Neutral Citation Number: [2006] EWHC 836 (Ch)

Case No: HC04C02668

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th April 2006

Before :

MR JUSTICE ETHERTON

Between :

Shepherds Investments Limited **Shepherds (Financial) Limited**	**Claimants**
- and -	
Andrew Walters **Mike Simmons** **Mark Hindle** **Alan Morgan-Moodie** **Assured Fund Limited** **Policy Selection Limited**	**Defendants**

Paul Nicholls (instructed by **Dechert LLP**) for the **Claimants**
Iain Quirk (instructed by **Eversheds**) for the **First, Third, Fifth and sixth Defendants**
Toby Kempster (instructed by **Spring Law**) for the **Second Defendant**

Hearing dates: 21, 22, 23, 24, 27, February, 2, 3, March 2006

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 ETHERTON

INDEX

Mr Justice Etherton :

Introduction

1. These are proceedings for damages, an account of profits and other relief against the First to Fourth Defendants, as former directors and employees of the Claimants, for various breaches of duty and contract, including, in particular, setting up a competing business, diversion of a business opportunity and misuse of confidential information.

2. The First Defendant, Andrew Walters ("Mr Walters"), and the Third Defendant, Mark Hindle ("Mr Hindle"), were formerly directors and employees of the Second Claimant, Shepherds (Financial) Limited ("Financial"). The Second Defendant, Michael Simmons ("Mr Simmons") was formerly an employee, and is alleged by the Claimants to have been a de facto director, of the First Claimant, Shepherds Investments Limited ("Investments").

3. The Fifth Defendant, Assured Fund Limited ("Assured"), and the Sixth Defendant, Policy Selection Limited ("PSL"), are alleged to carry on the competing business.

Background

4. The following is a brief summary of the factual background to the proceedings.

5. Shepherds Select Fund plc ("SSF") was an open-ended investment company founded by Michael Abraham. It had two subsidiaries. One of them, Traded Life Policies Limited, carried on business investing in US traded life policies ("TLPs"): it provided an investment opportunity in TLPs through the purchase of interests in life policies which had been acquired by market makers from persons living in the USA, who, in the case of each such policy, wished to raise money from the policy prior to maturity on the death of the assured. Until May 2004 those TLPs took the form of interests in "fractionalised policies" held by a US corporation, Mutual Benefit Corporation ("MBC"), that is to say a share in each of a number of different life policies held by MBC.

6. The other subsidiary of SSF, Traded Endowment Policies Limited, carried on business investing in UK traded endowment policies ("TEPs").

7. Custodial services for the Shepherds Group were provided by the merchant bank, Close Brothers ("Close").

8. SSF had different classes of shares reflecting the different types of business carried on by its two subsidiaries.

9. Investments acted as the manager of SSF, responsible for sales and marketing, pursuant to a written management agreement dated 16 May 2002 ("Investments' Agreement"). Financial advised Investments on investment policy for SSF, pursuant to a written investment and advisory agreement also dated 16 May 2002 ("Financials' Agreement"). Clauses 2 and 3 of Financials' Agreement provided, so far as relevant, as follows:

> "2 Appointment

> The Manager [i.e. Investments] hereby appoints the Adviser [i.e. Financial] and the Adviser hereby agrees with effect from the date hereof (subject always to the overall policy and supervision of the Directors [i.e. the directors of SSF]) to advise the Manager as to the investment and reinvestment of the assets of the Company [i.e SSF] in traded endowment policies ("TEPs") and traded life policies ("TLPs") in accordance with the provisions of the Memorandum and Articles of Association of the Company, this Agreement, any Offering Document, the laws of the Isle of Man and any other applicable laws or regulations for the time being in force ... within the investment policy from time to time laid down by the Directors until its appointment shall be terminated as hereinafter provided.
>
> **3. Duties**
>
> Without prejudice to the generality of Clause 2 the Adviser shall:
>
> 3.1 advise the Manager concerning all actions which it appears to the Adviser would be advantageous to the Company in implementing the TEPs and TLPs investment policy of the Directors in relation to the Company...;
>
> 3.2 evaluate the opportunities for possible investment in TEPs and TLPs by the Company and communicate its advice to the Manager;
>
> 3.3 keep constantly under surveillance and review the Assets for the time being of the Company comprising TEPs and TLPs and recommend, as circumstances may require, changes in such Assets;"

10. Both Investments, under Investments' Agreement, and Financial, under Financials' Agreement, were entitled to fees which reflected the amount of funds under SSF's management.

11. Financial was the parent company of Investments. I shall refer to Financial, Investments, SSF and its two subsidiaries as "the Shepherds Group".

12. Mr Walters was the finance director of Financial from 5 November 2001 until 7 May 2004. He had a written contract of employment. The following provisions of that contract are material:

> "Confidential Information

> You shall not, except as authorised or required by your duties under your employment contract, use for your own benefit, gain or divulge to any persons, firms, company or other organisation whatsoever, any confidential information belonging to the company or relating to it's affairs or dealings which may come to your knowledge during your employment. This restriction shall cease to apply to any information or knowledge which may subsequently come into the public domain other than by means of unauthorised disclosure.
>
> All confidential records, documents and other papers, together with any copies or extracts thereof, made or acquired by you in the course of your employment shall be the property of the company and must be returned to the company on the termination of your employment.
>
> Confidential information shall include all information which has been specifically designated as confidential by the company and any information which relates to the commercial and financial activities of the company. The unauthorised disclosure of which would embarrass harm or prejudice the company. It does not extend to information already in the public domain unless such information arrived there by unauthorised means.
>
> Restrictions on other Business Activities
>
> You will devote the whole of your time and attention during business hours to your duties as an employee and will not, at any time, without the written consent of the company, be directly engaged, concerned or interested in or connected with any other company, business or concern (except as the holder of shares, stock debentures or debenture stock in any other company quoted or dealt with on any recognised stock exchange)."

13. Mr Simmons was employed by Investments from 29 May 2002. He was originally employed as a sales manager. He had no written contract of employment. It is alleged by Investments that, although Mr Simmons was never formally appointed a director of Investments, he in due course assumed the role of, and acted as, a director. There is a dispute between the parties as to the precise date on which his employment came to an end. It was either in late September 2003 or early October 2003.

14. Mr Hindle was the investment director of Financial from 2 September 2002 until 10 October 2003. He was employed under a written contract of employment, which contained the same provisions as in Mr Walters' contract set out in paragraph 12 above.

15. The Fourth Defendant, Alan Morgan-Moodie ("Mr Morgan-Moodie"), was a director of Investments, SSF and its two subsidiaries until he resigned with effect from 31 October 2003. He was the managing director of Investments until May 2003. The

claim against Mr Morgan-Moodie was settled prior to the trial. It is not necessary, therefore, to include in this summary of events the allegations of Investments against him in the amended Particulars of Claim ("the APOC").

16. In the rest of this judgment I shall refer to Mr Walters, Mr Simmons and Mr Hindle together as "the Individual Defendants".

17. In the first half of 2003 the Shepherds Group began to consider the establishment of a "whole policy" investment fund, which would purchase whole life policies rather than interests in fractionalised policies owned by MBC. It consulted Close in that connection. Further, a legal executive, Ms Aisling Costello, was employed by Financial on a short term fixed contract to prepare a report on the TLP market. She travelled to the US on a number of occasions between April and August 2003 to assess the standing of the various market makers in life policies, including MBC, and to obtain further information on business structures, US licensing of TLPs and trust and escrow accounts. She also obtained quotations from a number of potential providers of trustee and escrow services. In due course, she submitted a written report to Financial ("the Costello Report").

18. By early May 2003, following a decision by Mr Abraham to take up residence abroad, the Individual Defendants had begun to discuss between themselves the idea that they might establish for their own benefit a new investment fund which would invest in whole life policies.

19. On 13 July 2003 the Individual Defendants produced a draft business plan for their proposed new business. Under the heading "Corporate Profile" the draft business plan said:

> "Policy Selection Limited (PSL) is a young company. Formed this year by core members of what was the management team of Shepherds (Financial) Limited – arguably the U.K.'s leading Traded Endowment Policy (TEP) market-maker and the first U.K. asset management company to offer retail investors the opportunity to benefit from the returns generated by a portfolio of U.S. Second Hand Insurance Policies (SHIPs). As such, the team behind PSL is the most experienced team in the U.K. in the SHIP market.
>
> Having identified significant improvements that could be made to the Shepherds model, but being unable to have Shepherds adopt the various measures, PSL was formed to take the exciting concept of SHIP portfolios forward into the U.K. and International market in a transparent, ethical and diligent fashion."

20. Under the heading "Corporate Structure" the draft business plan stated that "Policy Selection Limited is the fund manager to Assured PLC".

21. Under the heading "The Fund" the draft business plan said as follows:

> "The objective of the SHIP share class is to invest shares in Assured PLC a Luxemburg domiciled investment fund scheme.
>
> Assured PLC will invest in second hand insurance policies issued by American life assurance companies, scoring at least B+ in the A M Best rating (equivalent to A rating on S+P) with the aim of delivering capital growth.
>
> The attraction of the investment is a fixed payment that is free from equity market volatility and interest rate fluctuations.
>
> The capital growth is the difference between the market price of the second hand life policy and the death benefit. If a life assured should unfortunately die earlier than expected then there will be an accelerated payout, but equally if a life assured should outlive their expected lifespan there will be a lower annualised return to the investor. The Assured Fund by investing in a portfolio of policies can reduce this variation, producing a low risk, high return medium.
>
> The Fund differs to other funds in its asset class due to the transparency of the commission that is received from market makers selling the assets and the amount reinvested back into the Fund for the benefit of the shareholders, which will further enhance their return. The Fund will also receive an independent medical report from a UK resident medical practitioner confirming the life expectancy given by the medical practitioners in the US are reasonable.
>
> Using a sophisticated investor model on a sample of a 1,000 policies the portfolio returned over 12% per annum. The Fund will target policies with a life expectancy of 3-5 years due to research showing that the maturity of the policies where in fact on average earlier than the life expectancy which would enhance the return to the Fund."

22. The draft business plan identified the Individual Defendants as "The team behind PSL" and "the most experienced people in the UK with regards SHIPs."

23. It also identified Barings Bank ("Barings") as the possible administrator, and Close as the possible custodian and banker, for the new business.

24. By 13 July 2003 the Individual Defendants had prepared financial predictions for their proposed new business for its first three years of operation, including a cash flow summary.

