# Primary Group (UK) Ltd and others v Royal Bank of Scotland plc and another

[2014] EWHC 1082 (Ch)

CHANCERY DIVISION

ARNOLD J

18–20, 24–27 MARCH, 1–2, 11 APRIL 2014

*Bank – Banker/client relationship – Duty of bank – Duty of confidentiality – Subsidiary of banking group a competitor to bank's customer – Banking group disclosing reports containing confidential information about customer's business to subsidiary – Whether disclosure amounted to a breach of a contractual obligation of confidentiality.*

*Equity – Breach of confidence – Confidential information – Use of information obtained in confidence – Subsidiary of banking group a competitor to bank's customer – Banking group disclosing reports containing confidential information about customer's business to subsidiary – Whether reports had been disclosed to subsidiary in circumstances giving rise to an equitable obligation of confidence – Whether subsidiary acted in contravention of that obligation.*

The first claimant (Primary UK), a wholly owned subsidiary of the second claimant insurance group (collectively, Primary) had banked with the first defendant banking group (RBS) who, at all material times, was the parent to the second defendant insurance company (RBSI), a competitor to three subsidiaries of Primary UK. Despite concerns about a potential for conflict arising from RBS's relationship to RBSI, Primary UK entered into a Senior Facilities Agreement with RBS that contained a number of covenants, breach of which constituted an Event of Default on the part of Primary UK. Subsequently, Primary UK breached two covenants in the agreement and RBS instructed accountants, at Primary's cost, to prepare detailed reports on the company's businesses, financial performance, history, activities, client relationships and funding needs. RBS also asked RBSI and, at least two of its employees to assist it with the matter by providing insurance industry insight. To that end, RBS disclosed the accountants' reports to RBSI, impressing upon the recipients the need to keep them confidential. However, RBS did not inform Primary that it was obtaining advice from RBSI or that it was disclosing the accountants' reports to it; did not ask RBSI for any formal assurances or undertakings as to confidentiality or ask RBSI to set up any formal information barriers or, require that the accountants' reports be subsequently destroyed or deleted. Moreover, RBSI did not take any formal steps to prevent a possible conflict of interest arising from receipt of the reports. Later, Primary repaid all outstanding sums to RBS and, discovered the fact of the disclosure to RBSI of the accountants' reports. It brought proceedings against both RBS and RBSI, alleging breach of confidence. The court was required to determine, inter alia, (i) whether disclosure of the accountants' reports by RBS to RBSI amounted to a breach of a contractual obligation of confidence; and (ii) whether the

accountants' reports had been disclosed to RBSI in circumstances that gave rise to an equitable obligation of confidence that RBSI acted in contravention of. *a*

**Held** – (1) The information contained in the accountants' reports had been confidential to Primary. RBS was not entitled to disclose the information to RBSI. Moreover, it was apparent that RBS had provided assurances in respect of confidentiality to Primary. Accordingly, Primary was entitled to damages for *b* breach of a contractual obligation of confidence. The proper assessment of such damages was the price which Primary could reasonably have demanded of RBS for agreeing to relax the contractual restriction on confidentiality in a hypothetical negotiation between the parties notwithstanding the fact that either party might not have agreed to such a deal. Although Primary was *c* entitled to be compensated for being exposed to the risk that RBSI could have misused the information, RBS had a strong negotiating position in either having the benefit of assistance from an insurance industry perspective such as was available at RBSI, or, proceeding without the benefit of an insurance industry perspective. Accordingly, Primary had no realistic prospect of recovering a substantial sum by way of damages but rather, a nominal sum *d* assessed on the basis of the amount that RBS would have had to pay for an insurance industry perspective if RBSI had not been a subsidiary (see [181], [185], [190] [198]–[205] below); dicta of Arnold J in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [374]–[438] followed; dicta of Lewison LJ in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2013] EWCA Civ 780 at [97] and [107] and *e* dicta of Bankes LJ in *Tournier v National Provincial and Union Bank of England* [1923] All ER Rep 550 at 554 applied.

(2) An equitable obligation of confidence did not only arise where confidential information was disclosed in breach of an obligation of confidence (which might itself be contractual or equitable) and the recipient knew, or had *f* notice, that that was the case but, also where confidential information was acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knew, or had notice, that the information was confidential. Either way, whether a person had notice was to be objectively assessed by reference to a reasonable person standing in the position of the recipient. Further, it was not the law that an equitable obligation of confidence *g* would bind all recipients of confidential information except a bona fida purchase for value without notice. In the instant case, so far as recipients of the reports at RBSI were concerned, they were dealing with senior, professional and responsible bankers at RBS. They were entitled to assume that those bankers would act consistently with their duty of confidentiality, particularly when the purpose of the disclosure of the reports was to enable them to advise *h* RBS who had impressed upon them the need to keep the reports confidential. The situation was not unprecedented at RBS and, applying an objective test, none of the recipients of the reports at RBSI acted in contravention of the obligation of confidence to which they were subject (see [208], [211], [213], [223], [228], [237], [252]–[253] and [259]–[260] below); dicta of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] 86 RPC 41 at 47–48 followed; dicta of *j* Turner V-C in *Morison v Moat* (1851) 9 Hare 241, 20 LJ Ch 513, dicta of Nourse LJ in *Goddard v Nationwide Building Society* [1986] 3 All ER 264 at 271, *Thomas v Pearce* [2000] FSR 718, *R v Department of Health, ex p Source Informatics Ltd* [2000] 1 All ER 786 doubted; dicta of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at

415, dicta of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)*, [1988] 3 All ER 545 at 657–658, dicta of Lord Neuberger in *Imerman v Tchenguiz* [2011] 1 All ER 555 at [116], dicta of Lord Neuberger in *Vestergaard v Bestnet* [2013] 4 All ER 781 at [23]–[27], *Seager v Copydex Ltd* [1967] 2 All ER 415 considered.

**Notes**

For the essential features of confidentiality see 19 *Halsbury's Laws* (5th edn) (2014) para 8.

For breach of an obligation of confidence generally see 19 *Halsbury's Laws* (5th edn) (2014) para 68.

For breach of confidence in equity and the equitable jurisdiction in breach of confidence, see 47 *Halsbury's Laws* (5th edn) (2014) para 232.

**Cases referred to**

*A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545, [2003] QB 195, [2002] 3 WLR 542.

*A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER (Comm) 1, [2009] 2 All ER 1127, [2009] 1 WLR 1988.

*A-G v Blake (Jonathan Cape Ltd, third party)* [2000] 2 All ER (Comm) 487, [2000] 4 All ER 385, [2001] 1 AC 268, [2000] 3 WLR 625, HL.

*A-G v Guardian Newspapers Ltd (No 2) ('Spycatcher')* [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

*A-G v Parry* [2004] EWHC 3201 (Ch), [2004] EMLR 223.

*Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780, [2002] All ER (D) 450 (May).

*Albert (Prince) v Strange* (1849) 2 De G & Sm 652, 47 ER 1302, LC.

*Argyll (Duchess of) v Argyll (Duke)* [1965] 1 All ER 611, [1967] Ch 302, [1965] 2 WLR 790.

*Ashburton (Lord) v Pape* [1913] 2 Ch 469, 82 LJ Ch 527, [1911–13] All ER Rep 708, CA.

*Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] IP & T 86.

*Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633, [2003] 2 WLR 80; *rvsd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457, [2004] 2 WLR 1232.

*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, [1968] FSR 415.

*Copland v United Kingdom* [2007] IP & T 600, (2007) 25 BHRC 216, (2007) 45 EHRR 858, [2007] All ER (D) 32 (Apr).

*Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.

*Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 All ER (Comm) 1, [2007] 4 All ER 545, [2008] 1 AC 1, [2007] 2 WLR 920.

*Enfield London Borough v Outdoor Plus Ltd* [2012] EWCA Civ 608, [2012] 2 EGLR 105.

*English and American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232.

*Evans (J) & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078, CA.

*Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.

*Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); *affd* [2013] EWCA Civ 780.

*Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA.
*Goddard v Nationwide Building Society* [1986] 3 All ER 264, [1987] QB 670, [1986] 3 WLR 734, CA.
*Grace Shipping Inc and Hai Nguan & Co v C.F Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd's Rep 207, PC.
*Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, CA.
Hellewell v Chief Constable of Derbyshire [1995] 4 All ER 473, [1995] 1 WLR 804.
*HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2007] 2 All ER 139, [2008] Ch 57, [2007] 3 WLR 222.
*Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] 1 All ER 555, [2011] Fam 116, [2011] 2 WLR 592.
*London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 88.
*Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 EGLR 29.
*McDonald's Hamburgers Ltd v Burgerking (UK) Ltd* [1987] FSR 112, CA.
*Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* [1984] HCA 73, (1984) 156 CLR 414, Aus HC.
*Morison v Moat* (1851) 9 Hare 241, 20 LJ Ch 513, 15 Jur 787, 18 LTOS 28.
*Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, HL.
*Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] 4 LRC 200, [2011] 1 WLR 2370, PC.
*Pizzey v Ford Motor Co* [1993] 17 LS Gaz R 46, [1994] PIQR P 15, CA.
*Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 12 LDAB 162.
*R v A-G for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132, [2004] EMLR 24.
*R v Department of Health, ex p Source Informatics Ltd* [2000] 1 All ER 786, [2001] QB 424, [2000] 2 WLR 940, CA.
*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER (Comm) 1, [2012] 1 All ER 1137, [2011] 1 WLR 2900.
*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378, [1995] 3 WLR 64, PC.
*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413, CA.
*Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.
*Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134.
*Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* [1991] FCA 154; 28 FCR 291; 99 ALR 679, NSW Reg.
*Spencer v United Kingdom* (Application 28851/95, 28852/95) (1998) 25 EHRR CD, [1998] EHRLR 348, ECt HR.
*Spurling (J) Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, CA.
*Thinc Group v Armstrong* [2012] EWCA Civ 1227.
*Thomas v Pearce* [2000] FSR 718, CA.
*Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686, [1971] 2 QB 163, [1971] 2 WLR 585, CA.
*Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, [1923] All ER Rep 550, CA.

*Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 4 All ER 781, [2013] 1 WLR 1556, [2013] IRLR 654.
*Volkswagen Aktiengesellschaft v Garcia* [2013] EWHC 1832 (Ch).
*Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798.
*WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER (Comm) 129, [2008] 1 All ER 74, [2008] 1 WLR 445.

**Claims**

The first and second claimants, Primary UK and Primary Group, brought a claim for damages against the first and second defendants, the Royal Bank of Scotland and Royal Bank of Scotland Insurance Ltd, for breach of confidence in respect of the disclosure, by the first defendant to the second defendant, of certain, confidential accountants' reports addressing the claimants' financial position that had been commissioned by the claimants and first defendant to address the first claimant's breach of covenants in a senior facilities agreement. The facts are set out in the judgment.

*Alain Choo-Choy QC* and *Michael Fealy* (instructed by *Quinn Emanuel Urquhart & Sullivan LLP*) for the claimants.
*Charles Hollander QC* and *Edward Brown* (instructed by *Addleshaw Goddard LLP*) for the first defendant.
*Stephen Rubin QC* and *Matthew Parker* (instructed by *Reynolds Porter Chamberlain LLP*) for the second defendant.

*Judgment was reserved.*

11 April 2014. The following judgment was delivered.

**ARNOLD J.**

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## INTRODUCTION

**[1]** The second claimant ('Primary Group') is the parent company of a group which has carried on business in the non-life insurance industry since 1997. The first claimant ('Primary UK') is a wholly-owned subsidiary of Primary Group. From 1997 to 2007 the first defendant ('RBS') provided banking services to the claimants (collectively, 'Primary'). At the times that are relevant to this dispute, both RBS and the second defendant ('Direct Line'), then called the Royal Bank of Scotland Insurance Ltd (frequently referred to in the contemporaneous documents as 'RBSI'), were subsidiaries of the Royal Bank of Scotland Group plc ('RBS Group'), but Direct Line is no longer a subsidiary. Direct Line was a competitor to three subsidiaries of Primary UK including GBI (Holdings) Ltd which traded as Swiftcover ('Swiftcover'). Primary contend that, when Primary expressed concern about this, RBS assured them of confidentiality. On 17 January 2006 Primary UK entered into a Senior Facilities Agreement with RBS ('the SLF'), which contained a number of covenants by Primary UK. Primary UK was soon in breach of two of those covenants. This led to RBS taking various steps, including instructing KPMG LLP to prepare reports on Primary's financial position referred to as 'the Medway reports'. It is common ground that RBS disclosed copies of the Medway reports to at least one individual in Direct Line without seeking or obtaining Primary's consent and that that individual used the Medway reports at least for the purposes of advising RBS. Primary contend that this constituted an actionable breach of confidence by both RBS and Direct Line. Primary also contend that their information was disclosed more widely and that it was used for Direct Line's own purposes. RBS and Direct Line both deny committing any breach of confidence. In the alternative, RBS and Direct Line contend that any breach sounds only in nominal damages.

THE WITNESSES

*Primary's witnesses*

[**2**] Philip James is a founding director and the majority shareholder of Primary Group. He was a claimant in these proceedings, alleging that RBS had disclosed his personal asset schedule to Direct Line, but that claim was abandoned at the beginning of the trial. Mr James clearly feels strongly that Primary was badly treated by RBS, specifically RBS's Special Lending Services ('SLS') division. Furthermore, he was very keen to ensure that he presented his side of the story as fully as possible. Yet further, some aspects of his evidence are difficult to reconcile with the documentary record. Counsel for RBS submitted that Mr James was 'a thoroughly unreliable and partisan witness'. I think this goes too far, in particular in so far as it suggests that Mr James was deliberately untruthful. Furthermore, I do not accept some of the criticisms which counsel made of Mr James's evidence. For example, counsel criticised Mr James for referring to his payment of £10m to Primary (as to which, see below) as an 'injection' of money, but that is how it was referred to by RBS in several contemporaneous documents. Nevertheless I agree that Mr James was not a very reliable witness, and I have therefore treated his evidence with caution. As will appear, however, on the point that matters most, I have concluded that I accept his evidence.

[**3**] Lord Carter of Coles has been the chairman and a non-executive director of Primary UK since 1999. He was a member of its audit and remuneration committee from 2002 to 2007 and was chairman of the special committee described below from 2006 to 2007. He has held a number of commercial positions, and has had a distinguished career in public life which has included chairing a number of government reviews. Lord Carter was a very clear and direct witness.

[**4**] Dr Margaret Downes was a non-executive director of Primary UK from 2002 to 2007 and non-executive Chairman of Primary Insurance Co Ltd ('PICL') from 2002 to 2009. She was formerly a partner of Coopers & Lybrand Ireland, President of the Institute of Chartered Accountants in Ireland and a non-executive director and Deputy Governor of the Bank of Ireland. Dr Downes was another very clear and direct witness.

[**5**] Susan Bradbury was a finance director for various entities within RBS Group from 1994 to 2004. During this period she was finance director for UK Insurance Ltd ('UKI'), which was part of the Direct Line Insurance Division, when it acquired Churchill Insurance Co Ltd ('Churchill') and when it sold an insurance portfolio to UK Underwriting Ltd ('UKU'), a subsidiary of Primary UK. In October 2004 she left RBS Group and joined Primary. Shortly afterwards, she was appointed as Chief Financial Officer. She was a director of Primary UK and an officer of Primary Group. She is presently working for a new insurance start-up. Ms Bradbury struck me as a very capable person and as a good witness.

[**6**] Andrew Blowers started his career in the insurance industry in 1989. From 2001 to 2003 he was Executive Director of Sales and Marketing for Churchill. He left the company when it was acquired by RBS Group. Shortly afterwards, he and a group of colleagues established GBI (Holdings) Ltd, which traded as Swiftcover, and Mr Blowers became the Chief Executive Officer. Swiftcover was a subsidiary of Primary UK until it was sold to Axa. Mr Blowers is currently Chairman and a non-executive director of Qmetric Group Ltd. He was a straightforward witness.

[7] Alastair Murray is a chartered accountant and a director of Primary UK and Primary Group. He was a straightforward witness.

*RBS's witnesses*

[8] Nicola Baker worked for GE Capital in mergers and acquisitions and private equity for several years before joining RBS's SLS division from 2003 to 2007. She is now Executive Director in RBS's Capital Resolution division. She was rather defensive in her manner, and appeared uncomfortable at points in her evidence.

[9] Michael Birch worked for Barclays Bank from 1989 to 2002. He was employed by RBS's SLS division from 2002 to 2011. He is now Lead Business Analyst with the Pensions Regulator. On the whole, he was a clear and careful witness; but he too exhibited some discomfort at certain points in his evidence.

[10] Richard Kerton started working for RBS in 1987 and joined the Insurance Team in 1999. In 2005 he was appointed to lead a Transaction Team in the Financial Institutions Group (FIG). He was Primary's relationship manager from mid-2004 to July 2005. He is now Managing Director of the Financial Institutions Structured Finance Team at RBS. He was a straightforward witness.

[11] Roland Stumpf worked for Barclays Bank in various roles from 1989 to 2000. He then joined Chubb Insurance as a senior underwriter. He joined RBS's Insurance Team, which was a specialised unit within FIG, on 18 July 2005 and became Primary's relationship manager. He is presently Director in the Commercial Banking group at Coutts Bank, a subsidiary of RBS Group. He was a straightforward witness.

[12] Derek Sach joined RBS to set up SLS in 1992. He was in 2005–2007, and remains, Head of SLS, which has since been re-named Global Restructuring Group. He was a clear and direct witness.

[13] Christopher Dewis obtained a degree in commerce (with a major in accounting and finance) from the University of Tasmania, after which he was employed as a financial analyst by the Department of State Development from January 1989 to October 2002. From October 2002 to July 2004 he worked for Australian and New Zealand Banking Group. He joined RBS as a Regulatory Risk Officer in September 2004, where he remained in July 2006. He left RBS and joined Standard Chartered Bank in Singapore in 2010. Mr Dewis seemed somewhat nervous, but otherwise was a straightforward witness.

[14] Stephen Brennan, legal counsel for RBS, made a short witness statement. He did not attend trial to give evidence as he was not in the country. His statement was therefore tendered as hearsay evidence.

*Direct Line's witnesses*

[15] Richard Houghton was an accountant at Deloitte & Touche from about 1987 to 1997. During this period he became a licensed insolvency practitioner. He then moved to National Australia Bank, followed by RBS. He joined Direct Line in about 2001, then moved to Ulster Bank from 2003 to 2004. He was Group Finance Director of Direct Line from 2004 to 2005 and Chief Operating Officer from 2005 to March 2007, when he left Direct Line. He is currently Chief Financial Officer of RSA Insurance Group plc. Mr Houghton was a good witness.

[16] Arieh Gilbert worked as a consultant for Arthur Andersen and then Deloitte & Touche from 1992 to 2004. He joined Direct Line as a Strategy Manager in the Strategy Team in July 2004. He was promoted a number of

times within the Strategy Team and ended with the title of Strategy Director. He left Direct Line in February 2011. He is currently working in his own account. Mr Gilbert gave evidence in a distinctly combative manner which made me approach his evidence with some caution. Furthermore, in one respect, I have not felt able to accept his evidence. Apart from that, however, I see no reason to believe that he was untruthful.

