



In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2018 No: 149

BETWEEN:

ATHENE HOLDING LTD

Plaintiff

And

**(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDINGS LTD**

Defendants

RULING

Dates of Hearing: Thursday 20 June 2024 and Friday 21 June 2024

Date of Ruling: Friday 31 January 2025

Counsel for the Plaintiff: Bridget Lucas KC of Counsel
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Counsel for the
First and Third Defendants: Mr. Michael Todd KC of Counsel
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Allegations of Fraud, Breach of Confidence and Breach of Fiduciary Duty Claims – Defendants’ Application for Further and Better Particulars of Claim and Schedule of Loss – Whether allegations of misuse of corporate trade secrets and information of proprietary value have been sufficiently pleaded – Plaintiff’s Application for Leave to Amend its Pleadings and for a Split Trial – Leave to Adduce Expert Evidence- RSC Order 1A Case Management Duties and Powers of the Court Overriding Objective

RULING of Shade Subair Williams J

INTRODUCTION:

1. These proceedings were commenced by a Specially Indorsed Writ of Summons (the “Writ”) filed on 3 May 2018. In a number of previous interlocutory rulings of both this jurisdiction of Court and the Court of Appeal, an account of the pleaded facts, as they were, is provided. An overview of the related US proceedings consisting of two sets of a JAMS arbitration and various Court proceedings in New York (the “New York Proceedings”) is also provided in previous rulings of this Court and the Court of Appeal.
2. The age of the Writ, together with its circuitous travel to the upper Court, unveils the vigour of the parties’ will to fiercely tackle through this litigation. Those full servings of judicial scrutiny are facilitated by the appearances of three separate skillful teams of experienced Counsel, each led by formidable London-based King’s Counsel.
3. At this stage of these proceedings, I am concerned with competing applications for trial directions. Athene Holding Limited (“Athene” / the “**Plaintiff**”) seeks leave to amend its pleadings, leave to adduce two expert witnesses and a direction for a split trial. The Defendants are in pursuit of further and better particulars of claim and further and better particulars of loss and quantum in the form of a Schedule of Loss. Each of these four applications were contentious, save that the Plaintiff’s application to amend was conditionally agreed.

4. The hearing documents for these applications consisted of extensive written submissions from each party and seven bundles of documents accumulating thousands of pages in hardcopy before the Court.
5. At the close of the 2-day hearing, I reserved my decision on these applications, which I now provide in this reasoned Ruling.

THE PARTIES AND THE RELEVANT NON-PARTIES

6. The Plaintiff is a former Bermuda exempt company now redomiciled in Delaware which, through its US subsidiaries, operates as a business creating, acquiring and reinsuring annuity-like products and investing in assets to generate investment returns to pay those liabilities. In December 2016, Athene transitioned from being under the private ownership and control of Apollo Global Management LLC (“Apollo¹”) to being publicly registered on the New York Stock Exchange. Apollo retained a significant share interest in Athene after the December 2016 IPO and in or around January 2022, Athene and Apollo merged.
7. The First Defendant, Mr. Imran Siddiqui, (“D1”) is a former director and officer of Athene. It is said on his pleaded case that he served as an officer of Athene only in his capacity as a director nominated by Apollo². The Plaintiff’s case is that D1’s office holding commenced on 16 July 2009 and that during his tenure he served as the lead director, that being the director with primary responsibility in significant aspects of the Plaintiff’s business. This related to the Plaintiff’s strategic direction, its financial underwriting and its identification, pricing and execution of strategic transactions. The Plaintiff’s case is that D1 ended his service to the Plaintiff as a director on or about 20 March 2017.
8. The Plaintiff describes the Second Defendant, Mr. Stephen Cernich, (“D2” and together with D1, the "Officer Defendants") as one of its former officers together with certain of its subsidiaries between 1 January 2015 and 30 June 2016, or thereabout. In his role as “Executive Vice President, Corporate Development” D2 was one of the primary people responsible for the Plaintiff’s merger, acquisition and strategic transaction activities. Prior to that role, the Plaintiff says that D2 was the Plaintiff’s Chief Actuary, responsible for determining the Plaintiff’s reserving practices and modelling, including with respect to potential acquisition targets.

¹ In this Ruling I employ the term “Apollo” to refer to Apollo Global Management LLC singularly and collectively with its affiliates.

² The Plaintiff states on its pleaded case that during the time that D1 and D2 were associated with Athene, Apollo held approximately 17% of Athene’s shares and Apollo appointed six of the fifteen members of Athene’s Board of Directors.

9. D2 admits that he was an employee of the Plaintiff between 2009 and 30 June 2016. He accepts that he was appointed to be the Plaintiff's Chief Actuary and says that he held that position up until the end of 2010 and between (approximately) August 2014 and October 2015. As Chief Actuary, he says that he was responsible for the Plaintiff's reserving practices, actuarial financial reporting, retail pricing and modelling. However, he denies ever having been responsible for determining the Plaintiff's reserving practices in respect of potential acquisition targets. D2 also admits that he was the Plaintiff's Executive Vice President, Corporate Development and that as Executive Vice President he managed the Plaintiff's merger, acquisition and strategic transaction activities.

10. D1 and D2 founded Caldera Holdings Ltd, the Third Defendant ("D3") which was incorporated on 11 July 2017 as a Bermuda exempt company. The Plaintiff's case is that D1 and D2 are each either a director, a shareholder and/or a beneficial owner of D3's shares. The Plaintiff says that the Officer Defendants own and control D3 and that D3 is the agent and/or nominee of D1 and D2. That is said to mean that D1's and D2's knowledge is to be attributed to D3. This is all admitted by D1 and D2, save that they deny that their ownership and control of D3 makes D3 an agent and/or nominee as alleged.

11. Mr. Ming Dang was a senior employee of Apollo and Mr. Thomas Daula and Mr Huan Tseng were senior employees of Athene, who, on the Plaintiff's case, collaborated with D1 and D2. That is all that is said by way of background on the Plaintiff's RRASOC in relation to Mr. Dang, Mr. Tseng and Mr. Daula. (In other related proceedings (JAMS 2 Final Award) it was said that Mr. Dang joined Apollo as an associate in 2011 and was subsequently admitted as a partner in two of its affiliated entities in 2016 and 2018.)

12. The Plaintiff's case is that D1 and D2, either themselves or with the assistance of employees of Apollo and Athene secretly removed and used its trade secrets and other protected confidential, proprietary and commercially sensitive information. (Intermittently, I will employ terms such as the "relevant documents", the "relevant information", or the "relevant documents and information" to refer in a general sense to what the Plaintiff contends to be its misused documents and information.) The Plaintiff says that when D1 and D2's respective office holdings came to an end, they directed or otherwise induced Mr. Dang to transmit to them the Plaintiff's Documents and Information. It is expressly stated on the Plaintiff's pleaded case that Mr. Dang acted on several occasions on the instructions of D1 and D2 and surreptitiously took and sent the relevant documents to D1 and/or D2.

RECAP OF THE US PROCEEDINGS

JAMS 1

13. In the first JAMS proceedings (“JAMS 1”), Apollo brought claims for injunctive relief against D1 and Company A. This was to be adjudicated by a single arbitrator in New York, applying Delaware law. Neither the Plaintiff, D2, nor D3 were party to JAMS 1 where Apollo sought to prevent D1 from using its confidential information in relation to Athene. D1 was accused of breach of fiduciary duty and breach of his post-employment restrictive covenants. Company A was accused of tortious interference with those contractual obligations.
14. The JAMS 1 claims were settled pursuant to a Settlement Agreement and Mutual Release dated 21 February 2018 (the “Settlement Agreement”). The Settlement Agreement was governed by New York law and contained an arbitration clause for dispute resolution.

JAMS 2

15. The second JAMS Arbitration proceedings (JAMS 2) commenced simultaneously with these present proceedings. In JAMS 2, Apollo brought claims against D1 which were consolidated³ with its claims against D3 and Mr. Dang. Apollo alleged in its Statement of Claim that D1 had engaged in wrongful use and disclosure of Apollo’s “Confidential Information” in violation of the Settlement Agreement. In respect of Mr. Dang, numerous claims were made, amongst which it was alleged that he violated his contractual and fiduciary duties by joining D1 and others in sharing Apollo’s confidential information and aiding in their scheme to usurp Apollo’s corporate opportunity. Apollo also brought claims against D1 and D3 for tortious interference and aiding and abetting Mr. Dang’s breach of fiduciary duty. These claims related only to post-Settlement Agreement conduct. So, the allegations concerned conduct which occurred on or after 22 February 2018.
16. A final award was made by the single arbitrator, Mr. Mark E. Segall (the “Arbitrator” or “Mr. Segall”), on 26 April 2019 (the “Award” or the “Final Award”).
17. In the Final Award, the Arbitrator found that D1 breached the Settlement Agreement in that he failed to return or destroy Apollo’s confidential information and then made a false attestation of compliance with the contractual requirement for him to do so. The Arbitrator also found that D1, in breach of the Settlement Agreement, solicited Mr. Dang to work on D3’s matters.

³ Mr. Dang’s counterclaim for the advancement of fees was also part of the consolidated JAMS 2 proceedings.

18. The Arbitrator granted Apollo injunctive relief enjoining D1, D3 and the other respondents from disclosing or using any of Apollo's confidential information, thereby requiring them to destroy any such information in their possession, custody and control.

19. D1 and D3 were also ordered to pay compensatory damages to Apollo in the sum of \$75,000. Mr. Segall found [page 20]:

“Given that Siddiqui and Caldera are liable for aiding and abetting Dang’s breach of fiduciary duty, they are also responsible for their portion of the damages following the execution of the February 21, 2018 Settlement Agreement. It follows, therefore, that Siddiqui and Caldera are jointly and severally liable for \$75,000. In the exercise of discretion no pre-judgment interest is awarded on these damages amounts.”

20. A punitive damages award in the sum of \$150,000.00 was also made against D1. The Arbitrator found [page 20]:

“...it is appropriate to impose punitive damages against Siddiqui who continued to involve Dang after the Settlement Agreement was signed and while he was still an Apollo employee. It is reasonable to impose punitive damages against him in the amount of \$150,000, which approximates the amount that Apollo paid Dang after signing the Settlement Agreement. Apollo argues that additional punitive damages should be assessed in the form of requiring the forfeiture of all of Siddiqui’s carried interests in Apollo funds. This would amount to a penalty of approximating an additional \$15,000,000. This is far too draconian a remedy in light of the conduct which transpired subsequent to February 21, 2018. Given that Siddiqui bears principal responsibility for this, he rather than Caldera as the corporate entity, should be responsible for this award. Siddiqui shall pay punitive damages of \$150,000. No punitive damages award is assessed against Caldera.”

21. However, the Arbitrator rejected the following claims against D1:

- Apollo's claim for breach of the Settlement Agreement by the use and disclosure of Apollo's Confidential Information.
- Apollo's claim against D1 and D3 for tortious contractual interference.

22. As against Mr. Dang, the Arbitrator found, *inter alia* that he aided and abetted D1's breach of fiduciary duty to Apollo and further breached his own fiduciary and contractual duties to Apollo. Mr. Dang was also found to be liable for common law fraud.

23. The Arbitrator made various findings of facts against Mr. Dang. He found that Mr. Dang continued to work on D3's matters at a stage when both the Plaintiff and D3 were considering whether to make a bid for Company A. The Arbitrator found that there were over 20 email

examples of Mr. Dang's involvement in D3's bidding efforts. Referring to one particular such email, the Arbitrator found that Mr. Dang suggested that D3 should emphasize that it was a better buyer than Apollo and Athene on the basis that Athene would be responsible for payment of an affiliated asset management fee to Apollo. In a 22 April 2018 email exchange referred to in the Award, it was said that Mr. Dang submitted comments on D3's bid for Company A. At page 10 of the Award, the Arbitrator said:

“Even worse, on April 23, 2018, Dang secretly accessed Apollo's highly confidential [Company A]-related folders on Apollo's shared drive. These documents reflected that what [sic] Apollo's own bid price would be. Dang had no Apollo-related reason for accessing these folders. Apollo's Chief Information Security Officer testified that, after reviewing the forensic evidence, he had concluded with a high degree of certainty that Dang had used a Google-based email address to transmit these files outside of Apollo. This testimony was credible, and it is telling that Dang never took the witness stand following this testimony to attempt to rebut it. Cernich admitted that this conduct was “stupid and sophomoric.” Dang's involvement subsequent to February 21, 2018 Settlement Agreement is impossible to justify.”

24. In assessing Apollo's damages claim for \$300,000,000.00, the Arbitrator found that there was no evidence that Apollo suffered any damages from its failure to acquire Company A.

The New York Court Proceedings

25. From previous judgments of the Court, it appears that on 3 May 2018, the same day on which these proceedings and the JAMS 2 proceedings commenced, D3 brought an action against Athene, Apollo and Apollo's Chairman and CEO. Various of the respective parties' affiliates were also party to these proceedings before the United States District Court for the Southern District of New York and the Supreme Court of the State of New York, County of New York.
26. Essentially, D3 claimed that the defendants conspired to manipulate the market for acquisitions of insurance companies through the use of unfair business practices, unfair competition, tortious interference with commercial relationships, commercial disparagement *“and other blatantly anti-competitive activities”*.
27. On 31 January 2020, Apollo and its related entities brought proceedings against Mr. Cernich in relation to the alleged misuse of confidential information. Those proceedings were withdrawn. However, on 20 July 2020, Apollo and its related entities brought proceedings against Mr. Cernich and Mr. Huan Tseng. Those proceedings are said to be pending.

OVERVIEW OF THE COMPETING APPLICATIONS FOR TRIAL DIRECTIONS

28. On 6 December 2023, D1 and D3 filed a summons for further and better particulars and for directions in relation to loss and quantum. In material part, D1 and D3 seek trial directions compelling:

- (i) the Plaintiff to file further and better particulars of its case by completing all relevant sections in the Schedule of Particulars appended to a draft Order which is to be filed and served in an editable Word format;
- (ii) the Defendants to set out their responses to the Plaintiff's further and better particulars using the Schedule of Particulars as completed by the Plaintiff which is to be filed and served in an editable Word format;

(Once completed the Schedule of Particulars is to stand as further and better particulars of each party's case alongside their pleadings which may be amended only by consent between the parties or with the leave of the Court.)

and

- (iii) the Plaintiff to file and serve a Schedule of Loss setting out the heads of loss, a breakdown of the amounts claimed under each head and the supporting calculations.

29. The following week, on 11 December 2023, the Plaintiff filed an application for various case management directions, amongst which included:

- (i) an application for leave to amend its pleadings;
- (ii) an application for a split trial to deal with the issues on liability and quantum separately; and
- (iii) leave for the filing of expert evidence entailing two separate expert witnesses.

30. By letter dated 19 March 2024, D2 gave general support for D1's and D3's summons and further joined them in opposition to the Plaintiff's application for a split trial and expert evidence. D2 also requested further and better particulars in relation to the Plaintiff's pleaded allegations of dishonesty and lack of good faith against it. D2's application for the requested particulars specifically points to paragraph 58A of the Plaintiff's proposed amendment. In applying to this Court for particulars in respect of its case, D2 addressed its submissions under

the prayer in the summons of D1 and D3 inviting “such further or other relief” as this Court “considers to be just”. No procedural challenge or difficulty arose on this.

31. The Plaintiff, in a 9 May 2024 letter of response, proposed amendments in relation to its claim for relief and in relation to D1’s liability to repay the sums advanced by the Plaintiff pursuant to my 15 April 2021 Ruling. Pursuant to (i) section 3(b) and section 9 of a 29 May 2015 Indemnification Agreement between the Plaintiff and D2, and (ii) a conditional repayment undertaking by D2, the Plaintiff also advanced monies to D2, for which it seeks recovery under the proposed amendments. The indemnifiable sums represented D1’s and D2’s legal fees and expenses in connection to these proceedings. The success or failure of the Plaintiff’s claim for repayment of the advanced sums is contingent on a final determination by this Court on the question of the Defendants’ entitlement to be indemnified.
32. Enclosed with the Plaintiff’s 9 May 2024 letter was an amended draft RRASOC including a Schedule 2 draft of “Particulars of Knowledge and Dishonesty”. Ms. Lucas KC argued that this adequately addresses the requested particulars on the case of dishonesty and lack of good faith against D1 and D2. Mr. Mansfield KC, however, submits that the requested answers do not serve as particulars, but rather the Plaintiff’s summary or analysis of the evidence supporting its claims.
33. As for the Defendants’ Schedule of Particulars, Ms. Lucas KC resisted the proposed exercise, characterizing it as a request for a reproduction of its pleaded claims in the form of a table. Setting out its overarching position, the Plaintiff said that it is “clear and obvious” that it has executed its duty in establishing a “seriously arguable case on the face of its pleading and the documents...”.