25. On 1 August 2003 Jeremy Leach ("Mr Leach") joined Investments as managing director, and brought with him 4 new sales people.

26. On 12 August 2003 Mr Walters contacted the Cayman Islands attornies Soloman Harris about the proposed new business.

27. On 13 August 2003 Mr Walters confirmed to Mr Scrivener of Soloman Harris, that, for tax reasons, Mr Simmons would be the client of Soloman Harris. Mr Simmons was at that time living outside the UK.

28. On 15 August 2003 Mr Scrivener sent Mr Simmons information about the Cayman Islands' regulatory regime relevant to the proposal for the new business.

29. By letter dated 19 August 2003 from Mr Scrivener to Mr Simmons, Mr Scrivener confirmed that Soloman Harris would be pleased to accept instructions from Mr Simmons "in relation to the proposed establishment of a Cayman Islands open-ended fund... and the establishment of a Cayman Island investment advisory company... which will act as the investment advisor to the Fund". The letter set out who would undertake responsibility for the work, described the work to be undertaken, and the fees payable to Soloman Harris for the work, and drew attention to Soloman Harris's terms of engagement, a copy of which was attached.

30. On 26 August 2003 Mr Scrivener approached Ernst & Young to see if they would consider acting as auditors for the proposed new business.

31. On 29 August 2003 Mr Scrivener sent Mr Simmons the first draft of an Offering Memorandum, which was also copied to Mr Hindle and Mr Walters. In his e-mail message, to which the draft was attached, Mr Scrivener asked for comments on the draft and referred to the intention to circulate it to Close and Barings, the intention being that they should be asked to act as custodian and administrator respectively of the new business.

32. Between then and early October 2003 successive drafts were prepared of the Offering Memorandum, an Escrow Agreement with Close, an Administration Agreement with Barings, a Custodian Agreement with Close and Barings, an Investment Advisory Agreement, and the Memorandum and Articles of Association of Assured and PSL. They were circulated for the consideration of, among others, the Individual Defendants.

33. By letter dated 3 September 2003 to Mr Leach, Mr Simmons stated that he resigned with immediate effect. Mr Simmons accepts, however, that his employment with Investments did not in fact cease immediately. He contends that it ceased on 21 September 2003. Investments claims that it did not terminate until 10 October 2003.

34. It is common ground, as I have said, that Mr Hindle ceased to be a director and an employee of Financial on 10 October 2003.

35. Assured and PSL were incorporated in the Cayman Islands on 10 October 2003. The directors of Assured included Mr Simmons and Mr Hindle. PSL is the manager of, and the investment adviser to, Assured.

36. By 14 October 2003 the final draft of the Offering Memorandum had been prepared. It was subsequently published later that month.

37. On 14 October 2003 Assured was registered with the Cayman Islands Monetary Authority ("CIMA") as an open ended investment company.

38. On 28 November 2003 the Custodian Agreement, the Escrow Agreement and the Administration Agreement were executed by Assured, PSL, Close and Barings as appropriate.

39. There was a special launch offer for early investment in Assured from 31 November 2003 in return for a special bonus.

40. In January 2004 printed promotional literature for Assured was ordered. It was received at the end of that month and the beginning of the following month.

41. In February 2004 the first agreements for the supply of whole policies for Assured's business were put in place by Mr Hindle.

42. In May 2004 MBC was suspended from trading by the US authorities. SSF's TLP business was also suspended at that time.

43. On 7 May 2004, as I have said, Mr Walters ceased to be an employee and a director of Financial.

44. On 8 June 2004 the first purchase was completed of a whole life policy for Assured's business.

45. In July 2004 Mr Abraham launched Shepherds High Security Fund plc ("SHSF") as an investment company, listed on the Cayman Islands Stock Exchange ("the CISE"), carrying on business exclusively in whole life policies. It subsequently invested also in fractionalised policies.

46. The present proceedings against the Individual Defendants, Assured and PSL were commenced on 17 August 2004. The original Claimants were Investments and Financial.

47. On 11 February 2005 the CISE cancelled the listing of SHSF.

48. Financial was placed in liquidation on 27 March 2005.

49. Financial's liquidator assigned Financial's rights in these proceedings to Investments by a deed of assignment dated 12 January 2006.

50. Investments is now wholly owned by Mr Abraham.

The Witnesses

51. Witness statements were made, on behalf of Investments, by: Mr Abraham, who, as well as being a founder shareholder of Financial, is a director of Investments and chairman of the Shepherds Group; and Mr Leach, who was the managing director of Investments from 1 August 2003 until April 2005. They both gave oral evidence at the trial.

52. Witness statements were made, on behalf of the Defendants, by: Mr Walters; Mr Simmons; Mr Hindle; Mr Mike Richardson, who gave evidence on the development of the concept of a "deferred sales charge" used by both SSF and Assured: Mr Patrick Stapleton, who had discussions with Mr Abraham in 2001 and 2002 leading to the

launch of the Shepherds Group's TLP business; and Mr Rogan Redfarn, who, at the request of Mr Abraham, investigated the business of MBC in 2003 and the market in fractionalised life policies, and who also investigated the TLP market in the US for the Individual Defendants in August 2003 and currently assists PSL in research into whole life policy investment. Mr Walters, Mr Hindle, Mr Simmons and Mr Redfarn gave oral evidence at the trial. The parties agreed that the witness statements of Mr Richardson and Mr Stapleton are admissible as hearsay evidence.

Investments' claims

Preparations for a competing business: breach of fiduciary duty, the obligation of fidelity and express contractual terms

53. Mr Walters and Mr Hindle were, until they ceased their employment with Financial, directors of Financial. It is common ground that, as such, they owed fiduciary duties to Financial.

54. Investments claims that Mr Simmons, although never appointed a member of the board of directors of Investments, owed fiduciary duties to Investments for a period prior to his resignation by virtue of his senior management position within Investments and the fact that he held himself out as a director of that company.

55. Investments claims that the steps taken by the Individual Defendants in promoting the business now carried on by Assured and PSL, at the time when they were employed by Financial (in the case of Mr Walters and Mr Hindle) and Investments (in the case of Mr Simmons), were in breach of their fiduciary duties to those companies and also in breach of their implied obligation of fidelity as employees.

56. Investments further claims that those steps were in breach of the express terms of the written contracts of employment of Mr Walters and Mr Hindle that they would "not, at any time, without the written consent of the company, be directly engaged, concerned or interested in or connected with any other company, business or concern…".

Diversion of business opportunity

57. Investments claims that the Individual Defendants, in breach of fiduciary duty and their obligation of fidelity, diverted to themselves a business opportunity, namely investment in whole life policies, of which they became aware as a consequence of their employment by, or their position as directors of, Financial (in the case of Mr Walters and Mr Hindle) and Investments (in the case of Mr Simmons).

Misuse of confidential information

58. Investments claims that, for the purpose of establishing their competing business, the Defendants wrongly used confidential information belonging to Investments and Financial. In the case of the Individual Defendants, that conduct is said by Investments to have been in breach of fiduciary duty, their obligation of loyalty to their employers, the express terms of the contracts of employment of Mr Walters and Mr Hindle, and their equitable duty of confidence. In the case of Assured and PSL, the use of such confidential information is said by Investments to have been in breach

of an equitable duty of confidence arising from their knowledge that the confidential information had been obtained by the Individual Defendants in breach of duty.

59. Although the APOC contains allegations of wrongful use of a wide range of confidential information, by the conclusion of the trial only two areas of misuse were relied upon. Firstly, Investments relies upon the statement in the draft Business Plan that the Individual Defendants had "identified significant improvements that could be made to the Shepherds model", and alleges that it is plain that the Defendants began with that business model, which was confidential, and used and developed it for their own purposes.

60. As I have said, Investments alleges that, in addition to being in breach of Mr Walter's and Mr Hindle's fiduciary duty, their obligation of fidelity and their equitable duty of confidence, such conduct was also in breach of the express confidentiality provisions in the contracts of employment of Mr Walters and Mr Hindle set out in paragraph 12 above.

61. Second, Investments relies on an e-mail of 9 November 2003 from Mr Simmons in which he said, among other things, that he was no longer in the employ of Shepherds and was "still very much in the industry" and provided a contact e-mail address and mobile telephone number. Investments alleges that the email was sent to independent financial advisers ("IFAs"), with whom Mr Simmons had conducted business while employed by Investments, and that it must be inferred that Mr Simmons was able to send the e-mail to them because, in breach of fiduciary duty or his obligation of fidelity and his duty of confidence to Investments, he made a list of such contacts while still employed by Investments and subsequently used the list for the purpose of soliciting business for Assured.

Other claims

62. In addition to those I have mentioned, there are other claims against the Defendants in the APOC, but they were no longer pursued by Mr Paul Nicholls, Investments' counsel, by the conclusion of the trial.

Remedies

63. In paragraphs 46 to 56 of the APOC Investments claims damages; alternatively, an account of profits made by Assured and PSL; alternatively, an order that the Individual Defendants hold their interests in Assured and PSL on constructive trust for Investments and Financial; and injunctions. By the conclusion of the trial, Investments restricted its remedies to damages or alternatively an account of profits. At that stage the claim for an account of profits was not limited, as in paragraphs 46 and 50 of the APOC, to Assured and PSL, but extended to the Individual Defendants. There was no objection by the Individual Defendants on that ground.

The defences

64. Mr Simmons, on the one hand, and the other Defendants, on the other hand, were separately represented at the trial. Mr Toby Kempster, counsel, appeared for Mr Simmons. Mr Ian Quirk, counsel, appeared for the other Defendants.

65. The starting position of Mr Walters and Mr Hindle is that they only owed fiduciary duties, an implied obligation of fidelity and express contractual obligations to Financial. They owed no duties to Investments or SSF. Accordingly, the establishment of a rival business to SSF and Investments was no breach of their duties and obligations.

66. The starting position of Mr Simmons is that he did not have any fiduciary duties to Investments since he never assumed the role or responsibilities of a board director of Investments. His only relevant obligation, he maintained, was the usual implied obligation of fidelity of an employee.

67. All the Individual Defendants contend that, in any event, the steps taken by them to establish the business of Assured, while they were still employed by Financial or Investments, never went beyond the preparatory steps that, by established case law, are permitted activity by an employee and a director contemplating setting up a competing business. Nor, Mr Quirk submitted, were those preparatory steps in breach of the express terms of the written contracts of employment of Mr Walters and Mr Hindle.

