Stevenson, to renege on their forward contracts with Tullett and to decide to remain at Tullett when their existing contracts came to an end. BGC have not brought any claim against the brokers themselves. Tullett deny that they did induce the Tullett Three to renege on their BGC contracts and assert that in each case the brokers decided for themselves not to go to BGC without inducement from Tullett. Tullett advance a number of other defences. The

defence which Tullett put first is that on any view BGC cannot establish any loss. Although it was put on behalf of Tullett as a separate defence, one aspect of whether BGC can show any loss is whether the brokers in question were entitled to terminate their contracts with BGC as they purported to do by their solicitors' letters of 1 May 2009. It is, however, logical to consider first whether the three brokers were induced by Tullett as BGC allege.

185. In broad terms BGC's case as to inducement is that the three brokers were induced by not to comply with their forward contracts with BGC by a combination of three matters: the white board presentations held on 9 or 11 March, the offer of indemnities against action by BGC, and the offer to repay to BGC the monies which had been paid by BGC to the three as signing payments. There is no dispute that Tullett have agreed to give indemnities. There is no dispute that they agreed to repay and have repaid to BGC the signing payments. But when and in what circumstances Tullett agreed these matters is unclear. In his sixth witness statement made on 29 June 2009 Mr Wink said that he had been informed by Mr Potter that Tullett had confirmed to the three brokers that they will be indemnified for any liabilities and costs they suffer as a result of their decisions to inform BGC that they do not consider themselves bound by their contracts with BGC and not to join BGC. This is the only written confirmation as to the indemnities which is before the court.

186. Although there are close similarities between the positions of the three brokers, the course of events is not the same, and so I will consider them separately, beginning with Mr Comer.

Mr Comer

187. Mr Comer signed a contract with BGC on 30 January 2009. He was paid the half of his signing fee to which he was entitled. On the evening that he signed he received advice from his solicitor as to the contract: the written advice – H2239 – 2242 concluded 'In summary this is quite an onerous contract'. On 11 or 12 February he handed his notice to Mr Potter that he would be joining BGC when free to do so. On about 20 February, on meeting Mr Potter in the corridor, he said something along the lines of 'mate, I'm so sorry. I'll buy you a drink when this is all over.' The outcome was an exchange of e-mails initiated by Mr Comer as Mr Potter had asked, suggesting that they meet for a drink on 26 February.

188. They did meet for a drink on 26 February at Sophie's Steak House. A drink turned into dinner. Before this Mr Potter had suspected that Mr Comer was less than happy at the prospect of moving to BGC. I am satisfied that he approached the meeting very aware of the possibility that Mr Comer might change his mind. Mr Potter wanted that. At the dinner Mr Comer talked freely about his situation. He said BGC were looking for an opportunity to claim that Tullett had broken a contract, put a foot wrong, and then all the brokers would walk out. He said he did not want to leave Tullett but felt

trapped. He said that if he received from Tullett the 50% of his BGC signing fee which he had received and an indemnity, he would stay at Tullett. He said he thought that Mr Harkins and Mr Stevenson were of the same mind. Mr Potter made a note of the meeting the next morning – O 4592, which I accept as broadly accurate as far as it goes. The note stated: 'We must be careful how we approach [Mr Comer]. He doesn't want to be a whistleblower.' Mr Potter asked Mr Comer at the meeting in Mr Potter's words from his witness statement of 8 June 2009, 'if he wanted me to arrange a meeting with the legal team to see if there was anything he could do. Mr Comer said he did.' In Mr Comer's words, 'Mr Potter said he would try to assist me to remain at Tullett, but he made no firm commitment. ….. Mr Potter said he would try to help me, but that he would need to discuss the matter with senior Tullett management. He said that I should trust him. He also mentioned setting up a meeting with Simon Clark, of the Tullett Legal Department, if I wanted.' Both Mr Potter and Mr Comer were cross-examined about the meeting –Day 12.113 et seq., and Day16.48. Mr Potter said he told Mr Comer that he could not comment on his requests for money and an indemnity: they were not within Mr Potter's remit; he would have to speak to Mr Clark. Mr Comer did not add or detract from his witness statement.

189. The next day Mr Comer told Mr Potter that he would like a further meeting. Mr Potter had reported on the dinner to Mr Wink and Mr Clark. At 6 that evening Mr Comer had a 2 hour meeting with Mr Clark and Mr Potter. Litigation privilege was claimed for the whole of the meeting : Day 12.130 - .132. That must mean the litigation against BGC was contemplated from this time, and that the whole of the meeting was for that purpose. I was surprised at that. Following a ruling from me, Mr Potter was asked if Mr Comer had asked for an indemnity at the meeting. Mr Potter said probably, but that he could not remember the answer: he had not been interested in the discussion. I found his evidence defensive and unconvincing, as I did when he was recalled and further questioned on Day 35. He said, which I accept, that only Mr Smith had authority to give an indemnity. Mr Smith accepted in his evidence that he had given authority for an indemnity to be given, but was imprecise about when it was. It may have been around 24 March, but the evidence is unclear – Day 11.152. Mr Wink made his first statement on 24 March. It refers in paragraph 58.2.7 to Mr Comer having changed his mind and decided to stay at Tullett. I have referred in paragraph 63(127) to the business initiative proposals – BIPs, which Mr Potter caused to be made in February and March. The first to include the payments which were in fact later to be made to Mr Comer, Mr di Palma and Mr Stevenson is dated 18 March. That is consistent both with it having been prepared in anticipation of what the brokers had asked for being agreed, and also with the sums having been agreed. Because it was disclosed only in January 2010, Mr Smith was not originally cross-examined on the documents referred to in paragraph 63(124) relating to the payments to BGC on account of the Tullett. Mr Onions said that he would recall Mr Smith if asked by Mr Hochhauser. Mr Hochhauser said the decision was for Mr Onions. So there was a stand-off and Mr Smith was not recalled. There was also great pressure of time and it may be that the exercise would have added little.

190. I will next trace through Mr Comer's relevant mind states. By 26 February he had come to think he had made a mistake in signing a contract with BGC. But he had

received BGC's money and did not want to pay it back, and if he reneged on the contract he faced being sued. Mr Hall had told him that. Like the other forward cable brokers he attended a meeting with Tullett management on 11 March and was given the white board presentation by Mr Wink. What he said to the meeting as to his position is unclear, for he has said various things: I refer to his second witness statement at paragraph 55 and to Day 16.9,10. His statement at Day 16.9,10 that he said at the meeting that, if he did not receive an indemnity from Tullett, he would be going to BGC, may or may not reflect what he said at the meeting: but it does reflect the state of his mind. He said that he was irritated at being required to attend and saw no purpose in his being there. It is BGC's case that Mr Comer attended the Rules dinner on the evening of 11 March as a mole for Tullett. Mr Potter knew that he was going to attend, and as Mr Comer was speaking freely to him he would have expected to hear what happened at the dinner. But I do not think that Mr Comer went as an informer for Tullett. Mr Comer went to the dinner because he was still facing the prospect of joining BGC. He hoped to avoid that. He decided before the dinner to talk to Mr Verrier and see if he could get out of his contract. If he had succeeded, that would have solved his problems. At the dinner he became rather drunk early on. During the course of the evening he asked Mr Verrier if he could get out of the BGC contract. Mr Verrier was suspicious by this time that Mr Comer had been 'turned' by Tullett, and he told him with an expletive that, if he tried, he'd nail him to the wall. Mr Comer had earlier had another passage of words with Mr Verrier, when Mr Verrier had reacted badly. Mr Comer said that the next day he decided that in the light of what had happened at the dinner he was not going to BGC. He told Mr Potter that morning. He said he only heard that he was going to be indemnified by Tullett from Edwards Angell in mid April. He gave no satisfactory explanation of his knowledge as to Tullett's payment to BGC on his behalf.