THE PROPOSED RRASOC

34. The Plaintiff proposes to file a Re-Re-Amended Statement of Claim (the “proposed RRASOC” or the “RRASOC”) with leave of this Court. During the hearing, this Court was made to understand the Defendants conditionally agreed to the Plaintiff’s application to amend. Such agreement was said to be contingent on the success of the Defendants’ application for further and better particulars. (In *inter partes* correspondence, it is explained that an agreement to this application would also be subject to the satisfaction of three other points which the Plaintiff expressly agreed to take under consideration.)
35. While I have not been asked to decide the Plaintiff’s application to amend until the parties further consider their position, it remains necessary for me to outline the proposed RRASOC in order to fully assess the Defendants’ application for further and better particulars. The

question on the table is whether the call for particulars is adequately addressed by the proposed amendments.

36. The Plaintiff's case is that D1 and D2 prior to and after their respective resignations, breached their fiduciary duties and/or their duty of confidence owed to the Plaintiff. The Plaintiffs say that D1 and D2 took steps to establish D3, to directly compete against the Plaintiff for the potential acquisitions of "Company A" and "Company B". The Plaintiff's pleaded case is that it worked together with Apollo to acquire Company A and Company B. So, the Plaintiff says that D1 and D2's conduct was inconsistent with their fiduciary duties owed to the Plaintiff. In establishing D3, it is alleged that D1 and D2 sought to benefit from the Plaintiff's specific business opportunities which were under negotiation, via the Officer Defendants. The Plaintiff further alleges that D1 and D2 breached their duties by failing to notify the Plaintiff of the resulting "nascent commercial threat".
37. Sparking the Defendants' request for further and better particulars is the Plaintiff's allegation that D1 and D2 wrongfully took and/or used the Plaintiff's trade secrets and other protected confidential, proprietary and commercially sensitive information and analysis produced by and/or at the direction of or for the benefit of the Plaintiff. These "trade secrets and other protected confidential, proprietary, commercially sensitive information and analysis..." is the definition assigned by the Plaintiff to the term "Information" employed on its pleaded case. The term "Documents" is defined as documents containing "Information". The Plaintiff's case is that D1 and D2 wrongfully took, received and or used the "Documents" and "Information" for the benefit of the Defendants and/or to the detriment of the Plaintiff. D3 is alleged to have served as an agent and/or nominee of the Officer Defendants, making it party to and liable for the breaches committed by D1 and D2.
38. Amongst the proposed amendments, the Plaintiff provides some detail on the nature of the "Information" alleged to have been wrongfully taken. The "Information" is said to comprise [2A]:
- "...confidential, proprietary, commercially sensitive and other information and analysis and/or trade secrets created by the Plaintiff and/or on its behalf, relating to, inter alia, (a) the Plaintiff's retail pricing assumptions and strategies; (b) new products in the market and under development at the relevant times by the Plaintiff; (c) the Plaintiff's calculations relating to its pricing methodology for new business; (d) the Plaintiff's calculations relating to its costs of funds ("COF"); (e) details of and data concerning the Plaintiff's Fixed Income Annuity ("FIA") guaranteed income riders; (f) details of the methods and mechanisms used by the Plaintiff to assess and manage risks both in its investments and the design and implementation of insurance products and policies; (g) details of the Plaintiff's asset and liability classes, including the allocation of the Plaintiff's asset classes; (h) details of the stress testing implemented by the Plaintiff to model risks generally and in relation to specific asset and*

liability classes to, among other things, ensure compliance with regulatory requirements in various scenarios, including recession and depression scenarios; and (i) details of the Plaintiff's strategies and methods relating to mergers and acquisitions of other insurance, reinsurance and /or annuities companies."

39. The Plaintiff says that its assets are generated by the returns on its investment activities. Its business in the creation, acquiring and reinsurance of annuity-type products is counted as a liability of the business. On both the asset and liability sides, the Plaintiff uses its "Information" to gain the competitive edge.
40. The Plaintiff's pleaded case is that its profitable investment methodology is reliant on "highly sensitive and proprietary" information and models. The Plaintiff says that its "Information" was neither in the public domain nor generally available in the insurance and reinsurance industry. It was shared with only select senior executives such as D1 and D2 and certain of the Plaintiff's advisers.
41. It is explained in the RRASOC that the Plaintiff's competitive advantage lies in its ability to accurately underwrite liabilities. The Plaintiff's means by which it is able to accurately underwrite those liabilities is further explained. It is said to entail "proprietary highly confidential" data, analyses and assumptions and is said to be "based on decades of experience with tens of thousands of policies and efforts in the market". This is leveraged to evaluate the costs, risks and benefits of annuity offerings, of which guaranteed income rider products feature as one of the Plaintiff's "primary competitive advantages in the insurance market price costs".
42. The Plaintiff's case is that its special ability to price annuity offerings, particularly guaranteed income rider products, is not driven by a generic industry approach. It is reliant on the "Information" which is the fruit of the Plaintiff's experience and paid-for advice from Apollo. The value of the "Information" is needed not only for the Plaintiff's assessment of the risks and advantages of annuity offerings but also for the Plaintiff's approach in its buy-side merger and acquisition modeling.
43. Asserting its beneficial right to the portion of its "Information" and "Documents" which were created and/or provided by Apollo, the Plaintiff explains on a proposed amendment [27] that *"Apollo created confidential, proprietary, commercially sensitive and/or other information for and at the direction of Athene. Apollo often worked with Athene in creating this information. This information also included identification and analysis of acquisition targets, potential investments, potential investment returns, and risk analysis and modelling..."*

44. Schedule 1 to the RRASOC provides a list of 71 compilations of single and multiple documents (the “Schedule 1 Documents”), identifiable by their bates number and the date of the document. The Plaintiff’s pleaded case is that D1 and D2, who it refers to as the “Officer Defendants”, deliberately and dishonestly took its “Documents” and “Information”. The Plaintiff’s case is that the Schedule 1 Documents contain its “Information” of the kind identified in paragraph 2A as quoted further above. The Plaintiff says that the Schedule 1 Documents therefore contain highly sensitive and valuable confidential information about fundamental aspects of the Plaintiff’s business and/or disclose analysis of the Plaintiff’s business and the market in which it operates. The Plaintiff says that the Schedule 1 Documents contain information that D1 and D2 considered to be of business utility and advantage for the establishment of D3. The Plaintiff also says that the Schedule 1 Documents were taken either by D1 and/or D2, or employees of Athene and Apollo, and by Mr. Dang who acted as they instigated during and immediately after their respective tenure. The information from the Schedule 1 Documents is said to have been incorporated into models and strategies in relation to Company A and Company B.
45. Fraudulent and dishonest conduct is expressly pleaded against D1 and D2 for having taken the Schedule 1 Documents. The Plaintiff alleges that D1 and D2 and those acting on their behalf took steps to conceal their misconduct from the Plaintiff.
46. In relation to Company A, the Plaintiff’s case is that D1 and D2 prepared for the bidding of Company A, both on behalf of the Plaintiff and simultaneously on their own behalf for the benefit of D3. The Plaintiff says that such a conflict of interest is underpinned with dishonesty on the part of both D1 and D2. On a proposed amendment [para 44A], it is alleged that D1 and D2 took the Schedule 1 Documents disclosing Athene’s market-leading FIA products in order to price what the Plaintiff would pay for the acquisition. D1 and D2 are said to have done this by directing or encouraging Mr. Dang, during his employment with Apollo, to access and transmit the Plaintiff’s documents. The Plaintiff further alleges that D2 communicated with Mr. Dang about how to strengthen D3’s bid in comparison to the Plaintiff’s bid. The documents taken by Mr. Dang are said to have been used to assist D3 in amending its bid, which was submitted on 24 April 2018, only one day after the documents were taken and transmitted by Mr. Dang.
47. Turning to Company B, the Plaintiff’s case is that it put in a bid in or around 2015, without completing the acquisition. In 2017, Company B was again put on auction. It is said that D1 and D2, with the assistance of Mr. Dang, took steps to solicit investors for D3, to enable D3 to acquire Company B. In doing so, they focused on attracting entities and persons who were already investors of the Plaintiff. Additionally, it is alleged that, on 17 March 2017, D1 and D2 met somewhere in the Middle East with a potential investor and that they took steps to conceal the purpose of that trip. In support of this part of its case, the Plaintiff relies on Documents MDM00063830 and MDM00131277.

48. D1 and D2, together with Mr. Dang, are said to have also prepared communications to Company B. During this period, the Plaintiff says that D1 was a member of its Board of Directors, and he was responsible for spearheading the Plaintiff's 2017 bid for Company B. Notwithstanding, D1 continued to secretly advance D3's bid for Company B, according to the Plaintiff. The Plaintiff's case is that shortly after D1 resigned from his service on the Board, he continued to work with D2 and Mr. Dang to solicit potential investors in D3 for the purpose of acquiring Company B. The Plaintiff alleges that they carried out this competitive work against the Plaintiff, using the Schedule 1 Documents. Documents MDM00063830 and MDM00131277 are relied on by the Plaintiff on this part of its case.
49. Particulars of the Plaintiff's claims for breach of fiduciary duty and/or breach of duty of confidence by D1 and D2 are provided in the RRASOC. At paragraph 48A the Plaintiff accuses D1 and D2 of having failed to act in good faith in the interests of the Plaintiff by competing with the Plaintiff and thereby placing themselves in a position where their personal interests conflicted with the Plaintiff's interests. The Plaintiff also claims under the proposed amendment that D1 and D2 failed to inform the Plaintiff of the commercial threat resulting from their actions. The Plaintiff says that their breaches also arise out of their secretive efforts to obtain the Schedule 1 Documents without the Plaintiff's approval and for their own personal gain.
50. At paragraph 49A the Plaintiff provides three examples in support of its claims for breach of fiduciary duty and/or breach of duty of confidence. At paragraph 49B the Plaintiff, asserting equal liability, attributes the knowledge of D1 and D2 to D3.

THE STARTING APPROACH - THE OVERRIDING OBJECTIVE

51. Sound case management in civil and commercial matters is guided by the Overriding Objective under RSC Order 1A/1. Interlocutory rulings routinely refer to the Court's powers and duties to ensure that cases are dealt with expeditiously and fairly. This has become a proverbial norm because every single litigant in every single case is entitled to procedural fairness, from litigants in person to the under-represented through to wealthy individuals and billion-dollar corporate conglomerates armed with the best of legal forces.
52. The Court's case management powers are, in practice, more so a set of duties which must be carried out for each case without exception. This entails safeguarding the parties from an uneven battleground. That is what is envisaged by RSC Order 1A/1(2)(a). It also involves the Court's role in assisting the parties to save avoidable expense where that can reasonably be achieved. Cases must be handled in a manner which is proportionate to the amount of money

involved, the importance of the case, the complexity of the issues and the financial position of each party.

53. As Mr. Todd KC pointed out at the hearing, this is a document-heavy case. By way of illustration, it is said that the Plaintiff disclosed approximately 47,500 documents to the Defendants and about 27,000 documents were submitted by Apollo. The Plaintiff is said to have received approximately 40,000 documents from the Defendants in discovery. In aggregate, this totals approximately 250,000 pages of documents on Mr. Todd KC's estimation. In a case as document-heavy as the present case, and in which the impact of the documents on liability is particularly high, careful case-management is especially complex but equally imperative. The full body of documents which are to be relied on, and the purported effect of those documents, must be undeniably clear prior to the commencement of the trial. The Defendants have a clear right to be made plainly aware of the case they are to meet.
54. RSC Order 1A/1 also governs the Court's decision-making approach to the question of expert evidence and a split trial. The material questions are as follows:
- Would a direction for the proposed expert evidence and a split trial be just and expeditious in all circumstances of this case?
 - Is the granting or refusing of these applications likely to leave either side on lower footing than the other?
 - Would two trials and two sets of expert evidence per side be proportionate to the amount of money involved and the complexity of the issues?
 - Having regard to the financial position of each party, would the grant of the said directions result in unfair and avoidable expense?
55. It is blatant that this case is manifestly important to both sides. Effectively, the Plaintiff alleges that it was the victim of a calculated coup in the sense that a number of its most senior and trusted officers not only failed in their duty to promote its interests but were responsible for a corporate hijacking operation of its most confidential and crucial business analyses and strategies. The Defendants, on the other hand, would assert that they are the victims of the Plaintiff's relentless persecution which has harassed both their personal and professional lives for at least the past 6 ½ -7 years.
56. These are all points which build into the principles to be applied under the Overriding Objective.

THE APPLICATION FOR FURTHER AND BETTER PARTICULARS

The Governing Legal and Procedural Principles

57. The Plaintiff's pleadings must be fashioned in the style set by the requirements of RSC Order 18. Rule 7(1) provides a general position: "*every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies..., but not the evidence by which those facts are to be proved*". It continues: "...*the statement must be as brief as the nature of the case admits*".

58. The words "*contain only*" are explained in the 1999 White Book Commentary [18/7/10] to emphasise that only facts which are material should be stated in a pleading. It then goes on to say: "*The question whether a particular fact is or is not material depends mainly on the special circumstances of the particular case. Thus knowledge, notice, intention and, in a few cases, motive, are in some cases material, and if so, must be pleaded as facts and with proper particularity. The legal relation in which parties stand to one another should generally be stated.*"

59. Distinguishing facts from evidence, the following narrative is provided [18/7/9]:

"All facts which tend to prove the fact in issue will be relevant at trial, but they are not "material facts" for pleading purposes."

60. Quoting from Lord Denman CJ in *Williams v Wilcox* (1838) 8 A. & E. 314 at 331):

"It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation."

61. What is meant by "material facts" is also the subject of the White Book commentary [18/7/11]:

"It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet... "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad. Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount

to a cause of action. Where the evidence at the trial establishes facts different from those pleaded ...the action will be dismissed...”

62. So, the demarcation between the material facts and the subordinate facts which counts as the supporting evidence is the important constituent of Rule 7(1) of RSC Order 18. The material facts are the primary allegations. That is all that is generally required in a pleading. The subordinate facts form the evidence which underpins the primary allegations. In poetic terms, the marriage ceremony for the joining of the allegations and the evidence is the trial. As for pleadings on points of law, it is permitted, but not generally required.

63. However, there are specific matters which are required for inclusion in a pleading. Rule 7(2) is relevant to the Defendants’ application for further and better particulars:

“...the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated...”

64. Both Mr. Todd KC and Mr. Mansfield KC relied on the below extracts of the judgment of Laddie J sitting in the Chancery Division (Patents Court) of the English High Court in *Ocular Sciences Ltd. v Aspect Vision Care (No 2)* [1997] RPC 289 (Pat) at 359 and 360-361:

“The rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings. But it is well recognized that breach of confidence actions can be used to oppress and harass competitors and ex-employees. The courts are therefore careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings. If the plaintiff fails to do this the court may infer that the purpose of the litigation is harassment rather than the protection of the plaintiff’s rights and may strike out the action as an abuse of process...”

65. Laddie J recognized the enormity of the work which might be entailed in having to particularise confidential information from voluminous documents. However, this is overridden by a plaintiff’s duty to ensure that a defendant understands what confidential information is in issue.

66. Pulling from the reasoning in *Ocular Sciences Ltd* (previously cited in these proceedings by the Bermuda Court of Appeal) and other previous cases⁴ cited by Laddie J in his judgment, it seems, as a matter of general proposition, that the following reasons highlight the importance of particularity of pleadings where breach of confidentiality is alleged:

⁴ *John Zink & Co. Ltd v Wilkinson* [1973] R.P.C. 717; *Palamisto General Enterprises S.A. v Ocean Marine Insurance Limited* [1972] 2 WLR 1425; *P.A. Thomas & Co. v Mould* [1968] 2 Q.B. 913 and *Suhner & Co. AG v Transradio Ltd.* [1967] R.P.C. 329

- (i) Allegations of breach of confidentiality may be of such a grave character that it borders or infringes on criminality. So, it is only fair that the allegations are void of ambiguity as to the information to which they relate;
- (ii) Compelling a plaintiff to particularise the allegations so to identify the specific items of information alleged to be confidential may offer fair and measured protection for a defendant who is being oppressively targeted by a disgruntled plaintiff motivated by a desire to harass a potential or future competitor's business;
- (iii) Where an injunction to restrain the defendant from using the plaintiff's confidential information is sought, there must be certainty in the scope of the terms of the information covered by the order of injunction (also see *Racing Partnership Ltd v Done Bros Ltd* [2020] EWCA Civ 1300, per Arnold LJ at para 49e); and
- (iv) The Defendant must be clearly aware of which items of information the allegations of breach relate to in order for him to meet the case against him, so as not to cripple his ability to properly defend himself.

67. Citing the English Court of Appeal's more recent judgment in *Racing Partnership Ltd v Done Bros Ltd* the Defendants point to the following statement from Arnold LJ [at 49]:

"The starting point in any confidential information case is to identify with precision the information which is alleged to be confidential. Experience shows that claimants are apt to make unfocused allegations of misuse of confidential information, and that when they are required precisely to identify the allegedly confidential information, it can turn out that the information is either not protectable or has not been misused. Moreover, even if confidential information has been misused, it is necessary precisely to identify what has been misused when it comes to considering remedies for such misuse, such as an injunction."