68. The Individual Defendants maintain, moreover, that the business of Assured was not in competition with the business of the Shepherds Group in any meaningful sense. They maintain that the TLP investment product offered by SSF and Investments at that time, and the investment product offered by Assured and PSL, were so strikingly different in material respects that they would have been considered by IFAs and their clients as distinctly different investment products.

69. The Individual Defendants reject the allegation that they wrongly, in breach of their fiduciary duties and obligation of loyalty, diverted to themselves a business opportunity of which they became aware as a consequence of their employment by, or role as directors of, Financial or Investments. They maintain that, in reality, prior to the suspension of MBC in May 2004 there was never an intention by SSF or Investments to move away from investing in MBC's fractionalised life policies. They claim that was because MBC offered extremely lucrative commissions which, in the case of the Shepherds Group's TLP investments, were paid to Financial Partners Limited ("FPL"), an offshore company controlled by Mr Abraham.

70. So far as concerns the allegation of misuse of confidential information, the Defendants claim that the reference to "the Shepherds Model" in the draft business plan was no more than a reference to the investment product which was being offered for sale by SSF, which was a matter of common market knowledge and experience. It was not a reference to an actuarial model or something of that kind.

71. So far as concerns the recipients of Mr Simmons' e-mail of 9 November 2003, Mr Kempster submitted that there is no evidence that Mr Simmons took or copied any list of IFAs while employed by Investments: he had no need to do so, since there was a limited number of IFAs with whom he carried on business at the Shepherds Group, and they were, or most of them were, long standing contacts of Mr Simmons, whose contact details he would have known or could have easily obtained without copying any list.

72. As regards remedies, the Defendants claim that, even if the Defendants were in breach of duty or obligation as alleged by Investments, it has not been proved that any such breach has caused any loss at all to Financial or Investments. Accordingly, they claim, it would in any event be wrong to order an inquiry as to damages.

Did Mr Simmons owe fiduciary duties?

73. Mr Simmons was never formally appointed a director of Investments. I agree with Investments, however, that, at the material time in 2003 prior to his resignation from Investments, he assumed the role of an actual director of that company.

74. Mr Nicholls referred to, and relied upon, *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371, in which the Supreme Court of Canada held that the president and the executive vice-president of a company stood in a fiduciary relationship with the company even though they had not been formally appointed directors. Laskin J, giving the judgment of the Court, described them (at p.381) as "top management" and "not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists". With reference to fiduciary duties, he adopted (at p. 381) the following passage in Gower's Principles of Modern Company Law, 3rd Ed. (1969) at p.518:

> "…. these duties, except in so far as they depend on statutory provisions expressly limited to directors, … apply equally to any officials of the company who are authorised to act on its behalf, and in particular to those acting in a senior managerial capacity."

That passage is repeated in the latest (the 7th) edition of Gower & Davies' Principles of Modern Company Law by Professor Paul Davies, at p.379.

75. Laskin J continued:

> "The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon which the Ontario Court of Appeal concluded that O'Malley and Zarzycki were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organisation, charged them with initiatives and with responsibilities far removed form the obedient role of servants. It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest."

76. Mr Kempster pointed out that there has been no reported English case in which an employee has been held to owe fiduciary duties to his employer company merely

because the employee was a member of the senior management. He submitted that, in the absence of express or implied contractual terms imposing on the employee a duty to act solely in the interests of an employer, fiduciary duties do not arise: comp. *Nottingham University v Fishel* 2000 IRLR 471. As that submission indicates, Mr Kempster accepted that in appropriate circumstances a senior manager could be a fiduciary. The test, he submitted, is whether the employee contributes to a process which imposes a responsibility to serve the company to a higher level of faithfulness and loyalty than would otherwise be the case. Indications of such a responsibility and duty would be the participation by the employee in, and the assumption by the employee of a responsibility for, the formulation of policy and strategy for the company, and that in doing so the employee is not merely carrying out instructions or assuming responsibilities for which he is accountable to a line manager or other superior. He submitted that there is no evidence in the present case that Mr Simmons was ever required by contract to assume, or did in practice assume, such a responsibility or that he ever undertook any such participation. There is no evidence that Mr Simmons ever attended any board meetings or participated in any policy or strategy meetings for Investments, Financial or SSF (other than part of a meeting on 16 September 2003 in connection with the anticipated resignation of Mr Hindle).

77. Investments appears to accept that there is no clear evidence that Mr Simmons assumed any fiduciary duty prior to the termination of Mr Morgan-Moodie's role as managing director of Investments in April or May 2003. The evidence is that thereafter, until his resignation, Mr Simmons was subject to the instructions and directions of, first, Mr Abraham, who assumed for a time the role of acting managing director, and then, from the beginning of August 2003, Mr Leach.

78. Notwithstanding those points by Mr Kempster, which were ably made, I am satisfied that, from at least the time when Mr Morgan-Moodie ceased to act as managing director of Investments, Mr Simmons held himself out as, and he was held out by Investments as, a director in fact. In *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 Millett J said:

> "A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."

79. There is no doubt that, after Mr Morgan-Moodie ceased to be managing director of Investments, Mr Simmons was one of a very limited number of senior managers who were responsible for SSF's TLP investment business.

80. In or after March 2003 Mr Simmons started to describe himself as sales director on his business cards. There are in evidence letters written by him with the designation "Sales Director". His evidence was that he was encouraged by Mr Abraham to hold

himself out as a director. Particularly telling, in my judgment, is the way in which he was described in the draft business plan for Assured. He was there described as "the Sales Director of Shepherds". He was also one of the persons to whom reference was intended to be made in the statement in the draft business plan that ["PSL"] is a company formed this year from the board of the Shepherds Group". Mr Simmons saw and approved those statements. The business plan was intended to be used as promotional material in order, among other things, to attract investment by venture capitalists.

81. Mr Kempster urged that it was a reflection of Mr Simmon's relatively modest status that Mr Leach was paid so much more than Mr Simmons; but that does not seem to me, either alone or with other matters, to outweigh the various factors I have mentioned supporting the conclusion that Mr Simmons came to owe fiduciary duties to Investments.

Was there a breach of duty in setting up a competing business?

82. At the heart of these proceedings is the question whether, in taking the steps which they did to establish Assured and PSL prior to their retirement from Financial and Investments, the Individual Defendants acted in breach of their duties to the companies which employed them and of which they were directors. The parties are not agreed on the legal principles and test applicable to determine that central issue.

83. It is convenient to start with what is common ground.

84. There is implied in every contract of employment an obligation to serve the employer with "good faith and fidelity": *Robb v Green* [1895] 2 QB 315 at p. 320 (A.L. Smith LJ).

85. A director is under a fundamental duty to act in what he in good faith considers to be the best interests of the company. The duty was described and considered as follows in paragraphs [41] – [43] of the judgment of Arden LJ in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ. 1244:

> "41. I prefer to base my conclusion in this case on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company. This duty of loyalty is the "time-honoured" rule: per Goulding J in *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11,21. The duty is expressed in these very general terms, but that is one of its strengths: it focuses on principle not on the particular words which judges or the legislature have used in any particular case or context. It is dynamic and capable of application in cases where it has not previously been applied but the principle or rationale of the rule applies. It reflects the flexible quality of the doctrines of equity. As Lord Templeman once put it "Equity is not a computer. Equity operates on conscience..." (*Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512, 1516.)

> **42** Professor Robert C Clark *Corporate Law* (1986), pp 34 and 141, has described the fundamental nature of the duty of the loyalty in these terms:
>
> > "The most general formulation of corporate law's attempted solution to the problem of managerial accountability is the *fiduciary duty of loyalty* : the corporation's directors... owe a duty of undivided loyalty to their corporations, and they may not so use corporate assets, or deal with the corporation, as to benefit themselves at the expense of the corporation and its shareholders. *The overwhelming majority of particular rules, doctrines, and cases in corporate law are simply an explication of this duty or of the procedural rules and institutional arrangements involved in implementing it.* The history of corporate law is largely the history of the development of operational content for the duty of loyalty. Even many cases that appear to be about dull formalities or rules of the road in fact involve disputes arising out of alleged managerial disloyalty ... Most importantly, this general fiduciary duty of loyalty is a residual concept that can include factual situations that no one has foreseen and categorised. The general duty permits, and in fact has led to , a continuous evolution in corporate law.
>
> **43** Although Professor Clark was writing about the duty of loyalty in the United States, his observations seem to me to express qualities of the duty of loyalty applying equally to the law of England and Wales."

86. In that case the defendant, who was a salaried director of the claimant company, secretly approached the main customer of the company, at a time when the claimant was renegotiating its contract with the customer, proposing to divert the contract to a company which the defendant had established for his own benefit. In the event the negotiations failed, and the customer terminated its contract with the claimant. The claimant discovered the defendant's misconduct and he was summarily dismissed. The claimant brought proceedings against the defendant for compensation on the ground that he was in breach of his duties as a director and employee in seeking to divert the claimant's contract to his own company. The Court of Appeal dismissed the defendant's appeal from the first instance Judge's decision that the defendant was in breach of duty in failing to disclose his own wrongdoing to the claimant. The Court of Appeal held, on the facts of the case, that there was no basis on which the defendant could reasonably have come to the conclusion that it was not in the interests of the claimant company to know of his breach of duty: he could not fulfil his duty of loyalty on the facts of that case except by telling the claimant of his setting up of his own company, and his plan to acquire the contract for himself.

87. Investments claims that the resolution of the central issue in these proceedings whether the Individual Defendants were acting lawfully in taking the steps they did for the establishment of Assured and PSL while owing fiduciary duties to Investments (in the case of Mr Simmons) and Financial (in the case of Mr Walters and Mr Hindle) is to be found in a straightforward application of the fundamental duty of a director to

act in good faith in the best interests of his company. Mr Nicholls submitted that the Individual Defendants could not have been in any doubt that it would have been in the best interests of those companies to be aware of the plans they were implementing to establish Assured and PSL.