Mr di Palma

191. Mr di Palma had previously worked for BGC and had not enjoyed it. His meeting with Mr Wink, Mr Potter and Mr Clark was held on 9 March as he was going to Rome on 11 March. He was given the white board presentation. By an addition to his first witness statement made in his second, he said in paragraph 36 that 'I thought Mr Wink gave a balanced and impartial presentation.' I think that this shows more of Mr di Palma's desire to assist Tullett than of the presentation – which favoured Tullett strongly. He said that when he thought matters through on 10 March he realised he had always been happy at Tullett and did not want to move. He was unhappy that he had been pushed into handing in his resignation letter earlier than he wanted, and he was unhappy at the suggestion they would leave Tullett before the expiry of their contracts. He talked to his partner and decided he should remain at Tullett. On his return from Rome on Thursday 12 March he made an appointment to see Mr Wink that day. He told Mr Wink that he no longer wished to join BGC. Mr Wink told him to speak to Mr Potter and Mr Clark. Mr Wink said he had nothing more to do with Mr di Palma after this; he said he did not offer Mr di Palma an indemnity – 'all of that was dealt with by Mr Clark' – Day 8.35. Mr di Palma said that he saw Mr Potter and Mr Clark the following week. But Mr Potter did not think he was present – Day 12.165. Mr Potter heard that Mr di Palma was staying with Tullett around 15 March – Day 12.166. Mr Potter thought that in March he had discussed making a payment to Mr di Palma, but not an indemnity – Day 12.169. Privilege is claimed in respect of the

meeting with Mr Clark. Mr di Palma said it was a brief meeting of perhaps 5 minutes – Day 19.101. That cannot be true. He said he never thought he might be sued by BGC – Day 19.104. That cannot be true. On 13 March Mr Hall told Mr di Palma that the plan would only work if they all left together: I refer to paragraph 63(100) above. On 17 March he found on his mobile phone Mr Hall's message with the suggested letter complaining about the white board meetings. He did not agree with it. His first statement made on behalf of Tullett was dated 20 March. Mr di Palma said that he was never offered an indemnity until after Edwards Angel were instructed. He said that he personally was never offered anything, neither indemnity nor signing payment – Day 19.96.

Mr Stevenson

192. At the conclusion of his meeting on 11 March Mr Stevenson made a remark along these lines: 'I think I'm just going to pop out and buy some rope to hang myself.' At this point he was strongly regretting that he had signed a contract with BGC. He was in particular unhappy at the position of Mr Marshall and the advice he was receiving. But he had not then changed his mind about going to BGC – Day 20.90. In the days following the Rules dinner he was concerned that Mr Verrier had an early exit plan, which was never his intention. He felt that the brokers were being used by Mr Verrier to get even with Tullett and Mr Smith. He concluded that BGC was not the place for him. On 16 March he received a call from Mr Potter with Mr Clark also listening. Mr Potter said that he thought Mr Stevenson might be having doubts about going to BGC and asked if Mr Stevenson might like to see them. Mr Stevenson said he would. The next day he attended a meeting with Mr Potter and Mr Clark for which privilege is claimed. Mr Stevenson said in evidence – Day 20.89, that he first asked Tullett for the money he had been paid by BGC at that meeting. He said:

> "I asked them at that point – I basically said: I cannot go to BGC, I have absolutely no interest, can you help me stay? And they said yes. And I said; there are a couple of problems with this; I fear that I may be sued by BGC. I do not have the money left to give back to BGC. And to be honest I have plans for some of the rest of the money. I was quite looking forward to getting that. And they said: just trust us, it is fine. So I did."

Later he said in respect of the payment that nothing had been agreed formally until his contract extension of 7 October. He was asked if it had been agreed informally and said: 'Only if you take trust as an informal arrangement, then, yes. Otherwise, no.' I found Mr Stevenson a more reliable witness than Mr Comer or Mr di Palma.

193. It is remarkable that nothing has been disclosed recording the decisions to indemnify the three brokers and to repay to BGC what had been paid by BGC to them as signing payments. Nor were the two relevant executives called on behalf of Tullett, Mr Wink and Mr Potter, able to help. There must either have been a deliberate decision not to put anything in writing or there has been a failure in disclosure. I find it difficult to see that the whole matter could be covered by privilege. But be that as it may, Tullett could if it wished have put before the court evidence which explained what happened. It chose not to do so, leaving a hole. I should infer that the truth of what happened is

unfavourable to Tullett. However I think that the truth is sufficiently indicated by the evidence of Mr Stevenson. It is that the three brokers were left to trust Tullett that the indemnity and money would be forthcoming in each case if they stayed with Tullett and cooperated with Tullett. In addition to Mr Stevenson's reference to trust, Mr Comer said that Mr Potter told him to trust him.

194. I have held that it was the intention behind the white board presentation to induce the brokers to change their minds about going to BGC. I think that those meetings were a factor in the decisions of Mr di Palma and Mr Stevenson, perhaps not in the case of Mr Comer. But none of the three would have decided to renege on their contracts with BGC without at least an indemnity from Tullett, and also the money to repay BGC. Tullett was very careful not to say in March in plain terms that both would be forthcoming, but the indication was given that they would be. That over-worked phrase, a wink is as good as a nod, is applicable. So I hold that Tullett did induce the three brokers to repudiate their contracts with BGC.

195. This aspect of the case does Tullett no credit. It is unclear to me how the decisions as to dealing with the Tullett Three were taken. The decisions to grant them indemnities and to pay BGC were taken by Mr Smith, but the circumstances in which he took them are deliberately obscure.

No loss

196. Tullett's case under this heading ran as follows. Although loss may be inferred when appropriate, it is essential to a claim for inducing breach of contract that loss be shown. BGC could show no loss because the evidence showed that the Tullett Three were unacceptable to Mr Hall, Mr Harkins, Mr Sully and Mr Bishop as companions on the desk because they were turncoats and had stabbed their fellows in the back, or, in more formal language, they had reneged on the move to BGC and had provided statements for Tullett saying what had happened. BGC's first response was that the question of loss was not one of the issues which this trial was to decide. Tullett's answer was that the court had to decide whether there was a claim, and proof of some loss was essential to a claim.

197. I think that while Tullett are technically correct, to raise the issue of loss goes against the spirit of the agreement that damages form no part of this trial. But in any event I do not think that Tullett's submission should be accepted. I do accept that the Tullett Three could not now sit on a desk with their former workmates. That arises from two causes, their decision not to move to BGC and their decision to give evidence for Tullett implicating in particular Mr Hall. There was understandably no examination of the hypothetical position if one of these causes was removed.

198. I have shown the difficulty in which the court is in deciding what happened within Tullett as to the three brokers. But it is reasonably clear that the understanding that was reached between Tullett and each broker covered all matters. It cannot be divided up. If Tullett had not indicated that it would indemnify the brokers, and repay the monies to BGC, the brokers would not have reneged on the BGC contracts. It is very unlikely that the three brokers would have agreed to give evidence for Tullett in a situation where they were going to perform their contracts with BGC and join BGC when they could. So, if the inducements of breach of contract had not occurred, the likelihood is that the three would not have given evidence for Tullett. So their colleagues' objections to them would not have arisen.

Did BGC repudiate the forward contracts?

199. As I have stated, this is in reality a second basis for saying that BGC have suffered no loss by reason of Tullett inducing the three brokers to act as they did. For if the three brokers were entitled to terminate the contracts as they wanted to do, Tullett's inducing had no effect on BGC.