68. Mr. Mansfield KC also produced an English Court of Appeal decision from *Scully UK Ltd v Lee* [1998] IRLR 259 at 263 in which Aldous LJ made the following *obiter* remarks about breach of confidence cases:

"...He drew to our attention cases in which the need to particularise the nature of the confidential information was emphasised. However, those were cases where a plaintiff was seeking to enforce an obligation of confidence. It was therefore necessary to identify with particularity the confidential information relied on, not only to enable the defendant to know the case made against him, but also to enable an injunction to be drawn with appropriate clarity. In cases where a restrictive covenant is sought to be enforced, the confidential information must be particularised sufficiently to enable the Court to be satisfied that the

plaintiff has a legitimate interest to protect. That requires an enquiry as to whether the plaintiff is in possession of confidential information which it is entitled to protect. (See Littlewoods Organisation v Harris [1977] 1 WLR 1472 at 1479F). Sufficient detail must be given to enable that to be decided but no more is necessary.”

69. RSC Order 18 Rule 8(1)(b) requires a party to specifically plead any matter which, if not pleaded, would take the opposite party by surprise. This is consistent with all case management principles and judicial instinct. After all, the parties would find themselves on very unequal footing if a plaintiff could prosecute its claims in a trial-by-ambush style. The requirement for any allegation of fraud or fraudulent intent to be pleaded and particularised is set by Rule 18/12 (1). Under Rule 12(3) the Court is given a general power to order a party to serve particulars of a claim or particulars of any other matter stated in a pleading, so long as the Court thinks it just to do so. Rule 12(4), leaving intact the generality of the Court’s power under Rule 12(3), specifically empowers the Court to make an order requiring particulars of any “knowledge” pleaded against the other party.
70. Ms. Lucas KC relied on the English High Court’s decision in *Recovery Partners GP Ltd v Rukhadze* [2018] EWHC 2918 (Comm). In that case, Cockerill J was concerned with a claim of breach of confidence arising out of contractual obligations and duties in equity. In factual summary, the case was about competing business services to recover the family assets of a wealthy Georgian businessman who died intestate. The information said to have been misused comprised details of strategies devised by a company called Salford Capital Partners International (“SCPI”) and the claimant companies established by the CEO and founder of SCPI, a Mr. Eugene Jaffe, who knew the deceased well, having worked with him and managed his investments through a private equity fund.
71. The various defendants (the “Individual Defendants”) were employed by the claimant companies and worked on the project to recover the deceased’s assets. In 2011, after a major fallout, the Individual Defendants resigned from the claimant companies and formed a separate agreement with the deceased’s family to continue with the recovery services. From these circumstances arose the claims of breach of confidence and breach of fiduciary duty owed to SCPI on the basis that the Individual Defendants diverted for themselves a business opportunity to conclude a contract for the recovery services.
72. In *Recovery Partners*, the key information in question involved the progress made between the family and the claimant companies in negotiating terms of remuneration. The case presented by the claimants was that the defendants used this information to formulate remuneration offers for their own services, and that without that information they would not have known where to start. The claimants argued that this information, said to have been misused by the Individual

Defendants, had the quality of confidence and that the information was imparted in circumstances which imposed an obligation to treat the information as such.

73. Relevant to the issues at hand, the defendants in *Recovery Partners* submitted that the claim was inadequately pleaded. At paras 433-438 of the judgment:

“433

The Defendants submitted that it is essential in a claim for breach of confidence that the claimant should give full and proper particulars of all of the confidential information on which he intended to rely. They point to the dictum of Aldous LJ in Scully (UK) Ltd v Lee [1998] IRLR 259 at [23]:

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

434

The Defendants say that the only particulars that the Claimants have provided of the information that is the subject of the breach of confidence claim are the broad categories of information referred to in [105] of the Particulars of Claim and as to the misuse of the information, in [106] the Claimants said that they would provide particulars following disclosure, but never did so.

435

The Defendants submit that the information relied upon was information relating to the Family's assets and business relationships which was obtained at the Family's request in exchange for payment by the Family. As such, that information, and any confidence in it, belonged to the Family and, if it did not otherwise constitute a breach of fiduciary duty for the Defendants to provide the Recovery Services to the Family having left Revoker, there was no reason why they could not use that information in order to do so.

436

As regards the BTG information specifically the Defendants submitted that insofar as it related to the Family's position, the confidence was theirs and insofar as it related to the individuals' position, in the event Hunnewell ended up using an entirely different structure. All this point would appear to go to is the cost of the fees of instructing BTG.

437

Though it is unlikely to add much in practical terms, given the conclusions which I have already reached, I am satisfied that the claim in breach of confidence is made out. Each of the Individual Defendants was subject to a confidentiality obligation. Each acquired information which had the quality of confidence in circumstances where one would expect it to be subject to an obligation of confidentiality. One might test the proposition this way: would SCPI have objected to the Individual Defendants revealing this sort of information to the Individual

Defendants' friends over dinner? It is self-evident that they would as regards the progress of negotiations in which was a major deal. The contrary was not really argued, as can be seen from the points taken by the Defendants.

438

As regards those points, I do not regard the pleading point as a good one. Aldous LJ's judgment indicates that it is necessary to know what information is said to be confidential to enable the Court to decide the point. It is not a formalistic point about pleadings. It cannot be said that the material was not before me, or that the absence of pleadings prejudices the ability to decide this point.”

74. A general position is put in Toulson & Phipps on Confidentiality (4th Edition). The following summary of the principles promotes more of a case-by-case approach to deciding whether a plaintiff has discharged the burden to give particulars of its case [4-010 – 4-013] [footnotes omitted]:

“Particularisation is necessary, not only in order to enable the parties to prepare their evidence, or to establish clearly what any injunctive relief against the defendant requires, but also in order to enable the court to assess whether the information in question is in truth of a confidential nature. A claimant’s particulars should not only identify the relevant confidential information but also (unless obvious) explain why the information is said to be confidential. Identification of confidential information solely by reference to a particular occasion on which, or means by which, the information was communicated is unlikely to suffice.

However, it would be wrong to cast the claimant’s obligation of particularisation as an absolute rule, applicable without modification in every case. Much may depend on the manner in which a defendant originally came by the information alleged to be confidential. In Tchenguiz v Imerman, a case of marital breakdown, the wife’s brother wrongfully accessed and copied a large quantity of documents on the husband’s computer. The Court of Appeal said:

“...it was contended that, until Mr. Imerman had specifically identified the documents which contained confidential information, and the grounds for claiming confidentiality, his claim in confidence should be rejected. No authority has been cited to support the proposition that, in every case where it is said that breach of confidence has occurred, or is threatened, in relation to a number of documents, the claim must, as a matter of law, identify each and every document for which he claims confidence, and why. In some cases, that may be an appropriate requirement, for instance where a claimant is seeking to enjoin a former employee from using some, but not all, of the information the latter obtained when in the claimant’s employment...However, in the present case, the imposition of such a requirement is unnecessary (as it is obvious that many, probably most, of the documents are confidential or contain confidential information), disproportionate (because of the

sheer quantity of documents copied), and unfair on Mr Imerman (in the light of the number of documents copied, and the fact that the copying was done without his knowledge, let alone his consent). It is oppressive and verging on the absurd to suggest that, before he can obtain any equitable relief, Mr Imerman must identify which out of 250,000 (let alone which out of 2.5 million) documents is or is not confidential or does or does not contain confidential information.”

Other categories of situation in which a claimant may not be required to identify with specificity every item of information alleged to be confidential include:

(a) where it is apparent that the entirety of a collection of information falls within the scope of a contractual obligation of confidence, but the defendant argues that some of the information is governed by the terms of a contractual exception (for example, an exception for information in the public domain)

(b) where confidentiality is asserted in relation to a collection of information based upon the skill, effort, time and/or money expended on the collation of the information (even if individual parts of the collection could not be described as confidential in themselves)

(c) where evidential difficulties have been caused by the defendant’s own wrongdoing (such as the destruction of documents).

Moreover, a clause in an employment contract restraining the employee from post-employment competitive activity in order to protect the employer’s confidential information may be valid, although the employer may not be able to identify with precision the line between that which is confidential and that which is non-confidential. The potential difficulty in drawing the line may indeed be a ground for regarding the clause as reasonable.”

75. What I take from all of these cases cited are the following key legal principles relevant to particulars of confidential information in a breach of confidence case such as the present case:

(a) In cases of breach of confidence, the Court must be immediately alert to vet insufficient particularity from a claim brought by a plaintiff who may be attempting to use the Court process to harass or stamp out commercial competition brought on by a former officer or employee.

(b) The Court must take steps to guard a defendant from ignorance of the case it has to meet. A defendant ought not to be ambushed at trial by evidence underpinning unpleaded material facts. The Rule requires every pleading to contain a summary of

the material facts, not the underlying evidence which is also referred to as the subordinate facts.

- (c) What is considered to be a material fact will depend on the special circumstances of the case. For example, knowledge, intention, and sometimes motive may be material, in which case those things must be pleaded as facts with proper particularity. However, in all cases the material facts which are necessary to formulate a complete cause of action must be pleaded.
- (d) The plaintiff's pleaded case must be sufficiently particularised to enable the Court to know what information is said to be confidential and ultimately determine the point.
- (e) Unless it is otherwise obvious, the plaintiff's claim should explain why the information in question is said to be confidential. This is not an absolute rule as it is subject to modification in every case. However, the manner in which a defendant comes by the information may be a determining factor. For example, the wrongful access, copying and /or dissemination of a specific document or a collection of documents in respect of which skill, effort, time and/or money was expended for its collation may likely have a real bearing on the requirement or the extent to which a plaintiff is required to explain why the information in question is said to be confidential. In such a case, it will not usually matter whether individual parts within the collection of documents cannot be described as confidential.

The Defendants' Requests for Further and Better Particulars

- 76. In the present case, the Defendants say that the "Information" on the Plaintiff's case lacks particularity on the issue of (i) trade secrets (ii) proprietary and (iii) confidentiality. The Defendants say that the Plaintiff has failed to make it known to the Defendants what portions of the "Information" so qualify and on what grounds they so qualify. The Defendants also take issue with the Plaintiff's use of the term "other information" in the definition for "Documents", which by clear implication can only mean information which is neither trade secret, proprietary or confidential.
- 77. The Defendants also say that the Plaintiff should be made to distinguish between its documents and those which belong to Apollo. They also seek this Court's intervention for the Plaintiff to untwine from its case the information and documents which are the subject of the relief sought by Apollo in the New York proceedings. Another requested distinction to be drawn is between the information and documents which have long-term value and utility and the information and documents which, because they are market-based, are quickly rendered worthless.

78. Both Mr. Todd KC and Mr. Mansfield KC contend that the Defendants are acutely disadvantaged for as long as they are not provided the requested further and better particulars. Without them, the Defendants say that they will not know what arguments or evidence, including expert evidence, are needed in order to formulate their defence.
79. The Defendants' complaints are not confined to a request for particularization on the character and ownership of the documents and information. They also seek particulars as to how any such information is said to have been misused by them and how that misuse is said to have been carried out.
80. The final limb of the Defendants' application for further and better particulars calls for the Plaintiff to produce a Schedule of Loss. The Defendants are keen for the Plaintiff to plead its quantum of loss, accounting for the fact that D3 was never successful on its acquisition pursuits.

The Evidence before the Court on the Application for Further and Better Particulars

81. On behalf of D3 and in his own right as D1, Mr. Siddiqui, swore two affidavits in support of the application for further and better particulars. Mr. Siddiqui complained in his evidence that the RRASOC fails, for the most part, to particularise the alleged misuse of Athene's documents and that it fails to disclose the documents said to be confidential, proprietary or a trade secret. With a show of equal concern, complaint was also made that the Plaintiff, continues to withhold particulars of the loss it claims to have suffered as a result of the Defendant's alleged breaches. Setting out the position in his Tenth Affidavit, Mr. Siddiqui said [4]:

“In short, this application has been necessitated by the Plaintiff's persistent failure to particularise its case properly. The Plaintiff's case has four core elements. It alleges that the Defendants have (i) misused (ii) confidential documents and (iii) confidential information, thereby (iv) causing it loss. It has failed to specify properly any of those four elements. This makes it impossible for the Defendants to understand the case they are expected to meet, and for the parties to prepare for trial. The Plaintiff's case remains unfocussed despite the litigation now just surpassing its fifth anniversary.”

82. However, the Plaintiff on its pleaded case, says that it is D1 and D2 who have refused to identify any of the relevant documents to the Plaintiff. Amongst the proposed amendments on the RRASOC the Plaintiff says [2]: “...Only through a painstaking review of documents eventually produced by the Defendants and others has the Plaintiff discovered some of the Information and Documents the Officer Defendants took from the Plaintiff (or that were taken

on their behalf). The Plaintiff has identified dozens of its confidential Documents that were taken by the Defendants.”

83. In his affidavit evidence, Mr. McSweeney of Walkers (Bermuda) Limited (“Walkers”), explained that the documents obtained by the Defendants in discovery were foundational to the development of the Plaintiff’s drafting of the RRASOC. This, according to Mr. McSweeney’s evidence, was hampered by the Plaintiff having to make repeated requests for discovery against the Defendants followed by the Plaintiff’s review of voluminous documents produced on a piecemeal basis. Blaming the Defendants for the delay which led up to the Plaintiff’s proposed amendments, Mr. McSweeney averred that the Plaintiff’s case is sufficiently particularised on the RRASOC.
84. Mr. Siddiqui disputed Mr. McSweeney’s evidence. In his evidence, Mr. Siddiqui said that the bulk of the relevant discovery had also been in the Plaintiff’s possession for more than an 18-month period before a draft RRASOC was produced. He also said that the Defendants cannot be expected to know which particular documents and information forms the basis for the claims, without this being confirmed by the Plaintiff by way of particulars. This is especially so for a case of this nature which involves in excess of 40,000 documents.

Issues to be Decided on Application for Further and Better Particulars

85. The proposed schedule to the Defendants’ draft Order seeks further and better particulars on each document in a table format. The Defendants want for the Plaintiff to provide a summary of its case with respect to each document it proposes to rely on at trial. They also ask for the Plaintiff to identify which of the Defendants is said to have misused the document and how. Finally, they push for the Plaintiff to provide particulars of the loss which was suffered as a result of the misuse and the profit which was allegedly gained from the misuse.
86. So, the following issues have been raised on the Defendants’ application:
- (i) Whether the Plaintiff should be made to mark out on its pleaded case the specific portions of the Schedule 1 Documents which are said to be trade secret, proprietary and confidential.
 - (ii) Whether the Plaintiff should be made to plead the grounds for its assertions of trade secret, proprietary and confidentiality in respect of each of the Schedule 1 Documents or each of any such marked out portions of the Schedule 1 Documents said to be trade secret, proprietary and confidential.

- (iii) Whether the Plaintiff should provide a narrative of its case on each of any such marked out portions of the Schedule 1 Documents said to be trade secret, proprietary and confidential.
- (iv) Whether the Plaintiff ought to be made to distinguish on its pleadings the documents which were decided in the JAMS 2 proceedings and which are before the Court in respect of Apollo's claims against D2 and Mr. Tseng in the New York proceedings.
- (v) Whether the Plaintiff should be made to identify which of the Defendants is said to have misused the information said to be trade secret, proprietary and confidential and how that was carried out.
- (vi) Whether the Plaintiff's case in respect of its loss and each Defendant's profit ought to be pleaded in respect of each selected portion of the Documents said to contain trade secret, proprietary and confidential information.
- (vii) Whether the Plaintiff's pleadings on fraudulent and dishonest conduct are sufficiently particularised.

DISCUSSION:

Particulars of 'Trade Secret', 'Proprietary' and 'Confidential'

87. As is clear from the legal principles extrapolated from the authorities placed before this Court, there is no absolute rule which would require the Plaintiff to particularise the alleged confidential information on each and every document said to have been taken and misused by the Defendants. In fact, in a case such as this, involving a massive number of documents, it is important for this Court to recognize the overwhelming work which the Plaintiff would be required to undertake, thereby significantly increasing litigation costs, if it is required to extract from each of the thousands of pages of documents in order to weed out passages or extracts which it considers not to be trade secret or confidential to the extent of legal protection. Such an order should only be made after careful judicial scrutiny.
88. It is necessary to consider whether the manner in which the Defendants originally came by the relevant information lends to an entitlement for the Plaintiff to claim that the collection of documents taken were at the relevant time of a confidential nature. If the answer proves to be in the affirmative, it will also prove to be unnecessary for the Plaintiff to undergo a particularization of its 'trade secret', 'confidential' and 'proprietary' averments in respect of

each of the Schedule 1 Documents. That assessment cannot be made before consideration is given to the meaning of these legal terms.

89. The Defendants promote a focused assessment on the legal meaning of ‘trade secret’ and ‘proprietary’, accepting those legal characteristics are inherently ‘confidential’. At paragraph 6.2 of D1’s and D3’s Amended Defence and paragraph 7.2 of D2’s Amended Defence, it states:

“...in this Amended Defence, the phrase “confidential information” is used to mean information (and the documents containing that information) that is treated as confidential information at law and accordingly subject to the relevant legal principles restricting its improper or unauthorised use and/or dissemination. Unless the context requires otherwise, confidential information in this sense includes trade secrets and proprietary information, but does not include published information, industry practices, professional know-how or other types of information not protected at law.”