[**17**] Nathan Bavidge joined Direct Line in June 2006 as a Strategy Manager within the Strategy Team. He is currently Head of Finance and Chief Customer Officer. He was a straightforward witness.

[**18**] Kate Syred joined Direct Line in 2000 to work in the Performance Management Team. Since then she has held a number of different positions within Direct Line and is now Commercial Director. She was a straightforward witness.

[**19**] Gail Rutherford joined Direct Line in March 2011 as Acting Head of Strategy and is presently Head of Corporate Strategy and Development. Since she was not there at the relevant time, she was unable to give evidence of fact concerning the events in question. Most of her two witness statements consisted of expressions of opinion. She did not purport to express such opinions as an expert, however, nor did Direct Line seek or obtain permission to adduce expert evidence. Surprisingly, counsel for Primary only objected to the admissibility of this evidence immediately before Ms Rutherford was called. During the course of the subsequent discussion between myself, counsel for Primary and counsel for Direct Line, counsel for Direct Line explained that he only intended to rely upon Ms Rutherford's expressions of opinion for certain purposes. In the light of that assurance, counsel for Primary withdrew his objection to the admission of the evidence. Understandably, he nevertheless confined his cross-examination to a small number of points. Ms Rutherford was a straightforward witness.

APPROACH TO FACT FINDING

[**20**] All the witnesses in this case were faced with the difficulty of attempting to recall the events of 2005–07. Counsel for RBS reminded me of two well-known statements of the correct approach in such circumstances. In *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 Lord Pearce said at 431:

> 'It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.'

In *Grace Shipping Inc and Hai Nguan & Co v C.F Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd's Rep 207 Lord Goff of Chieveley said at 215:

> 'It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities.'

I have adopted this approach.

[**21**] There were few real conflicts of evidence, as opposed to differences of recollection and emphasis, between the witnesses on factual questions. As a general observation, I consider that the Primary witnesses are more likely to have remembered the relevant events accurately than the RBS witnesses, both because Primary's only banking relationship at the time was with RBS and because it was a rather traumatic period for Primary, whereas RBS had many customers and Primary was not the only one in default. As for Direct Line's main witnesses, their involvement was relatively unusual and so they will have had some reason to remember the relevant events.

MISSING WITNESSES

[**22**] Despite the considerable number of witnesses who testified, each party failed to call at least one witness whose evidence would have been material. Primary failed to call David Arthur, who was its legal counsel at the time. RBS failed to call Steve Cockell, Ian Grimsley or John Mallett, whose role is described below. It is not clear whether they are still employed by RBS. Direct Line failed to call Annette Court and Christopher McKee, whose role is also described below. Neither of these individuals is currently employed by Direct Line, and I was informed by counsel for Direct Line that they declined to assist voluntarily when approached by Direct Line's solicitors.

[**23**] I have not drawn any inference adverse to the relevant parties from the fact that these witnesses were not called. The fact remains, however, that, if they had been called, they might have been able to shed light on some of the events discussed below. Their absence has made it all the more important for me to rely upon the documentary record. As will appear, this is particularly true in the case of Ms Court and Mr McKee.

THE FACTS

[**24**] Although the factual basis for Primary's claims lies within a relatively narrow compass, it is the Defendants' position that it is important to view the matters relied on by Primary in a wider context. Accordingly, it is necessary for me to relate the facts in some detail.

*Primary's position in early-mid 2005*

[**25**] During the period 1997 to early 2005, Primary had grown rapidly, both organically and through acquisitions and start-ups, from a small wholesale and reinsurance brokerage and agricultural underwriting agency, into a diverse insurance and reinsurance distribution and underwriting group. (They have continued to grow since then, and now employ nearly 1,000 people and have premium turnover of some US$1.25bn per annum.) Mr James's evidence is that Primary enjoyed a close relationship with RBS, and in particular its relationship manager John Holm, during the period 1997–2004. During this period, Primary's borrowing with RBS was relatively modest, however.

[**26**] As a result of its rapid growth, Primary's financial reporting and forecasting systems had become inadequate. This was one of the reasons for the recruitment of Ms Bradbury, and from October 2004 onwards she put a lot of effort into improving the situation, but it took time.

[**27**] In early 2005, Primary decided to seek to obtain a substantial loan facility in order to repay inter-company debts, fund further organic growth, start new businesses and make further acquisitions. As at the end of April 2005, Primary

had a temporary overdraft facility of £3.5m and was talking to RBS about overdraft and loan facilities of £12m. Primary was contemplating seeking a facility of up £100m, however.

[**28**] One of the issues Mr James and his colleagues considered was whether to continue the existing banking relationship with RBS or to move elsewhere. Mr James's evidence is that he and other board members and shareholders in Primary were concerned about potential conflicts arising from RBS's relationship with Direct Line. At this time, Mr James and others within Primary were aware that Swiftcover intended to establish an internet-based motor insurance business. The Swiftcover business was launched in July 2005 and was the UK's first exclusively internet-based insurance company. The launch was accompanied by a provocative television advertising campaign. Swiftcover was an obvious potential competitor for Direct Line's motor insurance business trading under the name Direct Line, which at that time sold policies both through call centres and via the internet. Furthermore, a number of Swiftcover's senior managers (and minority shareholders) had formerly worked for Direct Line's Churchill business. Two of those executives (Mr Blowers and Steve Hardy) told Mr James that the Chief Executive Officer of the RBS Group, the then Sir Fred Goodwin ('Mr Goodwin'), ran the business very aggressively and took a close interest in the affairs of Direct Line. They expressed to Mr James their concerns that Mr Goodwin would not be happy to support former employees in competition with Direct Line and that they were worried that information would not be kept confidential by RBS.

*Assurances of confidentiality*

[**29**] Mr James and Ms Bradbury gave evidence that RBS's representatives gave Primary's representatives numerous assurances from this time onwards that all information provided by Primary to RBS would be kept confidential and would not be passed to Direct Line. Apart from the meeting on 9 May 2005 and the telephone conversation on about 27 July 2005 discussed below, their evidence is not specific as to when such assurances were given. Furthermore, there is relatively little documentary support for this evidence. It is, however, supported by the e-mail from Mr James to Mr Hardy dated 31 August 2005 discussed below.

*The 9 May 2005 meeting*

[**30**] On 9 May 2005, Mr James, Ms Bradbury, Ian Bond and Mike King of Primary made an 'investor style' presentation to RBS. RBS was represented by Mr Kerton (who was Primary's relationship manager at that time), Steve Cockell (who was Managing Director of FIG at that time) and probably one other person. Mr James's and Ms Bradbury's recollection was that the other person was John Mallett. Mr Kerton thought it was more likely that Mr Grimsley had attended than Mr Mallett. This is supported by the fact that Mr Mallett replaced Mr Grimsley as Head of the Insurance Team in early July 2005 following a handover period. On the other hand, it is possible that Mr Mallett attended the meeting in the absence of Mr Grimsley: there is documentary evidence that Mr Grimsley was in Bermuda the week before the 9 May 2005 meeting. In my view the evidence does not permit a conclusion even on the balance of probabilities as to whether Mr Mallett attended the meeting or not.

[**31**] The Primary team had a series of PowerPoint slides which projected onto a screen. It is possible that the attendees of the meeting received copies of

the slides. The last slide was headed 'The RBS/Primary Relationship' and the penultimate bullet point read 'RBS should explain how potential conflicts will be managed or avoided'.

[**32**] Mr James's evidence was there was considerable discussion during the meeting about three of Primary's businesses (Swiftcover, UKU and PBSH) that competed with Direct Line (and in the case of UKU and PBSH, with another RBS customer, Towergate). The RBS attendees said that they were comfortable having a direct competitor to Direct Line as a customer, and that Primary would not be treated differently or have their confidential information shared with Direct Line. Primary were told something to the effect of 'we do this all the time, we wouldn't have a business if we shared information, we bank many competitors'. Mr James's recollection was that these assurances were mainly given by Mr Mallett. Counsel for RBS submitted that Mr James's recollection was unreliable given, in particular, that (a) in his witness statement Mr James had mistakenly identified Mr Stumpf (rather than Mr Kerton) being present (a point Mr James corrected in his evidence in chief after Mr Stumpf had stated that he only joined RBS on 18 July 2005) and (b) Mr James had not specifically identified Mr Mallett as the person who had given the assurances at this meeting prior to cross-examination (although he had identified Mr Mallett as one of the persons who had given assurances). I have taken these points into account, as well as the fact that Mr James may be mistaken as to Mr Mallett's attendance at the meeting at all.

[**33**] Ms Bradbury, who is now an independent witness, did not specifically recall this issue being discussed at the 9 May 2005 meeting; but she did recall such assurances being given on repeated occasions and the 9 May 2005 meeting is a prime candidate for such an occasion.

[**34**] Mr Kerton did not specifically remember the 9 May 2005 meeting at all. He nevertheless said that he did not remember any discussion about confidentiality, had never been asked for or given any assurance of the kind mentioned by Mr James and would have made a note for the file if he had. On the other hand, if Mr James's recollection is correct, it was not Mr Kerton who gave the assurance and there is no evidence that Mr Kerton made a note of the meeting at all. Furthermore, Mr Kerton agreed that, if requested by a customer, he would readily give an assurance that he would not pass the customer's information to a competitor even if the competitor was in the same group of companies as the bank. (Mr Stumpf gave evidence to the same effect.)

[**35**] For the reasons discussed above, there is no evidence about the meeting from Messrs Cockell, Grimsley or Mallett. As stated there, I decline to draw an inference against RBS from the fact that they were not called. But equally I cannot assume that their evidence would have been helpful to RBS.

[**36**] There is only one note of this meeting, a one-page manuscript note by an RBS attendee, Mr Kerton thought probably Mr Cockell. It does not record anything about confidentiality or conflicts being discussed, but it does not purport to be a verbatim record of the meeting. Rather, it is a short list of points of interest to the author expressed in abbreviated terms.

[**37**] Having considered all of the evidence, and the inherent probabilities, I conclude that it is more probable than not that an assurance was given as described by Mr James and Ms Bradbury. It is clear that Primary were concerned about the issue at the time. It is inherently probable that Primary's representatives asked for an assurance, as is suggested by the PowerPoint slide. It is also inherently probable that RBS's representatives would have given such an assurance if asked – they had no reason not to. It is not surprising that

Mr James and Ms Bradbury remembered assurances being given, whereas Mr Kerton did not, since they had reason to remember it, but he did not. Mr James's and Ms Bradbury's recollection is supported by the evidence relating to the 27 July 2005 conversation considered below. Above all, it is supported by Mr James's subsequent e-mail to Mr Hardy. Finally, it also receives some indirect support from what happened during the meeting on 12 October 2006 discussed below.

[**38**] Counsel for RBS submitted that, if any assurance was given at all, it was probable that it was simply an assurance that RBS would not be negatively influenced towards Primary by reason of its competition with Direct Line. I do not accept this submission, which is contrary both to Mr James's and Ms Bradbury's evidence and to Mr James's e-mail.

*Primary send RBS Swiftcover's business plan*

[**39**] On about 12 May 2005 Primary sent RBS a copy of Swiftcover's business plan. It was annotated and dated 12 May 2005 by Mr Kerton's assistant Ian McKay.

*Direct Line's reaction to Swiftcover*

[**40**] Swiftcover did not go unnoticed by Direct Line. An internal Direct Line analysis of market price assumptions dated 13 May 2005 included Primary Group as a 'threatening' new competitor: 'How significant a threat these new entrants will be remains to be seen and RBS continues to keep a watching brief on these companies.' A Direct Line Executive Review dated 19 September 2005 records that 'Swiftcover launched in June 2005' and, in the context of a discussion of the internet as a 'fast growing highly competitive channel', notes that 'Swiftcover TV adverts portray call centres as "chickens" and call to action purely web focused'. Later the same document refers to 'Other ambitious competitors eg Easy, SwiftCover (pricing aggressively)'. A draft Direct Line board paper dated October 2005 noted that continued migration of new business to the internet was driving profit out of the motor market and that Swiftcover was a new market entrant for 2005 as the 'first internet only insurance company'.

[**41**] A draft UK External Market Overview dated 25 January 2006 for a 'Scene-Setting Session' planned for 6/7 March 2006 noted that: 'The internet continues to gain share, leading to some smaller and new entrants players with web focussed propositions gaining competitive advantage.' A chart of competitors placed Primary in the 'small players' row of the 'watchful' column ('Currently not a significant threat to RBS Insurance but their actions suggest they may be in the future') for both UK General Insurance and UK Personal Motor. A Briefing Pack for the same session included 'Growth of the Internet' and 'Innovation' as among the 'key trends/issues', the latter being exemplified by 'Swiftcover launching the first internet focussed brand'. Later in the same document, Swiftcover was described as an 'Internet focussed brand with a strong price proposition launched in July 2005 backed by a large advertising spend' and was placed in the 'Watchful/Small player' category.

*The application to the Credit Committee in June 2005*

[**42**] On 23 June 2005 Mr Kerton presented an application on behalf of Primary to RBS's Credit Committee for an aggregate lending facility of £30m. The Credit Committee was concerned with a number of aspects of the proposal, including the lack of reliable financial information and the overall

corporate governance. The Credit Committee agreed to approve a revolving credit facility of £5m as 'an act of good faith'. The provision of the remainder of the facility sought was made conditional upon a pre-lending review by independent accountants.

*Appointment of Ernst & Young*

[**43**] In July 2005 RBS appointed Ernst & Young LLP ('E&Y'), at Primary's expense, to carry out what was described as a 'due diligence' exercise.

*Telephone conversation on 27 July 2005*

[**44**] In that context, Mr Hardy sent Ms Bradbury and Fiona Munro of Primary an e-mail on 27 July 2005 saying that he was 'very nervous about sharing all of our future plans to the advisors of the number 1 player in our market. Is there a confidentiality agreement in place to guarantee our data won't end up on Annette Court's desk (for Fiona – she is the CEO of [Direct Line])?'. Ms Bradbury's evidence was that her reaction to Mr Hardy's concern was to raise the issue with Mr Stumpf, who had taken over the relationship manager role from Mr Kerton by this stage. Mr Stumpf assured her that RBS would treat Primary's information as confidential and would not pass it to another group company without Primary's consent. Accordingly, on the same day she replied to Mr Hardy and Ms Munro that: 'RBS are happy to give confidentiality. EY have via engagement letter.' Mr Stumpf did not recall any such conversation, but accepted that it was possible that it had occurred and that he had given such an assurance.

[**45**] Again, I conclude that it is more probable than not that Mr Stumpf did give the assurance described by Ms Bradbury. It is inherently probable for the reasons given above and Ms Bradbury's evidence is supported by her contemporaneous e-mail as well as Mr James's subsequent e-mail to Mr Hardy. Counsel for RBS submitted that, if any assurance was given at all, it was probable that it was simply an assurance that Primary's information would not be passed to Ms Court (or, by implication, to Direct Line's Executive Committee). I do not accept this submission, which is inherently improbable and contrary to Ms Bradbury's evidence. (I would add that, for reasons that will appear, it would not assist RBS if that was the nature of the assurance.)

*Mr James's e-mail dated 31 August 2005 and an undated meeting*

[**46**] Mr James gave evidence that similar assurances to those given by RBS at the 9 May 2005 meeting were also given by RBS at a later meeting at which Mr Stumpf was present, but he could not remember the date of this meeting although his best estimate was between July and September 2005.

[**47**] This evidence, as well as the evidence relating to the meeting on 9 May 2005 and the telephone conversation on 27 July 2005, is supported by the e-mail from Mr James to Mr Hardy, copied to Mr Arthur and Mr Bond, dated 31 August 2005 which I have already referred to. In this e-mail Mr James was explaining to Mr Hardy a problem that had arisen because a document which Primary needed to sign in order for certain payments, including Mr Hardy's marketing expenditure for Swiftcover, to be made was not considered by RBS to be in order. In this context Mr James said:

> 'The general terms of the facility were agreed by RBS back in May and the finer detail about six weeks ago. The proposal is that in the future a larger facility will be put in place on a drawn down basis to fund Group's

future growth. The Group's plans as shown to RBS have always included your current forecast expenditure for GBI [ie Swiftcover] over the next year and we had also indicated that these plans may be stepped up. Hence my question to you and Andrew the other day and the need for us to meet. At every stage we have also sought and been assured of total confidentiality of our plans given that Primary competes with RBS in a number of areas.

We have however been continually let down by RBS's service on contractual documentation …

I know that for a long time there has been a view that RBS is deliberately trying to wobble certain of our businesses that compete with them.

I genuinely don't believe this to be the case but obviously situations like this don't make one feel any better.'

[**48**] Mr James said that it was as a consequence of these assurances, among other things, that Primary UK decided to refinance with RBS. I accept that evidence.

*RBS send Primary account opening forms*

[**49**] On 1 September 2005 Duncan Childs of RBS sent Ms Munro by e-mail a set of four account opening forms. The main form was New Account Opening Form A for a Business Current Account (version dated 28 June 2005). Section 8 of the form provided:

'**Declaration and signature**(**s**)

I/We the details on this form are full and correct and agree to notify the Bank of any changes.

I/We have read and understood the Business Current Account Terms and Conditions and agree to be bound by them.

I/We confirm the application is signed in accordance with the Bank Account Mandate.

**Your consent**

It is important that you have read and understood the section posted with this symbol [padlock] in the Business Current Account Terms and Conditions. By signing this application you consent to your information being processed as described therein.

[Signatures]'

[**50**] The Business Current Account Terms & Conditions provided:

'**Definitions**

- "Bank" means The Royal Bank of Scotland plc
- "customer(s)" means you, the person or persons, partnership, company, limited liability partnership, club, society, association, church, charity or trust in whose name(s) the account is opened
- "account" means The Royal Bank of Scotland Business Current Account

[**padlock**] **Your information**

We are a member of The Royal Bank of Scotland Group (the Group). If you would like a list of other Group companies, please telephone 020 7085 6498 or visit rbs.co.uk.

We may use and share your information with other members of the Group to help us and them:

- assess financial and insurance risks;
- recover debt;

- develop services and systems;
- prevent and detect crime.

We do not disclose your information to anyone outside the Group except:

- where we have your permission; or
- where we are required or permitted to do so by law; or
- to other companies who provide a service to us or you; or
- where we may transfer rights and obligations under this agreement.

From time to time we may change the way we use your information. Where we believe you may not reasonably expect such a change we shall write to you. If you do not object within 60 days, you consent to that change.'

[**51**] Slightly curiously, it appears that the customer copy of the Terms & Conditions which Mr Childs sent was the version dated 28 June 2005, whereas the bank copy (which provided for signature by the customer) was the version dated 23 May 2005, but nothing turns on this since there is no material difference between the two versions.

[**52**] There is no specific evidence that anyone signed and returned the New Account Opening Form or Terms & Conditions on behalf of Primary. It is clear from Ms Bradbury's evidence, however, that Primary did generally sign and return forms sent by RBS. Both for that reason and because it is inherently likely, I find that it is probable that someone at Primary UK did sign and return the New Account Opening Form and the Terms & Conditions as part of the process of opening a new business current account.

*The E&Y report*

[**53**] E&Y produced a report in two parts on 19 September 2005. Amongst other things, the report explained that:

(i) Operational cash flows had not been sufficient to fund costs of recent acquisitions, internal start-up businesses and a dividend of $29m (£16m) in 2004.