200. By letters of 1 May 2009 Edwards Angel responded to BGC's letters to the Tullett Three of 27 March 2009 saying that their clients treated their contracts with BGC as set aside. In paragraph 6 of Tullett's defence to BGC's counterclaim Tullett plead the duty of BGC not to destroy or seriously damage the relationship of trust and confidence. I accept that this applied as between the brokers and BGC even though the brokers were not yet in BGC's employment. It applied as appropriate taking account of that circumstance. In paragraph 14 it is alleged that the effect of the unconscionable conduct of BGC, Mr Hall, Mr Verrier, Mr Lynn and Mr Marshall set out in the particulars of claim together with other matters brought the trust and confidence essential for the Tullett Three to work for BGC and under Mr Hall to an end. The paragraph later referred to matters specifically relating to the three brokers. The main thrust of the paragraph is that the conduct of BGC through Mr Lynn and Mr Verrier in connection with the common plan set out in the particulars of claim was such as to end trust and confidence in BGC in breach of BGC's duty. This was in effect repeated in paragraph 987 of Tullett's closing submissions.

201. In looking at BGC's conduct for this purpose I should concentrate mainly on illegal and dishonest conduct. I summarise the relevant matters for this purpose as follows:

(1) The use of Mr Hall by Mr Verrier to bring over his desk.

(2) The attempt by Mr Verrier through Mr Hall to get the brokers to write letters complaining about their white board meetings, which contained matters which the brokers thought untrue and which were untrue. I refer in particular to the spicing up of the letters by BGC.

(3) The intention of Mr Verrier to 'blow the whistle' and have all the brokers leave Tullett regardless of whether they had honest claims for constructive dismissal.

(4) The use by Mr Verrier of Mr Marshall as the adviser to the brokers, when Mr Marshall's loyalties were divided and in some respects he was assisting Mr Verrier rather than representing the interests of his clients.

202. I should enlarge on the third of these, which may be the most important. At Day 16.117 Mr Comer said he was shocked at what Mr Verrier said at the Bleeding Heart dinner on 26 January about getting the brokers out early. I think 'shocked' was an over-statement, but I accept that Mr Comer was unhappy at what he heard. At Day 16.83 Mr Comer said that he was getting more and more 'vibes' that they would be leaving early, and he was never going to walk out on his contract. Mr di Palma was likewise concerned at what Mr Verrier said at the Bleeding Heart dinner about getting the brokers out of Tullett – second witness statement paragraph 23, and Day 19.140,141. After the meeting Mr di Palma told Mr Hall that he was not going to leave his Tullett contract – paragraph 24 of that witness statement and Day 19.177. Mr Stevenson said at Day 20.177 in the context of the Rules dinner that it was clear that there was an early exit strategy, and he had no intention of harming Tullett by walking out on his contract. He also said it was becoming clear that Mr Verrier was looking to lift a large number of brokers from Tullett, to try and cripple the company and upset Mr Smith. I accept the evidence I have referred to in this paragraph as generally accurate.

203. The Tullett Three had not informed BGC that they were not going to honour their contracts with BGC prior to Edwards Angell's letter of 1 May. But it could be readily inferred from their witness statements that they would not do so. Hence BGC's letters of 27 March to them. They did not respond to the ultimatum at the end of those letters. There is nothing preventing them from relying on BGC's conduct as they seek to do. They had done nothing to waive any right to accept a repudiation of the BGC forward contracts, nor had they affirmed these contracts. It is, of course, BGC's case that Tullett induced them not to perform those contracts in the latter part of March 2009. BGC's conduct has only been fully established during the course of this trial. The Tullett Three (and through them Tullett) are not prevented from relying on it by reason of any omission to rely on it in all its aspects in March 2009 or in Edwards Angell's letters of 1 May 2009: I refer to paragraph 79 above and the principle that a party may rely on any conduct to justify the termination of a contract whether or not it was known to him, or relied on by him, at the time he terminated the contract. However, the passage I have quoted from the letters of 1 May 2009 in paragraph 63 (125) covers the case.

204. I have dealt with the law in relation to constructive dismissal and breach of an employer's duty to maintain trust and confidence when considering the broker defendants' case for constructive dismissal.

205. In my judgment the conduct of Mr Verrier was such that the Tullett Three could have no trust and confidence in him and BGC as their future employers. In my judgment on the application for interim relief when I had heard no evidence from BGC I stated that, on Tullett's evidence, BGC's conduct showed a cynical disregard for the law and for employees' duties. Broadly that remains true. A person can have no trust or confidence in an employer who has recruited him in such a manner, and should not be obliged to serve him. The Tullett Three were entitled to treat their obligation to join BGC when free to do so, as ended.

206. I therefore conclude that while Tullett induced the Tullett Three to end their contracts with BGC, the Tullett Three were entitled to do so; that is, Tullett induced them to do something which they were entitled to do. They were entitled to repudiate the contracts because of BGC's conduct which I have summarised in paragraph 201. Any liability of Tullett is ancillary to that of the Tullett Three : paragraph 146 above. Tullett's conduct has caused BGC no loss.

Superior right

207. Tullett further submitted that the BGC forward contracts with the Tullett Three were inconsistent with its contracts, and it was therefore entitled to procure breaches of the former, citing Clerk & Lindsell on Torts 19th Edition, page 1553:

> "The fact of an earlier contract with a defendant inconsistent with the claimant's contract may well afford a justification to the defendant for procuring a breach of the latter, or in other words:
>
> > There are circumstances in which A is entitled to induce B to break a contract entered into by B with C. Thus, for instance, if the contract between B and C is one which B could not make consistently with his preceding contractual obligations towards A, A may not only induce him to bread it, but may invoke the assistance of a Court of Justice to make him break it."

The citation is from *Smithies v National Association of Plasterers* [1909] 1 KB 310 at 337 per Buckley LJ. I was also referred to *Edwin Hill & Partners v First National Finance Corporation* [1989] 1 WLR 225. In the *OBS* case Lord Nicholls mentioned the principle in paragraph 193, citing *Edwin Hill*.

208. I have considered whether there is any inconsistency between the Tullett contracts and the BGC contract in connection with the conspiracy claim in paragraph 142(a) above. I concluded that there was not. So no issue of superior right arises.

209. A different point was raised in respect of Mr Stevenson's BGC contract. By reason of an error as to the dates provided in his contract with Tullett, the BGC contract provided that he should begin work no later than 16 months from 5 February 2009. The date Mr Stevenson was free under his Tullett contract to work for BGC was 29 February 2012 after taking account of post termination restrictions for 6 months. So there was a conflict. However each party to the BGC contract would in my view have been entitled to have it rectified. There was no threat that Mr Stevenson would go to BGC before he was entitled to. In this situation I do not think that Tullett can rely on superior right to induce Mr Stevenson to repudiate his contract with BGC.

Were BGC's contracts with the Tullett Three voidable?

210. Tullett submitted that the contracts are voidable because (1) they were entered into using unlawful means, and (2) they were made under economic duress.

211. In its written closing submissions Tullett referred to unlawful means 'as described in detail above'. I do not think that this can add anything to the case I have already considered under the heading of the repudiation of the contracts by BGC.

212. I regard the case of economic duress as a very long shot. The submission is in essence that the three were subjected to peer pressure from the others on the desk, and pressure from BGC to sign their contracts. In my view such pressure as there was falls far short of the compulsion necessary to found a case in economic duress. The main reasons why the three men decided to go with the others to BGC were, first, the money and, second, a desire to stay with their colleagues.

Part G – Relief by way of Injuction

213. The relief sought by Tullett is essentially twofold. First the defendant brokers should not be entitled to join BGC, and BGC should not be entitled to employ them, for 18 months from the first grant of relief on 2 April 2009, so until October 2010. Second, BGC should not be entitled to seek to recruit further from Tullett for that period. The case for the defendants is in essence that no further relief by way of restraint should be granted. But there are two reasons for deciding whether lesser periods would be appropriate. One is that I have to decide the appropriate periods, which may be lesser periods. Second, there is Tullett's cross-undertaking in damages.