90. As observed by Hellman J in *Athene Holding Ltd v Siddiqui, Cernich and Caldera Holdings Ltd* [2018] Bda LR 68 [para 38], Apollo’s 3 May 2018 Statement of Claim in JAMS 2 defined its “Confidential Information” in the Settlement Agreement as follows:

“The term ‘Confidential Information’ refers to all confidential and proprietary information that is not generally known to the public in Apollo’s possession, including information that Apollo has directly developed. Thus, the confidential and proprietary information that Apollo has obtained from its client, Athene, while providing investment advisory services to Athene falls within this definition of Confidential Information.”

91. Citing *Coco v A N Clark (Engineers) Ltd.* [1968] FSR 415, the English Supreme Court in *Vestergaard Frandsen A/S v Bestnet Europe Limited* [2013] ICR 981 and the Bermuda Court of Appeal’s decision in *Bermuda Press (Holdings) Ltd v Tamine* [2023] CA (Bda) 28 Civ, D2’s Counsel submitted in its written submissions [paragraph 28] that the essential components for a claim of breach of equitable duty of confidence are as follows:

“... ”

- a. *The information in question must have the necessary quality of confidence.*
- b. *The information must have been imparted in circumstances imparting an obligation of confidence.*
- c. *There must be an unauthorised use of the information to the detriment of the party communicating it.”*

92. Also, on the written submissions of Counsel for D2, the case of *Faccenda Chicken Ltd v Fowler* [1986] I.C.R.297 is relied on in support of the following submission [30]:

“...the distinction between trade secret and “merely” confidential information is an important one. Whereas a former employee may not use their former employer’s trade secrets after termination of employment, a former employee is not prohibited from using merely confidential information after the end of their employment unless they have taken or memorised information prior to termination of their employment for use after termination.”

93. In the case of *Faccenda*, the English Court of Appeal, on appeal from the decision of Goulding J’s 8 November judgment ([1984] I.C.R. 589), was concerned with the claims⁵ brought by Faccenda Chicken Ltd. (“FCL”) against a former employee, Mr. Barry Fowler, who set up a competing business, Fowler Quality Poultry Products Ltd. (“FQL”). The allegations, which were proven in the High Court, were that Mr. Fowler, the plaintiff’s former sales manager for an operation involving the sale of fresh chickens, abused the plaintiff’s confidential information in his departure and setting up of his new business. The confidential information was termed the ‘sales information’. The sales information was acquired by Mr. Fowler during his period of employment under the plaintiff. The same was so for the eight employees who left FCL to join FQL. Some of those employees, also named defendants in the action, were van salesmen who, like Mr. Fowler, came to know FCL’s customers, the detailed routes to their addresses, delivery times and pricing information.

94. FCL claimed against all of the defendants for, *inter alia*, breach of contract by abuse of FCL’s confidential information. None of the employees’ contracts of employment contained express terms against the unauthorized use of FCL’s confidential information. The contractual claim thus relied on a finding that the breach was in respect of an implied term restricting the defendants during and after their employment from using FCL’s confidential information and trade secrets gained by them in the course of their employment.

95. It is of note that Goulding J, at first instance, proceeded on the factual basis that FQL did indeed use all of FCL’s sales information. However, Goulding J held that the confidential nature of the sales information was such that the defendants could not disclose the information without breaching their implied duty of fidelity during the course of their employment. That being so, Goulding J also found that the information was not of such a heightened confidential level so to qualify as trade secret, meaning the defendants were free to use the information they had retained, once their employment had come to an end.

⁵ The first action commenced by Faccenda Chicken Ltd, Writ dated 10 September 1981, was for injunctive relief to restrain the nine defendants from using and disclosing their confidential information. On 16 September 1982 the first defendant, Mr. Barry Fowler, brought an action in the Queen’s Bench Division for outstanding commission during his employment with the plaintiffs. The Plaintiff counterclaimed for breach of contract by abuse of confidential information. Those proceedings were transferred over to the Chancery Division with the first action.

96. Criticising Goulding J's legal findings, Counsel for FCL referred the English Court of Appeal to the judgment of Farewell LJ in *Sir W.C. Leng & Co Ltd. v Andrews* [1909] 1 Ch. 763 where he said:

“To acquire the knowledge of the reasonable mode of general organisation and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learned it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, [etc.], or any secret process or things of a nature which the man was not entitled to reveal.”

97. As stated by the Court of Appeal in *Faccenda*, this formulation of principle was subsequently approved by Lord Atkinson in *Hermert Morris Ltd. v Saxelby* [1916] 1 A.C. 688, at 705. The same principle in relation to pricing was recognized in the judgment of Sir Robert Megarry V.-C. in *Thomas Marshall (Exports) Ltd. v Guinle* [1978] I.C.R. 905, 926, to which the English Court of Appeal was also referred by Counsel for FCL. In that judgment, Megarry V.-C. said: *“Costs and prices which are not generally known may well constitute trade secrets or confidential information...”*

98. In the leading judgment for the Court of Appeal in *Faccenda*, although rejecting FCL's submissions on the degree of confidentiality to be given to its sales information, Neill LJ said [13]:

“We can well appreciate that in certain circumstances information about prices can be invested with a sufficient degree of confidentiality to render that information a trade secret or its equivalent. The price put forward in a tender document is an obvious example. But there may be many other cases where the circumstances show that a price or prices are matters of great importance and highly confidential.

Information about the price to be charged for a new model of a car or some other product or about the prices negotiated, for example, for various grades of oil in a highly competitive market in which it is known that prices are to be kept secret from competitors occur to us as providing possible further instances of information which is entitled to protection as having the requisite degree of confidentiality.”

99. Neill LJ explained the legal principles relating to the implied terms of an employment contract which arise in the absence of an express term in respect of the use and disclosure of information. Such implied terms impose on an employee a duty of good faith and fidelity.

Accepting that the extent of that duty will vary according to the nature of the contract, Neill LJ stated [10-11]:

“(3)that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see Robb v. Green [1895] 2 Q.B. 315 and Wessex Dairies Ltd. v Smith [1935] 2 K.B. 80.

(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (Amber Size & Chemical Co. v. Menzel [1913] 2 Ch. 239), or designs or special methods of construction (Reid and Sigrist Ltd. v. Moss and Mechanism Ltd. [1932] 49 R.P.C. 461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.

The obligation does not extend, however, to cover all information which is given to or acquired by the employee while in his employment, and in particular may not cover information which is only "confidential" in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith.

This distinction is clearly set out in the judgment of Cross J. in Printers & Finishers Ltd. v. Holloway [1965] 1 W.L.R. 1; [1965] R.P.C. 239, where he had to consider whether an ex-employee should be restrained by injunction from making use of his recollection of the contents of certain written printing instructions which had been made available to him when he was working in his former employers' flock printing factory. In his judgment, delivered on 29th April 1964 (not reported on this point in [1965] 1 W.L.R. 1), he said [1965] R.P.C. 239, 253):

“In this connection one must bear in mind that not all information which is given to a servant in confidence and which it would be a breach of his duty for him to disclose to another person during his employment is a trade secret which he can be prevented from using for his own advantage after the employment is over, even though he has entered into no express covenant with regard to the matter in hand. For example, the printing instructions were handed to Holloway to be used by him during his employment exclusively for the plaintiffs' benefit. It would have been a breach of duty on his part to divulge any of the contents to a stranger while he was employed, but many of these instructions are not really 'trade secrets' at all. Holloway was not, indeed, entitled to take a copy of the instructions away with him; but in so far as the instructions cannot be called 'trade secrets'

and he carried them in his head, he is entitled to use them for his own benefit or the benefit of any future employer."

...

(5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid:

(a) The nature of the employment. Thus employment in a capacity where "confidential" material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.

(b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine [by that name]... ..

...

It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets, though the secrecy of some information, may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.

(c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. It is to be observed that in E. Worsley and Co. Ltd. v. Cooper [1939] 1 All E.R. 290 Morton J. at page 307 attached significance to the fact that no warning had been given to the defendant that "the source from which the paper came was to be treated as confidential".

(d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose. In Printers & Finishers Ltd. v. Holloway [1965] R.P.C. 239, 256, Cross J. considered the protection which might be afforded to information which had been memorised by an ex-employee. He put on one side the memorising of a formula or a list of customers or what had been said (obviously in confidence) at a particular meeting, and continued:

"The employee might well not realise that the feature or expedient in question was in fact peculiar to his late employer's process and factory; but even if he did, such knowledge is not readily separable from his general knowledge of the flock printing process and his acquired skill in manipulating a flock printing plant, and I do not think that any man of average intelligence and honesty would think that there was anything improper in his putting his memory of particular features of his late employer's plant at the disposal of his new employer."

For our part we would not regard the separability of the information in question as being conclusive, but the fact that the alleged "confidential" information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

These then are the principles of law which we consider to be applicable to a case such as the present one. We would wish to leave open, however, for further examination on some other occasion the question whether additional protection should be afforded to an employer where the former employee is not seeking to earn his living by making use of the body of skill, knowledge and experience which he has acquired in the course of his career, but is merely selling to a third party information which he acquired in confidence in the course of his former employment. ..."

100. In the present case, the documents and information which the Plaintiff says are or were confidential are the Schedule 1 Documents. The Plaintiff particularises the confidential nature of the Schedule 1 Documents as follows:

"...The Schedule 1 Documents contain, inter alia, Information of the kind identified in paragraph 2A above. The Schedule 1 Documents include, for example, detailed calculations and assumptions about the Plaintiff's methods and strategies, including calculations for Net Investment Earned Rates ("NIER") and COF, which are critical to the investment spread strategy that forms the basis of the Plaintiff's competitive advantage in the market. The Plaintiff uses these calculations and methodologies to evaluate the profitability of its business, which informs decisions relating to risk, pricing and investment targets, which are the mechanisms by which the Plaintiff generates profit. The Schedule 1 Documents and the

Information therein were created based on decades of experience in connection with tens of thousands of policies, at immense cost to the Plaintiff. The Documents therefore contain highly sensitive and valuable confidential information about fundamental aspects of the Plaintiff's business and/or disclose analysis of the Plaintiff's business and/or disclose analysis of the Plaintiff's business and the market in which it operates."

101. Under the Final Award, arbitral scrutiny was given to specific examples of purported confidential documents relied on by Apollo. The Arbitrator reviewed an April 2013 regulatory presentation to the Iowa Insurance Department in connection with another acquisition. This raised the question about how confidential regulatory filings made five years prior could be, particularly in light of the level of regulatory scrutiny it received in the course of public hearings. Apollo also claimed that its confidential information included certain "cost of funds" information used by Athene. Again, the confidential nature of this information was rejected by the Arbitrator, this time on the grounds that it was Apollo itself who had publicly disclosed this information. Other information touted to be confidential, but rejected on the basis that Athene had already affected public disclosure via an SEC filing, was a revolving credit agreement. These examples seemingly support the Defendants' request for the Court to scrutinize each document or item of information which the Plaintiff contends to be confidential in the legal sense.

102. What is unclear from the Arbitrator's judgment is whether Apollo was asked or made to particularise its pleadings in any format or detail similar to that called for on the present application. In JAMS 2, Apollo produced reports, decks and analyses which the Arbitrator appears to have accepted to contain proprietary and confidential information. This is the nature of the information which the Arbitrator found that D1 had failed to destroy once the Settlement Agreement had been executed. Those documents, at least some of which are said to feature in the present case, were found to be confidential and proprietary information that Apollo obtained from Athene while providing investment advisory services to Athene.

103. The important first step is to establish whether this is a case in which the Plaintiff is entitled to proceed on the basis that all of the documents taken were of a confidential nature in all circumstances. As is stated at paragraphs 3.a.-b. and 3.e.-f. of Schedule 2, the Plaintiff's case is that the Schedule 1 Documents are wholly confidential. The Plaintiff says this is supported by the treatment of those documents between Athene and Apollo and by Athene's policies, including codes of ethics and its confidentiality policies. The Plaintiff says that the confidential nature of the Schedule 1 Documents is "clear" and "obvious".

104. A similar case in relation to confidentiality policies was put by Apollo in JAMS 2. At page 7 of the Award, the Arbitrator stated that D1 conceded that he was bound to comply with

Apollo's Code of Ethics, although Mr. Dang sought to refute its governance over him. Summarizing Apollo's Code of Ethics, the Arbitrator said [pages 7-8]:

"The Code itself sets forth "minimum standards" that are expected of all Apollo employees. The Code emphasizes the need to protect what it describes as "Business Sensitive Information", which includes, among other things, financial information about Apollo and its clients and reports and analyses prepared by the Firm or its clients that are based on Business Sensitive Information". All such information is to be treated as confidential and is to be accessed only for valid business purposes and with proper authorization. ... As the Chief Compliance Officer testified, ... sharing non-public information about a company Apollo was considering acquiring is a clear violation of these policies.

Unfortunately, beginning in mid-2016, Siddiqui and Dang began to engage in conduct that violated both the letter and the spirit of the Code of Ethics. Starting in July 2016 and continuing regularly thereafter, Siddiqui, while an Apollo partner, began sending internal Apollo reports, decks, and analyses from his personal Gmail account to the personal email accounts of Cernich, Daula, and Dang. There are at least five such examples from July 2016 through January 2017. Information from these documents was incorporated into decks and models Caldera was using to solicit potential investors to invest in Caldera. There are at least four examples of this. ..."

105. After the execution of the Settlement Agreement, D1 was required as a matter of contractual obligation to return or destroy all of Apollo's Confidential Information in his possession custody or control. However, the Arbitrator found that D1 made a false attestation verifying his compliance with this contractual requirement as it was established at the discovery stage of the proceedings that "voluminous quantities of such information" had remained under D1's possession custody and control. Those documents dated back to 2016. In the Arbitrator's words [page 12], he found that D1 "*produced countless documents that fit squarely within this definition.*"

106. D1, in his own defence at the JAMS 2 arbitration, sought to defend his conduct by pointing to a provision in the Settlement Agreement which provided him a 5-day return-period of documents discovered at a future date. What he does not appear to have done is challenged the confidentiality or proprietary nature of each of the documents proved to be in his possession, custody and control. That may or may not be entirely correct.

107. Notwithstanding, I must independently consider whether the Plaintiff should be made to highlight the specific portions of the Schedule 1 Documents said to qualify as trade secret or confidential in a legal context. An independent assessment by this Court is also required to

determine whether the Plaintiff should also plead further grounds for those assertions in respect of each of the Schedule 1 Documents.

108. In *Faccenda*, the accepted fact, at both levels of Court, was that each salesman could quickly commit the whole of the sales information to memory and the sales information was generally known in the company, even at junior level. The Court of Appeal distinguished that from a case where the relevant information was restricted to senior management or to confidential staff. In the present case, the Plaintiff alleges that the Schedule 1 Documents contain confidential information which is not only outside of the general domain of industry practitioners but was reserved only for select senior executives such as D1 and D2.

ANALYSIS AND DECISION:

Particulars of “Confidential” and “Trade Secret”

109. In this case, the Plaintiff alleges that the relevant information was acquired and used by D1 and D2 as a result of knowledge not sourced from their professional skill and retention of information by memory, but via knowledge gained by their secret taking and procuring of a massive number of documents via personal email addresses during one of the following periods which are described according to the Plaintiff's case:

(i) Between July 2016 and March 2017:

When D1 was still a member of the Plaintiff's Board of Directors, serving as the lead director who had primary responsibility in significant aspects of the Plaintiff's business, relating to the Plaintiff's strategic direction, its financial underwriting and its identification, pricing and execution of strategic transactions

But after:

D2 had resigned as Executive Vice President, Corporate Development

(ii) After March 2017:

After D1 had resigned from the Plaintiff's Board of Directors and after D2 had resigned as Executive Vice President, Corporate Development

But during:

Mr. Dang's employment in a senior post at Apollo, it being the Plaintiff's case that on multiple occasions Mr. Dang surreptitiously took and sent the Plaintiff's Information to D1 and/or D2, having acted on their instruction to do so.

110. It is this background which the Plaintiff relies on to set the scene for the alleged secretive taking of the Schedule 1 Documents. The Plaintiff's case is that D1 and D2 knew perfectly well that the Schedule 1 Documents were confidential which is why they took steps to conceal their taking of them.

111. Effectively, the Plaintiff's case is that the Schedule 1 Documents comprise confidential and trade secret information in relation to the Plaintiff's reinsurance business, its investments and its acquisition and management projects relevant to its pursuit of Company A and/or Company B. As the Plaintiff's case is grounded on loss and harm caused by the Defendants in relation to the acquisition pursuits of Company A and Company B, it is implicit on the Plaintiff's pleaded case that all of the Schedule 1 Documents were not only commercially sensitive and highly confidential but were of value to those two acquisition pursuits which involve companies that write or have owned fixed and other annuity products.

112. It rings clear that the Plaintiff's case is that when these documents were taken and obtained by D1 and D2, they, the Defendants, knew that they had no entitlement to them. It is expressly pleaded that the Schedule 1 Documents were so confidential that the Plaintiff shared them with only select senior executives, amongst which D1 and D2 featured.