88. Mr Nicholls placed particular weight on the reasoning and decision of Hart J in *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466, [2003] 2 BCLC 523. In that case the claimant ("BMT") was a specialised engineering company which carried on the business of manufacturing and supplying cutting tools to the motor industry. Four of the defendants, who were directors of BMT, conceived and developed a plan, which they kept secret, to leave their jobs at BMT and set up a rival company. Following the retirement of one of those defendants as managing director of BMT, an advertisement appeared in the local paper inviting applications from fully skilled personnel for jobs with a "specialist cutting tool manufacturer". It gave no name and address for the prospective employer but invited applications to be sent to a box number. Shortly afterwards, the other three directors gave notice to BMT of their resignation as directors and of termination of their employment with BMT. A few days later twelve of BMT's skilled workers tendered their resignations to the company through one of those directors. The new business was set up next door to BMT's own premises. Subsequently more of BMT's employees left to join the new enterprise. A core component of BMT's business was the supply of cutting tools to Ford Motor Co. In the event BMT was unable to retain that business, and eventually it closed down. BMT brought the proceedings against the defendants alleging conspiracy to damage BMT. Hart J found in favour of BMT and held the defendants liable in damages.

89. Against that factual background, Hart J described as follows, in paragraph [81] of his judgment, the fundamental duty of a director of a company to act in good faith towards it:

> "[81] It is a fundamental duty of the director of a limited company to 'do his best to promote its business and to act with complete good faith towards it': see *Scottish Co-operative Wholesale Ltd v Meyer* [1958] 3 All ER 66 at 88, [1959] AC 324 at 366 per Lord Denning. It is also his duty not to embark on a course of conduct in which his own interests will conflict with those of the company: see *Parker v McKenna* (1874) LR 10 Ch App 96 at 118 per Lord Cairns LC. He is also, like an employee, under a duty of fidelity to his company: see *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 All ER 350 at 353, [1946] Ch 169 at 174 per Lord Greene MR. On the face of it, therefore, one might think it a simple proposition that a director would be under a duty to alert his fellow board members to a nascent commercial threat to the future prospects of the company, and that the duty would be all the greater (and certainly no less) when he himself was planning to be part of that threat."

90. Having referred to, and considered, the decision of Falconer J in *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 and other cases, Hart J said as follows at paragraph [89]:

> "89.... A director's duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. The fact that the activity is contemplated by himself is, on the authority of *Balston*'s case, a circumstance which may excuse him from the latter aspect of the duty. But where the activity involves both himself and others, there is nothing in the authorities which excuses him from it. This applies, in my judgment, whether or not the activity itself would constitute a breach by anyone of any relevant duty owed to the company... A director who wishes to engage in a competing business and not disclose his intentions to the company ought, in my judgement, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps ..."

91. Mr Nicholls submitted that by 12 August 2003 at the latest, when Soloman Harris were approached to act for them, the Individual Defendants had formed the irrevocable intention of setting up the business now carried on by Assured and PSL, in competition with SSF and Investments, and had begun to take preparatory steps of a kind and extent which, in the absence of full disclosure to and the consent of Investments and Financial, it was in breach of their fiduciary duties and duty of loyalty to undertake.

92. Mr Quirk and Mr Kempster, for their part, placed particular weight on the *Balston* case. The facts of that case, so far as relevant, were that *Balston* manufactured and sold glass microfibre filter tubes. On 17 March 1986 the second defendant, an employee and director of *Balston*, gave notice of termination of his employment which expired on 11 July 1986. Prior to that date, on 14 March 1986 he had agreed to take a lease of certain business premises. His evidence was that at that time he had not decided whether to set up a business as a dealer in filtration products or as a manufacturer of filter tubes. He formally resigned his directorship on 18 April 1986. On 25 April 1986 he bought the first defendant company "off the shelf". On 2 May 1986 he had a telephone conversation with one of *Balston*'s customers, in which he said that he was leaving *Balston*'s employ and that after 12 July 1986 he would be in a position to supply filter tubes to the first defendant. On 8 May 1986 the second defendant visited the customer, and it was agreed that the customer would place an order with the first defendant for delivery from 14 July 1986 to December 1987. That order was confirmed in writing on 26 July 1986. Following the 2 May 1986 telephone call, the second defendant made active preparations for the first defendant to commence manufacture of filter tubes on or as soon as possible after 14 July 1986, including the purchase of equipment and the engaging of persons as employees of the first defendant, including certain employees and ex exployees of *Balston*. The second defendant commenced manufacture of sample tubes for the first defendant on 13 July 1986 and showed them to the customer on 14 July 1986.

93. Falconer J held, among other things, that the second defendant was not in beach of fiduciary duty as a director in not disclosing to *Balston* the intention to set up a business in competition or in taking such steps as he had to forward that intention prior to 18 April 1986. Nor was he in breach of his duty of fidelity as an employee, as

at 18 April 1986, in forming the intention to set up a business in competition with *Balston* and in carrying out preparatory acts for that purpose. From 8 May 1986, however, the second defendant was in breach of his duty of good faith in being engaged in active competition with *Balston* for the custom of the customer, and also in approaching one of *Balston*'s employees and offering her employment with the first defendant. The critical passage in the judgment of Falconer J, relied upon by the Defendants before me, is at p.412 as follows:

> "In the statement of the overriding principle by Roskill J in the *IDC* case, namely "that a man must not be allowed to put himself in a position in which his fiduciary duty and his interests conflict," the conflict contemplated must be one with a specific interest of the company (or other body or person) to whom the fiduciary duty is owed, as, for example, a maturing business opportunity, as in *Canaero*, or the plaintiff's interest in the contract secured by the defendant in the *IDC* case, or a contract falling within the first class of contracts in Lord Blanesburgh's dichotomy in *Bell v Lever* (page 194), or the use of some property or confidential information of the company which has come to a director as such (Lord Blanesburgh's qualification of his second class). In my judgment an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading, while he remains a director.
>
> It follows, in my judgment, that Mr Head was not in breach of his fiduciary duty owed to Balston as a director of the company in not disclosing to Balston his intention to set up a business in competition, whether as a dealer in filter products or as a manufacturer of micro-fibre tubes or in taking such steps as he did to forward that intention prior to 18 April 1986."

94. As regards the period from 8 May 1986 onwards, Falconer J said as follows at p.416:

> "Quite plainly at that stage, i.e. from 8 May onwards, Mr Head was in active competition with Balston, in effect competitively tendering, and successfully tendering, for Clifford Edwards' custom, a customer hitherto and for very many years of Balston, as of course, Mr Head was very well aware. In my view in so doing as an employee of Balston at that time and until 11 July 1986 he was clearly in breach of his duty of good faith as their employee."

95. The Defendants rely upon the *Balston* case as authority that the taking of preparatory steps by a director, short of actual competitive activity, is not in itself in conflict with a specific interest of the company and is not therefore in breach of fiduciary duty.

96. Mr Quirk pointed out that *Balston* has been cited and applied in at least three cases: *Framlington Group plc v Anderson* [1995] 1 BCLC 475 (Blackburne J); *Saatchi & Saatchi Company plc v Saatchi* (unreptd) 13.2.1995 (Jonathan Parker J); and *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 (HH Judge Robert Reid Q.C., sitting as a High Court Judge).

97. Analysing the reported cases, Mr Quirk submitted that the following have been shown to be "preparatory steps" which are permissible: (1) identifying suitable premises for the new business, negotiating a lease of them and signing it (*Balston*); (2) the purchase of a shelf company (*Balston*); (3) negotiating and agreeing terms of employment with a competing business (*Framlington*); (4) entering into heads of terms for the formation of a company to carry on a competing business, subject to a condition precedent that they are only to take effect when the employee or director is free of any fiduciary, contractual or other restrictions imposed upon him as a result of his directorships or employment (*Saatchi*).

98. Mr Quirk submitted that the reported cases show, by contrast, that the following amount to "actual competitive activity" within the statement of principle of Falconer J in *Balston*: (1) actual competitive trading, in the sense of the actual sale of an object or service (*Balston*); (2) competitive tendering for supplies or customers (*Balston*); (3) competing with the employing company for equipment and staff (*Coleman Taymar*), and (4) a loan to the employee from a customer of the employer coupled with an exclusive supply agreement by the employee as and when the competing business becomes operative (*Lancashire Fires Ltd v SA Lyons & Co Ltd*) [1997] IRLR 113).

99. Mr Quirk acknowledged that there is a tension between, on the one hand, the fundamental duty of a director to act in good faith in the best interests of his company and the duty of fidelity of an employee to his employer, and, on the other hand, the *Balston* line of cases which recognise that a director and an employee may lawfully take steps to set up a competing business to be undertaken once the directorship or employment has ceased. The explanation for that tension, and its resolution, are to be found, Mr Quirk observed, by reference to "the rules of public policy as to restraint of trade" mentioned by Falconer J in *Balston* at p. 412.

100. Such policy considerations were also reflected, Mr Quirk submitted, in the following comments of Arden LJ in paragraph [63] of her judgment in *Item Software*, under the heading "Policy reasons for holding that a director's duty of loyalty requires him to disclose his misconduct":

> "**63** Both counsel have addressed the court on the policy reasons for holding that Mr Fassihi was in breach of his duty of loyalty in this case. These are relevant questions. If the approach of the law were overly intrusive, legitimate entrepreneurial activity would be discouraged and this would not be a beneficial outcome. That is not in my judgment the result of holding that a duty of loyalty applies in the present case. This is because, on well-established principles of law, Mr Fassihi's setting up of a new company to which the business of Item would be diverted was not a legitimate entrepreneurial activity."

101. Mr Quirk submitted generally that the relevant broad principles to be deduced from the cases are as follows. First, a director will not be in breach of fiduciary duty and an employee will not be in breach of the implied obligation of fidelity if the steps taken to set up a competing activity are restricted to steps preparatory to actual competitive activity. Second, "actual competitive activity" in this context may be something other than the actual selling of goods and services. Third, such preparatory steps may be matters of which the company, to which the director owes fiduciary duties, would wish to be informed, but any obligation to disclose them which might otherwise arise by virtue of the director's fiduciary duty is "trumped" by the public policy of encouraging entrepreneurial activity.

102. Mr Quirk and Mr Kempster submitted that the decision of Hart J in *British Midland Tool* could and should be read in such a way as to be consistent with the *Balston* line of cases. They observed, in that context, that Hart J sought to distinguish *Balston* on the facts. They rely, for example, on the observation of Hart J, at paragraph [89] of his judgment, that the intention to compete did not appear to have been formed in *Balston* prior to the resignation of the second defendant as a director. Furthermore, they emphasised, *British Midland Tool* was a case concerning the director's obligation of disclosure rather than as to what constitutes permissible preparatory steps for the establishment of a competitive business. Further, Mr Quirk and Mr Kempster submitted, that, on its facts, *British Midland Tool* was a case of actual competitive activity.