214. A point was raised on behalf of BGC which it is convenient to deal with at the outset. It is that Tullett did not disclose at the time of the interim application that it had successfully re-signed a large number of its employees. Mr Ritchie prepared a schedule listing fifty as re-signed between October 2008 and May 2009, to which

must be added Mr Badini and his team. The re-signing of a number was referred to or was to be inferred from, Tullett's evidence. But the full scale of the operation was omitted. It was said on Tullett's behalf that as BGC was not respecting contracts the re-signings were no protection. Certainly with hindsight it can be said that it would have been better that a fuller picture had been presented by Tullett. A further answer is that BGC were aware that Tullett was resigning, if not of the full scale. I refer to Mr Lynn's evidence at Day 24.66. In one instance Tullett's initial evidence at the trial was positively misleading. I refer to paragraph 6 of Mr Brown's witness statement where he referred to Mr Dixon refusing to sign an extension to his contract with Tullett because of an offer from Mr Verrier, but did not add that Mr Dixon changed his mind and signed soon thereafter. It was not submitted for BGC that Tullett should be barred from any relief by reason of non-disclosure, but it was said to be a factor I should take into account. I do not think that it carries any weight. It can be seen now that Mr Verrier's raid on Tullett has had limited success. But that is at least in part due to the proceedings and the giving of undertakings following my judgment of 2 April. The position seemed rather different when the proceedings were being prepared.

Relief against the defendant brokers

215. Each of the defendant brokers' contracts with Tullett contained a garden leave provision. Clause 11.3 of the schedule of standard terms provided:

> "11.3. If the Company wishes to terminate your employment, or if you wish to leave the employment of the Company, and whether or not either party has given notice to the other, it may not be appropriate for you to continue performing your duties for the Company having regard not only to your position but also your access to and knowledge of confidential information about the business of the Company and other companies in the Group and the need to protect the trading connections of the Company and the other companies in the Group. The Company may therefore require you to perform duties not within your normal duties or special projects or not to attend for work for a period equivalent to the notice required to be given by you to the Company or for the unexpired period of your Employment Agreement. For so long as you are not required to work during such period, you will remain employed by the entitlements (except for any bonus or profit share) and to be bound by all the terms of this Employment Agreement. You will not directly or indirectly work for any person, have any contact with any customer of the Company or any Group company or any employee for business purposes without the prior written consent of the Company. If you are not to attend for work under this clause, the Company shall be entitled to offset any outstanding accrued holiday due to you for each day of non-attendance".

216. Each defendant broker is subject to post termination restrictions for a period of 6 months after termination of employment.

217. The dates which are the earliest on which the brokers' contracts with Tullett might be brought to an end are:

Mr Hall	30 June 2012
Mr Sully	11 February 2010
Mr Bishop	31 March 2011
Mr Harkins	31 January 2010
Mr Yexley	28 February 2013
Mr Bowditch	28 February 2011
Mr Temple	30 June 2010
Mr Wilkes	30 November 2010
Mr Cohen	28 February 2011
Mr Matthews	31 August 2011

Save in the cases of Mr Sully, Mr Harkins and Mr Temple an 18 month period would end within the contract period. So, with the others, I have only to consider whether it is appropriate to enforce garden leave periods of 18 months. Mr Sully's post termination restrictions will end on 30 June 2010 if credit is given for the limited garden leave set off provided in the restrictions. So he cannot be restrained for the full 18 months. In the case of Mr Harkins the equivalent date is 19 June 2010. So he is in a similar position. In the case of Mr Temple the equivalent date is 19 November 2010, which is outside an 18 month period.

The law

218. I do not think that there was in the end much difference between the parties as to the law. The differences were as to how it should be applied to the facts of this case. I will set out the principles as they are applicable here.

219. The starting point is that the court will approach the enforcement of a period of garden leave by injunction in a similar way in part to that in which it approaches the enforcement of a post termination restraint, often called a restrictive covenant. A covenant that is in restraint of trade because it restricts the employee's ability to work will only be enforced to the extent that it is reasonable. In considering whether it is reasonable the court will consider whether it is reasonable in the interests of the parties and whether it is reasonable in the interests of the public. In modern times the emphasis is on the former. If the restraint is greater than is necessary to give adequate protection to the party claiming its benefit, it will not be reasonable between the parties. The party seeking enforcement must show a 'protectable interest'. That will often be his trade connection with customers with whom the employee has been dealing. It may be confidential information held by the employee. The court will not enforce a covenant where the employer's object is simply to prevent lawful competition by the ex-employee.

220. Here the interest which Tullett seek to protect is the relationship which it has through the brokers with the traders. It seeks to prevent a broker moving to BGC taking with him his trader clients. It asks that it have a reasonable time to rebuild the connection following the departure of the broker in question. BGC do not dispute that approach, but question the reasonableness of the period sought. Any confidential information which the brokers may have had, has, in my view, long since lost its value, and I am not concerned with confidential information here.

221. Where the enforcement of a garden leave provision differs from the enforcement of a covenant is that the enforceability of a covenant is to be judged at the time that it was entered into. If, on that basis, it is unenforceable, that is the end of the matter. If it is enforceable, then prima facie an injunction will follow. But there may be situations where the court will nonetheless hold that, because of what has actually happened, an injunction is inappropriate, or is inappropriate for the whole period of the covenant. The enforcement of a garden leave provision may come in at this stage as a reason for declining to enforce the covenant in whole or part.

222. Where the issue is garden leave, the court looks at the situation at the time enforcement is sought. The court will look primarily at what is required for the reasonable protection of the protectable interest, here trade connection. It will also take account of the situation of the employee. That brings in here the facts that the brokers are on garden leave as a result of their having walked out from their employment in reliance on their indemnities from BGC without, as I have held, having grounds to do so; that they are suffering no financial loss because they are receiving salary from Tullett and will be indemnified for bonus by BGC and are in fact better off as a result of what has happened by reason of their signing payments from BGC. The court will also have in mind the strong public interest in employees being held to contracts which they have freely entered into for substantial remuneration. That interest pulls in the opposite direction to the public interest in employees being freely able to exercise their skills in work by transferring from one employer to another. It is also a factor that the brokers will take time to get back up to speed once they begin work again. It is also ironic that under their contracts with BGC they will have rather less freedom of future movement than under their contracts with Tullett. These are all factors which are subsidiary to the main issue as to the time required for the reasonable protection of the employer's protectable interests.

223. The public interest in employees being held to their contracts may be satisfied not only by means of injunctions. Where an employee breaks his contract, he will be liable in damages for such loss as his employer can establish as caused by his breach. Whether or not an injunction is granted, that remains. For an injunction to be granted the employer must show that damages would not be an adequate remedy. This is usually established, perhaps without much difficulty, by showing that the assessment of the loss would be speculative and so the loss hard to prove. In such circumstances the threat of a claim for damages is reduced: but it does not disappear.

224. Where the court considers that the period for which the employer is entitled to protection ends during the time for which the employee may be on garden leave, it will enforce the garden leave provision for that period, and will decline to enforce any enforceable post termination restriction. It will decline the latter because the employer will have already got all the protection he is entitled to, and the court has a discretion not to enforce an enforceable post termination restriction or covenant where the circumstances are such that it should not.

225. The court may consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction or covenant. The court will then exercise its discretion as to the enforcement of the restriction and will enforce the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate. This seems to me to be the correct approach, but it is not that agreed between the parties in a note dated 12 February 2010. That suggested that the covenant should be enforced for the whole of its period with the balance being made up by garden leave. This approach terminates the contract and starts the covenant running before the contractual termination date, and there is no justification for that.