113. Additionally, the Plaintiff says that the confidentiality of the documents is reinforced by visible 'Confidential' labels which appear on a number of the documents in question. In support of its contention that this information is not free flowing throughout the industry, the Plaintiff says that Apollo's assistance with the costly development of this information was in exchange for fees paid to Apollo.

114. At paragraph 17 of the RRASOC the Plaintiff outlines what it described to be proprietary and highly confidential information relating to its annuity reinsurance business. The Plaintiff attributes its business to its liabilities. Explaining the information platform grounding its business, the Plaintiff says that its data, analyses and assumptions are based on decades of experience with tens of thousands of policies and efforts in the market. The Plaintiff's case is that it leverages its data, analyses and assumptions to evaluate the costs, risks and potential upsides and downsides of a suite of annuity offerings. (Ranking with importance amongst its annuity offerings is its guaranteed income rider products. The Plaintiff says that this is one of its primary competitive advantages in the insurance market – its price / costs of funds.) On the Plaintiff's assertions, its evaluations inform its buy-side merger and acquisition modelling and

its operation. Essentially, the Plaintiff's case is that these evaluations are reflected in the assumptions it uses for its coveted buy-side merger and acquisition modelling.

115. The Plaintiff's case is that it has investments in a stress tested portfolio of assets. It is said that these investments are essentially the Plaintiff's assets. In relation to its investments, the Plaintiff's pleaded position is that its information, models and methods relating to its investment portfolio and its stress testing is proprietary and highly sensitive. The Plaintiff contends that this material is neither in the public domain nor that of the industry.

116. It is not for this Court to pre-judge any of the contentious factual issues to be decided at trial. So, no determination can be made at this stage as to whether any class of documents or any particular document qualifies as confidential, proprietary or trade secret. All I am to determine, in relation to the Plaintiff's pleaded case where it is asserted that the Schedule 1 Documents are confidential and trade secret, is whether the Plaintiff's case is sufficiently pleaded with material facts which enable the Defendants to know the case they have to meet prior to the start of the trial.

117. Effectively, the Plaintiff says that it has fulsomely pleaded, without the need for further particulars, that the Schedule 1 Documents are collectively confidential. The Defendants, however, invite me to consider the Plaintiff's pleadings on confidential and trade secret information by approaching each individual document with scrutiny for its confidential and trade secret portions. Mr. Todd KC pointed out that the Plaintiff is a public company which makes regulatory filings, thereby placing its financial and other information into the public domain. The Defendants also contend that the Schedule 1 Documents contain known industry information and practices and stale information, falling very much short of a trade secret grade.

118. In my judgment, the question as to whether the Plaintiff has fully pleaded the material facts that the relevant documents were confidential, and trade secret must be considered looking at the full circumstances alleged by the Plaintiff. It is of no use or value to look at each document in a vacuum because the Plaintiff's claims for breach of confidence import varying legal tests for what is confidential and legally protectable. The test varies according to the timeframe of the taking and misuse of the documents. So, for example, where the Plaintiff's case is that the documents were taken and/or procured by D1 while he was still the Plaintiff's lead board member, the grade of confidentiality to be assigned to those documents would be akin to that described under Goulding J's second category in *Faccenda*.

119. The Plaintiff is entitled to assert confidentiality of a category 2 nature in respect of all of the documents which are alleged to have been taken or procured by D1 during his tenure with the Plaintiff up until 15 March 2017. On this second category of confidential documents, Goulding J said [8]:

“Secondly, there is information which the servant must treat as confidential (either because he is expressly told it is confidential, or because from its character it obviously is so) but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; and...there seems to be no established distinction between the use of such information where its possessor trades as a principal, and where he enters the employment of a new master, even though the latter case involves disclosure and not mere personal use of the information. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment.”

120. Save only for Goulding J's final statement in this passage where he opined that an employer could protect information in this second category with a restrictive covenant, the English Court of Appeal quoted this passage with approval on appeal from Goulding J's decision.

121. Notwithstanding, Mr. Todd KC turned to select documents within the Schedule 1 Documents. He referred to Document MDM00100157, which appears under the cover of a 4 February 2017 email from D1 to Mr. Daula (Volume 1 of the Schedule 1 Documents Tab 15). Casting doubt on the level of confidentiality that can be fairly attached to this JP Morgan report, Mr. Todd KC pointed to the completion and dissemination dates marked in the header of the document, being 16 November 2016 and 17 November 2016 respectively. However, Ms. Lucas KC drew this Court's attention to a Copyright 2016 mark on the footer of the same report which provides:

“Copyright 2016 JP Morgan Chase & Co. All rights reserved. This report or any portion hereof may not be reprinted, sold or redistributed without the written consent of J.P. Morgan.”

122. The same report also provides a caption which reads:

“For the exclusive use of Ming Dang (mdang@apollolp.com) at Apollo Global Management. LLC”

123. Without encroaching on the final determination of the confidential or proprietary trial issues raised by the Defendants, I find that the Defendants do not require any further information in order to understand the basis upon which the Plaintiff claims that this document is confidential and trade secret.

124. Under the same email cover is a 2014 report marked “CONFIDENTIAL” (Document MDM00100170). Mr. Todd KC argued that the report of three years prior was obviously stale and submitted that the Defendants have the right to know the grounds on which the Plaintiff claims that the document is confidential. In response, Ms. Lucas KC referred to the following text within the opening passage of the report:

“0.1 INTRODUCTION

The ... is “a confidential internal assessment appropriate to the nature, scale, and complexity of an insurer conducted by the insurer of the material and relevant risks identified by the insurer associated with an insurer’s current Corporate Plan, [footnote omitted] and the sufficiency of capital resources to support those risks.” ...”

125. The cogency of the Plaintiff’s claim that this document is confidential and/or trade secret is not the concern of the Court at this stage of the proceedings. All that is necessary is that the Defendants are provided with sufficient particulars to understand the Plaintiff’s basis for asserting that it is confidential and/or trade secret for the purpose of the breach of confidence claims. In February 2017, D1 continued to serve as a member of the Plaintiff’s Board of Directors. So, the Plaintiff’s case is that while he was serving in that capacity, he was disseminating documents marked confidential to a participant in the scheme to establish D3 and to place D3 in a position of advantage over the Plaintiff. This allegation is clearly made to support both the breach of confidence and breach of fiduciary duty claims brought by the Plaintiff.

126. So, in my judgment, in respect of the documents allegedly taken and/or procured during D1’s term as a Board member of Athene, the **particulars of the Plaintiff’s material facts on ‘confidential’ are sufficiently pleaded.** I am therefore bound to reject the Defendants’ proposed approach for the Plaintiff to table further grounds for its averments that the Schedule 1 Documents were at the material times confidential and trade secret. The same principle applies to **D2** in respect of the Schedule 1 Documents alleged to have been obtained and misused by him during the course of D2’s employment with Plaintiff.

127. So, what of the documents obtained after the Defendants’ departure from the Plaintiff? The Plaintiff says that all of the Schedule 1 Documents were confidential, proprietary and trade secret in any event. This is more consistent with Goulding J’s third category in *Faccenda* which the Court of Appeal quoted without criticism, as follows:

“Thirdly, however, there are, to my mind, specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have

left the service, they cannot lawfully be used for anyone's benefit but the master's. An example is the secret process which was the subject-matter of Amber Size & Chemical Co. v. Menzel, [1913] 2 Ch. 239.”

128. In this case, the Plaintiff alleges that the information contained in the Schedule 1 Documents had not been committed to the Defendants' memories but rather obtained in continuance of an unlawful scheme which was already 18 months underway. The Plaintiff's case is that this massive number of documents were taken under cloak and dagger in a way which compares to what Cross J envisaged could not have been lawfully done in *Printers & Fisheries Ltd* when he said (with the approval of the Court of Appeal in *Faccenda*); “*Holloway was not, indeed, entitled to take a copy of the instructions away with him; but in so far as the instructions cannot be called 'trade secrets' and he carried them in his head, he is entitled to use them for his own benefit or the benefit of any future employer...*”.

129. Under paragraph 2A of the RRASOC the Plaintiff assigns descriptive sub-categories to the Schedule 1 Documents to establish a case that these documents qualify under this class of confidentiality. In my judgment, the following descriptive categories provide **sufficient particularity** of the Plaintiff's claim that the documents belong to this heightened class of confidential documents:

- pricing methodologies and retail pricing assumptions and strategies;
- new products in the market which were under development;
- calculations relating to pricing methodology for new business;
- details of the methods and mechanisms used by the Plaintiff to assess and manage risks in its design and implementation of insurance products and policies;
- details on strategies and methods relating to mergers and acquisitions of other insurance, reinsurance and /or annuities companies;
- details of the methods and mechanisms used by the Plaintiff to assess and manage risks in its investments;
- returns on different rounds of private equity;
- details of the stress testing to meet compliance requirements for risk modelling under recession and depression scenarios;

- details of asset and liability classes and allocations of asset classes; and
- cost of finance assumptions.

130. In the English authorities placed before this Court, even material which may not properly qualify as ‘trade secret’ may be protectable as if it were, depending on the nature of the information and the circumstances of the case. In my judgment, the Plaintiff is entitled to assert that the collection of documents fitting the above descriptions was of a highly confidential nature when the documents were allegedly obtained and misused, requiring the same protection as a trade secret *eo nomine*. The Plaintiff makes this claim in describing the Schedule 1 Documents as “trade secret”, “other protected confidential”, “proprietary” and “commercially sensitive”.

131. The Plaintiff is also entitled to assert, on the strength of the alleged factual circumstances of the taking and obtaining of the documents, that the collection of Schedule 1 Documents taken after the resignation of D1 and D2 is confidential and trade secret or so highly confidential that it qualifies for protection as a trade secret *eo nomine*. So, for example, the Plaintiff need not highlight the confidential portions of the Plaintiff’s agendas for meetings held by its Board of Directors or its Board’s Risk Committee. The Plaintiff’s case is that these documents, by their nature and by the circumstances of their taking, surpass the legal threshold for what is confidential in a breach of confidence claim.

132. For those reasons, I find that the Plaintiff’s pleaded case asserting trade secret and confidentiality of the Schedule 1 Documents taken after the resignations of D1 and D2 is sufficiently pleaded.

ANALYSIS AND DECISION:

Particulars of “Proprietary”

133. Mr. Todd KC also queried how a document prepared by Goldman Sachs could qualify as proprietary, confidential or trade secret. While this challenge may prove successful after the evidence is tested at trial, I see no reason to compel the Plaintiff to further state its grounds for asserting confidentiality solely because the document was prepared by an external firm providing investment banking advice. For example, Documents Apollo-Third-Party_0119993, Apollo-Third-Party_0119997 and Apollo-Third-Party_0010637 are voluminous presentations prepared by Goldman Sachs for the Plaintiff, as provided by Apollo. While the Defendants challenge the Plaintiff’s claim that this is a confidential document, having been collated by Goldman Sachs, the April 2018 document contains various analyses of potential acquisition

structures for particular corporate entities of interest. One such corporate target is the subject-matter of Apollo-generated documents which the Plaintiff says were documents prepared for Athene. These documents are visibly marked “CONFIDENTIAL” or “Privileged and Highly Confidential”. (See the Volume 4 Schedule 1 Documents).

134. Another example of a presentation prepared by a financial services entity is Document KENN00120297. This document appears to have been generated by “TH”. Under the Disclaimer on the first page, it reads, in part:

“These Confidential Materials (these “Materials”) are based on information provided by ...[TH] and are being delivered on behalf of ...[TH] by J.P. Morgan Securities LLC (“J.P. Morgan”) and Goldman, Sachs & Co. (“Goldman Sachs”) ...[TH’s] financial advisors, to a limited number of parties who may be interested in pursuing an acquisition of certain subsidiaries or businesses... ..

By accepting these Materials, the recipient agrees (in addition to any obligations it may have under a Confidential [Agreement] executed with ...[TH]) that neither it nor its agents, representatives, directors or employers will copy, reproduce or distribute to others these Materials, in whole or in part, at any time without the prior written consent of ...[TH] and it will keep confidential all information contained herein or otherwise made available in connection with any [further] investigation of ...[TH].”

135. In my judgment, it is immaterial on the Plaintiff’s case whether any of the Schedule 1 Documents were prepared by a corporate entity other than the Plaintiff, so long as the Plaintiff’s case is that the relevant document was acquired by the Plaintiff to own and was never made public nor generally known nor accessible to industry practitioners. The Plaintiff’s case is that documents prepared by Apollo for Athene were prepared for a fee paid by Athene. The Plaintiff also asserts its ownership over documents prepared by other professional service providers.

136. Ultimately, it will be a matter for trial whether or not any or all of the select documents prove to have indeed been confidential and trade secret. At trial, the Plaintiff will be required to show, on a balance of probabilities, that none of these documents were disseminated into the public domain, whether via its regulatory filings or via other professional service providers. However, at this stage, the Court is more so concerned to ensure that the Defendants are provided with sufficient particulars of the claims against them on this document-heavy case. This analysis does not ignore the fact that the Defendants assert themselves to be highly experienced and skilled professionals of the same industry. Even on the facts pleaded in their own defence, they would be particularly familiar with the Schedule 1 Documents and/or documents of the like.

Otherwise put, these are not likely to be documents, notwithstanding the volume of paper, that would confuse or overwhelm the Defendants.

137. For all of these reasons, I find that the **Plaintiff's case is sufficiently particularised** in respect of its claims that the Schedule 1 Documents were proprietary, and I reject the Defendants' applications for the Plaintiff to be directed to further particularise its pleadings on 'proprietary'.

ANALYSIS AND DECISION:

Particulars of JAMS 2 and New York Proceedings Documents

138. At paragraphs 7.10 and 7.11 of D2's Amended Defence, he says:

"further, in relation to the Arbitration Proceedings, the Plaintiff has not sought to distinguish its "Information" and "Documents" from the information and documents in relation to which Apollo has already sought (and either succeeded in obtaining or failed to obtain) relief in the Arbitration Proceedings or the information in relation to which relief is sought in the New York Proceedings; and

accordingly, the Second Defendant's right to seek further and better particulars in the above respects is specifically reserved as is his right to strike out the claim in full or in part if proper particulars are not provided. ..."

139. In the Plaintiff's Amended Reply to D2, no response specifically addresses paragraph 7.10 of D2's Amended Defence. In response to D2's paragraph 7.11, the Plaintiff refers to Hargun CJ's 14 January 2019 Ruling and the Court of Appeal's 29 September 2019 and 22 November 2019 Rulings which do not assist for the purpose of considering the merits of the complaint raised by D2 in paragraph 7.10.

140. Effectively, an issue estoppel is raised by D2 in warning of a strike-out application in respect of the documents and information which were before and determined by the Arbitrator in JAMS 2. Notwithstanding that D2 was not party to JAMS 2, I form no opinions on the merits of any such prospective application. Whether D2 is entitled to be made aware of the documents which were the subject of the Arbitrator's determination in JAMS 2 is a matter for a specific discovery application, not an application for the Plaintiff to provide further and better particulars. (Also see paragraphs 44-49 of my earlier Ruling of 6 July 2021 in these proceedings.) That said, if D2 proves successful in obtaining this information, whether from the Plaintiff or D1, it will be a matter for him to raise any resulting issues on his own pleadings.

He cannot properly ask this Court to compel the Plaintiff to make this a part of its own case as it does not constitute a material fact on the Plaintiff's claims.

141. For these reasons, I **decline to grant D2's application by way of further and better particulars** of the **documents and information determined in JAMS 2**. The same is so for the **New York proceedings**.

ANALYSIS AND DECISION:

Request for Particulars of "other information"

142. At paragraph 6.1(iv) and paragraph 6.1(v) of D1's Amended Defence he says:

"It appears to be the Plaintiff's case that "Information" includes "other information" but it is not clear how a proper claim could be brought even in principle (let alone on the facts of this case) in relation to "other" information, viz information that is, by definition, neither a trade secret nor proprietary nor confidential; and/or

The definition of "Documents" set out at paragraph 2 includes non-confidential and non-proprietary documents (including documents that are publicly available in regulatory filings and documents that the Plaintiff has voluntarily published to the public)."

143. The offending term which triggers both complaints in respect of "Information" and "Documents" is "other information". During the hearing, I was made to understand that Ms. Lucas KC agreed to remove the term "and/or other" from paragraph 1d of the RRASOC. The Plaintiff's claim for breach of confidence certainly requires the relevant information to be confidential and/or trade secret. So, in respect of the breach of confidence claim, the use of the term "other information" was plainly misplaced. As for the breach of fiduciary duty claims, these are not contingent on the dissemination of confidential information in principle. However, in this case, the breach of fiduciary duty claims spring from the same allegations of misuse on the breach of confidence claim. Otherwise put, the Plaintiff relies on the same factual basis for both claims. For that reason, it follows that the Plaintiff is necessarily committed to the allegations that the Schedule 1 Documents form the entire collection of the confidential documents on which it will rely at trial, subject to any further amendments of its pleadings.

144. The use of "other information" in the RRASOC is also inappropriate because the Defendants are entitled to know the case against them. The case against them is particularised by the Schedule 1 Documents. No "other information" can fairly form part of the Plaintiff's claims.