103. Mr Quirk and Mr Kempster submitted that, if and in so far as it is not possible to reconcile *British Midland Tool* with the *Balston* line of cases, the latter should be preferred as carrying the weight of established authority. In particular, they contended that, taken at face value, the observation of Hart J, at paragraph [89] of *British Midland Tool*, that "A director who wishes to engage in a competing business and not to disclose his intentions to the company ought... to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps" went too far and is inconsistent with the *Balston* line of cases.

104. Mr Quirk also contended that Hart J's reasoning and conclusion are inconsistent with the *Balston* line of cases in so far as he held, at paragraph [89] of his judgment, that a director is in breach of fiduciary duty if he fails to inform the company of any activity, actual or threatened, by another director or employee which damages the interests of the company, whether or not the activity itself would constitute a breach by anyone of any relevant duty owed to the company. Mr Quirk submitted, in this context, that *Item Software* provides no support for any duty of a director to disclose something short of a breach of fiduciary duty. In any event, he said, Arden LJ, in that case, was considering only the duty of a fiduciary to disclose his own misconduct. Mr Quirk also observed that the *Balston* line of cases was not cited in *Item Software*. Finally, he suggested that since *British Midland Tool* was cited in argument in *Item Software*, but was not mentioned by Arden LJ in her judgment, she must be taken not to have approved Hart J's reasoning.

105. As the most recent in the line of relevant authority, *British Midland Tool* is binding upon me, unless I am satisfied that it is plainly wrong. Far from considering that the decision is wrong, I respectfully consider that both the decision and reasoning of Hart J in that case were correct and, in so far as there is any conflict between them and the

decision and reasoning of Falconer J in *Balston*, the approach of Hart J is to be preferred.

106. In my judgment it is plain that the necessary starting point of the analysis is that it is the fiduciary duty of a director to act in good faith in the best interests of the company (*Item Software* at para [41]), that is to say "to do his best to promote its interests and to act with complete good faith towards it", and not to place himself in a position in which his own interests conflict with those of the company (*British Midland Tool* at paragraph [81] and *CMS Dolphin Ltd v Simmonet* [2001] 2 BCLC 704 at paragraph [84]).

107. It is difficult to see any legitimate basis for the "trumping" of those duties by "rules of public policy as to restraint of trade" as suggested by Falconer J in *Balston* at p.412. There is no reference to any such principle in any of the relevant cases prior to *Balston*, such as *Robb v Green, Wessex Dairies v Smith* [1935] 2 KB 801, *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169, and *Laughton v Bapp Industrial Supplies Ltd* [1986] IRLR 245. Hart J in *British Midland Tool* rejected any such principle. He said, at paragraph [89] of his judgment:

> "It does not, furthermore, seem to me that the public policy of favouring competitive business activity should lead to a different conclusion. A director is free to resign his directorship at any time notwithstanding the damage that the resignation may itself cause the company: see *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 at [95] per Lawrence Collins J. By resigning his directorship he will put an end to his fiduciary obligations to the company so far as concerns any future activity by himself (provided that it does not involve the exploitation of confidential information or business opportunities available to him by virtue of his directorship)."

108. What the cases show, and the parties before me agree, is that the precise point at which preparations for the establishment of a competing business by a director become unlawful will turn on the actual facts of any particular case. In each case, the touchstone for what, on the one hand, is permissible, and what, on the other hand, is impermissible unless consent is obtained from the company or employer after full disclosure, is what, in the case of a director, will be in breach of the fiduciary duties to which I have referred or, in the case of an employee, will be in breach of the obligation of fidelity. It is obvious, for example, that merely making a decision to set up a competing business at some point in the future and discussing such an idea with friends and family would not of themselves be in conflict with the best interests of the company and the employer. The consulting of lawyers and other professionals may, depending on all the circumstances, equally be consistent with a director's fiduciary duties and the employee's obligation of loyalty. At the other end of the spectrum, it is plain that soliciting customers of the company and the employer or the actual carrying on of trade by a competing business would be in breach of the duties of the director and the obligations of the employee. It is the wide range of activity and decision making between the two ends of the spectrum which will be fact sensitive in every case. In that context, Hart J may have been too prescriptive in saying, at paragraph [89] of his judgment, that the director must resign once he has irrevocably formed the intention to engage in the future in a competing business and, without disclosing his

intentions to the company, takes any preparatory steps. On the facts of *British Midland Tool*, Hart J was plainly justified in concluding, in paragraph [90] of his judgment, that the preparatory steps had gone beyond what was consistent with the directors' fiduciary duty in circumstances where the directors were aware that a determined attempt was being made by a potential competitor to poach the company's workforce and they did nothing to discourage, and at worst actively promoted, the success of that process, whereas their duty to the company required them to take active steps to thwart the process.

109. In the present case, I find that by 12 August 2003, when Mr Walters was in contact with Soloman Harris, all the Individual Defendants had formed the irrevocable intention to launch the business now being carried on by Assured and PSL. I am not satisfied that any such irrevocable intention had been formed before that date. That conclusion is supported by the following matters. The evidence of Mr Simmons was that it was only in August 2003, when Mr Abraham appeared finally to reject changing from investment in MBC's fractionalised life policies to the purchase of whole life policies, that Mr Simmons decided he no longer wished to work for the Shepherds Group. Ms Costello concluded her researches into the US TLP market in August 2003. On 1 August 2003 Mr Leach took over as managing director of Investments. His evidence (in paragraphs 6 to 9 of his 1st witness statement) was that he gained the impression that his appointment was not popular with the other members of the management team, and that Mr Simmons resented his appointment and said that, unless he was given a 25% shareholding in Investments, he would leave.

110. From 12 August 2003 the Individual Defendants acted in such a manner to implement their intention to launch the new business as to bring about a plain conflict between their personal interests, on the one hand, and the best interests of Financial and Investments, on the other hand.

111. Mr Hindle resigned on 10 October 2004. I find that Mr Simmons resigned and ceased to be employed on 21 September 2003. I reach that conclusion in the light of Mr Simmons' evidence on the matter, on which he was not challenged in cross examination, and his letter of resignation of 1 September 2003. While it is true that Mr Abraham's third witness statement and the APOC allege that Mr Simmons' employment with Investments did not terminate until 10 October 2003, no explanation was given by Mr Abraham as to why Mr Simmons' contract of employment continued for so long after his letter of resignation of 1 September 2003. It is common ground that Mr Walters left as late as 7 May 2004.

112. Prior to the resignation of Mr Hindle and Mr Simmons, they and Mr Walters had procured the services of Soloman Harris as attorneys in the Cayman Islands, and were working on production of the business plan for, and the incorporation of, Assured and PSL They were also preparing the Offering Memorandum, and were in discussions and negotiations with Close in relation to custodial and escrow services, including fees and the form of the relevant agreements, and with Barings in relation to administration services, including the form of the administration agreement. They had begun to consider and approach possible members of a panel of market makers in whole life policies. Ernst & Young had been approached to assist and to see whether they would act as auditors. They had also approached friends, family and others with a view to them investing in the new business as venture capitalists.

113. By the time of Mr Walters' resignation, PSL and Assured had been incorporated, and Assured was registered with CIMA. The custodian, escrow and administration agreements relating to the new business had been signed. Venture capitalist investors had been found. Promotional literature for Assured had been ordered and received, agreements for the supply of whole life policies had been put in place, and steps had been taken to purchase whole life policies. IFAs had been approached. According to Mr Walters' own oral testimony, and PSLs "Monthly update – February 2004," Assured's business had been launched on 16 February 2004 with an initial price of US$ 100 for Class B shares. Mr Walters did not disclose to Financial at the time any of those matters or his interest in or connection with Assured and PSL

114. The Defendants claim that the business now carried on by Assured and PSL cannot fairly be regarded as having been in competition with the business carried on by SSF prior to the collapse of MBC. In paragraph 29 of his Defence, Mr Simmons claims, for example, that:

> "The business model of the Sixth Defendant and the structure of and assets held within the Fifth Defendant are fundamentally different to the Claimants business which the Second Defendant regards as being conducted in an immoral and unethical and sometimes unlawful fashion."

115. Mr Simmons explained at some length in his oral evidence the reasons why the Defendants maintain that the business of Assured and PSL was not a competitive threat to the business of SSF prior to the retirement of the Individual Defendants from the Shepherds Group. His evidence on this aspect may be summarised as follows. SSF's investments in TLPs were solely in the form of fractionised policies which MBC had purchased, that is to say, SSF acquired a fractional interest in a number of policies held by MBC. Mr Simmons emphasised that, for investment purposes, what was actually sold by MBC to SSF was a guaranteed fixed rate of return, but over an uncertain period. The period over which that guaranteed return would be realised would depend upon the death of the assureds. One of the main criticisms of Mr Simmons and others in relation to the MBC fractionised policy investment was the alleged lack of objectivity as to the medical assessment of the anticipated life expectancy of each assured. Another was the lack of certainty and transparency about the commissions paid by MBC. The consequence, Mr Simmons said, was that it was not possible properly to price the value of the assets in which fractional interests were being purchased by the investor. Mr Simmons also said that an investor in MBC's fund could not establish how much money was set aside for payment of premiums on the policies. All those concerns were reflected, the Defendants say, in the criticisms of regulators and others in the US, which were mentioned in the Costello Report. Further, the investor would have to wait for maturity of all the policies in which fractional interests had been acquired by the investor before it was possible to receive payment.

116. Mr Simmons emphasised that, by contrast, Assured purchases whole life polices. He stressed that Assured, prior to the purchase of any policy, relies on an objective and reliable medical assessment of the anticipated life expectancy of the assured. Unlike MBC, which used its own doctors who gave, as Mr Simmons put it, a subjective

assessment of life expectancy, Assured uses a panel of independent medical underwriting companies who employ actuarial techniques based on a large database of people with broadly similar features. He described the way in which a statistical analysis is conducted on the likely date of maturity of a policy. He further referred to the care with which the policy, as an asset, is valued and priced. Mr Simmons said that a fixed 5% commission is paid by Assured to IFAs, and a management fee is paid to PSL. Those fees are brought into the calculation of the purchase price. Assured receives the entire money under each policy on the death of the assured. Mr Simmons described the procedures of Assured for payment of premiums into an escrow account in order to ensure that an adequate amount is set aside for the payment of future premiums.