226. I draw the above from the following cases in particular:

Evening Standard v Henderson [1987] ICR 588
Provident Financial Group plc v Hayward [1989] ICR 588
Euro Brokers Ltd v Rabey [1995] IRLR 206
Cantor Fitzgerald v George, Court of Appeal, 17 January 1996
Credit Suisse Asset Management Limited v Armstrong [1996] ICR 882
William Hill Limited v Tucker [1999] ICR 291
Symbrian Ltd v Christensen [2001] IRLR 77
Norbrook Laboratories (GB) Ltd v Adair [2008] IRLR 878

Matters relating to all desks

227. Tullett's contracts provided for post termination restrictions of six months for the defendant brokers although the period for Mr Comer and Mr di Palma was 12 months. It was submitted for BGC and the brokers that this suggests that Tullett considered that 6 months would be enough to protect its proper interests. But it must be borne in mind that Tullett could reasonably expect these to operate in conjunction with periods of garden leave. Indeed, that is recognised in the restrictions which allow for a limited reduction to be made for time spent on garden leave.

228. It was not in the forefront of the submissions on behalf of the brokers that damages were an adequate remedy and that, therefore Tullett was not in any circumstances entitled to any relief by way of injunction. For the submission as to damages being adequate came after the submissions as to the appropriate period of an injunction. I think the way it was put was rather that any injunction should be kept short and if Tullett suffered damages thereafter, the damages could be recovered. In any event I am satisfied that in this case, like most of those of its kind, damages are not an adequate remedy. Although Tullett has served evidence as to the substantially lower revenues of the desks in question, there has been considerable dispute as to the causes of the lower revenues with BGC and the brokers asserting that the market has been lower and that changes involving particular traders have resulted in the lower revenues.

229. Tullett provided figures for the earnings of relevant desks before and after the departure of the defendant brokers. These are confidential, and I will refer to them only in general terms. There was also evidence which looked in some detail at the relationships which existed between particular brokers and particular banks and traders. This was relied on mainly by the defendants. The identifications of banks and brokers were kept confidential, and numbers were used to refer to them in evidence. I shall not refer to that evidence in any detail because it is its overall effect that matters rather than the particulars.

230. There was some evidence that meetings had occurred since 2 April 2009 between brokers and traders. These were described on behalf of the brokers as 'social contact'. For as is inevitable in a close-knit business where the entertaining of clients is the norm, friendships develop. Tullett alleged that the brokers were here using their 'social contact' to keep their relationships with traders on hold until they could resume work. It was not established that this 'social contact' was on any large scale, and I do not think it of much importance. It does, however, emphasise how strong and long-lasting the relationship between a broker and trader can be. A further matter is that BGC have taken some steps to provide for the arrival of the defendant brokers by putting in lines to particular clients.

The forward cable desk

231. There were seven members of the forward cable desk, and four are defendants. So over half the desk left including the desk head, Mr Hall. The brokers left, Mr Comer, Mr di Palma and Mr Stevenson, the Tullett Three, are experienced and successful brokers. They were responsible for over half of the desk's revenue in the 12 months to the end of March 2009. Mr di Palma has taken over as head of the desk.

232. Tullett have recruited three new members of the desk and two trainees. Mr Rees began with Tullett on 18 May 2009. He was recruited from BGC's Swiss office and

there is litigation between the companies in consequence. In his case an injunction was refused. Evidence filed by BGC in that action mirrors some of that filed by Tullett here by emphasising how difficult it is to replace an experienced broker. Mr Rees had worked on BGC's forward Swiss desk. Mr Davison-Poltock joined the forward cable desk on 2 April 2009. He had previously been a trader at a bank, and had no broking experience. Mr Black began with Tullett on 15 June 2009. His earlier experience had been as a broker, primarily in forward yen. Tullett were criticised for not finding more recruits and recruits of direct experience in forward cable. I am not persuaded that Mr Potter's decisions made in the context that they were, were other than reasonable.

233. Mr Rees and Mr Black are experienced brokers and the evidence showed that a good currency broker should be able to pick up another currency within a matter of months. The establishment of trading relationships is a slower matter. There was substantial evidence as to the time which it may take to gain a trader's confidence. Tullett submitted that to establish relationships which will be strong enough to face competition from the four who left when they start at BGC requires 18 months. It was submitted for the defendant brokers that a much shorter period should be sufficient, namely 6 months. The difficulties of starting up at BGC were relied on by the brokers.

234. The figures put forward by Tullett covering the 9 months to the end of 2009 do, in my view, and despite the difficulties of interpretation, show that the desk is still suffering from the departure of the four who left. That is only one factor to be taken into account in deciding for what period it is reasonable to afford Tullett protection. Thus the desk might never recover its former strength, but there is no question of an indefinite injunction. The revenue loss is simply one indication of the difficulty of establishing relationships equivalent to those of the departing brokers. A number of particular matters are raised between pages 86 and 106 of the defendants submissions, some of them relating to the changes which have occurred in respect of individual traders. I have to take an over-all view as to the effect of all the disparate evidence I heard. No calculation or precisely reasoned assessment is possible. My conclusion is that in all the circumstances it is appropriate for the reasonable protection of Tullett's trading connections that the four departing members of the forward cable desk be held on garden leave for 12 months where that is available.

235. A period of 12 months will run past the dates on which the contracts of Mr Sully and Mr Harkins expire – 11 February and 31 January 2010 respectively. It is therefore necessary to consider the relevant post termination restrictions and their enforceability. The relevant legal principles were not in issue.

236. Clause 12(1) of the relevant standard terms provides:

"12.1 For 6 months after the date of the termination of your employment, you shall not directly or indirectly do or attempt to do any of the following:

(a) undertake, carry on or be employed, engaged or interested in any capacity in an area of business competitive with Restricted Business, which trades or an objective or anticipated result of which is to trade in the Territory in competition with the Company or any Group company:

(b) entice, induce or encourage a Client to transfer or remove business from the Company or any Group company,

(c) solicit or accept business from a Client for Restricted Business in competition with the Company or any Group company,

(d) employ, engage or retain the services of an Employee of the Company or any Group company for the purpose of business, which competes with Restricted Business.

(e) entice, reduce or encourage, or attempt to entice, induce or encourage an Employee to leave or seek to leave his or here position with the Company or any Group company for the purpose of being involved in business which competes with Restricted Business regardless of whether or not that employee acts in breach of any contract of employment by so doing.

12.2 If you are required by the Company not to attend for work under Clause 11.3, up to 6 weeks of the period of such exclusion shall be set against the period of post termination restriction under Clause 12.1(a).

"Client" means a person:

(i) who is at the expire of the Relevant Period or who was at any time during the Relevant Period a client of the Company or any Group company or to whom at the expiry of the Relevant Period the Company or any Group company was actively and directly seeking to supply services in either case for the purpose of Restricted Business; and

(ii) with whom (directly or indirectly through subordinates or colleagues) you had dealings at any time during the Relevant Period or for whom you were responsible or about whom you were in possession of confidential information, in any such case in the performance of your or their duties to the Company or any Group company.

> "Relevant Period"
>
> Means the period of 12 months ending on the day when your Employment Agreement terminates."

237. Tullett rely on clause 12(1)(a). It is submitted for the brokers that this is unenforceable for three reasons. The first is that it takes insufficient account of the possibility of garden leave. In my view, where a clause takes no account of the possibility of garden leave it is not thereby made unreasonable. For, as I have set out, in deciding whether to give effect to the covenant, and the extent to which it should be given effect, the court will take account of garden leave. Any necessary adjustment is, as it were, built in by the law. Where a clause takes some account of the possibility of garden leave, but inadequate account, that should not put the clause in a worse position than a clause which takes no account.

238. Secondly it is submitted that the covenant is not necessary to protect trade connections, that here, broker/trader relationships. It is said that a non-dealing or a non-solicitation covenant would suffice. Such covenants are notoriously difficult to enforce. I am satisfied that it is reasonable to deal with the situation by the present covenant.

239. Thirdly it is said that the covenant is disproportionate. I am satisfied that a six month period is no more than is reasonable in this business where broker/trader relationships have the importance which I have described.