145. For these reasons, I would have in any event found in favour of the Defendants' request for the removal of the term "other information".

DISCUSSION:

Particulars of "Misuse" against D1 and D2

146. The trial judge will be required to separately assess each Defendant's liability. In D1 and D3's Amended Defence there are repeated denials of the Plaintiff's claims that they used / misused the Plaintiff's information to pursue Company A or B or to gain any competitive advantage over the Plaintiff. Similarly, D2 states in his Amended Defence [para 5.1(iii)]:

"the Second Defendant did not use, or direct or induce anyone to use, any of the Plaintiff's confidential information...for the benefit of the Third Defendant (or for anyone else) to the detriment of the Plaintiff."

147. The Defendants attach significance to the Arbitrator's finding in JAMS 2 that misuse of the subject confidential information in relation to D3's bids for Company A and Company B was unproven. The Arbitrator held [page 13]:

"Apollo's fourth and principal breach of contract claim relates to Siddiqui's alleged use or disclosure of Apollo Confidential Information, which was strictly forbidden under the terms of the Settlement Agreement. Apollo's proof of this is deficient in a number of respects."

As an overall matter, Apollo seems to contend that Caldera could not have made the bids it did for AEL without using in some broad sense the confidential information it gleaned from Siddiqui's work on these matters while at Apollo. Having agreed in the Settlement Agreement to remove the covenant not to compete, it follows that Siddiqui would use whatever overall knowledge and experience he had in his future endeavors including whatever he did in competition with Apollo. If Apollo wanted to prevent that activity, then it should not have agreed to release the covenant not to compete in exchange for \$15 million in consideration from Siddiqui in the first place."

148. In JAMS 2, Apollo alleged on its Statement of Claim that D1 engaged in wrongful use and disclosure of Apollo's "Confidential Information" in breach of the Settlement Agreement. However, the Arbitrator found that it was of no consequence to the breach of contract claim whether or not D1 used Apollo's confidential information because the covenant not to compete had been removed from the Settlement Agreement. So, contractually speaking, D1 was entitled to use whatever knowledge and experience he gained before entering the Settlement

Agreement, even if such knowledge and experience was acquired through his previous competitive work for D3. So, if D1's knowledge and experience was drawn from any pre-Settlement Agreement misuse by him of Apollo's confidential information, his liability for breach of contract under the Settlement Agreement would not have resulted. That is because the breach of contract claim against D1 was for his failure to return or destroy Apollo's confidential information and his false attestation of compliance.

149. So, as against D1, the Arbitrator's findings that D1 was entitled to compete using whatever information he had acquired when he was an Apollo officer was purely a matter of construction of the Settlement Agreement. Further, the commencement period for any breach would have had to have occurred after the execution of the 21 February 2018 Settlement Agreement. With regard to the post-Settlement Agreement period, the Arbitrator said:

“There is evidence that Siddiqui had countless pre-release emails containing such Confidential Information, but there is no evidence that Siddiqui accessed even a single one of those emails in the post-release period, that any “Confidential Information” from those emails made its way into Caldera’s 2018 bid for AEL, or that Siddiqui or Cernich relied upon them in any way.”

150. That said, it is also noteworthy that there were at least two instances reported in the Arbitrator's judgment in which he found that D1 was not responsible for disclosing Apollo's confidential information. The Arbitrator found that transmission of an April 2013 regulatory presentation to the Iowa Insurance Department (in relation to another acquisition) was actually carried out by Deutsche Bank as opposed to D1. More so, the Arbitrator found that the forensic evidence before him did not establish that D1 had any involvement in the accessing of Apollo's files in relation to the acquisition of Company A. The arbitrator said [page 14]:

“Apollo also points to Dang’s accessing of the Apollo files relating to the [Company A] acquisition and emailing them to an unidentified address. While these actions are reprehensible, there is no actual evidence that Siddiqui had any involvement either with the decision to access the information or disclosed or used it any way. If he had done so, presumably that would have been uncovered in the course of the forensic examination, but no such evidence was introduced at the arbitration hearing.”

151. Against that background, the Defendants put the Plaintiff to strict proof as to how misuse of the Schedule 1 Documents was carried out by each of D1 and D2.

152. D2 was not a party to the JAMS 2 proceedings. However, D2 points to the Arbitrator's acceptance on the evidence that his efforts to build D3 entailed the use of his own expertise in addition to an above-board consultation with advisors. In the Arbitrator's words:

“Furthermore Cernich brought his considerable experience and knowledge to formulate Caldera’s bids. There is considerable un rebutted evidence of his efforts to build Caldera, to consult with outside advisors to the extent necessary and ultimately to make bids for [Company A]. No witness at the hearing analyzed those bids and presented evidence that the bids themselves reflected the use of confidential information obtained from Apollo or Athene.”

153. In the present case, the allegation of misuse on the Plaintiff’s pleaded case is that information taken from the Schedule 1 Documents was incorporated into models and strategies in relation to the acquisition of Company A and Company B. The Plaintiff’s case is that the relevant information was used and blended into materials, marketing pitches and other forms for D3’s business purposes and in order to solicit investment and interest in D3.

154. Particulars identifying the specific documents which correlate to the Plaintiff’s allegations of misuse are set out in the RRASOC by way of reference to document Bates Numbers from the collection of Schedule 1 Documents. The material facts on the Plaintiff’s case on misuse relate to the following material facts pleaded in the RRASOC:

1. D1’s forwarding of the relevant information entrusted to him as a director of Athene to D2, Mr. Daula, and/or potential investors in D3 for D3’s benefit as opposed to that of Athene.
2. D2’s receipt of the relevant information which had been entrusted to D1 as a director of Athene, such information having been received for D3’s benefit as opposed to that of Athene in circumstances where D2 was either a senior officer or a former officer of the Plaintiff.
3. D1 and/or D2’s solicitation of Mr. Dang to obtain the relevant information.

155. These alleged acts of misuse correlate with specific emails referenced in the RRASOC and select Schedule 1 Documents which were attached to the emails which span 2016 through to 2018. While those emails and attachments may be properly categorized as evidence lending to the subordinate facts, the pleaded Bates Number references to the emails and the relevant attachments have the effect of particularising the Plaintiff’s case as it relates to misuse. That is because the misuse is said to be not only in the taking and/or procuring of the relevant document but also in the sending and receiving of the relevant document by email. Many (but not all) of the documents referenced in the RRASOC were compiled in one of the four Schedule 1 Binders. (A fifth Schedule 1 Binder was prepared in the form of Hearing Bundle 2. Hearing Bundle 2 is a compilation of agreed selections from the Schedule 1 Documents for the purpose of the hearing.)

156. It is the Plaintiff's expressly pleaded case, under paragraph 39A of the RRASOC, that the wrongful use of the Documents and Information is "*to be inferred from the fact that they were specifically selected and taken by the Officer Defendants...as being of utility to the competing business.*" The selecting and taking of the Schedule 1 Documents is said to have been carried out by D1 and D2 by virtue of their office holdings⁶ with the Plaintiff and by requesting and/or receiving⁷ the confidential information.

157. The Plaintiff's case is that D1 and D2 continued to misuse its confidential documents and information after their departures from the Plaintiff, again by requesting and/or receiving the relevant documents and information.

158. Thus, the Plaintiff's case in respect of 'misuse' against D1 and D2 is not reliant on who wrote the emails or who sent the documents attached to the emails between them. The Plaintiff's case is that D1 and D2 were both involved in a scheme in which Mr. Dang and Mr. Daula participated. The alleged scheme entailed the taking and obtaining and the receipt and use of the Plaintiff's confidential information for the benefit of D3 and the detriment of the Plaintiff. All these things constitute the Plaintiff's material facts on the issue of misuse.

159. Ms. Lucas KC argued that the proposed RRASOC sufficiently particularises its allegations of misuse against both D1 and D2. Mr. Todd KC and Mr. Mansfield KC, however, argued that the RRASOC falls short of offering any clarity on how D1 and D2 allegedly misused any of the Plaintiff's documents. Both Mr. Todd KC and Mr. Mansfield KC submitted that the RRASOC does not explain what use was made of the Schedule 1 Documents.

160. The key question arising out of the Defendants' application is whether each instance of misuse is sufficiently particularised so as to make it known to the Defendants: (i) what the act of misuse is alleged to be and (ii) which Defendant(s) is/are accused of committing the particular acts of misuse in relation to the breach of fiduciary duty and breach of confidence claims.

ANALYSIS AND DECISION:

Particulars of "Misuse" against D1 and D2

161. The earliest date for which an allegation of misuse is specifically pleaded in the RRASOC [paragraph 49A.a.] relates to a 28 July 2016 email from D1 to Mr. Daula. D2 is not copied to the email; however, he is mentioned by name in the body of the email (Document MDM00099410). The subject line of that email is "a few interesting docs" and it appears to

⁶ Paragraph 49A.a. of the RRASOC

⁷ Paragraph 42A of the RRASOC

attach three separate documents. Of those three attachments, the first one is named “AprilBODRetailFollowups5-12-16MD.PDF”, which D1 in the email describes to be “retail product underwriting”. The second one is entitled “Apollo Meeting 07.25.16.pdf” and third is “Athene Update 7-12-16 vF.PDF”.

162. The material fact alleged is that both D1 and D2 “*sought out and copied by virtue of their office holdings Documents and Information that were used to conduct analyses, build models and develop products for [D3]*”. The pleaded reference to the 28 July 2016 email has the effect of making the Defendants aware that D1’s sending of the email and his sending of the three documents which the Plaintiff alleges to be its “Documents and Information” are particulars of the alleged misuse. Another particular of his alleged misuse, by reference to the three particular documents sent, is his communications with Mr. Daula about the attached three documents from the Schedule 1 Documents.

163. The attached documents, totaling 106 pages in aggregate, comprise the following three documents purported to comprise or contain the Plaintiff’s confidential information. Those documents are entitled:

12 May 2016: “*New Retail Product...Follow-up Excerpted from “Retail Growth: Income Rider Strategy” – April 18 Board meeting*”

25 July 2016: “*Athene Holding – Apollo Meeting*”

12 July 2016: “*Apollo Deployment Opportunities*”

164. In the email, D1 makes the following remarks⁸, *inter alia*, in reference to D2 and the document attachments:

“Tom - thanks for the time last Friday. Definitely much to think about. I’ll send you and steve a separate email about a call. Hopefully something tomorrow PM works for both of you, but if not we can find another time.

Attached are 3 interesting documents:

I think you’ve seen the first one (retail product underwriting). We’re reviewing the new COF/NIERs/returns tomorrow AM, and I’m sure we’ll be referring to this old retail document too.

⁸ In all email quotes, any information or indication disclosing what may potentially be commercially-sensitive information has been omitted.

The second one is a doc we just received about the impact on projections from ... yield curve/... sourcing product. Also some info on recent returns on retail and reinsurance product before the recent drop in crediting rates. We're not sure if the data on the projected niers/returns in the model are correct, so we're following up.

Last one is a doc that our credit guys presented to aam regarding how we can source more assets for athene (... ... so Apollo Credit came up with this plan).

Imran”

165. In a same-date reply email, Mr. Daula stated:

“Thanks I reviewed the docs from last week and will read these as well before tomorrow’s call.

*Best regards,
tom”*

166. D1 then further replies (Document MDM00099519):

“Thx. While part of me needs to pay some attention to what is going on at Athene, at this point I’m focused on learning what I can for the future. One thing I am worried about is the asset redeployment assumptions that I’m making in the Newco deck... ...and I need to get a better understanding of whether the level yield accounting approach is an intellectually honest approach.... Questions like this one, how to think about the risk profile of some of the rider products, etc.”

167. In a further same-date email reply, Mr. Daula responded:

“I think the AHL information is relevant to the extent it sharpens our analysis for NewCo: state of markets for both assets and liabilities, latest thinking on DoL, investor focus etc. I also think the asset assumptions need refinement and reflect a range of outcomes.

Tom”

168. These are the exchanges relied on by the Plaintiff to evidence the material fact alleged. Again, the material fact pleaded is that D1 and D2 sought out and obtained these three documents by virtue of their office holdings in order to conduct analyses, build models and develop products for D3. From the email referenced in the pleading, it is obvious that the Plaintiff’s case is that D1 dishonestly committed the following acts of misuse:

(i) D1 sent the three May / July 2016 Athene/Apollo documents to Mr. Daula for purposes unrelated to the Plaintiff's use or benefit but rather for D3's business advantage;

(ii) D1 disclosed the 12 May 2016: "*New Retail Product...Follow-up Excepted from "Retail Growth: Income Rider Strategy" – April 18 Board meeting*" document to Mr Daula on the basis of his certainty that this document would be referred to in a D3-related meeting fixed for the following morning.

(iii) in disclosing the 25 July 2016: "*Athene Holding" – Apollo Meeting*" D1 told Mr Daula that the document was just reviewed (i.e. three days prior to the email at the Apollo Meeting). D1 shared with Mr. Daula that this document was about the impact on projections from ...yield curve etc. D1 also stated that this document contained some information on "*recent returns on retail and reinsurance product...*"

(iv) In forwarding the 12 July 2016: "*Apollo Deployment Opportunities*" to Mr. Daula, D1 explained that this document had been used by Apollo Credit to present on how more assets could be sourced for the Plaintiff.

169. In my judgment, D1 cannot reasonably claim ignorance of these particulars of the allegation of misuse because the Plaintiff correlated with the 28 July 2016 email. However, I find that these particulars are relevant and applicable only to D1, not D2. D2 cannot fairly be expected to know from this instance of alleged use what his part of the wrongful act is said to have been. It is insufficient to allege misuse in respect of this email on the mere basis that he is named by D1 in the email in respect of an unknown following-morning meeting. For that reason, I find that the allegations of misuse on 28 July 2016 are **sufficiently particularised** against **D1 only**. While D1 referred to D2 in passing, there is nothing on this pleading or in the email exchanges from which D2 could be made to understand what constituted his act of "misuse" on 28 July 2016.

170. The Plaintiff also alleges the Officer Defendants' dishonest use of their office holdings to seek out and obtain 29 July 2016 Pricing Updates for Apollo. This was attached to an email sent by D1 to Mr. Daula on the same day, 29 July 2016. D2 is not shown to be copied to the email (Document MDM00099519) in which D1 sent Mr. Daula business materials marked "Athene" on each page and entitled "*Pricing Update for Apollo Costs of Funds/Spread Product Comparison/OTM Asset Opportunities July 29, 2016*". Again, in my judgment, the allegation of misuse is made out with **sufficient particularity** against **D1**. The alleged act of misuse is clearly hinged to D1's taking and disclosure of the 29 July 2016 pricing updates with Mr. Daula in furtherance of D3's business.

171. The allegation of misuse of the 29 July 2016 Pricing Update extends to D2 on the basis of the Plaintiff's reference to Document MDM00099561 at para 49A.a. of the RRASOC. That document is a 1 August 2016 email from D1 to D2 attaching the same 29 July 2016 Pricing Update. By the Plaintiff's pleaded reference to this email, the Plaintiff provides particularity of the material fact alleging (i) D2's involvement in the dishonest use of the relevant material, in this instance the 29 July 2016 Pricing Update, in furtherance of D3's business and (ii) D2's seeking out and obtaining by virtue of D1 and D2's office holdings, the 29 July 2016 Pricing Update to conduct analyses, build models and develop products for D3. The particularity provided by the document reference, as read with the Plaintiff's pleaded case in its entirety, is as follows:

a) On 1 August 2016 D2 received from D1 the Plaintiff's 29 July 2016 Pricing Update:

- (i) knowing that D1 had not resigned from his board membership of the Plaintiff;
- (ii) knowing that the information revealed by the 29 July 2016 Pricing Update was entrusted to D1 by virtue of his office holding as a lead Board of Director for the Plaintiff; and
- (iii) knowing that D1's sending of the Plaintiff's 29 July 2016 Pricing Update was for purposes unrelated to the Plaintiff's use or benefit but rather for D3's business advantage over the Plaintiff in respect of D3's acquisition pursuits of Company A and/or Company B.

172. That is essentially the Plaintiff's pleaded case on D2's misuse in the RRASOC. In my judgment, those **particulars of misuse** against **D2** in respect of the 29 July 2016 Pricing Update are **sufficient**.

173. The Plaintiff specifically alleges on its current pleadings at paragraph 39f.iv. of the RRASOC that on 10 December 2016 D1 sent term sheets to D2 for D2 to use in a meeting with a potential investor in D3. It is said that D1 asked D2 to convert the "document" into a pdf before circulating it in order to conceal D1's involvement in creating it. Documents KENN00119286 and KENN00077663⁹ are referenced here. KENN00119286 (Volume 1, Tab 11 of the Schedule 1 Documents) is a 10 December 2016 email from D1 to Mr. Daula, copied to Mr. Dang and D2. In that email D1 states, *inter alia*:

"Steve spoke to ...who wanted to meet Steve's partner. Before doing so, I thought it would be helpful to send a TS to them to see if they are willing to engage on our terms (or something close to it). As such, I'd like to get our TS fleshed out a bit more, and Steve, ...and I are having

⁹ Unable to locate Document KENN00077663 in the Hearing Bundle of Schedule 1 Documents.

a call tomorrow morning to review our TS and discuss what other key terms we'd like to add before sending over. I attach the following:

- a) TS pages in our powerpoint doc (which has not been shared with WP)*
- b) Old Athene TS from 2009*
- c) Recent Athene Germany TS*

Steve will forward to us the dial-in for the 10:30am call tomorrow.