117. In very broad terms, Mr Simmons' case is that the purchase by SSF of TLPs in the form of interests in fractionalised policies acquired by MBC was the purchase of a "ready-made product off the shelf" with a published fixed return on capital, but where the annualised return could not be predicted in advance, and where, in view of the various matters I have mentioned, it was impossible for an investor to ascertain with any clarity or certainty the actual value of the underlying fund, that is to say the policies held by MBC. By contrast, the interest of Assured is in individual whole life policies, the title to which is vested in Assured, and the value of which can be and has been tested by objective analysis and against objective criteria. Those critical differences between the two types of business and investment are the reason why, according to the Defendants, the investment product sold by SSF and the product now sold by Assured carry such different risks and appeal to such different investors. In particular, Mr Simmons maintained that, generally speaking, institutional investors would not be interested at all in the SSF product. Mr Simmons went so far as to say that the Assured investment product was no more a competitive threat to SSF than any other investment potentially available, such as fine wine.

118. I reject the Defendants' case that the business now carried on by Assured and PSL was not a competitive threat to SSF prior to the collapse of MBC. SSF was an open ended investment company, as is Assured. In each case, the investor purchases shares in the company. In each case, the underlying assets are life policies. For that reason, as Mr Simmons accepted in his oral evidence, both are regarded as "alternative investment funds", which exhibit low volatility and low correlation with movements in other markets. The differences between the two funds described by Mr Simmons relate to the degree of risk involved in the investment in the underlying asset and the transparency of the value of the underlying asset. I do not accept that the investment product offered by SSF, on the one hand, and Assured, on the other hand, were so dissimilar that they would appeal to quite different investors and could not fairly be regarded as competing in the same market or, rather the same area of the investment market.

119. More to the point, as the Individual Defendants knew, SSF, Investments and Financial would have considered, and reasonably so, that the business now carried on by Assured and PSL would be in direct or close competition with SSF's TLP business. Mr Walters accepted in cross examination that the Shepherds Group could regard Assured as a new competitor. Mr Hindle accepted in cross examination that IFAs might not appreciate that SSF's TLP product and Assured's product were different investment products, and, further, that his colleagues in the Shepherds Group would

possibly have wanted to know about the proposals and plans for the new business, and would conceivably have seen it as a competitive threat.

120. The draft business plan and the Offering Memorandum prepared by the Individual Defendants described the products intended to be sold by the new business as "US Second Hand Insurance Policies" with the acronym "SHIPs". The Defendants' case is that they invented the acronym expressly to distinguish their product from the TLPs of SSF. That case is, however, flatly contradicted by the contents of the documents prepared by the Defendants in 2003. The draft business plan described PSL as a company formed from the management team and from the board of the Shepherds Group. It stated that Shepherds was the first to promote "a fund of Life Policies in the UK". It further stated that "the team behind PSL is the most experienced team in the UK in the SHIP market". Assured's Offering Memorandum published in October 2003 gave the following description of Mr Simmons and Mr Hindle:

> "Mike Simmons was until recently the Sales Director of Shepherds Investments Limited, a member of U.K. financial services group, Shepherds. Shepherds is a leading supplier in the market for UK Traded Endowment Policies (TEPs) and, significantly, Shepherds was the first to promote a fund of SHIPs internationally...."
>
> "Mark Hindle was until recently the Investment Director of the UK Traded Endowment Policy Market Maker, Shepherds (Financial) Limited. Mark was responsible for advising Shepherds Select Funds (an Isle of Man domiciled Open Ended Investment Company) on suitable purchases of both TEPs and SHIPs..."

121. Similar statements are to be found in the due diligence pack prepared by Mr Simmons about Assured, PSL and the background to the market for SHIPs.

122. The draft business plan makes it clear that SSF's TLPs, in the form of interests in fractionised life policies, are in the same "asset class" as Assured's SHIPs:

> "The fund differs to other funds in its asset class [my emphasis] due to the transparency of the commission that is received from market makers selling the assets and the amount reinvested back into the Fund for the benefit of the shareholders, which will further enhance their return. The Fund will also receive an independent medical report form a UK resident medical practitioner confirming the life expectancy given by the medical practitioners in the US are reasonable."

123. PSL's written "Monthly update – February 2004", also treated SHIPs as the same as TLPs:

> "During this period, PSL have been busy ensuring that all the necessary support material and information for Assured Fund is in place to enable us to capitalise on the exciting investment opportunity that Assured Fund represents – ***the first***

> ***TOTALLY transparent, properly REGULATED and ETHICALLY STRUCTURED fund in the market capitalising on the safety and consistent returns available from a properly purchased and researched pool of Second Hand (U.S.) Life Insurance Policies*** (SHIPs) – TLPs as some like to refer to them."

124. Mr Simmons sought to explain those references to the Shepherds Group, and, in particular, to the experience of the Individual Defendants in promoting SHIPs while at the Shepherds Group, as a combination of error "akin to a typo", error of judgment, and "talking up". The other Individual Defendants gave similar evidence. I reject all those explanations. It is perfectly clear that the statements were deliberately made with the specific intention of conveying to those expected to read the relevant documents, including venture capitalists, Barings and Close, that the Individual Defendants had considerable experience at the Shepherds Group in promoting precisely the same type or class of business. At one point in his cross examination Mr Simmons appeared to concede as much when he gave evidence that he knew that what was being said on the matter in those promotional documents was wrong. It seems to me that those references in the various documents are the best guide to what the Individual Defendants believed at the time.

125. Mr Hindle and Mr Walters maintain that their knowledge of, and promotion of, the business now carried on by Assured and PSL could not have been in breach of any fiduciary duty or obligation of loyalty owed by them since they were directors of, and employed by Financial, whereas it was SSF which sold TLPs and Investments which acted as SSF's manager and adviser. The Individual Defendants further gave evidence that they understood that Investments was the company investigating in 2003 concerns about the market for TLPs. Further, the Individual Defendants emphasised that they were led by Mr Abraham to understand, and they believed, that ownership of Investments had been transferred from the Shepherds Group to FPL, which, as I have said, was an offshore company under the control of Mr Abraham. It is clear, in my judgment, that this is far too narrow an approach. It is common ground that Financial's fee for advising Investments on investment policy for SSF was related to the size of the funds held by SSF, that is to say, the success of SSF. It is relevant to note that the Costello Report, which contained references to a whole life policy business, was written for Financial. Accordingly, anything which might be a competitive threat to SSF, or otherwise undermine its business, was a matter of direct concern to Financial, both in relation to the size of its fee and in relation to the discharge of its duty to advise Investments on investment policy. As investment adviser to Investments, for the benefit of SSF, it was important for Financial to be aware of positive and negative potentialities in the relevant part of the investment market, including potential competitors and the potential for a whole life policy investment business.

126. In fact, it is clear that within the Shepherds Group consideration was being given in 2003 to establishing a whole life policy investment fund. Such policies were the subject of comment in the Costello Report to Financial in March 2003. It is clear that they were being actively considered within the Shepherds Group in September 2003. US attorneys prepared, on behalf of Investments, draft escrow and custodian agreements consistent with the acquisition of such policies. There were discussions

with Close and Barings in connection with those draft agreements, and Mr Abraham met some of the potential whole policy providers in the US. Although the Shepherds Group did not purchase any whole life policies before the second half of 2004 and, until the suspension of MBC in May 2004, continued to invest in TLPs solely in the form of MBC's fractionalised life policies, I am satisfied that no firm decision was taken by SSF, Financial or Investments prior to May 2004 never to acquire whole life policies.

127. In the light of all those matters, I am quite clear that from 12 August 2003 not only had the Individual Defendants formed the irrevocable intention to establish a business which they knew would fairly be regarded by Financial and Investments as a competitor to the business carried on by SSF, but they continued to take steps to bring into existence that rival business, contrary to what they knew were the best interests of Financial and Investments, and without the consent of those companies to do so after full disclosure of all material facts, and so in breach of their respective fiduciary duties and their obligation of fidelity. That conflict between the duties owed by the Individual Defendants to Financial (in the case of Mr Walters and Mr Hindle) and Investments (in the case of Mr Simmons), on the one hand, and the personal and private interests of the Individual Defendants, on the other hand, in the promotion of the new and rival business is exemplified by Mr Simmons' acknowledgement, in cross examination, that he found it difficult to promote "the Shepherds product" when developing the "new product".

128. Further, irrespective of whether, by virtue of *Balston* and contrary to my view, there was no obligation to disclose their own individual "preparatory" activity, I am bound by *British Midland Tool* to hold that each of the Individual Defendants was obliged, by 12 August 2003 at the latest, to disclose to Financial or Investments, as the case may be, the actual and threatened activity of the others to set up the competing business. If and so far as is necessary, like Hart J in *British Midland Tool,* I would distinguish *Balston* on the facts on the ground that the intention to compete in *Balston* does not appear to have been formed in that case prior to the resignation of the second defendant as a director. The principle that it is the duty of a director to inform the company of any actual or threatened activity of another, whether or not he himself is involved, which damages the interests of the company, and whether that activity would in itself constitute a breach by anyone of any relevant duty owed to the company, is part of the core reasoning and decision in *British Midland Tool,* which I must follow.

129. Finally, on this aspect of the case, I should record for completeness that, even if, contrary to my view, Mr Simmons was a mere employee owing no fiduciary duties to Investments, I nevertheless conclude that his conduct between 12 August 2003 and his resignation on 21 September 2003 was such as to breach his employee's duty of good faith and fidelity.

130. Mr Kempster indicated that, in the context of setting up a competing business, there might be a difference between the legal position of a director owing fiduciary duties to the company and that of an employee owing an implied obligation of good faith and fidelity to his employer. Mr Kempster noted, for example, that an employee has no duty to his employer to disclose his own wrong doing, and that an employee is not obliged to act solely in the interests of his employer: see e.g. *Hivac at* p.174, and *Nottingham University v Fishel* esp. at paragraphs 74 ff. Nevertheless, Mr Kempster

appeared content to accept that, on the facts of the present case, there is little material difference between those acts to set up and promote a competing business which would be in breach of a director's fiduciary duty, on the one hand, and in breach of the employee's duty of good faith and fidelity, on the other hand.