(ii) There were issues with taxation compliance, in particular as Primary had stopped filing VAT returns and had incurred substantial liabilities on intra-company transfers but not accounted for taxation.

(iii) There were key regulatory and compliance issues, including a lack of management explanations for client money movements.

*Planned application to the Credit Committee on 4 November 2005*

[**54**] A renewed application for a substantial facility increase was scheduled to be presented before the Credit Committee on 4 November 2005. The application had to be postponed, however, because of problems which emerged from the management information provided by Primary. In particular, the September management accounts forecast profit before tax (PBT) of £9m, whereas previous forecasts had assumed that the figure would be £14.5m. Mr Stumpf described this contemporaneously as a 'significant problem'.

*Primary's meeting with Barclays*

[**55**] For their part, Primary continued to have concerns as to the conflict posed to RBS by its involvement with Direct Line. This was one of the reasons why, as late as November 2005, Primary considered moving their business to Barclays. On 8 November 2005 Mr Bond e-mailed Mr James a note of a

meeting Mr Bond had had with Barclays the previous day. Mr Bond's note of the meeting records that he had 'explained to [the Barclays' representative] that there was a perceived conflict with RBS's involvement in Direct Line (DLG) and Primary Group developing SwiftCover. Whilst Swift Cover is still insignificant in DLG terms there was still a degree of discomfort on PGL's behalf real or not about potential conflicts.'

*Mr James's personal guarantee*

[**56**] During the course of the discussions between Primary and RBS during this period, RBS required the provision of a personal guarantee from Mr James (as majority shareholder). Mr James agreed to execute a personal guarantee (eventually in the amount of £7m).

*Application to the Credit Committee on 7 December 2005*

[**57**] Following various promises and assurances made by Primary's management, Mr Stumpf presented the renewed application for increased borrowing at the Credit Committee meeting on 7 December 2005. Mr Stumpf supported the application, and in response to a question from one of the committee as to whether 'there were likely to be any more unwelcome surprises from this connection' said that he was confident that they now had a full picture. The Credit Committee approved, subject to a desktop review that was delivered by E&Y on 16 January 2006, total facilities of £30m comprising a £5m revolving working capital facility and a £25m term loan facility.

*The SLF*

[**58**] On 17 January 2006 RBS entered into the SLF with Primary UK. The SLF is a lengthy and detailed agreement running to 157 pages prepared by Clifford Chance LLP. Under the SLF, RBS (acting as Mandated Lead Arranger, Agent, Issuing Bank and Security Trustee) agreed to provide Primary UK with a Term Facility of £25m for a period of four years and a Revolving Facility of £5m. It also envisaged the provision of various Ancillary Facilities, including in particular an overdraft facility and a letter of credit facility.

[**59**] The SLF was subject to a number of covenants by Primary UK contained in cl 25.2. By cl 27.2(a), breach of any of those covenants constituted an Event of Default. By cl 27.13(b), RBS was entitled, on and after the occurrence of an Event of Default, to declare all outstanding amounts under the Utilisations (defined so as to include the Term Facility and Revolving Facility) to be immediately due and payable. By cl 27.13(f), it was also entitled, in that event, to declare all outstanding amounts under the Ancillary Facilities to be immediately due and payable.

[**60**] Clause 8.3(c) provided that, with two exceptions, in the event of 'any inconsistency between any term of an Ancillary Facility and any term of this Agreement, this Agreement shall prevail'.

[**61**] Clause 8.6 provided:

> '**Information**
>
> Each Borrower and each Ancillary Lender shall, promptly upon request by the Agent, supply the Agent with any information relating to the operation of an Ancillary Facility (including the Ancillary Outstandings) as the Agent may reasonably request from time to time. Each Borrower consents to all such information being released to the Agent and the other Finance Parties.'

[**62**] Clause 24.7(d) provided that the Company (i e Primary UK) was required to supply to the Agent:

> 'promptly on request, such further information regarding the financial condition, assets and operations of the Group or the Parent as the Agent may reasonably request.'

[**63**] Clause 28.7 provided as follows:

> '**Disclosure of information**
>
> (a) Any Lender may disclose to any of its Affiliates and any other person:
>
> (i) to (or through) whom that Lender assigns or transfers (or may potentially assign or transfer) all or any of its rights and obligations under the Finance Documents;
>
> (ii) with (or through) whom that Lender enters into (or may potentially enter into) any sub-participation in relation to, or any other transaction under which payments are to be made by reference to, this Agreement or any Obligor; or
>
> (iii) to whom, and to the extent that, information is required to be disclosed by any applicable law or regulation; or
>
> (iv) for whose benefit that Lender creates Security (or may do so) pursuant to Clause 28.8 (*Security Interests over Lenders' rights*); and
>
> (b) any Finance Party may disclose to a rating agency or its professional advisers, or (with the consent of the Company) any other person,
>
> any information about any Obligor, the Group and the Finance Documents as that Lender or other Finance Party shall consider appropriate if in relation to paragraph (a)(i) and (ii) of this Clause 28.7, the person to whom the information is to be given has entered into a Confidentiality Undertaking.
>
> Any Confidentiality Undertaking signed by a Finance Party pursuant to this Clause 28.7 shall supersede any prior confidentiality undertaking signed by such Finance Party for the benefit of any member of the Group.
>
> Notwithstanding any of the provisions of the Finance Documents, the Obligors and the Finance Parties hereby agree that each Party and each employee, representative or other agent of each Party may disclose to any and all persons, without limitation of any kind:
>
> (i) any information with respect to the US federal and state income tax treatment of the Facility and any facts that may be relevant to understanding such tax treatment, which facts shall not include for this purpose the names of any Party or any other person named herein, or information that would permit identification of any Party or such other persons, or any pricing terms or other non-public business or financial information that is unrelated to such tax treatment or facts; and
>
> (ii) all material of any kind (including opinions or other tax analysis) that are provided to any of the foregoing relating to such tax treatment,
>
> in so far as such disclosure relates to US Federal income tax.'

[**64**] Clauses 31.6 and 31.12 provided:

> '31.6 **Rights and discretions**
>
> …
>
> (f) Notwithstanding any other provision of any Finance Document to the contrary, none of the Agent, the Arranger or the Issuing Bank is obliged to do or omit to do anything if it would or might in its reasonable opinion constitute a breach of any law or regulation or a breach of a fiduciary duty or duty of confidentiality.
>
> 31.12 **Confidentiality**
>
> (a) In acting as agent for the Finance Parties, the Agent shall be regarded as acting through its agency division which shall be treated as a separate entity from any other of its divisions or departments.
>
> (b) If information is received by another division or department of the Agent, it may be treated as confidential to that division or department and the Agent shall not be deemed to have notice of it.
>
> (c) Notwithstanding any other provision of any Finance Document to the contrary, none of the Agent and the Arranger are obliged to disclose to any other person (i) any confidential information or (ii) any other information if the disclosure would or might in its reasonable opinion constitute a breach of any law or a breach of a fiduciary duty.'

*The Overdraft Letter*

[**65**] Also on 17 January 2006 Mr Stumpf sent Primary UK a letter of that date setting out the terms and conditions for a Business Overdraft Facility of £5m in respect of Primary UK's account number 10077411 ('the Overdraft Letter'). The account in question was one which Primary UK had had since 1997. The Overdraft Letter cross-referred to the SLF (wrongly dated 12 January 2005). It provided for Primary to accept the terms and conditions set out by counter-signature. It appears that Ms Bradbury did sign the Overdraft Letter.

*Primary's breach of covenant*

[**66**] On 16 February 2006, a month after the SLF was signed, Primary notified RBS that they had failed to meet their forecast for 2005. Primary were at this stage forecasting $9m PBT and $19.6m EBITDA (Earnings Before Interest, Tax, Depreciation and Amortisation) and had identified an overall shortfall of $7.1m. By 13 March 2006, it was apparent that Primary expected to breach two of the covenants in the SLF by the end of the month. By that stage, Primary UK had drawn down £21m on the term facility, and £5m on the revolving facility.

[**67**] Primary UK formally reported the position to RBS by a compliance certificate dated 28 April 2006: as at 31 March 2006, Primary UK was in breach of two covenants, namely those contained in cll 25.2(b) and (c) of the SLF relating to Consolidated Tangible Net Worth and Debt Cover. As a result, RBS became entitled to demand immediate repayment of the Term Facility, the Revolving Facility and the Ancillary Facilities under the SLF.

[**68**] These matters caused considerable concern to RBS. On 5 May 2006 Mr Stumpf sent Ms Bradbury an e-mail that RBS was 'very surprised and disappointed by the latest information' and were 'finding it difficult to think of a reason why we should not immediately appoint investigating accountants to conduct a bottom-up review of Primary's reporting procedures, and confirm how at risk the Bank's borrowings are'. On 9 May 2006 Ms Bradbury wrote to

Mr Mallett acknowledging the 'significant covenant breach' and saying that the 'situation is taken extremely seriously by the Group's shareholders and directors and … the Group intends to work closely with you … to review the situation and agree the appropriate course of action'. She also disclosed for the first time that the unaudited 2005 accounts showed a loss before tax of $4m as against the September forecast profit (which itself involved a significant reduction on previous forecasts for that period) of $15.8m.

[**69**] At the same time, the Financial Services Authority ('the FSA') was expressing a degree of concern about Primary's position. On 10 May 2006 the FSA sent Primary a letter detailing the outcome of an 'Arrow' risk assessment, which identified a number of risks which required mitigation. The letter was subsequently copied to RBS, and, as Ms Baker explained, many of the FSA's concerns dovetailed with the bank's concerns.

*Swiftcover's sponsorship of Formula 1 on ITV*

[**70**] Sometime between 23 April and 14 May 2006 Swiftcover commenced sponsoring ITV's television coverage of Formula 1 racing.

*Transfer of Primary to LQE*

[**71**] On 25 May 2006 RBS decided to transfer Primary to its Low Quality Exposure ('LQE') Portfolio, indicating serious cause for concern as to the viability of debt recovery. An internal e-mail recorded that this was 'in response to the very significant deterioration in performance from the info on which the original decision was based'. On 2 June 2006 the Analysis Rating & Research ('ARR') division of RBS Credit downgraded Primary from D1 to D3, which Mr Stumpf explained was a 'significant movement'.

*Transfer of Primary to SLS*

[**72**] On 8 June 2006 Ms Bradbury and another representative from Primary met Mr Stumpf and others from RBS. At the meeting Primary said that they now expected a peak borrowing requirement in the first quarter of 2008 of £70.8m. They requested a stand-by line of credit of £5m and a new £30m line, which they asked RBS to agree immediately. Mr Stumpf considered this to be 'an alarming request'. It was apparent that Primary required a further £35m in excess of the facility, which had only been agreed four months previously, to survive.

[**73**] As a result, RBS decided on the same day to transfer Primary to SLS. SLS is a specialist division of RBS with a remit to address complex or distressed debts. Primary's relationship was formally transferred to SLS on about 12 June 2006. The SLS employees responsible for Primary were Ms Baker and Mr Birch. They reported to Ian Roberts, who reported to Pete Ballard, who in turn reported to Mr Sach. Ms Baker and Mr Birch were assisted by Mike Thomas. There was an initial meeting between representatives of Primary and of SLS on 13 June 2006. The witnesses agreed that the atmosphere at that meeting was cordial.

*Instruction of KPMG*

[**74**] On 19 June 2006 Mr Ballard decided that KPMG should be instructed to conduct an Independent Business Review which was code-named Project Medway. Ms Baker gave evidence that KPMG was chosen because its people were considered the best experts available and had the necessary insurance restructuring expertise. KPMG employed a sizeable team of people on the

Medway project. The team included Mike Walker, a partner who went on to become Head of Restructuring Insurance Solutions at KPMG in October 2006, by which time he had had 15 years' experience in dealing with substantial insurance company solvencies. Ms Baker and Mr Birch agreed that RBS was very pleased with KPMG's work on this project.

**[75]** On 5 July 2006 KPMG was jointly retained by RBS and Primary Group, at Primary's cost. KPMG's retainer letter stipulated that:

(i) Primary Group undertook to 'set aside sufficient time to provide … confirmations' 'that the information [contained in reports produced by KPMG] is factually accurate' and KPMG's work was expressed to be dependent upon 'receiving without undue delay full co-operation from all relevant personnel of Primary Group … and upon the timely and accurate disclosure to [KPMG] of all information [they] may need for the purposes of [their] work';

(ii) Primary Group 'authorise[d] the disclosure to [RBS] of any information relating to the affairs of the Company [ie Primary Group] and its subsidiaries that may come into [KPMG's] possession';

(iii) The scope of KPMG's engagement was generally described as 'work … cover[ing] Primary Group … and its material trading subsidiaries' and to be 'based at the head office of various locations [of Primary companies]' with KPMG's 'main point of contact' being Ms Bradbury;

(iv) The detail of KPMG's work was to comprise an analysis (during 'Phase 1') of short-term cash flow, background and commercial overview and review of historical performance, and (during 'Phase 2') of the 2006 budget and 2007–08 forecasts and funding requirement and financing options.

*Direct Line approaches RBS for assistance*

**[76]** On 20 June 2006 Paul Adams of Direct Line telephoned Phil Truscott of RBS's Major Corporate Credit department to say that Direct Line had discovered a claims limit of £1.2m in Primary's UKU subsidiary which managed claims on behalf of Direct Line's subsidiary UKI. Since UKU was put in funds to settle claims by UKI, Direct Line was at risk. Mr Adams asked how this limit could be regularised. Mr Truscott replied that this would need to be sanctioned by the Credit Committee by 30 August 2006. As Mr Truscott recorded in an e-mail he sent to Ms Baker among others:

> 'Also made him aware of the current issues and the SLS involvement (ie on a confidential basis).'

**[77]** On 3 July 2006 Mr Adams sent Peter Bole, UKI's finance director, and others an e-mail summarising Direct Line's credit risk with regard to UKU as follows:

(i) a £1.2m claims float for the administration of claims which UKI had been asked for, but had not yet been released;

(ii) £1.5m in deferred consideration on the sale of the portfolio to UKU; and

(iii) £2.5m of historic amounts built up over time.

**[78]** An internal Direct Line (or perhaps, more strictly, UKI) memo dated 11 July 2006 explained the position regarding the deferred consideration in more detail. It appears from this that UKU's position at that stage was that the debt was not due until October 2006. A copy of this memo was sent by e-mail to Mr Bole and others on 13 July 2006. Mr Bole forwarded this to Mr Houghton on the same day.

**[79]** On 14 July 2006 Mr Adams sent Mr Bole and others an e-mail saying:

'I have had a further conversation with SLS re UKU/Primary Group. Their view is categoric "we should be concentrating on collecting what is owed to us and not increasing our exposure."

They are currently reviewing the business and have not formed an opinion on the current trading, for this reason they are not in [a] position to share any information with us.'

Later the same day this e-mail was forwarded to Mr Houghton. Mr Houghton's evidence was that the reason he was forwarded these e-mails could have been that recovery of the debt was seen as problematic and therefore an issue he should be apprised of.

[**80**] On 21 July 2006 Kevin Tidman, Direct Line's Head of Credit and Enterprise Risk forwarded Mr Adams' e-mail dated 3 July 2006 to Ms Baker and Mr Birch, with a copy to Mr Bole, adding:

'As discussed, it will probably be easier for you to speak to Peter direct … to answer any questions you have and agree how to progress, acknowledging that you will need to refer to Compliance in terms of the extent to which you can assist.'

*SLS's concerns mount*

[**81**] On about 20 July 2006 (although the document is dated 20 July 2006, it went through a number of drafts and appears not to have been finalised until 21 July 2006) Ms Baker, Mr Birch and Mr Thomas sent Mr Ballard and Mr Sach a memo providing their initial assessment of Primary prior to the Group PER on 8 August 2006 (as to which, see below). The memo stated that they were doing this 'In the light of increasing visibility and concern over a number of potentially serious issues'. The memo calculated RBS's total exposure to Primary at £44.4m (excluding a sum of £4m for the UKU debt which had been included in an earlier draft of the memo). After briefly reviewing the background, a summary of Primary's financial position, the reasons for the transfer to SLS and the engagement of KPMG, the memo set out six 'initial issues arising' under the following headings: '1. Short term cash shortfall', '2. Weak management and central controls', '3. Medium term solvency crunch and funding requirement', '4. Operational performance', '5. Historical dividend policy' and '6. VAT and tax position'. After a short commentary on Primary's management and shareholders, the memo concluded:

'Provision

It is not clear at this stage whether the Bank will suffer any loss on this connection. However, due to the precarious nature of the Group's trading, and severity of intercompany issues, if a loss does arise, it could be sudden and severe. SLS will consider stressed loss/provision recommendation on receipt of KPMG's final report.

Conclusion & recommendation

Recommend close monitoring of events over the next few weeks as facilities are restructured.'

[**82**] When Mr Sach received his copy of this memo, he annotated it in manuscript: 'This has the making of a potential fraud or *at least* misdirection of funds for business that it could not afford.'

[**83**] Primary make the point that this memo, in common with others generated by RBS, contains factual inaccuracies. For example, it wrongly states that Mr James owned 75% of the shares in Primary Group and states that

Lord Carter was understood to be Mr James's father-in-law when he was not. Nevertheless, it is clear that SLS had serious concerns about Primary which were based on reasonable grounds.

*Mr Birch obtains advice from Mr Dewis*

[**84**] On 20 July 2006 Mr Ballard sent Ms Baker, Mr Birch and Michael Thomas an e-mail asking:

> 'Can we talk to compliance to establish whether there is any way we can either approach RBSI/Direct Line at a senior level for some input into the analysis of this business or whether we could request that somebody from RBSI's Executive be seconded to us to help on this case. There are clearly conflict issues as there will undoubtedly be areas within the bsuiness [sic] where they are effectively competitors … but it would be a big help and I'll bet it will be the first thing DSS says … so I'd like to have had it considered.' (Ellipses in the original.)

[**85**] DSS was Mr Sach. Mr Birch explained in evidence that, as this suggests, the reason why SLS's more junior employees wanted to seek advice from Direct Line was because they anticipated that that was what Mr Sach would want them to do. Mr Birch said that it was Mr Sach's view that people who ran a similar business would have a much more informed view than accountants, such as KPMG. Mr Birch agreed that he was fearful that, if he had not involved Direct Line, then Mr Sach would think he was not doing his job properly. It is clear from Mr Sach's evidence that they anticipated correctly. Mr Sach said that he had always preached the need to understand the business you are dealing with, and so 'the natural thing to do was to ask Direct Line for advice'.

[**86**] Mr Birch replied on 21 July 2006 saying:

> 'If we are required to get a team member for [sic] RBSI involved it may be worth doing this this morning so they can attend KPMG's presentation. A good way to get up the learning curve.'

As this suggests, SLS were due to attend a meeting with KPMG later that day at which KPMG was to present the initial results of its investigation (as to which, see below).

[**87**] Ms Baker replied shortly afterwards:

> 'Mike – we need to get clearance from Compliance first before getting RBSI involved.'