Imran”

174. The material facts pleaded in reference to this document are set out in paragraph 39 of the RRASOC as read with the whole of the pleaded case under the RRASOC. Those material facts alleged are as follows:

1. D1 and D2 habitually and intentionally breached their fiduciary duties by wrongly obtaining and/or using the Plaintiff's confidential information, in this instance term sheets, in order to compete with the Plaintiff through D3 to exploit the Plaintiff's maturing business opportunities, in this case the opportunities to acquire Company A and/or Company B.
2. D1 was dishonest in sending the Plaintiff's term sheets to D2 for the above-stated purposes.
3. D2 was dishonest in receiving the Plaintiff's term sheets from D1.
4. It was known to both D1 and D2:
 - (i) That D1 had not resigned from his board membership of the Plaintiff;
 - (ii) that the information revealed by the term sheets was entrusted to D1 by virtue of his office holding as a lead on the Board of Directors for the Plaintiff; and
 - (iii) that D1's sending of the Plaintiff's term sheets was for purposes unrelated to the Plaintiff's use or benefit but rather for D3's business advantage over the Plaintiff in respect of D3's acquisition pursuits of Company A and/or Company B.

175. It is evident that the Plaintiff relies on this email to particularise its allegation at paragraph 39 of the RRASOC that both D1 and D2 were involved in the wrongful obtaining, taking and or misuse of the Plaintiff's term sheets. While D1 continued to be an officer of the Plaintiff during

this period, D2, as of 30 June 2016, had resigned. The sending and receiving of the term sheets during this period feeds into the Plaintiff's case on misuse. In my judgment, reference to this 10 December 2016 email in support of the allegation of misuse is **sufficient particularisation** of the Plaintiff's case against both **D1** and **D2** in relation to the term sheets which were attached to the **10 December 2016 email** and which the Plaintiff alleges to have proprietary and confidential value. It is clearly alleged that this misuse was carried out for the benefit of investment in **D3**.

176. At paragraph 39.f.vi. of the RRASOC, the Plaintiff alleges on its proposed amendments that on 26 December 2016, D2, having consulted with D1, presented the Plaintiff's returns on different rounds of private equity in an email to a potential investor for D3. This allegation of misuse cites Documents KENN00063581 and MDM00099816 (Volume 3, Tab 24 of the Schedule 1 Documents). Document MDM00099816 shows email exchanges made on 22-24 December 2016 from D1 to D2 and Mr. Dang and Mr. Daula. The Plaintiff's case is that the attachments sent with the 23 and 24 December 2016 emails consisted of a two-page document entitled "Overview of Investment Returns" (Documents KENN00063583 and KENN000011154). It is clearly the Plaintiff's case that this correlates with D1's 24 December 2016 email to D2 and the others in which D1 is shown to have stated "*Here is the returns page. Ming-I'll send you the excel so you can tool around it if you'd like. Steve - pls make sure you understand all of the footnotes on it before sending out...*"

177. Again, the material facts in reference to this document are pleaded at paragraph 39 of the RRASOC as read with the whole of the pleaded case under the RRASOC. In my judgment, there is **sufficient particularisation** of the allegation against both **D1** and **D2** that on **26 December 2016** D2 in consultation with D1 presented the Plaintiff's returns on different rounds of private equity in an email to a potential investor for D3.

178. The Plaintiff also alleges on its proposed amendments that on 9 January 2017, while serving as a member of the Plaintiff's Board of Directors, D1 sent a series of the Plaintiff's Weekly Rate Setting NIER Updates and an asset management slide regarding NIER to D2, Mr. Dang and others. Information from these reports was copied, charted and recirculated by Mr. Dang to D1 and D2. The document references are AHL000076906; AHL000076912; AHL000076918¹⁰. The Schedule 1 Documents underpinning these allegations of misuse against D1 are KENN00077306 and KENN00077309 (Volume 3, Tab 29 of the Schedule 1 Documents). Document KENN00077306 shows email exchanges made on 9 January 2017 (i) from D1 to Mr. Dang, D2 and Mr. Daula; and (ii) from Mr. Dang to D1 and D2 and Mr. Daula. In the first of those exchanges, D1 is shown to state¹¹, in part:

¹⁰ Unable to locate Documents AHL000076906, AHL000076912 and AHL000076918 in the Hearing Bundle of Schedule 1 Documents.

¹¹ The email extracts are not fully quoted to avoid the publication of what might be considered to be commercially sensitive information

“A few files

First shows the retail spot yields at 3/5/7/10 year levels pre and post election (all gross of ...bps). Then a few files that show retail rates at various points in time (also gross of the ...bps).

The files should provide a swag at the differences from the summer (original presentation) to now.

Keep in mind that this is for standard retail production. If Athene were buying a large book of long-date structured settlements under this framework....because the early year cash flows... Their swag is about ...”

179. In my judgment, the Plaintiff’s reference to this **9 January 2017** email between D1 and D2 is sufficient particularisation of the Plaintiff’s material fact alleging dishonest misuse of its Weekly Rate Setting NIER Updates and an asset management slide regarding NIER, which the Plaintiff alleges to be confidential and of proprietary value. It is expressly pleaded at paragraph 39, as read with paragraph 39f.vii, that this information was wrongfully obtained, taken and/or misused in order for D3 to compete with the Plaintiff.

180. In the second of those email exchanges, Mr. Dang is shown to reply to D1 and D2 and Mr. Daula stating, in part:

“Please find attached a summary comparison laying out the 3/5/7/10 year over time showing the differing contribution of benchmark and spread to the movement in net yields. As you can see, current net yields are about ...wider vs. the summer across the 5/7/10, while the 3 year is about ... The magnitude of the net yield... ..but will need to see where net yields print over the next few weeks as the 12/27 data point may not be entirely representative...Would be helpful to sanity check all of this...just so we have another data point.

Separately, a couple of questions:

- Why are the effective durations all ...? This is especially pronounced for the 10-year product, which has a ...duration. Is this a purposeful part of Athene’s current investment strategy to run a ...?*
- Can you explain this: “If Athene were buying a ...book of...settlements under this framework they’d...earn... because ...and then the long WAL of the blocks are not easily invested against...Their swag is about ...bps...than the prevailing retail rates...”*

– are you saying that Athene will lose...bps of yield if they try toand then there is reinvestment risk....?...”

181.Document KENN00077309 shows the net yields of 3-, 5-, 7- and 10-year products. As may be seen from paragraph 42A of the RRASOC, the Plaintiff intends to run its case on dishonest misuse also on the basis that D1 and D2 requested and /or received its documents and information from Mr. Dang. So, it is clearly the Plaintiff’s case on the proposed pleadings that D1’s and D2’s **9 January 2017** receipt of the Plaintiff’s net yields shown in Document KENN00077309 constituted misuse for the benefit of D3. For those reasons I find that this allegation is **sufficiently particularised** against both **D1** and **D2** in relation to the **net yields of 3-, 5-, 7- and 10-year products Document KENN00077309.**

182.At paragraph 41b of the RRASOC, the Plaintiff particularises D1’s use of personal email accounts. In doing so, the Plaintiff alleges misuse against D1 on 9 January 2017 when D1 is said to have sent D2 and others the Plaintiff’s retail pricing assumptions for November 2016, December 2016 and January 2017. These documents are said to have been transmitted to Mr. Dang who allegedly used them to update the financial model for D3. In support of this allegation the Plaintiff refers to Document MDM00004442 (which runs for 227 pages in length through to MDM00100139).

183.In my judgment, this **allegation against D1** for misuse on **9 January 2017** of the Plaintiff’s **retail pricing assumptions for November 2016, December 2016 and January 2017** stands as sufficient particulars of the relating material facts alleged.

184.Two days later, on 11 January 2017, according to the Plaintiff’s proposed pleadings, D1 sent D2, Mr. Dang and Mr. Daula confidential pricing methodologies to inform the drafting and development of documents to be used to seek investment for and on behalf of D3. This email correspondence is on Document MDM00099962. A flavour of this correspondence is discernible from the below quoted portion of the email (again, redacted to avoid reporting any potentially sensitive information):

“Please see attached three decks that showed athene’s retail pricing in November, Dec, and Jan. [cost of funds analysis].

Also, fyi on methodology:

*...
...*

I’m thinking we can start to use this data to update the newco deck...

... ..”

185. The Plaintiff's case is that the attachments sent in this email were the Plaintiff's "New Business Rate Setting Proposals" for November 2016, December 2016 and January 2017 (Documents MDM00099968 through to MDM00100139 (Schedule 1 Documents (Volume 3 Tab 21))). The confidential information that the Plaintiff claims is contained in this 173-page document is its confidential pricing methodologies.

186. The primary allegation made by the Plaintiff in respect of the sending and receiving of these confidential pricing methodologies is that D1 and D2 breached their fiduciary duties and or their duties of confidence in furtherance of D3's business. The Plaintiff's allegation of **misuse against D1 is sufficiently particularised** under paragraphs 39f.vii. and 49A.b. of the RRASOC. Effectively, the Plaintiff's case is that, in breaching their duties, D1 and D2 relied on the confidential pricing methodologies sent and received by **D1 and D2** respectively, in the **11 January 2017** email between them and others **to inform the drafting and development of documents used to seek investment for D3**, thereby obtaining a significant head start and advantage in competition against the Plaintiff.

187. The Plaintiff also points to a **25 January 2017** email (Document MDM00100142 (Volume 1 Tab 14 of the Schedule 1 Documents)) from D1 to D2, Mr. Daula and Mr. Dang. In this 25 January 2017 email, the subject line reads "latest risk slides". The attachment reads "BRC Call – 01.26.2017 pdf". This email is referenced by the Plaintiff to particularise its allegation that D1 and D2 sought out and obtained the Plaintiff's information and documents by virtue of their office holdings. It is clear from paragraph 49Aa of the RRASOC that the allegation made by the Plaintiff is that D1 and D2 misused the Plaintiff's 25 January 2017 "Risk Adjusted Spreads" of the same date to conduct analyses, build models and develop products for D3. The **particularisation of misuse** against both **D1** and **D2** in my judgment is **sufficient**. Misuse against D1 is in the sending of the 25 January 2017 "Risk Adjusted Spreads" and misuse against D2 is in its receipt, albeit that D2 in his pleadings avers that his receipt of documents was unsolicited. On the Plaintiff's material facts, their conduct was dishonest and in furtherance of the larger dishonest scheme.

188. The Plaintiff says that D1 and D2 used the Plaintiff's information in furthering their efforts to make the Plaintiff overpay for acquisition targets, thereby attempting to weaken the Plaintiff's financial position and reducing the Plaintiff's ability to compete with D3 for future acquisition targets. This allegation specifically references Documents MDM00030726; MDM00152673; KENN00009616¹²; KENN00009628. I am disadvantaged in making a determination on the sufficiency of the particularity provided by these documents references as I am unable to access

¹² Unable to locate Documents MDM00030726; MDM00152673; KENN00009616 in the Hearing Bundle of Schedule 1 Documents.

Documents MDM00030726; MDM00152673; KENN00009616 from the hearing bundles before me.

189. However, I have reviewed Document KENN00009628 (Volume 2, Tab 16 of the Schedule 1 Documents) which is entitled “Project Floyd Refresher” dated 5 February 2017. It is expressly marked “CONFIDENTIAL” on each page of the double-sided four-page document which appears to provide various analyses in relation to the Plaintiff’s bid for Company B. Notwithstanding, **the Plaintiff does not state on its pleadings what act was performed by D1 and D2** from which it may be said that they attempted **to make the Plaintiff overpay for acquisition targets**. For example, it is not evident to me that any particular document was emailed to or from either of the Defendants to bring about this effect. Equally so, there is no allegation of a particular act committed by D1 or D2 from which the Plaintiff is entitled to allege that the Defendants misused Document KENN00009628 to weaken the Plaintiff’s financial position and to reduce the Plaintiff’s ability to compete with D3 for future acquisition targets. For these reasons, I am obliged to find that these primary allegations on the Plaintiff’s pleadings are **insufficiently particularised** against **D1** and **D2**. This finding is clearly subject to any subsequent review and position taken by this Court of the related unlocated documents.

190. The Plaintiff’s proposed amended pleadings at paragraph 39.f.ii. on misuse also alleges that during the course of **March 2017** D1 instructed Mr. Dang and Mr. Daula on communications to be made to potential investors in D3 in order to secure funding for D3 as opposed to an investment in the Plaintiff. These allegations are purportedly evidenced by Documents MDM00100347 and MDM00048830. Again, I am disadvantaged in making a determination on the sufficiency of the particularity provided by these documents references as I am unable to access these two Documents which do not appear to have been included in the hearing bundles before me.

191. For these reasons, I am obliged to find that these primary allegations on the Plaintiff’s pleadings are **insufficiently particularised** against **D1** and **D3** as the Plaintiff fails to state what information was misused to inform Mr. Dang’s and Mr. Daula’s advice to potential investors. This finding is clearly subject to any subsequent review and position taken by this Court of the related unlocated documents.

192. On 15 March 2017, it is alleged in another proposed amendment at paragraph 39.f.ix. of the RRASOC, that D1 sent a presentation and model to D2, Mr. Dang and Mr. Daula. The Plaintiff’s case is that the presentation sent with the email is Document MDM00100348 (Volume 3, Tab 33 of the Schedule 1 Documents), (also “Document PHL”). Document PHL comprises the following five sections: (i) Market Opportunity; (ii) Business Model; (iii) Differentiation & Investor Returns; (iv) Executives; and (v) Term Sheet. In the accompanying email from D1 it reads, in part:

“All – here is a revised presentation, incorporating most of Tom’s comments, the new risk section, updated asset yields, and updated CoFs. Please note that the asset yields for Newco are based on the most recent asset deployment information that I have from AHL (though I haircut some of their numbers to be conservative).

In addition, I’ve reattached the latest model. Based on the new NIER for Newco...I increased the 5,7, and 10-year NIERs on the Assumptions Page...I did NOT change any cost of crediting, as the latest information that I’ve seen indicates that this has not moved materially... ..

We still need to:

- a) Go through the entire thing for a scrubbing*
- b) Streamline/spread out Tom’s risk pages to make them a bit less dense*
- c) Add in a section on F&G*
- d) Should we change [PHL] everywhere to Caldera?*

Ming- when you take a look this AM let me know if you are generally ok with it, and we’ll pull the 9 pages to send to ADIC THIS MORNING (maybe after changing everything to Caldera). Would you please take a look at the F&G slides and figure out how to add them to our deck? The shorter presentation for the senior guys at ADIA will need to incorporate some of the F&G pages too, as we want to add the sense of urgency around that deal.

Steve- my goal is to have a locked down presentation by Thursday AM, so that we can send the short-form version and the full thing to [J] (potentially to speak to him about it sometime on Thursday). This requires that we spend much of Wednesday getting the F&G pages in good order and added to the presentation.

*thx
Imran”*

193. At paragraph 39f as read with sub-paragraph ix of the RRASOC, the Plaintiff asserts its ownership of the information in Document PHL. It appears that the Plaintiff’s case is that its ownership of information contained in Document PHL is confirmed by D1 himself who stated in the email: *“Please note that the asset yields for Newco are based on the most recent asset deployment information that I have from AHL”*. Document PHL does not present as an Athene or an Apollo document. So, it is only by assumption that the Plaintiff’s case is that Document PHL is a presentation which incorporated the Plaintiff’s asset deployment information. If that is the Plaintiff’s case, it should expressly say so. Equally, if the Plaintiff claims that it may be inferred from this email that D1 obtained and misused the Plaintiff’s asset deployment information by incorporating it or causing it to be incorporated into Document PHL, such an

allegation should be clearly pleaded. On this basis, I find that the Plaintiff **must further particularise its case of misuse** against **D1** and **D2** as it relates to the acts constituting **misuse of Document PHL on 15 March 2017**.

194. The February/March 2017 period is also relevant to the primary allegations against the Defendants in respect of Company B. The Plaintiff alleges that D2 solicited the assistance of and worked with D1 and Mr. Dang to “among other things” develop materials to solicit investors, focusing on persons or entities that were already investors in the Plaintiff or Apollo. The Plaintiff says the Defendants sought to garner support from the investors for D3’s bid for Company B. The particulars of this allegation of breach of duty relate to 17 March 2017 and 22 March 2017.

195. It is alleged by the Plaintiff that on 17 March 2017, shortly before D1 resigned¹³, D1 and D2 met in the Middle East to speak with a potential investor in D3 for support for its bid for Company B. (It is noted that in the Amended Defence of D1 and D3 it is averred that on or shortly after 20 March 2017, after D1 resigned from the Plaintiff’s Board, he met with potential investors in Abu Dhabi to discuss the possibility of capital for D3. D1 denies that he had any obligation or duty to inform the Plaintiff of this meeting or of its purpose as, on his case, he had already resigned from the Plaintiff.)