240. Tullett also relies on clause 12(1)(b) and (c). Objection is taken here to the definition of 'Client'. It is said that it should be limited to clients for whom the broker was first cover, and that clients for whom the broker was second cover should be excluded. A broker who is second cover should establish a good relationship with the client. It is unlikely to be as strong that of the first cover, but Tullett is reasonably entitled to protect it. Secondly, complaint is made that the words 'or for whom you were responsible' are unlimited in time, and would cover a situation where a broker's responsibility for a client had ended years before. I accept this point. The words should be excised from the covenant under the principle which is known by the shorthand of 'the blue pencil rule'. The same point is taken as to confidential information, and again I would accept it: but I have held that no issue of confidential information now arises in relation to the brokers.

241. I therefore hold that the relevant covenants may be enforced against Mr Sully and Mr Harkins for such period as will provide a total of 12 months taken with their time on garden leave, but not thereafter.

The short term sterling OBS desk

242. Mr Bowditch, Mr Cohen and Mr Temple gave notice that they were leaving Tullett. That left six on the desk. They were all successful brokers of experience. There has been one recruit to the desk, namely Mr Gibbs, who was transferred from Tullett's dollar OBS desk in early April 2009. In October 2009 Mr Stewart and Mr Franklin joined the desk. Mr Stewart had been working for a hedge fund for the previous 6 years but had considerable broking experience before that. He has some good connections. Mr Franklin is an experienced sterling broker and had previously run the desk at R P Martin. In Mr Wink's sixth witness statement dated 29 June 2009 he explained what attempts had been made to find further recruits and why none had then been found in addition to Mr Gibbs. I accept that Tullett have behaved reasonably in this regard. Mr Brooks is head of the desk in place of Mr Bowditch.

243. I have conducted a similar exercise in respect of this desk as in respect of the forward cable desk. There are two differences in particular. In terms of numbers the sterling OBS desk was the less depleted. But Tullett was only able to recruit Mr Franklin and Mr Gibbs in October 2009. I have again concluded that 12 months is the appropriate period in all the circumstances. In each case that will fall within the term of the broker's contract and no use of a post termination restriction is required.

The sterling cash desk – Mr Wilkes and Mr Matthews

244. Mr Wilkes and Mr Matthews were recruited by BGC as part of Project Phoenix. That was because much of their work was off balance sheet, and they worked closely with the short term OBS desk. It is appropriate in the circumstances that the same period of 12 months should be applicable to them as to the three who left the short term OBS desk.

Mr Yexley

245. Mr Yexley is the sole recruit from the dollar cash desk, of which he was head. The evidence showed that he excelled as a desk head rather than that he excelled as a broker. He had a wide but not particularly close connection with traders in his capacity as a desk head. Mr Freese and Mr Burgess are now joint heads of the desk. Tullett's evidence showed that revenue from a number of clients serviced by Mr Yexley was very substantially down. But this was largely explained by evidence such as that the trader in question had left the market. I refer to paragraphs 54 to 57 of the defendants' closing submissions on relief.

246. Taking account of all the circumstances I have concluded that a period of no longer than 8 months can be justified in the case of Mr Yexley.

Relief against BGC, Mr Lynn and Mr Verrier

247. When interim relief was granted on 2 April 2009 Tullett was facing an attack on its work force in which desk heads were being used to recruit in breach of their duty to Tullett, and in which it was intended to call out recruits to leave Tullett regardless of whether the recruits were entitled to do so by reason of constructive dismissal. It was appropriate to injunct BGC to prevent this conduct from continuing, and the only way to achieve that was to bar BGC from recruiting from Tullett in any way.

248. That course was proposed to me on the basis that BGC had obtained an advantage by its unlawful conduct, and so the principle of 'springboard relief' was applicable. That principle is described in paragraph 28-40 of Clerk & Lindsell, on Tort 19 Edition, as follows:

> "The Springboard doctrine" Very often, part of the confidential information is in the public domain and part is not; or the complete package of confidential information, as such, is not in the public domain but could be arrived at by diligent enquiry or routine research. Where the owner of the confidential information has himself made it public, for instance by publishing it in a patent specification, no difficulty arises: relief will be refused. But where a material amount of work would have to be done to arrive at it, the position is different. It is here that there springboard doctrine arises: the courts will not permit someone who has come into possession of such information to take a short cut and make use of it in order to steal a march on his competitors or to compete with the person from whom he obtained it in confidence. Thus, one who has obtained possession of such a package will not be permitted to make use of it unless he obtains it independently from a legitimate source. But such a disability will not be continued indefinitely; an injunction will only be granted over the period during which the unfair advantage continues.

Many of the authorities were reviewed by Arnold J. in paragraphs 42 to 93 of his judgment in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch)

249. There is a division of authority as to whether the principle can be applied other than where the cause of action is misuse of confidential information: compare *Balston v Headline Filters Ltd* [1987] FSR 330 and *Midas IT Services v Opus Portfolio Ltd*, 21 December 1999, Blackburne J, unreported.

250. It seems to me that here the basis for the interim injunction is better put more simply. BGC was carrying on an unlawful course of conduct against Tullett and Tullett was entitled to an injunction to stop it. It is a kind of *quia timet* injunction. As BGC had shown an intention to recruit unlawfully it was not appropriate simply to injunct

unlawful recruitment but all recruitment, because of the risk and likelihood of further unlawful means and the difficulty of detecting them.

251. Tullett assert that it is likely that, as soon as BGC are able, BGC will try to recruit from Tullett using the same or similar unlawful means as previously. They ask that the general embargo on recruitment should be extended for a total of 18 months from when it was first imposed. Tullett submit that the fact they face or faced a conspiracy makes this the more necessary. In my view the nature of the conduct is more important than the identification of a particular tort.

252. A factor which was much referred to at the hearing on 1 April 2009 was the destabilisation of Tullett as a result of the BGC raid. What Tullett meant by this was that the stability of its workforce arising from its long-term contracts was lost, because BGC had made it appear that an employee could leave when he wanted on the strength of a BGC indemnity - the evidence of Mr Wink at Day 8.70. I accept that this was an important factor at that time. But Tullett then obtained the undertakings which it did and the employees who left have had to give undertakings and have been on garden leave since. This judgment should make clear what is permissible. I do not consider that the 'destabilisation' of Tullett can any longer be a factor of real weight.

253. In my judgment it was appropriate that Tullett should have the protection it did until the delivery of this judgment. There is no justification for any further substantial extension of the relief. The court must assume that the exposure of BGC's conduct as set out in the judgment will curb unlawful recruitment in the future. BGC is a substantial and ostensibly responsible company. The relief against BGC will be continued for 14 days from the delivery of the judgment, so the judgment may be absorbed. It will then end.

Part H – financial claims against the broker defendants

(1) Conspiracy

254. I am not concerned in this judgment with any claims against the broker defendants for damages. It is, however, asserted by Tullett that Mr Hall and Mr Bowditch became party to the conspiracy headed by Mr Verrier no later than October 2008, that Mr Cohen became a party by 26 January 2009 – R 6918, that Mr Yexley became a party by 4 February 2009 – H 2266, and that the others became parties when they responded to Mr Verrier by leaving Tullett. If they became parties to the conspiracy, they may be liable to claims for loss caused by the conspiracy after they became parties.

255. The submission on behalf of the brokers was that that they did not share a common objective with BGC and that they did not know that Tullett was to be harmed by unlawful means.

256. An agreement in this situation is less than a contract. For it does not need to be supported by consideration. As is stated in Clerk & Lindsell on Tort, 19th Edition, paragraphs 25-118, 119:

> "The combination. The tort requires an agreement, combination, understanding or concert to injure, involving two or more persons. …. Of the various words used to describe a conspiracy, "combination" has been preferred on the ground that "agreement" might be thought to require some agreement of a contractual kind, whereas all that is needed is a combination and common intention. But judicial descriptions still speak of "concerted action taken pursuant to agreement". A party to a conspiracy need not understand the legal effect of it; but he must know the facts on which the combination is unlawful."