[**88**] It appears that SLS's first contact with Direct Line was made by Mr Sach when he briefly spoke to Ms Court on or about 21 July 2006, as Mr Sach put it in his witness statement, 'to ask if someone from RBS Insurance could assist us in understanding some of the technicalities of the insurance industry'. Mr Sach spoke to Mr Birch on 21 July 2006, and told him that Ms Court had identified Mr McKee as the appropriate person at Direct Line with whom to speak. According to Mr Houghton, Mr McKee was a member of Direct Line's Executive Committee who ran an actuarial team that developed pricing and reserving for Direct Line. In Mr Houghton's view, he was a very experienced insurance expert. In the absence of Ms Baker on holiday, it fell to Mr Birch to contact Compliance to establish whether it would be appropriate for SLS to seek Mr McKee's assistance in relation to Primary.

[**89**] On 24 July 2006 Mr Birch telephoned Mr Dewis in RBS' Corporate Markets Regulatory Risk department (ie Compliance). Following that conversation, Mr Birch sent Mr Bole an e-mail, copied to Mr Tidman, Mr Ballard, Ms Baker, Mr Thomas and Mr Dewis, saying:

> '… I understand from Kevin that you would like to discuss with us whether, as a result of our relationship with Primary, we can assist you in collecting a debt of circa £4m from UKU (Primary) dating from 2002 (but for which payment has only recently been requested).
>
> I have discussed this with Chris Dewis in Corporate Markets Regulatory Risk. Chris' view is that we should not get involved given the potential conflict involved. If you would like to discuss this, could I suggest you contact Chris …'

[**90**] Also on 24 July 2006 Mr Birch telephoned Mr McKee. Mr Birch's note of the conversation indicates that they discussed Swiftcover, including its sponsorship of Formula 1 (in fact the televising of Formula 1, as noted above).

[**91**] Later the same day, Mr Birch sent Mr McKee an e-mail, copied to Ms Baker, Mr Thomas and Mr Dewis, saying:

> 'Many thanks for your time earlier, and for offering to assist us with this.
>
> I said that I would send a briefing note across to help you decide who on your side would be appropriate to get involved. However, an issue has come up which I need to resolve prior to sending the note. I have been contacted by Kevin Tidman and Peter Bole in respect of a debt, dating from 2002, owed by a Primary group company (UKU) to an RBSI subsidiary (UKI) arising from the sale of a business by RBSI to Primary. This sum is outstanding and Kevin/Peter were asking for our help in collecting the debt.
>
> I have referred this question to Regulatory Risk, Chris Dewis. Chris advised that, due to the inherant [sic] conflict in the position, we should not get involved with the collection of the RBSI debt. However, he is comfortable that we obtain the help that you and I were discussing from someone in RBSI, providing that they are not involved with the collection of the RBSI debt, and do not pass information regarding the bank debt position to those dealing with the RBSI debt. Before I send our summary sheet to you, could you confirm that you are not involved with this issue (and are therefore not conflicted).'

Mr McKee replied shortly afterwards, 'I confirm I am not conflicted'.

[**92**] Mr Dewis' evidence in his witness statement was that 'the help … from someone in RBSI' in relation to which his advice was sought was 'some industry expertise on Primary's business' or 'an industry view on Primary from someone at RBS Insurance'. Mr Dewis added that '[it] was fairly common for SLS to draw upon experts from other parts of RBS Group to provide specific industry or geographic knowledge on the customer's sector', or to 'obtain industry or geographic assistance from time to time in relation to customers (whether or not they are debtors of the bank)'. In cross-examination, he clarified that what he had advised Mr Birch was that it would be acceptable for SLS to seek Direct Line's assistance in order to get 'their view of Primary in relation to the industry … it was not necessarily Primary's information that RBSI had, but it was more their knowledge and understanding of Primary within that industry', ie for SLS to receive information from Direct Line about Primary's position within the insurance industry. Mr Dewis was not told that

what SLS was proposing to do was to provide the Medway reports (or any detailed confidential information emanating from Primary) to Direct Line, nor did he give any advice about such a proposal. Mr Birch agreed that he had not sought any such advice from Mr Dewis.

[**93**] On the morning of 25 July 2006 Mr Ballard sent Mr Birch, Ms Baker and Mr Thomas an e-mail saying 'let's get some real clarity around the funds due to RBSI, in total. What are they? What for? when are/were they due? what action has been taken re recovery?'. Mr Birch replied shortly afterwards saying 'I'm meeting compliance at 3.15 to discuss whether I can get the info from RBSI'.

[**94**] On the same morning Mr Birch sent Mr Dewis an e-mail saying:

> 'While we are ensuring that we do not seek to recover the RBSI debt, or pass information to the relevant people there on Primary, it would be very useful for us to understand what their debt from primary is, how it arose, and how it is quantified. Briefly, RBSI believe the amount is circa £4m, whilst Primary list it as being £2m. Primary have total deferred consideration that they are due to pay of £24m, but if RBSI are right that their £2m is really £4m, this £24m could be £48m! As a result, understanding their debt would help us to understand Primary's position generally. We would not seek to prefer them over other creditors or to intervene on their behalf.
>
> Could you let me know whether we can seek this information from RBSI on this basis?
>
> Additionally the credit team at RBSI are seeking our input on a credit limit that they mark for trading with Primary (a £1.2m "claims fund" limit). Can we discuss this with them?'

[**95**] Later the same day Mr Birch met Mr Dewis for half an hour to discuss 'SLS/RBSI – information sharing'. It appears that the meeting was also attended by Andrew Norley and Richard Parrett of Corporate Markets Regulatory Risk. As Mr Birch accepted, it is clear from the documentary record that the principal subject matter discussed at the meeting was the sharing of information between Direct Line and RBS concerning the Direct Line debt. An undated note made by Mr Birch which includes Mr Norley and Mr Parrett's names, and thus appears to be from this meeting, includes the following statements:

> 'Get KPMG to opine on amount.
> OK on claims fund £1.2m if go to credit.
> Clarify with co the ability to share information.'

As Mr Birch accepted, the reference to 'co' is a reference to Primary.

[**96**] Following the meeting, Mr Dewis sent Mr Bole an e-mail, copied to Messrs Birch, Norley and Parrett, saying:

> 'We have discussed this matter with Mike Birch of SLS and agreed to the following:
>
> * SLS will be requesting information regarding the debt from RBS Insurance (through the Credit function) to assist with their assessment of Primary;
>
> * SLS will make it known to Primary that they have been given this information and that going forward it will continue to share any material information as appropriate for risk management purposes;

* In the mean time, RBSI are free to pursue their debt collecting as they see fit and independently from SLS.

It is important to ensure that RBSI are not given preferential treatment as this could have adverse consequences should a litigation scenario unfold.'

[**97**] Mr Dewis's evidence about this was as follows:

'I would have expected the legal documents relating to Primary's credit situation to permit information sharing between RBS Group companies for the purpose of risk management as it is important that RBS Group has an understanding of group risk. I would have suggested that SLS tell Primary that we were sharing information in this way as a matter of best practice.'

[**98**] Mr Birch gave evidence that he did in fact discuss the matter with someone at Primary, who asked SLS not to get involved in recovering this debt in the near term.

[**99**] Shortly afterwards, Mr Birch sent Mr McKee an e-mail, copied to Ms Baker and Mr Thomas of SLS and to Messrs Dewis, Norley and Parrett of Compliance, saying:

'I have had further discussions with compliance and have agreed the following:-

* They remain comfortable that you or one of your senior colleagues gets involved to assist in understanding this situation from annindustry [sic] perspective, though that should not involve any involvement by you in trying to recover the RBSI debt from Primary. Could you confirm whether this will be you? We will be getting a finalised phase 1 report from KPMG on Friday, but it would be useful if we could sit down with you ahead of that to bring you more fully up to speed and provide further information. Would 3pm tomorrow or 9am Thursday be okay for this – I can come to Bromley if that helps. We will be having meetings with management of the various subsidiary companies next week and it would be helpful if you could be involved in those meetings.

* They are comfortable that we seek information from which to understand the RBSI debt (dating from our sale of a business to Primary in 2002). their advice is that our request should be to you (as credit), with you then passing it on to the relevant party within RBSI (I believe that this is Pete Bole). I am looking to understand how the debt arose, how it has been quantified (I believe it is based on the profitability of the business sold and so is subjective), what actions RBSI have taken to recover it and what response they have had from Primary. Could you seek this information for me as a matter of urgency.

* RBSI should seek repayment of the amount due to them entirely independent of our debt relationship.

* RBSI have a £1.2m "claims fund" exposure to Primary. Could you establish who within your credit function deals with this. Compliance are comfortable that we discuss management of this exposure with RBSI credit.'

[**100**] I consider that the reference to 'you or one of your senior colleagues get[ting] involved to assist in understanding this situation from an industry perspective' was a reference to Mr McKee (or a colleague) providing advice of the kind discussed in para [92] above.

*Ms Court expresses concern*

[**101**] Later the same day, Mr McKee replied to Mr Birch:

> 'I am free tomorrow from 1pm to 3.30pm and from 9am to 11am on Thursday. However, I spoke to Annette yesterday and she was concerned that I would be conflicted in that several companies within the Primary Group are competitors of companies within RBS Insurance and as an FSA approved person for RBS and a member of the RBS Insurance executive I would have an interest in what happened to Primary Group. Annette was happy that I gave you a market steer on Primary and discussed general issues such as solvency capital etc. but that to discuss further specifics and attend external meetings could be seen as exploiting the RBS Group position.
>
> I am not sure who would be best to advise on this and I would appreciate a discussion with you so that we can decide how to proceed.'

[**102**] It is clear from this e-mail that Ms Court was content for Mr McKee to meet Mr Birch to give RBS 'a market steer on Primary' and to discuss 'general issues such as solvency capital etc.', but not for him to 'discuss further specifics' or 'attend external meetings'. It is manifest that her concern was that Mr McKee should not receive confidential information concerning Primary which would put him in a position of a conflict of interest given that Primary and Direct Line were competitors. Mr Birch gave evidence that his understanding was that 'further specifics' meant what happened to Primary. His evidence on this subject was unconvincing, however, and I do not accept that it accurately reflected his understanding at the time he received this e-mail.

[**103**] Despite this expression of concern by Ms Court, Mr Birch did not revert to Mr Dewis (or anyone else at Compliance) to seek further advice. Nor is there any evidence that Mr McKee sought any advice from Direct Line's compliance or legal departments, or that Ms Court's concerns were specifically addressed and resolved in any way.

[**104**] It is convenient to note at this point that Mr Houghton gave evidence that he did not see this e-mail when he became involved and did not become aware of Ms Court's concerns in any other way.

*KPMG presentation and draft report(s)*

[**105**] On 21 July 2006 KPMG gave a presentation to SLS of the initial results of its investigation. This included the provision of a draft dated 21 July 2006 of KPMG's Phase I report. It may also have included the provision of an undated draft of KPMG's Phase 2 report. Certainly KPMG had provided the latter document by 27 July 2006.

*Mr Birch discusses the draft KPMG reports with Mr McKee*

[**106**] On 27 July 2006 Mr Birch and Mr Thomas met Mr McKee at Direct Line's premises at Churchill Court, Bromley. They took with them the 21 July 2006 draft of KPMG's Phase 1 report and the undated draft of KPMG's Phase 2 report. Mr Birch gave evidence that he and Mr Thomas discussed 'the key elements' of these draft reports with Mr McKee during this meeting. It is reasonably clear that they did not leave copies of the draft reports with Mr McKee after the meeting, however. Nor does it appear that Mr McKee ever received final versions of any of the Medway reports.

[**107**] It is not clear from the evidence whether Mr McKee expected Mr Birch and Mr Thomas to be bringing the draft KPMG reports, or material of that

nature, to the meeting. I infer from his e-mail relaying Ms Court's concerns that he did not. There is no evidence that he raised any concern about the matter at the meeting, however. I infer that he must have been told, or assumed, that Mr Birch had obtained the appropriate clearance from Compliance.

[**108**] Mr Birch's note of the meeting shows that one of the subjects discussed at the meeting was Swiftcover and the possibility of selling it. Mr McKee suggested that Primary might not own Swiftcover.

*The Phase 1 Medway report*

[**109**] On 28 July 2006 KPMG produced the final version of its first report entitled 'Project Medway Phase 1 – Group Report'. This runs to 69 pages (including appendices). It is divided into four sections: Group overview, Key Group issues, Short term cash flow and Appendices. It contains a detailed overview of Primary's businesses and their financial performance and funding needs. It identified a number of serious issues which were of concern to SLS.

*Mr Houghton replaces Mr McKee*

[**110**] On 4 August 2006 Mr Birch sent Mr Sach an e-mail, copied to Ms Baker and Mr Thomas, in which he said:

> 'You mentioned that you would be speaking to Annette at RBSI. Chris McKee is on holiday today and for the next 2 weeks. If Annette could provide someone in his place to assist us that would be very helpful. Ideally they would be available to attend Monday's meeting with KPMG (here).'

[**111**] It appears that Ms Sach duly spoke to Ms Court, who recommended Mr Houghton as a replacement for Mr McKee. Like Mr McKee, Mr Houghton was a member of Direct Line's Executive Committee, and as such he was involved in strategy and the analysis of competitors. Mr Houghton did not recollect receiving a briefing from Mr McKee about the Medway project.

*Meetings between Primary and SLS on 7 and 8 August 2006*

[**112**] On about 3 August 2006 Ms Baker telephoned Lord Carter on holiday in France and asked him to return to London for an urgent meeting between SLS and Primary's non-executive directors. In advance of the meeting, Mr Birch sent Lord Carter an e-mail on 4 August 2006 in the following terms:

> 'As discussed earlier, I attach a brief outline of the issues which we would like to discuss when we meet on Tuesday. These issues are highlighted by the KPMG report, and it would be useful if you could review their report prior to our meeting so that we are talking from a common base of understanding.
>
> In particular we would like to focus on:-
>
> - Transactions involving PICL, by way of loan, retention and upstreaming by Monument, and the UKU:UKI transaction
> - Acquisitions made on deferred consideration and how these were to be funded
> - Dividend payments
> - Loans to entities outside the group
> - The issue of unallocated cash in Monument
> - Accounting policies regarding recognition of future income which have now had to be reversed.

> As we discussed, we would like to discuss how the board, and you as Chairman, got comfortable with these transactions, which have combined to create very significant solvency issues within the group and particularly the regulated risk-carrying entities. This has crystallised into a very significant funding requirement. Before the bank can consider this, we need to be comfortable with the governance issues which underly this position.'

[**113**] On 7 August 2006 there was a meeting between SLS and Mr James and a colleague to discuss the KPMG Phase I report. During this meeting, Primary's representatives were told that Mr Goodwin had taken a personal interest in Primary and that the situation was to be discussed with him the following day, as in fact happened.

[**114**] On 8 August there was a meeting between SLS and Lord Carter and Dr Downes. SLS tried to speak to them separately, but they refused to agree to this. The meeting was a rather tense one. During the meeting, one of the subjects discussed was Primary obtaining assistance with restructuring. After the meeting, Mr Birch sent Lord Carter an e-mail recommending Chris Hughes of the restructuring specialists Kroll Talbot Hughes ('Kroll').

*Mr James's promise to pay Primary £10m*

[**115**] Following the meeting on 7 August 2006, and as had been agreed at the meeting, Mr James wrote to Mr Birch on 8 August 2006 'setting out how and when payments in respect of balances due from me and from companies I control outside Primary Group would be effected during the course of this month'. The letter proceeded to give details of sums totalling a little over £10m which would be paid to Primary.

*The PER meeting on 8 August 2006*

[**116**] On 8 August 2006 Ms Baker sent Mr Birch and Mr Thomas an e-mail in preparation for the RBS's Problem Exposure Review (PER) meeting later that day in which she noted that: 'We are working closely with Richard Houghton of RBSI, to ensure that we have the most informed sector view. The company has noted a potential commercial conflict here, which is being managed.'

[**117**] At the PER meeting, one of the items discussed was Primary's debt to RBS. It was clear that a formal demand for immediate repayment of the facility risked triggering insolvency and it was therefore decided that RBS would forbear on appropriate terms. These included repayment of the SLF in full by the end of the year, the payment of the £10m promised by Mr James, the formation by Primary of a special committee of non-executive directors to oversee the situation and the appointment by Primary of a restructuring specialist such as Mr Hughes.

[**118**] The PER meeting was attended by Mr Goodwin. Mr James suggested in his evidence that, by then, Swiftcover's sponsorship of ITV's Formula 1 coverage had come to the attention of Mr Goodwin (who was a Formula 1 fan), that Mr Goodwin made the connection between Swiftcover and Primary, and, as a result, Mr Goodwin instructed SLS to give Primary a hard time at the meeting. While I accept that Mr James genuinely believes this, there is no documentary support for this suggestion. On the contrary, the documentary record shows that RBS was concerned about Primary well before 8 August 2006. Furthermore, although SLS's attitude to Primary hardened from

7 August 2006 onwards, there is no reason to think that this was due to instructions from Mr Goodwin as opposed to genuine concerns about its exposure to Primary and Primary's response to those concerns.

*Primary Group board meeting on 9 August 2006*

[**119**] At a board meeting of Primary Group on 9 August 2006, the board agreed: (i) to set up a special committee of non-executive directors to deal with RBS and manage disposals; (ii) to dispose of assets to repay RBS by the end of the year; and (iii) to appoint a Chief Restructuring Officer. The board and special committee recognised that repayment of the SLF could only be achieved through disposal of subsidiaries or refinancing through alternative bankers. The board identified Swiftcover and Goodhealth as businesses that could be sold. They took no steps to obtain alternative bankers.

*Mr Houghton involves Mr Gilbert*

[**120**] On about 9 August 2006 Mr Houghton requested Mr Gilbert to assist him in advising RBS. At this point, Mr Gilbert had been in Direct Line's Strategy Team for just over two years. Prior to joining Direct Line, he had had no experience in insurance. Like others in the Strategy Team, he was recruited for his ability to absorb information and analyse it. The Strategy Team was responsible for strategy, mergers and acquisitions and market and competitor analysis.

*SLS brief Direct Line*

[**121**] Mr Houghton and Mr Gilbert met Ms Baker, Mr Birch and Mr Thomas for a briefing on the Primary matter on 9 August 2006. Ms Baker, Mr Birch, Mr Houghton and Mr Gilbert all gave evidence to the effect that the SLS representatives impressed on the Direct Line representatives that the matter was confidential and that Direct Line should only involve 'a small team' of people. They did not ask the Direct Line representatives for any formal assurances or undertakings as to confidentiality, however, nor did they ask Direct Line to put in place any formal information barriers. As will appear, they did not even take any steps to ensure that the Direct Line representatives returned or destroyed their copies of the Medway reports, let alone to delete any relevant electronic records. For their part, the Direct Line representatives took no formal steps to prevent any conflict of interest arising as a result of the receipt of information concerning Primary from RBS.

[**122**] Mr Gilbert gave evidence that he was told at this meeting that Axa was interested in buying Swiftcover from Primary. Certainly it is clear from the documents that he knew this by 22 September 2006.

*Formation of the special committee and appointment of Mr Hughes*

[**123**] Primary duly formed the special committee and Mr Hughes was appointed on 10 August 2006.