131. Mr Kempster submitted, by reference to the decided cases, that the steps taken by Mr Simmons prior to his resignation never constituted, for the purposes of an employee's obligation of loyalty, more than lawful preparatory steps since nothing was done which had an immediate impact on Investments. I reject that submission. By the time Mr Simmons resigned the Individual Defendants had not only made a firm decision to set up a competing business, but they were well advanced in the development of a rival and, in their view, superior investment "product". Not only was that a matter of which, on the Defendants' own evidence, Financial and Investments would have wanted to know, but, on Mr Simmons' own admission in cross examination, he felt it difficult to promote SSF's TLPs when he was developing that competing product. What he was doing did in fact interfere with his duty to serve his employer faithfully and honestly to the best of his abilities. In the circumstances, the fact, as Mr Kempster emphasised, that at the date of Mr Simmons' resignation there was still a great amount to be done to establish the business of Assured and PSL is not a critical factor.

132. Mr Nicholls, in his closing submissions, sought to advance Investments' case by distinguishing between what he suggested were two distinct and separate issues: (1) the taking of impermissible preparatory steps in breach of fiduciary duty and the obligation of fidelity (as to which he said there was no significant difference), and (2) the failure to disclose what was being done. Mr Quirk similarly, in his closing written submissions, sought to identify three different lines of authority as to fiduciary duties owed by directors which, he said, should be kept distinct and separate. It was suggested by both Mr Nicholls and Mr Quirk that the *Balston* line of cases fell into one category or line of authority, and *Item Software* into another. As should be apparent from my analysis, both those approaches seem to me to be misconceived in the context of directors' fiduciary duties. As Arden LJ so clearly stated in *Item Software*, in relation to a fiduciary's duty to disclose his own misconduct to his principal, or, more generally, information of relevance and concern to his principal, the single and overriding touchstone is the fundamental duty of a director to act in what he considers in good faith to be in the best interests of the company. There is no separate and independent duty of disclosure. In the context of the director's own acts to promote a competing business, the breach of fiduciary duty is to carry out the impermissible acts of promotion without first disclosing the intention to do them and obtaining permission to do so. There is a breach because the director's conflict between his personal interest and his duty to the company has not been authorised after full disclosure to, and informed consent by, the company. In the case of the acts of his fellow directors in promoting a rival business, the breach of fiduciary duty of the director is failing to disclose matters which are of relevance and concern to the company and which, if acting in good faith in the best interests of the company, the director would disclose. Those are straightforward applications of ordinary principles of equity concerning fiduciary duties.

Diversion of a maturing business opportunity

133. Investments claims that the Individual Defendants have exploited for their own benefit a business opportunity, namely investment in whole life policies, of which they became aware through their employment by Financial and Investments, as the case may be, and that they are liable to account for the profit made from the exploitation of that business opportunity. Investments relies upon the principle that a fiduciary may not retain a profit which he makes from the use of property subject to the fiduciary relationship or which he otherwise makes by reason of his fiduciary position, and that, by analogy, a director who exploits after his resignation a maturing business opportunity of the company is to be treated as appropriating for himself property of the company in relation to which he had fiduciary duties. He is, accordingly, just as accountable as a trustee who retires without properly accounting for the trust property. In the case of the director, he becomes a constructive trustees of the fruits of his abuse of the company's property, which he has acquired in circumstances where he knowingly had a conflict of interest and exploited it by resigning from the company: *CMS Dolphin* esp. at paragraphs [84] and [96].

134. I agree with Investments that the principle in *CMS Dolphin*, which I have summarised, applies to the resignations of Mr Simmons and Mr Hindle to enable them to establish and promote the business of investing in whole life policies now carried on by Assured and PSL. I agree with Investments that such a business opportunity was under consideration by Financial, Investments and SSF during 2003 and, as I have already stated earlier in this judgment, no final and firm decision had been taken against the exploitation of such a business by those companies prior to the resignations of Mr Simmons and Mr Hindle.

135. The position of Mr Walters is, on the evidence, rather different. First, I am not satisfied that Mr Walters was aware during his employment by Financial that SSF was considering a whole life policy business. Further, I find, on a balance of probabilities, that at some point between the resignation of Mr Hindle in October 2003 and the collapse of MBC in May 2004. Financial, Investments and SSF had decided not to proceed, for the time being, with a whole policy investment business in view of the level of commissions that were paid by MBC and which could not be obtained from the suppliers of whole life policies: comp *Island Export Finance Ltd v Umunna* [1986] BCLC 460.

Express terms of employment contracts of Mr Walters and Mr Hindle

136. Investments claims that Mr Walters and Mr Hindle were in breach of the express term of their contracts prohibiting them from being "at any time, without the written consent of the company,.. directly engaged, concerned or interested in or connected with any other company, business or concern (except as the holder of shares, stock debentures or debenture stock in any other company quoted or dealt with on any recognised stock exchange)".

137. Investments relies on the decision of the Court of Appeal in *Ward Evans Financial Services Ltd v Fox* [2001] EWCA Civ. 1243, [2002] IRLR 120, in which the Court of Appeal held, on the facts, that employees, who had formed a company and made formal application for authorisation by the Personal Investment Authority while they were still employed by the claimants, were in breach of a contractual prohibition that

during their employment they "shall… Not, without the company's prior written permission hold any material interest in any… company which… Impairs or might reasonably be thought by the company to impair his ability to act at all times in the best interests of the company…."

138. Mr Hindle and Mr Walters rely on *Saatchi*, in which Jonathan Parker J held that certain of the defendants were not in breach of the express obligation in their contracts of employment to devote the whole of their time and attention to the business of the first claimant ("PLC") and not to be concerned or interested in any other business trade or calling whatsoever. Jonathan Parker J, on the hearing of a notice of motion for interlocutory injunctions, rejected PLC's claim that those defendants, by signing heads of terms for the formation of a new company to operate as an advertising agency, which would be in competition with PLC, which heads of terms were expressed to come into full force and effect only when the respective defendant was free of any fiduciary, contractual or other restrictions imposed upon him as a result of his directorships or employment which affected his ability to perform his contractual obligations set out in the heads of terms, was thereby in breach of the contractual employment terms to which I have referred.

139. I am satisfied that Mr Walters was in breach, but that Mr Hindle was not in breach, of the express contractual term on which Investments relies. Mr Quirk observed, correctly in my judgment, that the decision of the Court of Appeal in *Ward Evans* does not assist Investments since the material clause considered in that case ("Not… [to] hold any material interest in any … company which … Impairs or might reasonably be thought by the company to impair his ability to act at all times in the best interests of the company") is much wider than the contractual term in the present case. Further, as Mr Quirk observed, the claimant in that case did not appeal from the trial judge's rejection of a claim that the defendants were in breach of a contractual term (which is closer to the contractual terms with which I am concerned) "not without the prior written consent of the employer…[to] engage, whether directly or indirectly, in any business or employment which is similar or in anyway connected to or competitive with the business of the employer".

140. At the time of Mr Hindle's retirement neither Assured nor PSL had been incorporated. I do not consider that, at that stage, Mr Hindle could fairly be described as "directly engaged, concerned or interested in or connected with any other company, business or concern". Those words seem to me to be directed at a business enterprise which, if not in full operation, had nevertheless reached a stage at which it was conducting some kind of business activity.

141. The position of Mr Walters, however, is rather different. By the time he resigned Assured was undoubtedly conducting a business activity, if not actually fully in operation as an investment company. Unlike the defendant in the *Saatchi* case, he was assisting the activities of Assured and PSL whilst still employed by Financial: see, for example, his e-mail to Soloman Harris of 15 October 2003 dealing with compliance issues and referring to "my" (i.e. his) business plan and asking for legal advice in connection with Assured and PSL, and also subsequent e-mails from Soloman Harris which were copied to him, including an e-mail of 27 October 2003 concerning the Articles of Association of PSL. Further, in his e-mail of 15 October 2003 he described himself as "the lucky chap who will be the compliance officer for PSL". In his oral evidence in cross examination Mr Walters acknowledged that there

had to be a compliance officer for PSL and Assured, and that no one other than himself was identified at any material time as the compliance officer. I find that he acted as the compliance officer for PSL and Assured at the same time as he was employed by, and indeed was the compliance officer of, the Shepherds Group.

142. In Mr Nicholls' written submissions it is claimed that Mr Walters and Mr Hindle were also in breach of an express term of their written contracts of employment not to engage directly or indirectly in any business in direct competition with the Shepherds Group for a period of 6 months after the termination of their employment. This claim was not the subject of any oral submissions by Mr Nicholls, Mr Quirk or Mr Kempster. Mr Quirk observed in his closing written submissions that breach of the post termination restrictive covenants was not alleged by Investments in the APOC, and he advanced in those written submissions several legal objections to the legality of the restrictions. Mr Nicholls did not pursue that head of claim, and his oral submissions on the loss suffered by Financial and Investments as a result of the Defendants' wrongful conduct, to which I will refer later in this judgment, were all based on the alleged time advantage which the Individual Defendants had gained in setting up a competitive business through their unlawful action while still employed by Financial or Investments, rather than unlawful action after their employment ceased.

Misuse of confidential information

143. In my judgment, Investments has not made out a case that the Defendants have misused confidential information of Investments or Financial. In his closing oral submissions Mr Nicholls made clear that Investments' claim that the Defendants misused confidential information relating to "the Shepherds model" is based entirely on the single statement in the draft business plan that:

> "Having identified significant improvements that could be made to the Shepherds model, but being unable to have Shepherds adopt the various measures, PSL was formed to take the exciting concept of SHIP portfolios forward into the UK and International market in a transparent, ethical and diligent fashion."

144. The "model" there being described was not an actuarial model. It was simply a shorthand for the investment of SSF's subsidiary in TLPs in the form of fractionalised policies held by MBC. That was not confidential information. That was simply general market knowledge of the type of investment made by SSF, the opportunity for investing in which SSF offered investors who purchased the relevant class of its shares.

145. So far as concerns the other area of alleged misuse of confidential information, namely the allegation that Mr Simmons must have copied, while still employed by Investments, and subsequently used a list of IFAs with whom SSF had conducted business, I find that this allegation has not been established to the requisite standard of proof. Investments relies entirely, in support of this allegation, on the evidence that Mr Simmons sent his letter of 9 November 2003 to IFAs with whom he had dealt while employed by Investments. His evidence, however, was that he brought IFAs with him to Investments and some were his personal friends. His evidence was that

the letter was sent to his personal contacts. Taking the evidence as a whole, I am not satisfied that there was any need for Mr Simmons to have copied a list while at Investments or subsequently used any such list in order to be able to send his letter of 9 November 2003 to them.

Damages

146. Investments having established breach of fiduciary duty and breach of the obligation of fidelity by each of the Individual Defendants and, in the case of Mr Walters, breach of the express terms of his employment contract, Investments is, on the face of it, entitled to an inquiry as to damages.