257. I ask myself whether in a particular case the evidence shows that the broker was party to an agreement. His being a party must be deduced from his conduct if at all. I have already found that the three desk heads agreed with Mr Verrier to assist in recruiting their desks. Their assistance was a breach of their duty to Tullett in any event, and to say that they were conspirators to that end adds nothing. Mr Hall is also shown to have agreed with Mr Verrier to try to stir up Tullett into action which might constitute grounds for constructive dismissal. But that, as it has turned out, adds nothing.

258. The crucial question is whether the various broker defendants became party to an agreement that BGC would call out the brokers regardless of whether they had grounds to claim constructive dismissal. Here I think the three desk heads are on the other side of the line. I do not think that they are shown to have been parties to the agreement to that end. They did what they did because it was what independently suited them. The position of the other brokers is clear. They did not become parties to the conspiracy but followed their own course when the time came.

(2) Claims in respect of re-signing and retention payments

259. Tullett claim:

(a) against Mr Hall, £500,000 paid to him in July 2008 as a 'retention payment' pursuant to the extension of his contract dated 23 June 2008.

(b) against Mr Bowditch and Mr Cohen, £300,000 each paid to them in about July 2006 as a 'signing payment' under the extension to their contracts dated 6 July 2006.

(c) against Mr Matthews, two thirds of the signing payment of £50,000 paid in March 2008 under the extension to his contract dated 29 February 2008.

In each case repayment may be covered by the 'loss memo' agreed between Mr Marshall and Mr Arif in relation to BGC's indemnities, but Mr Hall is limited to recovery from BGC of half only. The sums were paid by Tullett to the brokers net of tax and national insurance, and Tullett seek only to recover the net sums.

260. The relevant provision in Mr Hall's extension letter is:

> 'In the event that you resign, are not actively performing your duties, are working under notice of termination or if your employment is terminated by reason of your gross misconduct (pursuant to clause 11.1 of the attached Schedule of Standard terms) before the end of the initial minimum term you will no longer be entitled to receive the Retention Payment. Furthermore, the Retention Payment will become repayable immediately to the Company if during the initial minimum term, your employment is terminated or on the day notice to terminate is given, whichever is earlier.'

261. The provisions relating to Mr Bowditch and Mr Cohen are in the same terms:

> 'In the event that you resign, are not actively performing your duties, are working under notice of termination or if your employment is terminated by reason of your gross misconduct before the end of the Term you will be liable to repay the whole of the Signing Payment to the Company upon the termination of your employment or on the day notice to terminate is given, whichever is earlier.'

262. The provision in Mr Matthew's contract is:

> 'In the event you resign before commencing employment under the terms of this agreement you will be liable to repay the whole of the Signing Payment to the Company. Thereafter in the event that you resign, are not actively performing your duties, are working under notice of termination or if your employment is terminated by reason of your gross misconduct (pursuant to clause 11.1 of the attached Schedule of Standard Terms) before the end of the Term you will be entitled to retain only 1/36 of the Signing Payment for each complete month of service after the Start Date. The balance of the Signing Payment will become repayable to the Company upon the termination of your employment or on the date notice to terminate is given, whichever is earlier.'

263. Tullett's case in each instance is that the broker has resigned and is no longer actively working before the end of the term provided by the contract. Tullett submitted that the payments were in each case part of the consideration for the extended term of the contract, and that it was entitled to require the money to be repaid if the employee did not work out the full term. Two defences were raised on behalf of the brokers: restraint of trade, and the law as to penalties.

(i) Restraint of trade

264. Two authorities were relied on on behalf of the brokers. In *Marshall v NM Financial Management Limited* [1995] ICR 1042 the court had to consider a provision that a commission agent would be paid commission following the termination of his agency provided that he did not within a year become an independent intermediary or work for a competitor. Here the suspension of payment was directly related to the agent's activity after he had ceased to act for the principal, and was held to be in restraint of trade as it could not be justified as in reasonable protection of the principal's trade interest. Mr Jonathan Sumption QC sitting as a judge of the High Court stated:

> "I do not think that there can be any doubt that proviso (i) is a restraint of trade. It had been well established since the decision of the Court of Appeal in *Wyatt v Kreglinger and Fernau* [1933] 1 K.B. 793 that there is no relevant difference between a contract that a person will not carry on a particular trade and a contract that if he does not do so he will receive some benefit to which he would not otherwise be entitled. Proviso (i) is a financial incentive to the agent not to carry on business in the specified fields. It is therefore unlawful unless it is justified as being reasonable in the interests of the parties and in that of the public."

On appeal – [1997] 1 WLR 1527, the finding as to restraint of trade was not challenged. The decision of the Court of Appeal is considered in a further citation below.

265. In *Electronic Data Systems Ltd v Hubble*, Court of Appeal, 20 November 1987, the court was concerned with an appeal against summary judgment. It held that the defence raised – restraint of trade, was not so hopeless that it should not be permitted to be advanced. The defendant had been employed by the claimant computer company, which had invested time in an education programme for him. He had agreed that, if he left, he would repay certain sums, and had signed a promissory note to that end. I do not consider that any principle can be derived from the decision.

266. Tullett relied on *Peninsula Business Services v Sweeney* [2004] IRLR 49, a decision of the Employment Appeal Tribunal where the judgment was delivered by Rimer J. The employee was entitled to commission provided that he was in the company's employment at the end of the relevant month. After leaving he was not entitled to any further commission. In holding that there was an unreasonable restraint of trade the

Employment Tribunal had relied upon the judgments of the Court of Appeal in *Marshall v N M Financial Management.* In over-ruling the decision Rimer J stated:

> "38. The third issue which arises is this. In case section B was in fact incorporated into his contract, a further argument advanced by Mr Sweeney, which the tribunal upheld, was that section B was void as being in unlawful restraint of trade. The tribunal's reasons for this were as follows:
>
> > "The Tribunal also concluded that it was in unlawful restraint of trade in that in part it was designed to provide an economic disincentive or discouragement to the established salesmen from leaving their employment and working elsewhere. Such a clause could not be objectively justified. In this connection the Tribunal considered and applied the observations of the Court of Appeal in Marshall v. N.M. Financial Management Ltd [1997] IRLR 49 ."
>
> 39. We do not know which observations in the Marshall case the tribunal had in mind. But our view is that not only does nothing in that case support their conclusion, we regard it as supporting the reverse conclusion. It concerned the validity of clause 10 of an agency contract. The effect of clause 10 was essentially that, following termination of the agent's agency, no previously earned commission (with certain exceptions) was to be payable to the former agent, but this was subject to the provisos that renewal commissions were to be paid to him:
>
> > "(g) If at the date of termination of this agreement … the agent has for a period of not less than five years been continuously an agent of the company and either (i) within the period of one year after the date of such termination the agent does not become an independent intermediary or become employed by or represent or become an appointed representative of any company or organisation which may directly or indirectly be in competition with the company; or (ii) at the date of termination the agent (if an individual) has attained the age of 65 years …"
>
> 40. The judge had held, and there was no appeal against this, that proviso (g)(i) was void as being in unreasonable restraint of trade and that, as (g)(ii) was a proviso to (g)(i), it had to be excised as well. But he held that the remainder of clause 10 survived, and the Court of Appeal upheld him. The reason why proviso (g) was held to be void is that it was regarded as one whose performance "not only constitutes [the ex-agent's] acceptance of the offer but provides the consideration necessary to enforce it." (See per Millett L.J., at paragraph 23).
>
> 41. The point about the case, however, is that it is clear that the only feature of clause 10 which the court regarded as constituting a restraint of trade was the condition in clause 10(g)(i). This is because that is what

that condition amounted to, namely a condition restricting the former agent's liberty to carry on his trade in such manner and with whom he might choose. There is no such condition in the present case. Mr Sweeney was at liberty, on leaving Peninsula, to work for whomever he liked.