*Ms Baker seeks Direct Line's view on further work by KPMG*

[**124**] On 10 August 2006 Ms Baker sent Mr Houghton's assistant an e-mail, copied to Mr Gilbert, attaching a draft of further instructions that SLS wished to give to KPMG, for Direct Line's review. Mr Gilbert set out his comments on the draft in an e-mail to Ms Baker, copied to Mr Houghton, on 1 September 2006. Mr Gilbert accepted that it was likely that he had seen at least one of the KPMG reports by this stage. I consider it probable that, at the meeting on

9 August 2006, he was provided with the following: (i) a copy of the final Phase I report; (ii) an undated draft of the Phase II report which appears to be intermediate between the draft taken by Mr Birch and Mr Thomas to their meeting with Mr McKee and the final version; and (iii) a draft update report dated 7 August 2006.

*Ms Baker cautions Mr O'Reilly*

[**125**] In August 2006, Streamline, a division or subsidiary of RBS Group which provided credit card processing services, developed concerns about its potential exposure to two Primary group companies. As a result, William O'Reilly, a Credit Analyst, and Alan Saunders, a Senior Credit Analyst, prepared a Credit Assessment dated 18 August 2006. An appendix or attachment to this included the statement that:

> 'SLS are working closely with Richard Houghton of RBSI, to ensure that we have the most informed sector view. The company has noted a potential commercial conflict here, which is being managed.'

[**126**] On 21 August 2006 Mr O'Reilly sent copies of his paper to Ms Baker, Mr Birch and Mr Thomas by e-mail. Ms Baker replied later the same day, saying:

> 'Finally, I note that you included a point about RBSI in your paper. I would caution you that this is ***extremely sensitive*** information, and is being handled very carefully with Chinese walls, etc. We would not like this to be transmitted to the customer. Please do not refer to this in any future correspondence.' (Emphasis in the original.)

[**127**] Mr O'Reilly responded the same day, telling Ms Baker that she could be 'assured that the information will not be leaked to the customer'.

[**128**] It is clear that RBS did not inform Primary that it was obtaining advice from Direct Line, as opposed to exchanging information with regard to the Primary (UKU) debt to Direct Line (UKI). Still less did RBS inform Primary that it intended to disclose the Medway reports to Direct Line before that was done, or that it had done so after the event. Ms Baker and Mr Birch were somewhat equivocal in their evidence as to whether or not this was a deliberate decision, but I have no doubt that, as Ms Baker's e-mail to Mr O'Reilly demonstrates, it was a deliberate decision. Ms Baker's and Mr Birch's evidence was that the reason this was not disclosed to Primary was because it would make an already difficult relationship worse. They accepted, however, that they had appreciated that Primary would object to the disclosure of the Medway reports to Direct Line.

*Primary commissions FPK*

[**129**] At some point in mid-August 2006 Primary commissioned Fox-Pitt, Kelton ('FPK'), an investment bank, to prepare a valuation of the group. It is clear that RBS had been made aware of this by 23 August 2006.

*The Phase 2 Medway report*

[**130**] On 24 August 2006 KPMG produced a second report entitled 'Project Medway Phase 2'. This runs to 272 pages (including appendices). It contains four sections: Group overview, Sensitivities, Business Unit Analysis and Appendices. As this suggests, it contains a detailed review of each of Primary's 12 business units, including Swiftcover. In relation to each business

unit, there is a detailed review of the nature of the unit's business, operations, strategy, historic financial performance and financial forecasts. The section on Swiftcover alone occupies pp 118–135 inclusive.

*KPMG's third Medway report*

[**131**] On 6 September 2006 KPMG produced a third report entitled 'Project Medway Update Pack – Draft for Discussion'. This runs to 32 pages (including appendices). Its contents are as follows: Update on progress, Key issues to discuss, Focus for following week, Timetable, Latest view of funding surplus/shortfall, Funding requirement between GBI and Goodhealth transactions and Appendices. One of these appendices is a disposal timetable for GBI (i e Swiftcover) which makes it plain that Primary is in negotiations to sell GBI to Axa.

*KPMG's fourth Medway report*

[**132**] On 11 September 2006, KPMG issued a fourth report entitled 'Primary Group Limited Indicative pricing and review of exit options'. This runs to 24 pages. It contains valuations for five of Primary's business, including GBI. The report explains the methodology employed, which involved using comparable company and transaction data and included consideration of potential purchasers for each business. The report valued GBI at $20–35m and all five businesses at $370–520m. It gives every indication of being a thorough and expert piece of work.

*The Medway reports generally*

[**133**] The Medway reports represented a considerable amount of work on the part of KPMG, for which it charged Primary UK some £1.56m (excluding VAT) in fees. In addition, Primary's management and staff devoted considerable time and effort to providing KPMG with the information set out in the reports.

[**134**] The Medway reports set out a detailed description of Primary Group, its subsidiaries and their businesses. They also set out a detailed analysis of the financial performance and forecasting of the group companies. KPMG acknowledged that its primary source of information was Primary's 'internal management information and representations made … by management'. The Medway reports contain a considerable amount of factual information about the Primary businesses which is self-evidently confidential. In particular, they contain detailed information as to (inter alia) Primary's history, activities, client relationships (including client names and make-up), income, costs, profit and loss analysis, underwriting books, key staff, growth strategy and prospects and as to the values of the individual businesses.

*SLS arranges for the fourth Medway report to be sent to Mr Gilbert*

[**135**] On 6 September 2006 Ms Baker sent Mr Houghton and Mr Gilbert an e-mail referring to their previous discussion and continuing:

> 'We have now received a report from KPMG valuing 5 of the businesses … I've asked KPMG today to courier a copy of this report directly to you, so you may like to look out for it, given the sensitivities here. When you have had a chance to digest it, perhaps we could have a

call/meet to discuss your views on valuations, given your industry knowledge? In particular, the valuation of UKU looks quite toppy, so your views on that would be appreciated.

Do let me know if the reports don't turn up in the next day or two.'

[**136**] It appears that Mr Gilbert was on holiday when this e-mail was sent and the report was sent. When he returned to work on 19 September 2006 he received the e-mail and an undated draft of the fourth Medway report. With one exception, the valuations in the draft fourth report were the same as in the final report. PBSH was given a lower valuation than in the final report.

[**137**] Mr Gilbert gave evidence that he kept his copies of the Medway reports in a locked cabinet by his desk. It appears unlikely that Mr Houghton received his own copies of any of the Medway reports at any stage, but Mr Houghton gave evidence that, if he had, he would also have kept them in a locked cabinet.

*Mr Gilbert's review*

[**138**] On 19 September 2006 Mr Gilbert sent Mr Houghton an e-mail asking Mr Houghton if there was any work that Mr Houghton would like him to carry out. It appears from an e-mail which Mr Gilbert sent Mr Houghton the following day that Mr Houghton asked him to prepare a 'high level review of the company'. On 21 September 2006 Mr Gilbert sent Ms Baker an e-mail saying he and Mr Houghton should be able to 'look through the document and provide any comments' by the end of the following week.

[**139**] On 25 September 2006 Mr Gilbert e-mailed Mr Houghton a two and a half page document entitled 'Review: Pricing and Exit Options' for discussion in a 'pre-meeting' before they met SLS. The opening sentence of the document stated that it 'sets out a high level review/sense check of KPMG's report'. It then set out brief comments on the individual businesses and valuation multiples, on each of the five valuations and on the overall valuations. In relation to one business, Mr Gilbert's only comment was 'Approach and overall valuation seem reasonable'. In relation to three businesses, he made the same comment, but went on to express some minor qualifications. In relation to GBI he commented 'Valuing GBI is extremely difficult' for reasons he explained. He suggested a valuation of $15–23m would be appropriate and added:

> '(Note: this would exclude any increase in value in knowing that Axa is interested in buying GBI, and is currently looking to increase its presence in the UK motor market).'

[**140**] It appears that Mr Houghton and Mr Gilbert met on 27 September 2006, and that the two of them met Ms Baker, Mr Birch and Mr Thomas on 28 September 2006. Although it seems likely that they gave SLS a copy of Mr Gilbert's review at the meeting, it does not appear from Mr Birch's note of the meeting or his e-mail report of the meeting to Mr Ballard later the same day that the review was discussed. Instead, the discussion was about the effects that insolvency would have on Primary's business, and hence on the value of the business. The Direct Line representatives suggested that the focus should be on 'a fire-sale of a business to the likes of Towergate, ideally before an insolvency'. Mr Ballard queried how that would be possible. Mr Birch replied saying:

> 'The point made by RBSI was that Towergate (and perhaps others) would buy some of the businesses if the price was right without DD and could complete in a matter of days as they will know all the businesses well and are acquisitive.'

*Discussions between Primary and SLS in September and October 2006*

[**141**] Mr James paid (or arranged for the payment of) two sums of circa £1m and $1m reasonably promptly, but did not pay (or arrange for the payment) of the remainder of the £10m by the end of August 2006 as he had promised in his 8 August 2006 letter. There are disputes as to the reasons for this, and the extent to which RBS was made aware of those reasons and when, which it is not necessary for me to resolve.

[**142**] Partly for this reason, by the third week of September 2006, the relationship between RBS and Primary had become strained. At a meeting attended by Primary's special committee members, Mr Hughes, a representative of KPMG and representatives of SLS on 20 September 2006, Mr Birch closed the meeting by making statements which were minuted as follows:

> '1) The delay on the shareholder monies has been a fundamental hit to confidence.
>
> 2) There appears to be lots of things going on, but no tangible output thus far. Company remains in breach of its banking documents.
>
> 3) In view of this, RBS will be coming back with a proposal on fees, linked to failure to meet progress milestones. It is accepted that this will make things even more uncomfortable for Management.'

[**143**] On 27 September 2006 representatives of SLS, KPMG and Kroll met with Lord Carter and Dr Downes of Primary. It is common ground that the meeting was a fractious one. Mr Birch explained that a number of points were concerning SLS. In particular, at that point Norton Rose was holding a sum of $4m for Mr James. Mr Birch threatened to withdraw Primary UK's overdraft if this money was not paid to Primary by the end of September. Lord Carter's response was to say that there was little point in continuing the meeting, because the money was subject to an undertaking which would prevent that. He considered that SLS's attitude left the non-executive directors little alternative but to resign and to invite RBS to appoint administrators. After further discussion, Lord Carter and Dr Downes walked out of the meeting, which continued in their absence.

[**144**] The $4m was paid on 5 October 2006. On 10 October 2006 Mr Birch sent Mr Hughes an e-mail re-iterating that, unless withdrawn or demanded before then, RBS expected repayment of the facilities on 31 December 2006. In the interim, in view of the work which was involved, it would charge a fee of £50,000 per month for continuation of the overdraft facility and there would also be a fee of £1m if the outstanding $11m had not been repaid by Mr James by 31 October 2006. He also said that any extension of the facilities beyond the end of the year would be subject to a further fee of £1m plus the provision of equity in Primary to RBS.

*Mr Blowers' e-mail of 11 October 2006*

[**145**] On 11 October 2006 Mr James received an e-mail from Mr Blowers (the then Chief Executive Officer of Swiftcover) with the subject 'And so much for Chinese Walls'. Mr Blowers said:

> 'Some interesting information that I'd ask you to treat with extreme caution as my source could be fairly easily identifiable were it to get out.

I heard today that Primary's financial details were shared by RBS with RBSI and that the details appear in papers circulated at least as far as senior middle management.

Some of the information is obviously being distorted (as is usual in anything of course) but I was told today by someone in the above category that Goodwin has instructed that Primary be given a hard time when "they failed to meet the terms of their loan" on the basis that RBS should do everything possible to make life difficult for their competitors, Swiftcover. My "informant" seemed to think that the loan was £60M but added that he wasn't sure.

I suppose that at least sets any doubts to rest.

B'stards!'

[**146**] Mr James replied the same day, saying:

'If what your contact says is true, I believe it is a breach of the banking code of conduct and may be actionable. It would certainly merit the attention of the office of fair trading.

Regardless, PGL have decided to assume the worst and refinance RBS, who despite my instincts, assure us they are being supportive in the circumstances and would never use a banking relationship to undermine a commercial competitor! We will refinance regardless of Orchestra.'

Project Orchestra was Primary's proposed sale of Swiftcover to Axa.

[**147**] Mr Blowers replied saying that he was happy for Mr James to pass this information to other senior people within Primary. Mr James gave evidence that he asked Lord Carter to raise this issue with RBS at a meeting on the following day. This is supported by the evidence of Lord Carter.

*The 12 October 2006 meeting*

[**148**] On 12 October 2006 there was a meeting between representatives of Primary, SLS, Kroll and KPMG. Among the attendees were Lord Carter and Ms Bradbury for Primary and Ms Baker and Mr Thomas for SLS. During the course of the meeting, Lord Carter provided an update on the proposed sale of Swiftcover to Axa. In this context, there was a discussion about confidentiality. There is a conflict of evidence between Ms Bradbury and Lord Carter on the one hand and Ms Baker on the other hand as to precisely what was said. The contemporaneous note of this part of the meeting made by Mr Arthur reads as follows:

'PC …

– Confidentiality – we want you to share with us in this ……. who knows about this

– There is conflict in this with Direct Line

– We have been told Fred Goodwin knows & there is a conflict at the top of the organisation.

NB Clearly confidentiality in any way damaging – v cognisant – to highest prof standards – clearly Goodwin has to know

DA It is a question of how he uses it.

PC We just need to know.'

[**149**] Ms Baker's evidence was to the effect that this discussion was solely about the sale of Swiftcover, whereas the evidence of Lord Carter and Ms Bradbury was to the effect that it concerned the confidentiality of

Primary's information more generally. It is clear, as I have said, that the immediate context was the sale of Swiftcover. Given the background provided by Mr Blowers' e-mail the previous day, however, I accept the evidence of Lord Carter and Ms Bradbury that they were raising a more general concern. Furthermore, I consider that Mr Arthur's note shows that Ms Baker understood this, and that she re-assured Lord Carter that RBS recognised that '[breach of] confidentiality *in any way* [would be] damaging' (my emphasis), that RBS was very cognisant of its obligations and that it observed the highest professional standards. She made the point that Mr Goodwin had to know about the situation (ie given that he was the Chief Executive Officer of the RBS Group), but Mr Arthur responded that the question was how he used the information (ie whether it was disseminated and used within Direct Line).

[**150**] It is common ground that Ms Baker did not disclose to Primary that, in fact, RBS had already passed the Medway reports to Direct Line, and had obtained Direct Line's assistance in valuing Swiftcover (as well as other Primary businesses). I conclude that Ms Baker took a deliberate decision not to disclose this to Primary. Furthermore, by giving Lord Carter the assurance she did, she wrongly gave him and Ms Bradbury the impression that there had been no disclosure by RBS to Direct Line, except in so far as Mr Goodwin had some knowledge of the situation.

*Credit submission dated 17 October 2006*

[**151**] On 17 October 2006 Mr Birch prepared a Credit Submission regarding Primary which he circulated to his colleagues requesting sanction for the continuation of facilities until 31 January 2007. A section of this Submission reviewed SLS's actions since the handover. Among other things, this recorded the valuations of the five Primary businesses in KPMG's fourth Medway report and the total valuation of $370–520m. It also recorded that FPK had valued the Group at $1.1bn. Although it goes on to say that 'After clearance from Corporate Markets Regulatory Risk (Compliance), SLS is also in contact with RBSI (Richard Houghton) for expert advice on this connection', there is no reference to Mr Gilbert's review.

*SLS starts to impose fees on Primary*

[**152**] On 1 November 2006 RBS sent a formal letter to the directors of Primary Group and Primary UK, referring to Mr Birch's e-mail dated 10 October 2006 and saying that, because the outstanding $11m had not been repaid to Primary by 31 October 2006, it would charge a non-receipt fee of £1m. It also stated that the £50,000 monthly fee would be payable from October 2006. On 17 November 2006 Primary Group replied accepting these terms and saying 'the Group is still interested to know on what terms, if any, you would be prepared to continue funding beyond 31 December 2006 should that be necessary'.

*Mr James's e-mail dated 11 November 2006*

[**153**] On 11 November 2006 Mr James sent Lord Carter, Mr Arthur and another colleague an e-mail reporting on a telephone conversation with Mr Blowers and Mr Hardy, in which Mr James said:

> 'They asked if we had any assurances from RBS that it will not discuss Primary Group's affairs with competing business unit within RBS. Andrew said Sir Duncan [Nichol, a Primary non-executive director] had re-assured

him of Pat's request that RBS be mindful of their duties to Primary. I advised that from my recollection the bank had always assured us that there were no circumstances under which they would share Primary's details outside of the corporate bank.

I asked Andrew if he really thought the bank were sharing information of a confidential nature. I said this was a serious allegation and that, much as I might want to believe it, I found it unlikely to be true. He said that his source, who he knows well, is truthful and well informed. Both he and Steve said they thought Goodwin had discussed the matter with Annette Court and others at executive committee level. He said that from his experience RBS were always careful to cover their track when doing competitor analysis. He said he understood that some comments had gone into writing. I asked if he thought these related to me or the Group. He said he thought the Group but had been quite widely circulated.'

*SLS continues to press for payment of the $11m*

[**154**] On 28 November 2006 Ms Baker wrote to Mr James reminding him of his commitment in his letter dated 8 August 2006, saying that 'the cash reserves of the Group are depleting rapidly' and asking him to set out a 'precise and specific timetable' for the repayment of the $11m to Primary by return.

[**155**] Mr James's evidence was that, by this time, he was faced with the problem that his personal bankers (HSBC Bank plc, 'HSBC') were concerned that, if they lent him money to enable this sum to be re-paid to Primary, it would only benefit RBS.

*The draft NDA*

[**156**] On 1 December 2006 Mr Birch sent Ms Baker an e-mail saying that he'd just heard from Mr Hughes that Primary had just received an offer letter from Axa with regard to Swiftcover. The offer letter was subject to 'stringent' confidentiality restrictions, but Primary would send RBS a copy 'under an NDA' the following week. As a result, a non-disclosure agreement was drafted by Primary's legal department and sent to RBS for comments on 6 December 2006. Further drafts were circulated on 7 and 8 December 2006, but the agreement was never signed.

*The 12 December 2006 meeting*

[**157**] On 12 December 2006 there was a meeting attended by Mr James and Mr Arthur for Primary and Mr Sach and Mr Birch for SLS. Both Mr Arthur and Mr Birch made notes of the meeting. It is clear that, as the notes show, Mr James raised the question of the confidentiality of Primary's proposed sale of Swiftcover to Axa. On this occasion, it does not appear from the evidence that the discussion went any wider than that.

*Tri-partite meeting on 13 December 2006*

[**158**] On 13 December 2006 there was a meeting between Mr James, HSBC and RBS at which the impasse regarding the $11m was resolved by an agreement under which Mr James agreed to pay the money in three tranches, financed by HSBC, and RBS agreed to continue to forbear under the SLF until the earlier of completion of the Swiftcover transaction and the end of the January 2007. This agreement was formally documented in a letter from RBS to Primary UK dated 16 December 2006 which provided for the payment by

Primary of additional fees of the greater of 9% of the gross consideration on the sale of Swiftcover or £7m, or double these amounts if Mr James did not make the payments due from him in time.