147. Investments has formulated its claim to damages as a claim for the loss said to have been caused to it and Financial as a result of the loss of business allegedly suffered by SSF in consequence of the establishment of Assured and PSL at an earlier period of time than would have been the case had the Individual Defendants not been in breach of duty: comp. *Coleman Taymar*. The evidence of Mr Abraham and Mr Leach in their witness statements is that, by virtue of the Defendants' breaches of duty and obligation, the Defendants were able to start trading at least 6 months earlier than they would otherwise have been able to do. I reject that suggestion. On my findings, the period of unlawful activity by the Individual Defendants was from 12 August 2003 until the respective resignations of the Individual Defendants. The critical period was from 12 August 2003 until 10 October 2003. The loss of Financial and Investments was the diminution in their fees, commission or other income in consequence of the adverse affect of the promotion of Assured and PSL on SSF's business.

148. As I have said earlier in this judgment, by the end of the trial Investments no longer pursued any claim that Mr Hindle and Mr Walters were in breach of the post termination competition restrictions in their contracts of employment. In any event, for the sake of completeness, I should record that Investments has failed to establish that any loss was suffered by itself or Financial in consequence of any such breach. Mr Walters retired in May 2004, which is the same month in which SSF ceased to invest in TLPs. In the case of Mr Hindle, Investments has not made out any case that the formation and operation of PSL and Assured would have been delayed to any material extent if he had not been in breach of the post termination competition obligations in his contract of employment. The Defendants' witnesses were not cross examined on the point. Further Mr Simmons, who had no written contract of employment and who was under no such contractual post termination restraint, was the driving force behind Assured and PSL, and I am not satisfied on the evidence that, even without the assistance of Mr Hindle and Mr Walters, he would not have brought about Assured and PSL in much the same time frame as in fact occurred.

149. As I have said, Investments claims that the Individual Defendants commenced a new business in the market, in competition with SSF, sooner than would have been the case had they not committed any breaches of duty and obligation. Investments claims that the consequence was that the Shepherds Group's sales people were deprived of the opportunity of consolidating relations with those IFAs who had dealt with SSF prior to the departure of Mr Hindle and Mr Simmons and who ceased to deal with SSF after their departure. Accordingly, Investment claims, not only was SSF deprived of the opportunity of repeat business with those IFAs, but investment was

made with Assured and PSL which otherwise would or might have been made with SSF.

150. It is critical that, in order to establish a claim for damages, the loss allegedly suffered by Financial and Investments is linked to the Individual Defendants' unlawful acts rather than the mere fact of loss of senior management personnel and sales people. The Individual Defendants were entitled to resign. In general, there is no legal impediment to a number of employees deciding in concert to leave their employer and set themselves up in competition.

151. When, at the outset of the trial, I ordered that issues of quantification of loss be determined after the conclusion of the trial before me, I expressly directed that I would nevertheless determine at this stage any contested issues of causation, so as to limit the scope for dispute at any consequential inquiry as to damages.

152. The Defendants claim that there are two issues of causation which arise. The first is whether Investments is correct in its contention that IFAs were approached prior to the resignation of Mr Simmons and Mr Hindle. The second is whether Investments can show that any loss has been suffered by virtue of clients of IFAs ceasing to invest in SSF as a result of the Individual Defendants commencing a new business in the market, in competition with SSF, sooner than would have been the case if the Individual Defendants had not committed any breaches of duty and obligation. The Defendants maintain that Investments has failed to establish either point to the requisite standard of proof, and I should so rule at this stage, with the consequence that Investments can establish no loss and accordingly there should be no order for an inquiry as to damages.

153. Mr Nicholls is content that I make a finding at this stage whether IFAs were approached during the course of the employment of Mr Hindle and Mr Simmons. He objects, however, to any consideration or decision by me, at this stage, as to whether Investments has established that Financial or Investments or SSF suffered any loss by virtue of the clients of IFAs ceasing to invest in SSF as a result of the Individual Defendants' breaches of duty and obligation. The reason for that objection is that Investments claims that the Defendants have failed to give full and proper disclosure of all relevant material, including, in particular, accounting documentation in relation to the business of Assured and PSL.

154. That being the only ground for the objection to the second of the causation issues, I have decided that it is proper and appropriate for me to determine that issue of causation at this stage for the following reasons. Prior to the trial no direction was obtained by either side for a split trial as to liability and quantification of loss or account of profits. Nor had any firm agreement for such a split trial been reached between the parties. Accordingly, if Investments considered that the Defendants had failed to give full and adequate disclosure of all relevant documentation, Investments ought to have resolved that issue before trial. No application was made to adjourn the trial on the ground of inadequate disclosure. Further, as I have said, when I directed at the very outset of the trial that there be a split trial, I expressly directed that I would deal with all contested issues of causation. No objection was taken at that stage by either side to that direction whether on the grounds of inadequate disclosure of relevant material or otherwise.

155. The trial has extended over several days, doubtless at great cost. When I gave my original direction that I would deal with all contested issues of causation of loss, I intended, in accordance with the Overriding Objective, to limit the complexity of the issues to be determined at the post-trial inquiry stage, which I envisaged would take place before a Master. That remains, in my view, the proper approach in accordance with the Overriding Objective.

156. I find that Investments has failed to make out to the requisite standard of proof its case on either of the two causation issues which have been identified.

157. There is no direct evidence, either documentary or by way of oral testimony, that any IFAs were approached by any of the Individual Defendants prior to the resignations of Mr Hindle and Mr Simmons. Investments' case is that Mr Simmons must have started telling IFAs about the proposals for the establishment of the new business as soon as he could. In my judgment, however, that does not assist in identifying the likely date of the earliest approach to IFAs. Such contemporary documentation as exists leans against any finding that IFAs were approached prior to 10 October 2003. In particular, it is manifest from the terms of Mr Simmons' letter of 9 November 2003 to IFAs that he had not previously approached the recipients of the letter since the object of the letter was to explain precisely why they had not heard from him. That letter, and the inference that IFAs had not been approached prior to 10 October 2003, are consistent with the fact that it was only after that date that Assured and PSL were incorporated and were registered with CIMA, agreements were concluded with Barings and Close, bank accounts were opened, and the business plan, Offering Memorandum and due diligence pack were completed.

158. Nor is there any clear or cogent evidence indicating, to the requisite standard of proof, that the business of SSF suffered in consequence of the Individual Defendants commencing a new business in the market, in competition with SSF, sooner than would have been the case if the Individual Defendants had not committed any breaches of duty and obligation. I find, for this purpose, that the business of Assured was up and running for a period of approximately 2 months sooner than it would have been but for the Individual Defendants' breaches of duty or contract, that is to say a period approximately equivalent to the period of unlawful activity by the Individual Defendants between 12 August 2003 and 10 October 2003. There is, however, no cogent evidence that the period of two months made any difference to decisions of IFAs and their clients whether or not to make or to renew an investment in SSF. It is common ground that Mr Leach's sales people were good and successful. Financial, Investments and SSF were aware of the intended departure of Mr Simmons from receipt of his letter of resignation of 1 September 2003, and they were aware of the intended resignation of Mr Hindle by 16 September 2003. As I have said, I conclude that IFAs were not approached by the Individual Defendants about the proposed new business to be undertaken by Assured and PSL prior to Mr Simmons' letter of 9 November 2003, at the earliest. There was therefore a period of at least two months in which the Shepherds Group's sales people did or could have consolidated their relations with IFAs. The evidence is that Assured and PSL were not in a position to do business with the clients of IFAs until some months after Mr Hindle and Mr Simmons had left the Shepherds Group. There is evidence that in the first part of 2004 there were criticisms of SSF in the market, but there is no evidence that the Individual Defendants were responsible for the circulation or fuelling of those

criticisms. MBC itself was suspended from trading in May 2004, as was SSF's TLP business.

159. In the light of all those matters, notwithstanding the assumption that Assured and PSL were able to trade 2 months earlier than they could have done if the Individual Defendants had complied with their fiduciary and contractual obligations to Financial and Investments, and even though there is evidence that IFAs who had placed business with SSF subsequently placed business with Assured, Investments has, in my judgment, failed to establish to the requisite standard of proof that the Individual Defendants' breaches of duty and contract caused loss to SSF, Investments or Financial in the manner alleged.

160. I note that the claimants in *Coleman Taymar* similarly failed to prove any loss.

161. No argument or analysis has been presented to me, on behalf of Investments, that any different measure or type of loss was suffered by Financial or Investments by reason of the breach of fiduciary duty of Mr Simmons and Mr Hindle on the *CMS Dolphin* principle (diversion of a maturing business opportunity).

Account of Profits

162. As I have said, by the conclusion of the trial no claim for an account of profits was pursued against Assured or PSL. Their shareholders include persons other than the Individual Defendants.

163. In view of my finding that the Individual Defendants committed breaches of their fiduciary duties, Investments is entitled to an account of the profits made by them in consequence of their unlawful conduct in promoting after 12 August 2003 the establishment of the business now carried on by Assured and PLC: see *CMS Dolphin.*

164. I shall hear counsel further as to the manner in which that account of profits is to be carried out and the directions which I ought to give in relation to it.

Decision

165. For the reasons given in this judgment, I find that (1) Mr Walters and Mr Hindle were in breach of their fiduciary duties to Financial and in breach of their obligation of loyalty to Financial by virtue of the steps which they took, prior to their resignation from that company, in promoting the establishment of the business now carried on by Assured; (2) Mr Walters, but not Mr Hindle, was in breach of express terms of his contract of employment by virtue of the steps for the same purpose which he took prior to his resignation from Financial, (3) Mr Simmons was in breach of his fiduciary duties and of his obligation of loyalty to Investments by virtue of the steps which he took for the same purpose prior to his resignation from Investments; (4) Mr Simmons and Mr Hindle were in breach of fiduciary duty in exploiting the business of investing in whole life policies on the principle of *CMS Dolphin*; but (5) Investments has failed to establish that Financial or Investments were caused loss as a result of the Individual Defendants commencing a new business in the market, in competition with SSF, sooner than would have been the case if the Individual Defendants had not committed any breaches of duty and obligation while still employed by, and directors of, Financial or Investments and (6) Investments is entitled to an account of profits

made by Mr Walters, Mr Simmons and Mr Hindle in consequence of those breaches of duty. I reject Investments' case against the Defendants based on misuse of confidential information.