42. The tribunal's point, however, is that because section B had the effect of imposing what they regarded as a penalty on resigning employees, it must have operated as a disincentive on them to resign and, therefore, to go and work for competitors whom they might, but for section B, have wished to work for. We regard the tribunal's conclusion that those circumstances turned section B into a contract in restraint of trade as wrong. We do not consider it seriously arguable that the commission penalty that Mr Sweeney suffered on resignation arose under a contractual term involving an unlawful restraint of trade. His employment contract did not impose any restraint on him as to whom he might work for, or what he might do, after leaving Peninsula. It is also worth citing from Millett LJ's remarks in the Marshall case in paragraph 24, where he said:

> "Even if clause 10(g) is considered on its own, the consideration for the renewal commission consists in the performance by Mr Marshall of the two conditions on which it is made payable, one of which (the restraint) is invalid, and the other (at least five years' service) is not." (Our emphasis).

43. In that case, therefore, the Court of Appeal had no doubt that a condition requiring the agent to serve for five years before he could claim to be entitled to post-leaving commission was valid. The tribunal's reasoning in the present case would, however, suggest that such a condition was invalid, since it would have operated as a disincentive to a termination of the agency agreement during the first five years.
44. We consider that the tribunal's decision on this aspect of the case was wrong as well. We hold that nothing in section B was void as being in unlawful restraint of trade.

267. The provisions which provide for the repayment of signing or retention payments where the employee does not serve out the full term are not provisions in restraint of trade. They do not affect the employees' ability to work after leaving. They are substantial sums paid to highly paid employees as a reward for loyalty.

(ii) Penalties

268. A penalty is a sum provided by a contract to be payable in the event of a breach of the contract, which sum is inserted other than as a fair estimate of the loss which may be

occasioned by the breach, but in contrast is inserted *in terrorem*. It is stated in Chitty on Contract, 30th Edition, volume 1, paragraph 26-145 that 'If a contract provides that in a certain event a sum of money paid under a contract is to be repaid to the original payer, the reimbursement cannot be a penalty.' citing *Alder v Moore* [1961] 2 QB 57. I would accept that the factual situation in that case is rather different from the present.

269. The provision for repayment is not here a term which has anything to do with compensation for breach. The employee is given a large additional sum of money if he continues working for the company and does not give notice before the date when the minimum term ends (and when he is then entitled to give notice). If he does not do so, he has to give it back. The law relating to penalties is wholly inapplicable.

270. The brokers are intelligent, successful men capable of driving a bargain with Tullett, and the law should not look for ways for them to avoid the provisions of their contracts. But, in fact, for the reasons I have given the position is plain.

(3) <u>The claims for recovery of discretionary performance and loyalty bonuses</u>

271. Paragraph 5 of the schedule of standard terms incorporated into the defendant brokers contracts provided:

> 5. Payment of Salary and Discretionary Performance & Loyalty Bonus
>
> ...
>
> 5.3. No bonus (discretionary or guaranteed) shall be payable and any payment on account must be repaid if, prior to the date on which payment of such bonus is due, you are no longer employed by the Company or if you are not actively performing your duties or if you are in breach of, or the Company reasonably believes (and has notified you in writing of its belief) that you have committed any serious or material breach of, any of your obligations under the Employment Agreement.
>
> 5.4. It is a condition of any payment of the Discretionary Performance & Loyalty Bonus or any guaranteed bonus that, save in cases where the Company has terminated your employment pursuant to clause 11.1(a) and (b), on the date of payment you:
> (a) are employed by the Company; and
> (b) are not subject to notice of termination given by the Company; and
> (c) have not tendered your resignation, whether on notice or otherwise.

5.5. It is a condition of your retention of the full amount of the loyalty element of any Discretionary Performance & Loyalty Bonus paid to you that, save in cases where the Company has terminated your employment pursuant to clause 11.1(a) and (b), at the expiry of six calendar months from the date of payment ('the Retention Expiry Date') you:

(a) are employed by the Company; and

(b) are not subject to notice of termination given by the Company; and

(c) have not tendered your resignation, whether on notice or otherwise.

5.6. You agree that in the event that you are not employed by the Company or are subject to notice of termination, or have tendered your resignation whether on notice or otherwise on the Retention Expiry Date, you will be entitled to retain only 1/6 of the loyalty element for each complete month of service actively worked after the payment date. The balance of the loyalty element will become repayable to the Company upon the termination of your employment or on the day you tender your resignation, whichever is earlier.

5.7. For the avoidance of doubt, complete months of service under clause above shall not include months during which you are employed by the Company but not required by the Company to carry out your duties.

5.8. You agree if the Company exercises its right to require the repayment of any sum under this clause 5 that payment will be made by adjusting your monthly gross salary under this Employment Agreement during your notice period by equal instalments of the total amount to be repaid. If there is any sum remaining unpaid after this adjustment or where notice is not observed either in part or full, any outstanding sum repayable under this clause will be automatically repayable by you in one final cash lump sum to the Company no later than the last day of your employment with the Company. Any sums not so paid by you will be recoverable by the Company as a debt without deduction, set off or counterclaim.

5.9. For the purpose of any repayment of any amount due to the Company or the Group, whether or not under Clause 5, you authorise the Company to deduct any amount due to it from your salary or other amounts due to you.

272. The provision for repayment is in clause 5.6. The effect is that where an employee has given notice the employee may retain only 1/6 of the loyalty element for each complete month he has worked since the payment date. So if he has worked three

complete months, he will have to repay half of the loyalty element; if he has worked six complete months, he will have to repay nothing. Pursuant to these provisions Tullett seek to recover from Mr Hall £29,795, Mr Bishop £10,030, Mr Sully £20,060, Mr Harkins £13,127, Mr Yexley £7,316, Mr Matthews £47,200 and Mr Wilkes £37,981, as set out in schedule E to the particulars of claim.

273. In the relevant contracts the provision as to loyalty element included under the heading of 'Bonus', is as follows:

> "You agree that the bonuses are not only a reward for past service but also seen by the Company as an incentive to remain in employment with the Company. As such, a Discretionary Performance and Loyalty bonus consists of two elements: a past performance element and a loyalty element. 25% is attributable to past performance and 75% is in respect of your continued loyalty. Please refer to clause 5 of the attached Schedule of Standard Terms for further details in this regard."

274. It is not disputed that if the provisions are enforceable the sums are payable. It is alleged that the provision for the repayment of bonuses is in restraint of trade and unenforceable as wider than reasonably necessary to protect the claimants' legitimate interests. Alternatively the provision is said to provide for a penalty and so to be unenforceable. So the same defences are run as in respect of the claims for repayment of signing payments. No different submissions are made. The defences fail for the same reasons.

Part I – Conclusions.

275. I will here set out my main conclusions in short form :

(a) The claims of the defendant brokers that they were constructively dismissed by Tullett fail.

(b) Tullett's claims against BGC, Mr Lynn and Mr Verrier for conspiracy and inducing breach of contract succeed.

(c) BGC's claims against Tullett for inducing breach of contract by Mr Comer, Mr Di Palma and Mr Stevenson fail.

(d) The appropriate periods for relief by way of injunction are :

(i) in respect of Mr Hall, Mr Sully, Mr Harkins and Mr Bishop, 12 months;

(ii) in respect of Mr Bowditch, Mr Cohen, Mr Temple, Mr Wilkes and Mr Matthews, 12 months;

(iii) in respect of Mr Yexley 8 months;

(iv) in respect of BGC, Mr Lynn and Mr Verrier the period up to 14 days after the date of delivery of this judgment.

(e) Tullett's claims against the broker defendants for conspiracy fails. Its claims against them for recovery of signing payments and bonus succeed.