*Primary sell Swiftcover*

[**159**] On 12 January 2007 Primary sold Swiftcover to Axa. Primary contend that it could have obtained a better price from Axa if the sale had not been rushed at RBS's insistence; but on the other hand Primary also say that, due to deferred consideration provisions in the sale agreement, in the long run Primary made a substantial sum from the sale. It does not matter for present purposes whether Primary is right about these matters.

*Primary refinance with Credit Suisse*

[**160**] On 25 January 2007 Primary refinanced with Credit Suisse First Boston and a hedge fund. RBS was repaid all outstanding sums in full, together with fees totalling some £8m.

*Did Direct Line make any use of the information in the Medway reports after 28 September 2006?*

[**161**] This is an important factual issue in these proceedings. RBS and Direct Line both contend that it is clear that Direct Line made no further use of the information contained in the Medway reports after the meeting on 28 September 2006, and in particular no use of the information for Direct Line's benefit as opposed to RBS's benefit. This is supported by the clear and firm evidence of both Mr Houghton and Mr Gilbert. Both witnesses were adamant that they fully appreciated and respected the confidentiality of the Medway reports, and made no use of the information contained in them otherwise than to advise SLS in relation to Primary, and in particular for the purposes of Mr Gilbert's review. It is also supported by the disclosure which has been given by Direct Line in these proceedings, which does not suggest that Mr Gilbert made any use of the information for Direct Line's benefit.

[**162**] Counsel for Primary submitted in his closing submissions that this was an issue which Primary should have a further opportunity to explore, with the benefit of additional disclosure from Direct Line and expert evidence, on an inquiry as to damages. He suggested that it was possible that Mr Gilbert had made use of the information, in particular as part of his work on two projects in 2007, first a Direct Line/Tesco joint venture internet aggregator project and secondly a buy-to-let insurance project. Counsel for RBS and for Direct Line both objected that the issue of what use Direct Line had made of the information contained in the Medway reports, and in particular whether it had made any use of the information for its own benefit, had always been an issue for this trial, and that it was not open to Primary to seek a second bite at the cherry on an inquiry as to damages. I agree. In my judgment it was abundantly clear from the statements of case, correspondence, agreed list of issues, skeleton arguments and the oral opening submissions that this was a key issue for this trial. Furthermore, during the course of the trial, Primary sought and obtained an order for further disclosure of documents by Direct Line concerning a project called Project Horizon in 2008–2009 on the ground that they were relevant to this very issue. In the event, the documents did not assist Primary, but that is another matter. Yet further, counsel for Primary had a full opportunity to cross-examine Mr Gilbert on this issue, and it would be quite

unfair to expose him to being cross-examined on it for a second time. Accordingly, it is right that I should decide the issue on the basis of the evidence presently before the court.

[**163**] So far as Mr Houghton is concerned, there is really no question of him having used the information in the Medway reports for Direct Line's benefit. He probably did not have his own copies of reports, does not appear to have reviewed them in any detail and gave evidence that he had never referred to any Primary information when making decisions affecting Direct Line or its business. In any event, he left Direct Line in March 2007.

[**164**] So far as Mr Gilbert is concerned, I have no difficulty in accepting his evidence that he appreciated and respected the confidentiality of the information. Nor do I have any difficulty in accepting his evidence that he did not consciously make any use of the information for Direct Line's benefit. His evidence is supported by the evidence of Mr Bavidge, who was another member of the Strategy Team at the relevant time, that Mr Bavidge did not believe that he had ever heard of the Medway project or ever seen any confidential information relating to Primary. This is despite the fact that, according to Mr Gilbert, he and Mr Bavidge quite often sat opposite or near each other.

[**165**] What has given me more pause for consideration is the possibility of unconscious use by Mr Gilbert. The volume and detail of the information in the Medway reports is such that it would be very difficult for anyone to retain all of it in their memory for very long. On the other hand, some of the information in the documents might well lodge in the reader's mind. Mr Gilbert was adamant that he was able to compartmentalise his knowledge, and I accept that he tried to do so and believed that he had done so. I am sceptical, however, that people can compartmentalise their minds in a way which completely avoids the risk of unconscious misuse. It is precisely for this reason that the law insists on information barriers being put in place to protect confidential information. On the other hand, however, counsel for Primary did not put to Mr Gilbert any specific passages in the Medway reports as containing information which would have been of particular interest or use to Direct Line, and hence he might have made unconscious use of. In the end, I have concluded that Primary have failed to demonstrate that there is any real likelihood that Mr Gilbert did make any unconscious use of the information for Direct Line's benefit. I should make it clear that, in reaching this conclusion, I have taken into account my conclusion on the topic I shall discuss next.

*Mr Gilbert's retention of his copies of the Medway Reports*

[**166**] Mr Gilbert left Direct Line in February 2011. Mr Gilbert made his first witness statement in these proceedings on 20 February 2014. The witness statement was made at Direct Line's request and was served by Direct Line. On 7 March 2014 he revealed to Direct Line's solicitors for the first time that, when he left Direct Line, he had retained the copies of the Medway reports which were provided to him. On 11 March 2014 Direct Line's solicitors served a second witness statement from Mr Gilbert in which he confirmed that he had done this, and gave his explanation for doing so. This was that, when he left Direct Line, he did not know what to do with the reports given that Mr Houghton had already left Direct Line and he did not know anyone else in

Direct Line who had had any involvement with Project Medway. He therefore decided to take the reports home with him 'for safe keeping' in case anyone at Direct Line contacted him about the matter.

[**167**] Mr Gilbert's evidence on this topic was unconvincing. There were three alternative courses open to him. The first and most obvious was simply to shred the documents. Mr Gilbert accepted that he had placed a considerable quantity of other documents in confidential waste bins for shredding. He said he did not, in the brief consideration he gave the matter, consider that it would be appropriate to do the same with the Medway reports. I was unable to understand why not, particularly given how emphatic Mr Gilbert was that he had appreciated and respected the confidentiality of the documents. The second course would have been to return the documents to SLS. The third course would have been to return them to KPMG. Again, I was unable to understand why Mr Gilbert did not consider it appropriate to take either of those courses if for some reason he did not think that the documents should be destroyed.

[**168**] In my view, the true reason Mr Gilbert kept the documents was on the off chance that they might prove useful to him in some way at some point in the future. I do not think it is a coincidence that Mr Gilbert approached Primary, and revealed that he had reviewed Primary's business for RBS, only about two months later, as discussed below. In saying this, I should make it clear that I do not find that Mr Gilbert intended to misuse the information contained in the documents. Still less do I find that he did in fact misuse that information. I suspect that the reason why Mr Gilbert thought there would be no harm in him retaining the documents was that the passage of time meant that the information in the documents was no longer as sensitive as it once was.

[**169**] Counsel for Primary rightly did not suggest that Direct Line was liable in any way for Mr Gilbert's retention of the Medway reports.

*Mr Gilbert approaches Primary*

[**170**] In April 2011 Mr Gilbert made contact with Primary to pitch a business proposition. Mr Murray met Mr Gilbert on 13 April 2011. In the course of that meeting, Mr Gilbert disclosed that he had been asked by RBS to review the business of Primary and that he knew that Primary had breached its covenants with RBS.

[**171**] On 27 June 2011 Steve Morley-Ham of Primary met Mr Gilbert. Mr Gilbert told Mr Morley-Ham that he had read the Medway reports and that his boss had sent them to him at the time and asked him to give a view as to the value of Primary's assets.

[**172**] Mr Murray had a further meeting with Mr Gilbert on 28 October 2011. Mr Gilbert said that he had been given the Medway reports and asked to give RBS a view on value. He said that it was the only job that he had ever done that he had been asked to keep a secret. He also said that, whilst at Direct Line, he had followed Swiftcover, albeit not to the same extent as e-Sure.

*Commencement of the proceedings*

[**173**] These proceedings were commenced by the issue of a claim form on 12 July 2012 and the service thereof on 2 November 2012. There had been no letter before action concerning Primary's claim, although there had been some

correspondence concerning a subject access request by Mr James between August 2011 and January 2012. The claim was based on the information provided by Mr Gilbert in 2011.

PRIMARY'S CLAIM AGAINST RBS

**[174]** Primary's claim against RBS is for breach of a contractual obligation of confidence (the claim is also pleaded in equity, but it is common ground that it should be assessed by reference to contractual principles).

THE LAW

**[175]** In general, the ordinary principles of contract law apply to a claim for breach of a contractual obligation of confidence. The relevant principles for present purposes may be summarised as follows.

*Incorporation of contractual terms*

**[176]** Terms may be incorporated into a contract by written or oral agreement or conduct. Counsel for Primary reminded me of the famous observation of Lord Denning MR in *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686 at 690, [1971] 2 QB 163 at 170:

> 'I do not pause to enquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in *J Spurling Ltd v Bradshaw* ([1956] 2 All ER 121 at [125], [1956] 1 WLR 461 at [466]). In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it, or something equally startling.'

*Contractual interpretation*

**[177]** The principles of contractual interpretation were reviewed by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER (Comm) 1, [2011] 1 WLR 2900.

*Implication of terms*

**[178]** The principles for implication of contractual terms were reviewed by the Privy Council in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER (Comm) 1, [2009] 1 WLR 1988.

*Collateral assurances*

**[179]** Where a party to a prospective contract provides a specific promise or assurance to the other party, intending that it should be acted on by the other party in entering into the contract and the other party does rely on the promise or assurance, then the promise or assurance is contractually binding; and any printed term or condition which deals with the same subject matter, but which is repugnant to the express oral promise or assurance, is rejected or treated as overridden by the oral promise or assurance: see *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930 especially at 932–933, [1976] 1 WLR 1078 especially at 1081–1082 (Lord Denning MR) and *Thinc Group v Armstrong* [2012] EWCA Civ 1227, especially at [83]–[92] (Rix LJ).

*The banker's duty of confidentiality*

**[180]** It is common ground that a banker owes his customer a duty of confidentiality. In *Tournier v National Provincial and Union Bank of England* [1924]

1 KB 461, [1923] All ER Rep 550 the Court of Appeal considered the scope of this duty. Bankes LJ said [1924] 1 KB 461 at 471–472 and 473, [1923] All ER Rep 550 at 554:

> 'At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition of the duty. The moat that can be done is to classify the qualification and to indicate its limits … On principle, I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer … A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft, stating on the face of the writ the amount of the overdraft.'

Scrutton LJ formulated (c) in terms of what was 'reasonable and proper for its own protection, as in collecting or suing for an overdraft' ([1924] 1 KB 461 at 481 and 473, [1923] All ER Rep 550 at 558 and 554) and Atkin LJ in terms of what was 'reasonably necessary for the protection of the bank's own interests' ([1924] 1 KB 461 at 486, [1923] All ER Rep 550 at 561). As Atkin LJ pointed out (also [1924] 1 KB 461 at 486, [1923] All ER Rep 550 at 561), since this is an implied term, it may be varied by express agreement.

*Assessment of damages for breach of confidence*

**[181]** I considered the law with regard to the assessment of damages for breaches of both contractual and equitable obligations of confidence at length in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [374]–[438]. For convenience, I reproduce the key passage for present purposes below:

> '[383] In recent years … the law has come to recognise that the problem posed by situations in which the Claimant cannot prove orthodox financial loss as a result of the breach of a negative contractual term (ie a term that restricts the Defendant's activities in some way) can be addressed by the award of what have variously been referred to "*Wrotham Park* damages", "gain-based damages" and "negotiating damages". (I prefer the last of these terms. It is not necessarily the case that such damages are based on the Defendant's gain from the breach.) These are damages assessed as the price which the Defendant could reasonably have demanded as the price for agreeing to relax the contractual restriction in question.
>
> [384] As Lord Nicholls explained in *Attorney-General v Blake* [[2000] 2 All ER (Comm) 487 at 497–498, [2001] 1 AC 268 at 282–283 and 284]:
>
> > "An instance of this nature occurred in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [[1974] 2 All ER 321], [1974] 1 WLR 798. For social and economic reasons the court refused to make a mandatory order for the demolition of houses built on land burdened with a restrictive covenant. Instead, Brightman J made an award of damages under the jurisdiction which originated with Lord Cairns's Act. The existence of the new houses did not diminish the value of the benefited land by one farthing. The judge considered that if the Plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. He

assessed the damages at 5% of the developer's anticipated profit, this being the amount of money which could reasonably have been demanded for a relaxation of the covenant

In reaching his conclusion the judge applied by analogy the cases mentioned above concerning the assessment of damages when a Defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. […]

The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The Defendant must make a reasonable payment in respect of the benefit he has gained."

[385] In that case, the House of Lords went a step further and made an order for an account of profits in respect of Blake's breach of contract (i e a truly restitutionary remedy). Negotiating damages have been awarded in a number of subsequent cases, however, notably *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830, [2003] EMLR 515; *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER 74, [2008] 1 WLR 445; *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 25 EG 210, [2007] L&TR 6 and *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370, [2011] Bus LR D1.

[386] These cases establish the following principles for the assessment of such damages:

i) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* [[2000] 2 All ER (Comm) 487 at 511, [2001] 1 AC 268 at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Hendrix v PPX* at [26] (Mance LJ, as he then was) and *WWF v World Wrestling* at [56] (Chadwick LJ).

ii) The primary basis for the assessment is to consider what sum would have arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *PPX v Hendrix* at [45]; *WWF v World Wrestling* at [55]; *Lunn v Liverpool* at [25] and *Pell v Bow* at [48]–[49], [51] (Lord Walker of Gestingthorpe).

iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell v Bow* at [49].

iv) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly* at [29] and *Pell v Bow* at [50].

v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell v Bow* at [51].

vi) The court can take into account other relevant factors, and in particular delay on the part of the Claimant in asserting its rights: see *Pell v Bow* at [54].'

[**182**] On appeal, the Court of Appeal did not consider it necessary to review the law in detail, and refrained from expressing any view as to the correctness of my analysis: see [2013] EWCA Civ 780 at [97] (Lewison LJ). Nevertheless, it is important to note two points.

[**183**] The first is that I approached the question of quantum on the basis of Aerolab's actual use of the confidential information. In the result, the Court of Appeal did not disagree with this approach, but Lewison LJ expressed the following caveat:

> '[95] However, this does not deal with Force India's point that whatever the extent of Aerolab's *actual* use of the confidential information, its aerodynamicists and CAD draftsmen regarded themselves as free to use it as they thought fit. I do not think that the judge made findings of fact about this, although he dealt with the point obliquely in the section of his judgment on quantum …
>
> [96] Whether Aerolab's aerodynamicists and CAD draftsmen regarded themselves as free to use the CAD files as they thought fit is essentially a question of fact, which turns on the state of mind of the people in question. We were not shown any evidence about that, nor any questions put to the witnesses about their state of mind. In those circumstances I do not consider that we are in a position to make a finding of fact that the judge did not make. That said, if the judge had made that finding, then it seems to me that compensation should have been assessed on the basis of the value to Aerolab of the whole corpus of information. After all, if A wrongfully retains B's dictionary, it does not matter that he only looked up a few definitions.'

[**184**] The second is that the Court of Appeal rejected the claimant's argument, based on the judgment of Henderson J in *London Borough of Enfield v Outdoor Plus Ltd* [2012] EWCA Civ 608, [2012] 2 EGLR 105 at [51], that the measure of compensation awarded was erroneous because it eliminated the misuse, for reasons which Lewison LJ expressed at [107] as follows:

> 'In this passage Henderson J clearly accepts that the availability of alternatives is a legitimate consideration in assessing compensation. It could hardly be otherwise. In any negotiation the parties to the negotiation will be considering what their alternatives are to doing the deal. There is no reason why a hypothetical negotiation should be any different in that respect. It is, of course, different from a real negotiation in one respect because in the hypothetical negotiation not doing the deal at all is not an alternative. In selecting as the measure of damages the cost of employing a consultant in order to obtain an equivalent benefit from an alternative source the judge was, in my judgment, following a well-trodden path. I see no error of principle here.'

ASSESSMENT

[**185**] It is common ground that there is no need to distinguish between Primary Group and Primary UK for the purposes of assessing Primary's claim against RBS. It is also common ground that, viewed as a whole, the information contained in the Medway reports was confidential to Primary. Counsel for RBS accepted in his closing submissions that, if I concluded that RBS had in fact given Primary the assurances as to confidentiality that Primary claimed, then RBS had acted in breach of those assurances, and hence in

breach of contract, by disclosing the Medway reports to Direct Line. Given that that is my conclusion, I shall deal with the other issues on liability relatively briefly. Before doing so, it is convenient to note here that Primary make no complaint about the sharing of information relating to the UKU-UKI debt between RBS and Direct Line.

*Implied obligation of confidence*

[**186**] It is common ground that, if no such assurances were given, it was an implied term of the contract between RBS and Primary that RBS owed Primary a duty of confidentiality in respect of confidential information provided by Primary to RBS. There is a dispute, however, as to whether RBS's ability to disclose the Medway reports to Direct Line was regulated by the 23 May 2005/28 June 2005 Business Current Account Terms & Conditions ('the 2005 Terms & Conditions'), the SLF or the *Tournier* implied terms.

*Incorporation of the 2005 Terms & Conditions*

[**187**] RBS contend that the 2005 Terms & Conditions were incorporated into the contract between RBS and Primary as a result of the events I have described in paras [49]–[52] above. Primary dispute this. In my judgment, the 2005 Terms & Conditions were incorporated into the contract, but only with respect to the Business Current Account which Primary opened on that occasion and information referable to that account. RBS did not purport to seek Primary's assent to those Terms & Conditions regulating the relationship between RBS and Primary any more widely, and in particular did not purport to seek Primary UK's assent to those Terms & Conditions forming part of the pre-existing contract between RBS and Primary (e g relating to account number 10077411). Nor did RBS subsequently seek to incorporate those Terms & Conditions into either the SLF or the Overdraft Letter. On the contrary, the SLF contained different and inconsistent terms.

*Construction of the 2005 Terms & Conditions*

[**188**] Counsel for Primary submitted that the information disclosure provision in the 2005 Terms & Conditions should be construed as being subject to an implied qualification that RBS could only disclose the customer's information to other RBS Group subsidiaries in so far as it was reasonably necessary to do so. As he pointed out, interpreted literally, they permit RBS to disclose the customer's confidential information to any RBS Group subsidiary to help the subsidiary develop services and systems, including services and systems competitive with those of the customer. He submitted that customers of RBS would be horrified at this. I agree, and I am surprised that RBS can have thought that it was justified to include a clause of this width in its standard terms and conditions. (I should make it clear, however, that I consider that RBS did enough to draw customers' attention to the clause to ensure its incorporation if assented to.) Nevertheless, I cannot see any basis in the language of the clause for construing it in the manner suggested by Primary. Nor can I see any basis for implying a term to that effect.

*Application of the SLF*

[**189**] Counsel for Primary also submitted that the information disclosure provision in the 2005 Terms & Conditions did not in any event apply to the information contained in the Medway reports. That information was obtained by RBS pursuant to cl 24.7(d) of the SLF, alternatively by separate agreement as

part of the price for RBS's forbearance in not exercising its right of acceleration under the SLF as a consequence of Primary's default. At least in the former case, the applicable information disclosure provision was cl 28.7 of the SLF. I agree that the information disclosure provision in the 2005 Terms & Conditions does not apply to the information contained in the Medway reports. This is mainly for the reason given in para [186] above, and because the information in the Medway reports extends far, far beyond anything that can conceivably be referable to that business current account. If necessary, I would hold that the Medway reports were obtained pursuant to cl 24.7(d) of the SLF. It is true that, as counsel for RBS pointed out, RBS did not explicitly invoke that clause; but I infer that everyone was aware that RBS had the right to require such information to be provided under the SLF. Accordingly, I consider that cl 28.7 of the SLF governed disclosure of the information. Furthermore, it did so in place of the *Tournier* implied terms.

*Was RBS entitled to disclose the Medway reports to Direct Line absent the assurances?*

[**190**] For the reasons given above, I do not consider that the information disclosure provision in the 2005 Terms & Conditions entitled RBS to disclose the information in the Medway reports to Direct Line even absent the assurances which I have found were given. If the information disclosure provision in the 2005 Terms & Conditions was the applicable provision, however, then I would accept RBS's contention that disclosure to Direct Line was 'to help [RBS] assess financial risks'.

[**191**] If, as I consider, disclosure of the Medway reports was governed by cl 28.7 of the SLF, counsel for RBS rightly did not argue that this permitted RBS to disclose the Medway reports to Direct Line.

[**192**] If disclosure was governed by the *Tournier* implied terms, and hence RBS was required to demonstrate that disclosure of the information to Direct Line was reasonably necessary, I would not consider that it was reasonably necessary. My reasons are as follows. First, RBS could (and did) obtain advice from Direct Line regarding such matters as Primary's position in the market and general insurance questions based on Direct Line's own knowledge and expertise without disclosing any of Primary's information to Direct Line. Secondly, RBS had access to all the insurance restructuring and valuation expertise it reasonably needed from KPMG at great expense to Primary. (RBS was also aware of the FPK valuation, but I do not regard that as material.) Thirdly, Mr Gilbert had no relevant expertise that it was reasonably necessary for RBS to obtain. As explained above, he had only two years' experience in the insurance industry. Although he had apparently had some experience in insurance business valuation, he was not an expert in that field, and certainly no more expert than KPMG's team. Fourthly, SLS made no use of Mr Gilbert's review. Nor do they appear to have made any significant use of the advice they received from either Mr McKee or Mr Houghton. Fifthly, I was left with the clear impression by the evidence of both Mr Birch and Mr Sach that the only reason why SLS undertook the exercise at all was because Mr Sach regarded it as an automatic step to take whether it was needed or not. Sixthly, SLS failed to obtain clearance from Compliance. Seventhly, SLS failed properly to address the concerns raised by Ms Court via Mr McKee. Eighthly, RBS failed to obtain proper confidentiality protection from Direct Line. Ninthly, particularly in the absence of proper confidentiality protection from Direct Line, RBS was not justified in exposing Primary to the risk that a large amount of Primary's confidential information might be misused by Direct Line, even if only

subconsciously. In the event, I have found that that risk did not materialise; but that is a tribute to the professionalism of Mr Houghton and Mr Gilbert (apart from Mr Gilbert's retention of the Medway reports after he left Direct Line) rather than that of SLS's representatives.

*Should there be an inquiry as to damages?*

[**193**] Primary seek an inquiry as to damages. Primary accept that they have suffered no direct loss as a result of RBS's breach of contract, but contend that they are entitled to a reasonable fee by way of negotiating damages assessed on the principles explained in *Force India*. RBS accepts that, if Primary establish breach of contract, Primary are entitled to nominal damages, but contends that Primary have no realistic prospect of recovering any substantial sum and therefore no inquiry should be ordered.

[**194**] It is common ground that the principle to be applied at this stage is that stated by Fox LJ in *McDonald's Hamburgers Ltd v Burgerking (UK) Ltd* [1987] FSR 112 at 118–119:

> 'In my view the court must have a degree of discretion to refuse such an enquiry, with its attendant trouble and expense, if it is satisfied that such an enquiry would prove to be fruitless …
>
> If the plaintiffs have an arguable case for claiming damages, the court would (as a matter of ordinary justice) make an order for an enquiry to enable them to pursue it.
>
> … I find it quite impossible to say that the prospect of recovering damages of a significant amount is too slight to justify the ordering of an enquiry – which would of course (as has been emphasised) be at the plaintiffs' risk as to costs.'

[**195**] In approaching this question, it is fortunately not necessary for me to consider what the position would be if RBS had disclosed the Medway reports to Direct Line solely for RBS's purposes, but Direct Line had also used information contained in the reports for Direct Line's purposes. Accordingly, I express no view as to what the position would be in that event.

[**196**] As it is, the only use of the information contained in the Medway reports by Direct Line which I have found to have occurred is for the purposes of advising RBS, and in particular the preparation of Mr Gilbert's review. Even on that hypothesis, counsel for Primary submitted that Primary had a sufficient prospect of recovering substantial damages to justify ordering an inquiry. In support of that submission he made two main points. First, viewed as a whole, the Medway reports contained a large body of confidential information which was clearly of considerable potential value to a competitor. Secondly, disclosure of the Medway reports to Direct Line had exposed Primary to the risk of that information being misused by Direct Line, which was the very risk that Primary had sought to avoid by seeking assurances from RBS that information would not be disclosed, even if that risk did not materialise.

[**197**] Counsel for RBS submitted that there was no question in any hypothetical negotiation of RBS paying any money to Primary for release of the covenant because RBS was not obtaining a benefit for itself in disclosing the Medway reports to Direct Line. Rather, RBS wanted to obtain an insurance industry perspective on the Medway reports in order to be reassured about Primary's financial position. This was of benefit to Primary since it gave RBS the comfort to continue to forbear from demanding immediate repayment under the SLF.

[**198**] As counsel put to Mr James in cross-examination, there were logically only three possibilities to be considered in the hypothetical negotiation:

(i) Direct Line providing the insurance industry perspective on the Medway reports which RBS wanted;

(ii) an independent insurer providing an insurance industry perspective; and

(iii) RBS proceeding without the benefit of an insurance industry perspective.

[**199**] Counsel for RBS relied on the fact that Mr James accepted that, if an independent insurer had done the work, Primary would have had to bear the cost, as it had had to bear the cost of KPMG's and Kroll's work, as demonstrating that there was no question of RBS paying Primary for this. Nor, self-evidently, would RBS have had to pay Primary if RBS simply did without an insurance industry perspective, with the consequent risk to Primary of RBS calling in the loans. Accordingly, he argued that, since RBS would not have had to pay Primary anything in alternative scenarios (ii) and (iii), it would not have had to pay anything for Primary's agreement to scenario (i).

[**200**] Attractively though it was formulated, I do not accept this argument. In my judgment there are two flaws in the argument. The first is that it assumes that RBS was justified in wanting an insurance industry perspective on the Medway reports. For the reasons given in para [192] above, however, I do not consider that this was reasonably necessary (let alone necessary). Accordingly, Primary would have been able to argue in the hypothetical negotiation that there was no objective need for it, that it was really for RBS's comfort, and in that sense for RBS's benefit, and accordingly that RBS should pay for the privilege.

[**201**] The second flaw is that the argument assumes that, because Direct Line did not in the event make use of the information in the Medway reports for its own benefit, the hypothetical negotiation must be approached on the basis that there was no risk of misuse. I do not consider that this follows. In my judgment, the hypothetical negotiation should be approached on the basis that Primary is entitled to be compensated for being exposed to the risk that Direct Line might misuse the information (in particular, because RBS failed to require proper confidentiality protection from Direct Line and because of the possibility of unconscious misuse), even though it is now known that that risk did not materialise.

[**202**] I agree with counsel for RBS, however, that the availability of alternatives (ii) and (iii) would have given RBS a strong negotiating position in the hypothetical negotiation. I therefore consider that Primary have no realistic prospect of recovering a substantial sum by way of damages. I do not consider that it follows that Primary are only entitled to nominal damages. The covenant had value for Primary and something should be paid for its relaxation.

[**203**] During closing submissions, I canvassed with counsel what I should do if I came to the conclusion that Primary were entitled to more than nominal damages, but that the sum which Primary would be likely to recover would not justify the expense of an inquiry. Counsel for RBS submitted that, in that event, I should summarily assess the damages myself on the basis of the material already before the court. Counsel for Primary did not agree that this course would be appropriate, but offered no cogent argument against it.

[**204**] Counsel for RBS went on to submit that a rough and ready way in which to put a value on the relaxation of the covenant was to estimate the value of the time that Mr Houghton and Mr Gilbert had spent on the project. In the particular circumstances of this case, I agree that this is a suitable measure. For the reasons I have just explained, Direct Line was doing work for

RBS's comfort. An award of damages reflecting the amount that RBS would have had to pay for the work to be done if Direct Line had not been a group company is an appropriate way of putting a price on RBS's ability to release the Medway reports to Direct Line.

[**205**] Mr Gilbert's salary at the time is in evidence. Since he made it clear during his evidence that he regarded it as private, I shall not reveal it here. Mr Houghton's salary is not in evidence, but it is unlikely to have been more than two or three times Mr Gilbert's salary. Mr Gilbert cannot have spent more than a week of his time on the project at most. Mr Houghton is unlikely to have spent more than a day on it at most. I also bear in mind that Mr McKee spent a little time on the matter, and appears to have received some information from the Medway reports during the meeting on 27 July 2006, albeit not copies of the reports themselves. Given that I am assessing the matter summarily, I must apply a broad brush and it is right to err in Primary's favour. Accordingly, I shall summarily assess the damages payable by RBS to Primary in the sum of £5,000.

PRIMARY'S CLAIM AGAINST DIRECT LINE

[**206**] Primary's claim against Direct Line is for breach of an equitable obligation of confidence.

THE LAW

*The elements of an equitable claim*

[**207**] The clearest statement of the elements necessary to found an action for breach of an equitable obligation of confidence remains that of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47:

> 'First, the information itself … must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'

[**208**] This statement of the law has repeatedly been cited with approval at the highest level: see Lord Griffiths in *A-G v Guardian Newspapers Ltd (No 2)* (*'Spycatcher'*) [1988] 3 All ER 545 at 648, [1990] 1 AC 109 at 268, Lord Nicholls of Birkenhead in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457 at [13] and Lord Hoffmann in *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, [2008] 1 All ER (Comm) 1, [2008] 1 AC 1 at [111]. Nevertheless, it is not a complete statement of the ingredients of a claim. There is a further requirement, namely that the unauthorised use of information was without lawful excuse.

*The necessary quality of confidence*

[**209**] The expression 'the necessary quality of confidence' was coined by Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at 415. Lord Greene defined this quality by antithesis: 'namely, it must not be something which is public property and public knowledge'. In the present case, it is not necessary to say any more about this question, because there is no dispute that the package of information contained in the Medway reports possessed the necessary quality of confidence.

*Circumstances importing an obligation of confidence*

[**210**] In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 48 Megarry J propounded the following test for deciding whether information had been communicated in circumstances importing an equitable obligation of confidence:

> 'It may be that that hard-worked creature, the reasonable man, may be pressed into service once more; for I do not see why he should not labour in equity as well as at law. It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.'

[**211**] Two points may be noted about this test. The first is that it does not depend on the existence of a confidential relationship between the discloser and the recipient of the information. The second is that it is objective rather than subjective.

[**212**] In *A-G v Guardian Newspapers Ltd (No 2)* Lord Goff of Chieveley formulated the applicable principle in this way ([1988] 3 All ER 545 at 657–658, [1990] 1 AC 109 at 281):

> 'I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary, though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious …
>
> … I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers, where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or when an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.'

[**213**] Although Lord Goff left open the possibility that actual knowledge that the information is confidential is required, this statement of principle is otherwise consistent with Megarry J's reasonable person test. The reasonable person who has notice that the information he has received or acquired is confidential is bound by an equitable obligation of confidence precisely because he has such notice. To put it another way, the yardstick for judging whether or not a document is 'obviously confidential' is the reasonable person standing in the position of the recipient.

[**214**] In *Campbell v Mirror Group Newspapers Ltd* Lord Nicholls stated at [14]:

'This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281. Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.'

**[215]** Lord Hoffmann said:

'[44] … Equity imposed an obligation of confidentiality upon the latter and (by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.

[45] Thus the cause of action in *Prince Albert*'s case was based upon the defendant's actual or constructive knowledge of the confidential relationship between the Prince Consort and the printer to whom he had entrusted the plates of his etchings …

[46] In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way …

[47] The first development is generally associated with the speech of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281, where he gave, as illustrations of cases in which it would be illogical to insist upon violation of a confidential relationship, the "obviously confidential document … wafted by an electric fan out of a window into a crowded street" and the "private diary … dropped in a public place". He therefore formulated the principle as being that—

> "a duty of confidence arises when confidential information comes to the knowledge of a person … in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

[48] This statement of principle, which omits the requirement of a prior confidential relationship, was accepted as representing current English law by the European Court of Human Rights in *Earl Spencer v UK* (1998) 25 EHRR CD 105 and was applied by the Court of Appeal in *A v B (a company)* [2002] EWCA Civ 337 at [11](ix), [2002] 2 All ER 545 at [11](ix), [2003] QB 195. It is now firmly established.'

**[216]** Lord Hope of Craighead said at [85]:

'… As Lord Woolf CJ said in *A v B (a company)* [2002] EWCA Civ 337 at [11](ix), (x), [2002] 2 All ER 545 at [11](ix), (x), [2003] QB 195, the need for the existence of a confidential relationship should not give rise to problems as to the law because a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be

protected. The difficulty will be as to the relevant facts, bearing in mind that, if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified: see also the exposition in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659, [1990] 1 AC 109 at 282 by Lord Goff of Chieveley, where he set out the three limiting principles to the broad general principle that a duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential …'

**[217]** Baroness Hale of Richmond said at [134]:

'… The position we have reached is that the exercise of balancing arts 8 and 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential …'

**[218]** It is clear from these dicta that the House endorsed both of the propositions I have stated in para [211] above.

**[219]** In *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] 1 All ER 555, [2011] Fam 116, Lord Neuberger MR, delivering the judgment of the Court of Appeal, said:

'[64] It was only some 20 years ago that the law of confidence was authoritatively extended to apply to cases where the defendant had come by the information without the consent of the claimant. That extension, which had been discussed in academic articles, was established in the speech of Lord Goff of Chieveley in *A-G v Guardian Newspapers (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109. He said ([1988] 3 All ER 545 at 657–658, [1990] 1 AC 109 at 281) that confidence could be invoked "where an obviously confidential document is wafted by an electric fan out of a window … or … is dropped in a public place, and is then picked up by a passer-by."

[65] The domestic law of confidence was extended again by the House of Lords in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457, effectively to incorporate the right to respect for private life in art 8 of the convention, although its extension from the commercial sector to the private sector had already been presaged by decisions such as *Duchess of Argyll v Duke of Argyll* [1965] 1 All ER 611, [1967] Ch 302 and *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804 …

[66] As Lord Phillips's observation suggests, there are dangers in conflating the developing law of privacy under art 8 and the traditional law of confidence. However, the touchstone suggested by Lord Nicholls of Birkenhead and Lord Hope of Craighead in *Campbell v Mirror Group Newspapers Ltd* at [21], [85], namely whether the claimant had a "reasonable expectation of privacy" in respect of the information in issue, is, as it seems to us, a good test to apply when considering whether a claim for confidence is well founded. (It chimes well with the test suggested in classic commercial confidence cases by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at [47], namely whether the information had the "necessary quality of confidence" and had been "imparted in circumstances importing an obligation of confidence".)

…

a [68] If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and
b knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. The notion that looking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (albeit perhaps only in equity) is also consistent with the decision of the Strasbourg court that monitoring private telephone calls can infringe
c the art 8 rights of the caller: see *Copland v UK* (2007) 25 BHRC 216.

[69] In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant.'

d [**220**] Again, it is clear that the Court of Appeal considered that the propositions I have stated in para [211] above correctly represented the law.

[**221**] In *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 4 All ER 781, [2013] 1 WLR 1556 Lord Neuberger of Abbotsbury PSC, with whom the other members of the Supreme Court agreed, stated at [23]:

e 'The classic case of breach of confidence involves the claimant's confidential information, such as a trade secret, being used inconsistently with its confidential nature by a defendant, who received it in circumstances where she had agreed, or ought to have appreciated, that it was confidential—see eg per Lord Goff of Chieveley in *A-G v Guardian*
f *Newspapers (No 2)* [1988] 3 All ER 545 at 657, sub nom *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109 at 281. Thus, in order for the conscience of the recipient to be affected, she must have agreed, or must know, that the information is confidential.'

[**222**] In the first sentence Lord Neuberger is plainly applying Lord Goff's
g statement of principle and stating an objective test, consistently with *Campbell v MGN* and *Imerman v Tchenguiz*. Although the second sentence, if read in isolation, might be thought to indicate that the test is subjective, Lord Neuberger cannot have intended to contradict what he had said in the first sentence. Nor can he have intended to depart from *Campbell v MGN* and *Imerman v Tchenguiz*, which, although they were not cited in *Vestergaard*, he
h would obviously have been familiar with. I would add that Lord Neuberger went on at [39] to say that an injunction to restrain misuse of confidential information against a recipient of confidential information 'might well be justified, once it could be shown that she appreciated, or, perhaps, ought to have appreciated, that [the information was] confidential'. Again, this seems to recognise that the test is objective, albeit with what I consider to be surprising
j hesitation.

[**223**] It follows from the statements of principle I have quoted above that an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that that is the case, but also where confidential information is acquired or received

without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient.

[**224**] The latter type of case may be sub-divided into two classes: (1) where the confidential information is acquired improperly; and (2) where the confidential information is received adventitiously. A leading instance of the first class of case is *Lord Ashburton v Pape* [1913] 2 Ch 469, [1911–13] All ER Rep 708, where the defendant was restrained from using copies of certain privileged letters which he had obtained by a trick. Swinfen Eady LJ expressly based the injunction upon the Court of Chancery's jurisdiction to restrain the disclosure of confidential information. In essence, *Imerman v Tchenguiz* was a straightforward application of *Ashburton v Pape* to the electronic era in circumstances where one of the Tchenguiz brothers had copied a large volume of Mr Imerman's documents from a server to which the former had access. The fact that only some of the documents were privileged made no difference. Other examples of this class of case are *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892 (unauthorised tapping of telephone conversations); *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 at [474], [1995] 1 WLR 804 at 807 (Laws J, as he then was) (telephoto lens photography of a private act); and *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134, *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444 and *Douglas v Hello! Ltd (No 3)* (information obtained by entry onto private property, or a restricted part of a public area, without permission).

[**225**] The second class of case is exemplified by a series of cases in which documents have been accidentally disclosed to opposing parties during the course of litigation. Thus in *English and American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232 the papers of counsel for the defendants in an action had been mistakenly returned to the solicitors for the claimants. The claimants' solicitors, having realised what had happened, consulted the Law Society and taken their clients' instructions, proceeded to read the papers and take notes. The solicitors were restrained from using the information thus obtained and ordered to deliver up the notes. Sir Nicolas Browne-Wilkinson V- C rejected the solicitors' submission that a third party who had innocently received confidential information could not be restrained from using it, holding that the solicitors came under an obligation of confidence because they knew that the information was confidential.

[**226**] It is clear from subsequent cases concerning privileged documents said to have been disclosed by mistake, however, that it is not necessary for the recipient to have realised that the information was privileged and hence confidential if a reasonable person in his or her position would have realised this. Thus in *Pizzey v Ford Motor Co* [1993] 17 LS Gaz R 46, [1994] PIQR P21, Mann LJ said:

> 'Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question: evident to whom? The answer must be, to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of a case where it was not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context the law ought not to give an advantage to obtusity and if the recipient ought to have realised that a mistake was evident then the exception applies.'

[**227**] Although *Coco v Clark* was not referred to, this is the same test as Megarry J's 'reasonable man standing in the shoes of the recipient' test. In *Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780, [2002] All ER (D) 450 (May) at [16], Clarke LJ (as he then was), delivering the judgment of the Court of Appeal, cited Mann LJ's dictum with approval as correctly stating the law.

[**228**] I would add that it is clear from these authorities that it is not the law that an equitable obligation of confidence binds all recipients of confidential information except a bona fide purchaser for value without notice, despite the statements to that effect which have been made in several cases (e g *Morison v Moat* (1851) 9 Hare 241 at 264 (Turner V-C), *Goddard v Nationwide Building Society* [1986] 3 All ER 264 at 271, [1987] QB 670 at 685 (Nourse LJ) and *Imerman v Tchenguiz* [2011] 1 All ER 555, [2011] Fam 116 at [74]).

[**229**] Counsel for Direct Line cited two decisions of the Court of Appeal as authorities for the proposition that the test to be applied in determining whether a recipient of confidential information is subject to an equitable obligation of confidence is a subjective one. The first is *Thomas v Pearce* [2000] FSR 718. In that case, the claimant operated a letting agency. The first defendant was employed by the claimant, but left to join the second defendant, another firm of letting agents. Before doing so, the first defendant made a list of the claimant's clients. She then disclosed this to Mrs Price, an employee of the second defendant, who used it to notify certain clients that the first defendant was now employed by the second defendant. The claimant succeeded in her claim for breach of confidence against the first defendant, but failed against the second defendant. The judge found that, although Mrs Price must have known of the value of the information, and although a reasonable estate agent would have made further enquiries, Mrs Price had not realised that she was doing anything wrong and had not deliberately shut her eyes and ears to something she would rather not know. The claimant's appeal was dismissed by a two judge Court of Appeal consisting of Buxton LJ and Gage J, who held in extempore judgments that the test to be applied was whether the second defendant had acted honestly.

[**230**] There are a number of problems with the decision even before one comes to later developments in the law. The first is that none of the relevant authorities (such as *Coco v Clark* and *A-G v Guardian*) appear to have been cited. The only cases referred to in the judgment of Buxton LJ, who gave the main judgment, are *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378 and *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511. These are both cases on knowing assistance in a breach of trust. That doctrine, as Lord Neuberger noted in *Vestergaard v Bestnet* at [26], is a doctrine of accessory liability.

[**231**] This leads to the second problem, which is that the judgments proceed on the basis that the claimant's claim against the second defendant was one of accessory liability for the *first defendant's* breach of confidence in disclosing the information to Mrs Price (see Buxton LJ [2000] FSR 718 at 720). That is not how I read the extracts from the claimant's statement of case quoted by Buxton LJ, but I acknowledge that the extracts are not complete and the claim may not have been clearly pleaded. Be that as it may, the real issue was whether Mrs Price had *herself* committed a breach of confidence by using the information to notify the clients. (It does not appear to have been in dispute that the second defendant would be vicariously liable for any breach of confidence committed by Mrs Price.)

[**232**] This leads to the third problem, which is that the claimant's pleaded case appears to have been that the second defendant (strictly, Mrs Price) owed the claimant an equitable obligation of confidence because she *knew* that the information had been disclosed to her in breach of the first defendant's duty of confidentiality. The claimant did not plead that Mrs Price owed the claimant an equitable obligation of confidence because a reasonable person standing in her shoes would have appreciated that the information was confidential. It is not surprising that, in effect, the Court of Appeal held the claimant to her pleaded case.

[**233**] Finally, understandably in the circumstances I have described, the judgments do not distinguish between the questions (i) whether Mrs Price owed the claimant an equitable obligation of confidence, and if so, (ii) whether Mrs Price acted in breach of that obligation.

[**234**] In any event, whatever the status of *Thomas v Pearce* may have been at the time it was decided, in my judgment it is clear that it is no longer good law on the question of the test to be applied with regard to the imposition of an equitable obligation of confidence in the light of subsequent authorities, and in particular *Campbell v MGN*. As mentioned below, it may be good law on the correct test for accessory liability; but that is another matter.

[**235**] The second case cited by counsel for Direct Line was *R v Department of Health, ex p Source Informatics Ltd* [2000] 1 All ER 786, [2001] QB 424, in which Simon Brown LJ, with whom Aldous and Schiemann LJJ agreed, stated the test at [31] in terms of the recipient's 'own conscience, no more and no less'. Simon Brown LJ had previously cited *Coco v Clark* and *A-G v Guardian*, however, and it is not clear that he was intending to apply a different test, particularly since the case does not appear to have turned on the difference between a subjective test and an objective test. If he was applying a subjective test, then in my judgment it is again clear that the case is no longer good law on the question of the test to be applied with regard to the imposition of an equitable obligation of confidence in the light of subsequent authorities, and in particular *Campbell v MGN*.

*The scope of an equitable obligation of confidence*

[**236**] In *Smith Kline & French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991) 99 ALR 679 the Federal Court of Australia (Sheppard, Wilcox and Pincus JJ) stated at 691–692:

> 'Megarry J. has suggested a broad test to determine whether an obligation of confidence exists. In *Coco v. A.N. Clark (Engineers) Ltd.* (1969) RPC 41, Megarry J. said, at p. 48:
>
> > "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".
>
> However, this test does not give guidance as to the scope of an obligation of confidentiality, where one exists. Sometimes the obligation imposes no restriction on use of the information, as long as the confidee does not reveal it to third parties. In other circumstances, the confidee may not be entitled to use it except for some limited purpose. In considering these problems, and indeed the whole question, it is necessary not to lose sight of the basis of the obligation to respect confidences:

> "It lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained".
>
> This is quoted from *Moorgate Tobacco Co. Ltd. v. Phillip Morris Ltd.* (*No. 2*) (1984) 156 CLR 414 at &438 per Deane J., with whom the other members of the Court agreed … Similar expressions recur in other cases: *Seager v. Copydex Limited* (1967) RPC 349 at &368:
>
> "The law on this subject … depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it".
>
> To avoid taking unfair advantage of information does not necessarily mean that the confidee must not use it except for the confider's limited purpose. Whether one adopts the "reasonable man" test suggested by Megarry J. or some other, there can be no breach of the equitable obligation unless the Court concludes that a confidence reposed has been abused, that unconscientious use has been made of the information.'

[**237**] As the court rightly pointed out in this passage, it can be important to consider not merely whether the information has been disclosed or received in circumstances importing an obligation of confidence, but also the scope of the resulting obligation. In my judgment, it is now clear that, for the reasons explained above, the correct test to be applied in determining this question is to consider the matter from the perspective of the reasonable person standing in the position of the recipient of the information.

*Obligations in respect of third party information*

[**238**] I have already touched on the position where information confidential to A is disclosed by B to C in circumstances where C knows, or ought to appreciate, that the disclosure is a breach of B's obligation of confidence to A. As explained above, in those circumstances, C will become subject to an equitable obligation of confidence owed to A. Accordingly, if C makes unauthorised use of the information, C will be liable to A for breach of confidence.

[**239**] What if C knows, or ought to appreciate, that the information is confidential to A, but C believes, and a reasonable person standing in his shoes would also believe, that B is entitled to disclose the information to C for a particular purpose? In these circumstances C will come under an equitable obligation to A only to use the information for that purpose. (It is not necessary for present purposes to consider whether C will also owe a duty to B.) If it turns out that, in fact, B was not entitled to disclose the information to C, then C will not be liable to A for breach of confidence for using the information for that purpose. If, on the other hand, C proceeds to use the information for a different purpose, then C will be liable to A for breach of confidence.

[**240**] In some cases, the circumstances may be such that a reasonable person in the position of C would make further inquiries – and in particular would ask A if he or she consented – before making a particular use of the information. If C makes such use without making such inquiries, then in my judgment C will be liable for breach of confidence: cf *Volkswagen Aktiengesellschaft v Garcia* [2013] EWHC 1832 (Ch) at [38] (Birss J).

*Unauthorised use*

[**241**] It is important to distinguish between three questions which are sometimes confused: first, whether there is an equitable obligation of confidence at all (and, if so, its scope); secondly, if there is such an obligation, what conduct amounts to breach of the obligation; and thirdly, who is liable for such a breach. I have discussed the first of these questions above. I shall touch briefly on the third question below. I now turn to the second question.

[**242**] This question can be sub-divided into two issues. First, what acts constitute 'use' for this purpose? Secondly, what mental state, if any, is required in order for the use to be actionable?

[**243**] So far as the first issue is concerned, most cases of breach of confidence involve either use of the information for the defendant's own purposes (for example, to develop a competing product or process to that of the claimant) or publication of the information (for example, in a newspaper). As can be seen from the excerpt quoted above, however, the Court of Appeal held in *Imerman v Tchenguiz* that it is a breach of confidence for a person merely to read a document which that person knows, or ought to appreciate, is confidential.

[**244**] So far as the second issue is concerned, the decision of the Court of Appeal in *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923 establishes that a person who owes an equitable obligation of confidence is liable for acting in breach of that obligation even though he is not conscious of doing so. In that case Mr Seager had invented a patented carpet grip which he manufactured and marketed under the trade mark Klent. There were protracted negotiations between Mr Seager and Copydex over a proposal for Copydex to market the Klent. One of the issues in the negotiations was the price at which Mr Seager was to supply the product. During a meeting with two representatives of Copydex, Mr Seager disclosed to them an alternative design of grip which could be produced more cheaply. Although there was a dispute as to precisely what had been disclosed at the meeting, there was no dispute that the disclosure was in confidence (see Lord Denning MR [1967] 2 All ER 415 at 416–418 and, [1967] 1 WLR 923 at 929 and 931). The alternative design was not covered by Mr Seager's patent. The negotiations fell through, and Copydex subsequently manufactured and sold a grip essentially in accordance with the alternative design under the trade mark Invisigrip which Mr Seager had suggested. Copydex also applied to patent the alternative design. The Court of Appeal upheld Mr Seager's claim for breach of an equitable obligation of confidence, holding that Copydex must have unconsciously made use of the information which Mr Seager gave them (see [1967] 2 All ER 415 (per Lord Denning at 416), [1967] 2 All ER 415 (per Salmon LJ at 418) and [1967] 2 All ER 415 (per Winn LJ at 418)).

[**245**] This understanding of the law was expressly endorsed by Lord Neuberger in *Vestergaard v Bestnet* [2013] 4 All ER 781, [2013] 1 WLR 1556 at [24]:

> 'The decision in *Seager v Copydex* … was an entirely orthodox application of this approach. The plaintiff passed on to the defendants a trade secret about his new design of carpet-grip, and although the defendants realised that the secret was imparted in confidence, they went on to use that information to design a new form of carpet-grip, which they marketed. What rendered the case unusual was that the defendants (i) did not realise that they had used the information, as they had done so unconsciously, and

(ii) believed that the law solely precluded them from infringing the plaintiff's patent. However, neither of those facts enabled them to avoid liability, as, once it was found that they had received the information in confidence, their state of mind when using the information was irrelevant to the question of whether they had abused the confidence.'

*Without lawful excuse*

[**246**] It is well established that a person's unauthorised use of confidential information does not amount to a breach of confidence where that person has a lawful excuse for that use. For example, it is not a breach of an obligation of confidence (whether contractual or equitable) to disclose confidential information to an appropriate recipient, or in some circumstances the public at large, in the public interest (as to which, see *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583; *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 88; *Campbell v Frisbee* [2002] EWCA Civ 1374, [2003] IP & T 86; *A-G v Parry* [2004] EWHC 3201 (Ch), [2004] EMLR 223; *R v A-G for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132, [2004] EMLR 24; and *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2007] 2 All ER 139, [2008] Ch 57). Similarly, the exceptions that were recognised to the contractual duty of confidentiality in *Tournier* must equally apply if the relationship between a banker and a customer is non-contractual and the obligation is an equitable one (e g because no contract has yet been concluded).

[**247**] If and to the extent that either an express term of the contract or one of the exceptions in *Tournier* permits disclosure by the banker of the customer's information to a third party for a particular purpose, then the third party must be able to receive the information and use it for that purpose. If the third party knows or ought to appreciate that the information is confidential to the customer, then, as discussed above, the third party will come under an equitable obligation of confidence to the customer not to use the information for any other purpose.

*Liability for breach of an equitable obligation of confidence*

[**248**] Primary liability for breach of an equitable obligation of confidence attaches to the person who acts in breach of the obligation, that is to say, the person who uses or discloses the information (who for convenience I will call the principal).

[**249**] Lord Neuberger said in *Vestergaard* (at [27]) that it was at least arguable that, where the principal misused confidential information during the course of his or her employment, then the employer would be vicariously liable. In the present case, there is no dispute that Direct Line is liable for any breach of confidence committed by its employees during the course of their employment, whether on this or some other basis.

[**250**] Lord Neuberger also acknowledged in *Vestergaard* that it was possible for an accessory to be jointly liable for the principal's breach. He discussed two approaches to this question, the first by analogy with knowing assistance in a breach of trust (at [26]) and the second on the basis of participation in a common design (at [32]–[39]). He held that, either way, there was a requirement of knowledge, or at least 'blind-eye' knowledge, in order for a person to be liable as an accessory. This could be regarded as an endorsement of the approach of the Court of Appeal to the issue of accessory liability in *Thomas v Pearce*, albeit that *Thomas v Pearce* was not cited and other relevant

authorities, notably the decision of the Court of Appeal in *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633 (see the judgment of Lord Phillips of Worth Matravers MR at [66]–[71]), were not cited either. It is not necessary to explore this question for present purposes, however, since, as counsel for Primary confirmed, Primary do not pursue any claim against Direct Line on the basis that Direct Line is liable as an accessory in respect of any breach of confidence committed by RBS in disclosing the Medway reports to Direct Line.

ASSESSMENT

[**251**] Again, it is common ground that it is not necessary to distinguish between Primary Group and Primary UK for the purposes of assessing Primary's claim against Direct Line. As noted above, it is also common ground that Direct Line is liable for any breach of confidence committed by Mr Houghton or Mr Gilbert during the course of their employment by Direct Line. It is not necessary to give separate consideration to the position of Mr McKee, since he did not receive copies of the Medway reports and his involvement was less significant than that of Mr Houghton and Mr Gilbert.

[**252**] I have concluded that RBS disclosed the Medway reports to Direct Line in breach of a contractual obligation of confidentiality to Primary. I have also concluded that Direct Line only used the information in the Medway reports for RBS's purposes, and not for Direct Line's purposes. Accordingly, the issue which arises in respect of Primary's claim against Direct Line is a narrow one: were the Medway reports disclosed by RBS to Direct Line in circumstances which gave rise to an equitable obligation of confidence of a scope which Direct Line acted in contravention of?

[**253**] The starting point is that, again, it is common ground that, viewed as a whole, the information contained in the Medway reports was confidential to Primary. Furthermore, Direct Line does not dispute that Mr Houghton and Mr Gilbert appreciated this. Accordingly, Direct Line does not dispute that they become subject to an equitable obligation of confidentiality such that it would, for example, have been a breach of confidence for them to publish the Medway reports to the world. Direct Line contends, however, that Mr Houghton and Mr Gilbert believed, and reasonably believed, that RBS was entitled to disclose the Medway reports to Direct Line for the limited purpose of advising RBS; and that they therefore did not act in breach of confidence by using the information for that limited purpose. Primary contend that Mr Houghton and Mr Gilbert received the Medway reports in circumstances such that a reasonable person standing in their position would have appreciated that RBS was not entitled to disclose the Medway reports to them, or at least would have made inquiries of Primary, and therefore acted in breach of confidence by reading the reports and using the information contained therein to advise RBS. Primary do not suggest, however, that either Mr Houghton or Mr Gilbert were aware, or ought to have been aware, of the assurances which RBS had given Primary.

[**254**] Although I consider that the correct test to be applied is an objective one, I shall first apply a subjective test in case I am wrong about that.

*Applying a subjective test*

[**255**] Mr Houghton's evidence was clear that he had understood that RBS was entitled to disclose the Medway reports to him and Mr Gilbert in order for them to advise RBS. As Mr Houghton put it during the course of cross-examination:

'I saw myself as part of the credit process being undertaken by RBS. Actually I didn't regard myself as a Direct Line employee in this regard, I regarded myself as part of the RBS credit process who happened to have insurance knowledge.'

[**256**] Mr Gilbert naturally relied primarily on Mr Houghton, but he too gave clear evidence that he understood that RBS was entitled to disclose the Medway reports to Mr Houghton and himself in order for them to advise RBS.

[**257**] I have no hesitation in accepting Mr Houghton's and Mr Gilbert's evidence on this point. It follows that, if the correct test is a subjective one, neither Mr Houghton nor Mr Gilbert acted in contravention of the obligation of confidence to which they were subject.

*Applying an objective test*

[**258**] Counsel for Primary submitted that Mr Houghton and Mr Gilbert ought to have appreciated that Primary had not consented to the disclosure of the Medway reports to Direct Line, and accordingly they had acted in breach of confidence. In the alternative, he submitted that, at minimum, a reasonable person in their position would have enquired as to whether Primary had consented.

[**259**] Mr Houghton's evidence was that he had not applied his mind to the question of whether or not Primary had consented to the disclosure of the Medway reports to Direct Line. In my view, if he had applied his mind to that question, he ought to have appreciated that it was unlikely that Primary had consented. Certainly, he had no reason for believing that Primary had consented. But in my judgment this does not matter. What matters is that he had reasonable grounds for believing that RBS was entitled to disclose the Medway reports to Mr Gilbert and himself for the purpose of advising RBS whether or not Primary had consented. So far as Mr Houghton was concerned, he was dealing with senior, professional and responsible bankers. He was entitled to assume that those bankers would act consistently with their duty of confidentiality, particularly when the purpose of the disclosure was to enable them to advise RBS and those bankers impressed upon Mr Gilbert and himself the need to keep the Medway reports confidential. Mr Houghton gave evidence that he had occasionally been consulted by SLS previously, and so the situation was not an unprecedented one so far as he was concerned. Although Mr Houghton gave evidence that he did not recall being shown any advice from Compliance, I consider it likely that he was given to understand that SLS had obtained clearance from Compliance. In the case of Mr Gilbert, he was entitled to rely on the lead given by his superior Mr Houghton. In any event, he had no reason to think any differently.

[**260**] Accordingly, I conclude that, applying an objective test, neither Mr Houghton nor Mr Gilbert acted in contravention of the obligation of confidence to which they were subject.

OVERALL CONCLUSIONS

[**261**] Primary's claim against RBS for breach of a contractual obligation of confidence succeeds. The damages are summarily assessed at £5,000.

[**262**] Primary's claim against Direct Line for breach of an equitable obligation of confidence is dismissed.

*Claim against first defendant allowed; claim against second defendant dismissed.* a

Andrew Moroney Barrister