196. The Plaintiff refers to Documents MDM00063830¹⁴ and MDM00131277¹⁵ at paragraph 48a. of the RRASOC. Subject to this Court’s later receipt and examination of Documents MDM00063830 and MDM00131277, the act(s) of misuse and the documents to which the misuse relates remain unclear to this Court. On that basis, I find that **further particulars of D1’s and D2’s misuse of documents or information** in relation to the March 2017 Abu Dhabi trip are needed.

197. The Plaintiff’s case is that on 22 March 2017, shortly after D1 resigned, D1 and D2 misused its confidential information to **compare investments with D3’s investments**. Document MDM00152132¹⁶ and Document MDM00152134¹⁷ are referenced to particularise this allegation. However, these documents are not before me. So, it is unknown whether these are emails or investment-related documents which are intended to form part of the Schedule 1 Documents. Notwithstanding, it is evident that the material facts pleaded and particularised at paragraph 48b are:

¹³ On D1’s and D3’s Amended Defence paras 9.4 and 11.1 it is averred that D1 resigned on 15 March 2017. At para 48.a. of the RRASOC it states: “*On 17 March 2017, shortly before the First Defendant resigned...*”

¹⁴ Unable to locate Document MDM00063830 in the Hearing Bundle of Schedule 1 Documents.

¹⁵ Unable to locate Document MDM00131277 in the Hearing Bundle of Schedule 1 Documents.

¹⁶ Unable to locate Document MDM00152132 in the Hearing Bundle of Schedule 1 Documents.

¹⁷ Unable to locate Document MDM00152134 in the Hearing Bundle of Schedule 1 Documents.

1. When D1 was a member of the Plaintiff's board of directors, he was tasked with spearheading the Plaintiff's own 2017 bid for Company B.
2. While working on the Plaintiff's 2017 bid for Company B, D1 simultaneously and secretly worked on D3's competing bid for Company B.
3. On 22 March 2017, a few days after D1 resigned, both D1 and D2 worked with Mr. Dang to solicit investors in D3 for its bid for Company B.
4. Both D1 and D3 used the Plaintiff's confidential information (presumably the information contained in Documents MDM00152132 and/or Document MDM00152134) to compare a potential investment in D3 to an investment in the Plaintiff.
5. In carrying out this exercise of comparison, they purported to indicate that an investment in D3 would perform better than an investment in the Plaintiff.

198. In my judgment, the above **particulars of the material facts are sufficiently pleaded** against **D1** and **D2** in respect of their alleged dishonest conduct on **22 March 2017**. However, one caveat, this finding is conditional on the information allegedly misused being contained in Document MDM00152132 and/or Document MDM00152134.

199. The Plaintiff then alleges that on 26 April 2017, D1 misused its documents by sending D2 and a potential investor a number of documents including the Plaintiff's 19 April 2016 Risk Committee Update (Document MDM00100419 (Volume 3 Tab 29 of the Schedule 1 Documents)). This 76-page document is said to comprise confidential information about risk-management stress testing, pricing and highly competitive products. At paragraph 44A of the RRASOC, the Plaintiff says that D1 and D2 misused this information about the Plaintiff's market-leading FIA products that provided the Defendants with a significant head-start in valuing and bidding on Company A in competition with the Plaintiff. Particularising the instance of misuse, the Plaintiff claims under paragraph 49A.c of the RRASOC that D1 and D2 sent the Plaintiff's information about risk-management stress testing... directly to potential investors in D3.

200. The pleaded reference to the 26 April 2017 email by the Plaintiff has the effect of serving as both particulars of the pleaded material facts and evidentially supporting the allegation (to whatever degree). The email is between D1 and two others not before the Court who the Plaintiff clearly contends are the potential investors. D2 is copied to the email along with Mr. Daula. The subject of the email is "follow-up on FA/VA dispersion of returns, and Risk Management OTTI/MTM framework". There are also five attachments shown to be sent with

the email. Three of the documents present as pdfs without labels and the fourth attachment is labeled “Risk Limits docx” and the final attachment is labeled “Stress Test Example.pptx”.

201. In the body of the 2-page email, D1 speaks at length about FA/VA dispersion of returns. Under paragraph 1)a. of the email, D1 refers to what the Plaintiff describes at paragraph 49A.c of the RRASOC as a competitive product class. The Plaintiff’s case is that this 26 April 2017 email shows that D1 and D2 made use of the information contained in the five separate documents attached to the email. In my judgment, the allegation of misuse against **D1** and **D2** on **26 April 2017** in respect of what the Plaintiff says was its confidential 2016 risk management stress testing and pricing of competitive products is **sufficiently particularised**.

202. Misuse alleged at paragraph 39.f.xii of the RRASOC is also particularised by the Plaintiff’s reference to a **6 May 2017** email from D1 to a potential investor. On these proposed particulars, D1 stated that D3 had created a model “*consistent with how losses developed in recessions and depressions and how we ran downside projections at Athene*”. Document MDM00006285¹⁸ is cited in relation to this allegation. Document MDM00006288¹⁹ is specified to underpin the Plaintiff’s allegation that D1 provided a document that incorporated the Plaintiff’s assumptions which was described as “*based on past work that was performed [by the Plaintiff] using a bottom-up simulation*”. I find that this allegation of **D1’s misuse of the Plaintiff’s assumptions is sufficiently particularised**. The allegation is against D1 for his misuse of the Plaintiff’s calculated financial assumptions by incorporating them, or causing them to be incorporated, into D3’s investment model which was sent to a potential investor on 6 May 2017.

203. Misuse is also particularised at paragraph 39.f.x. by a pleaded reference to a **17 March 2018** communication. The Plaintiff alleges that D1 instructed Mr. Dang to send Document Apollo-Third-Party_0119997²⁰ to a potential investor. The allegation of misuse is in the instruction said to have been given by D1 for Mr. Dang to send what the Plaintiff claims to be its confidential information. In my judgment, this allegation of **misuse by D1 on 17 March 2018 of the Plaintiff’s confidential information is sufficiently particularised**, so long as the reference to Document Apollo-Third-Party_0119997 points to what the Plaintiff contends to be its confidential information.

204. The Plaintiff also particularises its claim for breach of confidence against D2 at paragraph 40 of the RRASOC. This relates to the period after D2’s resignation on 30 June 2016²¹ but before the resignation of D1²² i.e. at some point between 30 June 2016 and 15 March 2017 on the

¹⁸ Unable to locate Document MDM00006285 in the Hearing Bundle of Schedule 1 Documents.

¹⁹ Unable to locate Document MDM00006288 in the Hearing Bundle of Schedule 1 Documents.

²⁰ Unable to locate Document Apollo-Third-Party_0119997 in the Hearing Bundle of Schedule 1 Documents.

²¹ D2 Amended Defence paras 11.2 and 18.7

²² D1 and D3 Amended Defence para 9.4

Plaintiff's case. The Plaintiff says that D2 breached his duty of confidence owed to the Plaintiff in respect of its information by:

(i) scrubbing metadata from the Plaintiff's documents (Documents KENN00077663²³; KENN00077312²⁴ and MDM00155984²⁵ are referenced); and

(ii) by sending emails to the email account of Mr. Dang's fiancée. (Documents MDM00070707²⁶ and MDM00070806²⁷ are referenced).

205. In my judgment **these two allegations of misuse against D2 are sufficiently particularised.**

206. In a primary allegation, the Plaintiff avers that the Defendants sought to divert and exploit the Plaintiff's maturing business opportunity to acquire Company A. This allegation is particularised by three examples.

207. Firstly, the Plaintiff alleges that on 22 and / or 23 April 2018, both D1 and D2 directed or encouraged Mr. Dang to access the Plaintiff's documents, one or some of which disclosed the amount that the Plaintiff would be willing to bid for Company A. The document references for this allegation are in Volume 3 of the Schedule 1 Documents:

- (i) MDM00100348 (Tab 33);
- (ii) KENN00015353 (Tab 34);
- (iii) KENN00120297 (Tab 35);
- (iv) MDM00146322 (Tab 36);
- (v) Apollo-Third_0028006 (Tab 37)
- (vi) Apollo-Third_0028007 (Tab 38)
- (vii) 92 further Apollo-Third...documents (Tabs 39-67)

208. Document MDM00100348 is Document PHL which the Plaintiff earlier alleged to have been sent by D1 on 15 March 2017 to D2, Mr. Dang and Mr. Daula. Notwithstanding, it is clear that it is the Plaintiff's proposed pleaded case that on 22 or 23 April 2018 both D1 and D2 directed or encouraged Mr. Dang to access Document KENN00015353 which shows 2016 tables for appraisal summaries which, on its face, purport to show expenses allowable in accordance with the Plaintiff's pricing. (See 'Lines of Business Discussion' page in the same Tab showing the Plaintiff's "Focus Areas" on KENN00015356). Also, on 22 or 23 April 2018 it is said that the Defendants directed or encouraged Mr. Dang to access KENN00120297, a December 2016

²³Unable to locate Document KENN00077663 in the Hearing Bundle of Schedule 1 Documents.

²⁴Unable to locate Document KENN00077312 in the Hearing Bundle of Schedule 1 Documents.

²⁵Unable to locate Document MDM00155984 in the Hearing Bundle of Schedule 1 Documents.

²⁶Unable to locate Document MDM00070707 in the Hearing Bundle of Schedule 1 Documents.

²⁷Unable to locate Document MDM00070806 in the Hearing Bundle of Schedule 1 Documents.

presentation on business materials prepared on the basis of the recipient's corporate acquisition interests. Document MDM00146322 is entitled "Reinsurance Data for Investors" and by its Table of Contents, it refers to a date range up to the third quarter of 2013.

209. It is unnecessary for me to examine each of the 98 documents referenced for the purpose of determining whether the acts of misuse of the documents and information contained therein are sufficiently particularised by the Plaintiff. What is key to the question of sufficiency of the particulars of misuse in respect of D1 and D2 is what the Plaintiff alleges to have been done with its documents. The Plaintiff says that D1 and D2 directed or encouraged Mr. Dang to access these documents on 22 or 23 April 2018. The second step said to have been taken by D1 and D2 was to direct or encourage Mr. Dang to transmit these same documents to D1 and D2. The third particularised allegation made by the Plaintiff alleges the Defendants' efforts to divert and exploit the Plaintiff's maturing business opportunity to acquire Company A. The allegation is that D2 communicated with Mr. Dang about how to strengthen D3's bid for Company A. The listed Schedule 1 Documents are said to have been used to assist with the amending of D3's bid for Company A which the Plaintiff says was submitted the following day on 24 April 2018. In my judgment, these allegations of misuse on **22** and or **23 April 2018** **sufficiently particularise** the material fact pleaded that D1 and D2 **diverted and exploited the Plaintiff's maturing business opportunity to acquire Company A.**

ANALYSIS AND DECISION:

Particulars of the purposes for "Misuse" against D1 and D2:

210. At paragraphs 54(1)-54(4) of Counsel for D1's written submissions, the following complaints are made:

“

(1) At ¶3 it is alleged that the documents were used "in order to compete" and "to divert or exploit...maturing business opportunities". Neither the competition nor the allegedly diverted business opportunities are identified.

(2) At ¶6, it is alleged that the documents were used to "aid their business ventures, including to gain an advantage over the Plaintiff". Neither the business ventures nor the advantages are identified.

(3) At ¶9, it is alleged that the documents were used "in a course of conduct harmful to the interests of the Plaintiff". Neither the course of conduct, nor its harm to P is identified.

(4) *At ¶42 it is alleged that the documents were shared with “others”. Those “others” are not identified.”*

211. On an examination of the RRASOC as a whole, one may reasonably conclude that in all circumstances the alleged “competing”, “maturing business opportunities”, the Defendants’ “business ventures” and the “advantage over the Plaintiff” all relate specifically to the acquisition pursuits of Company A and/or Company B. If it is the Plaintiff’s case that these terms refer to matters unrelated to Company A and Company B, it should say so on its pleaded case.

212. In relation to sub-paragraph (4), I find that it is otherwise obvious on the Plaintiff’s case that “the others” are Mr. Daula and potential investors who are named in the covering emails included in the Schedule 1 Documents. If it is the Plaintiff’s case that the term “others” at paragraph 42 of the RRASOC refers to persons other than Mr. Daula and potential investors who are named in the covering emails, it should name those persons on its pleaded case.

ANALYSIS AND DECISION:

Particulars of Dishonesty

213. Dishonest and/or fraudulent conduct is expressly pleaded against D1 and D2 and the employment of the terms “dishonest” and “fraudulent” in the RRASOC is expressly interchangeable. The Plaintiff also says that D2 failed to act (a) in good faith or (b) in a manner that D2 believed to be in the best interests of the Plaintiff.

214. D2 applied for further and better particulars of the Plaintiff’s case on dishonesty and lack of good faith. In his 19 March 2024 letter, D2 specified that the Plaintiff should be made to answer the following request:

“In relation to paragraph 58A:

- (a) The Plaintiff should identify which conduct it alleges was fraudulent and dishonest. For the avoidance of doubt, it is not a sufficient response to this request for the Plaintiff simply to refer to paragraphs already appearing in the draft Re-Re-Amended Statement of Claim;*
- (b) In each case, the Plaintiff should identify the conduct of each of the First and Second Defendant that it relies on;*

- (c) *In each case, the Plaintiff should set out all facts and matters relied on in support of the allegation that the relevant Officer Defendant's actions in committing the said conduct were fraudulent. If it is alleged that the fraud is to be inferred, all facts and matters giving rise to the inference should be pleaded;*
- (d) *In each case, the Plaintiff should set out all facts and matters relied on in support of the allegation that the relevant Officer Defendant was dishonest in committing the said conduct. If it is alleged that dishonesty is to be inferred, all facts and matters giving rise to the inference should be pleaded;*
- (e) *Insofar as it is not addressed in (a)-(d), the Plaintiff should identify all facts and matters relied on in support of the allegation that each of the Officer Defendant's conduct alleged at paragraph 39(a) was dishonest.*
- (f) *For the avoidance of doubt, we do not accept the assertion in Walkers' letter of 13 February 2024 that the allegation of dishonesty in paragraphs 39A and 58A is "particularised at length in paragraph 39 et seq of the draft RRASOC".*

215. The Plaintiff's allegations of dishonesty, if proven, are material to the determination of the Plaintiff's claim for reimbursement of the monies advanced by the Plaintiff to D1 and D2 in accordance with indemnity bye-law provisions which governed the Plaintiff's litigation-costs liability to D1 and D2 as its former officers.

216. Paragraph 58A of the RRASOC refers to Clause 56 of the Plaintiff's Ninth Bye-Laws dated 14 November 2016 ("the Bye-Laws") in respect of D1 and D2's right of indemnity from all liabilities and expenses arising from litigation proceedings such as the present proceedings. In material part, the clause provides that a "Covered Person" (D1 and D2) shall not be indemnified where a final and non-appealable judgment entered by a Court of competent jurisdiction determines that the "Covered Person" acted fraudulently and / or dishonestly in relation to the Plaintiff.

217. In my earlier Ruling in these proceedings made on 15 April 2021, I held that the Plaintiff was liable to pay the full sum of the advances to cover D1's litigation expenses in addition to full payment of the expenses which had already been incurred in these proceedings prior to the date of the Ruling. However, I also held that Athene's indemnity obligations are subject to the requirement that D1 undertakes to fully reimburse Athene if a final and non-appealable judgment emerges from these proceedings which contains findings that D1 acted dishonestly or fraudulently in relation to Athene.

218.As for D2, his coverage of legal expenses is said to be governed by an Indemnification Agreement dated 29 May 2015 (“the Indemnification Agreement”) between him and the Plaintiff. Section 4(b) of that agreement is said to contain a similar dishonest and fraudulent conduct proviso as that which governs D1 under Clause 56 of the Bye-Laws. D2 is also said to have given a 12 October 2018 undertaking to the Plaintiff in respect of repayment in circumstances where a final Court determination is made on the construction of the Indemnification Agreement. The Plaintiff says that as of January 2024 it has advanced more than \$2,500,000.00 to D2.

219.Against this background, the Plaintiff alleges dishonesty and fraud against D1 and D2 as a primary element of its claims that both D1 and D2 are liable to repay all legal fees and expenses advanced by the Plaintiff.

220.Central to the pleadings of dishonesty against both D1 and D2 are the Plaintiff’s allegations that the Officer Defendants took steps to conceal their wrongful conduct. The Plaintiff’s case is that D1 and D2’s fraudulent and dishonest conduct is in their taking and/or procuring of the Schedule 1 Documents and their use of the information in those documents for their personal gain, whether directly or through D3.

221.The Plaintiff places emphasis in the proposed amendments on the Defendants’ attempts to conceal their communication between themselves and those who assisted in the establishment of D3 by the use of personal email accounts and document manipulation. The Plaintiff’s case is that the Defendants’ secret acquisition pursuits are evidence of their knowledge that their acts constituted breaches of their fiduciary duties.

222.At paragraph 39a. of the RRASOC, the Plaintiff says:

“Subject to further discoveries and to any evidence that will be elicited at trial, the Plaintiff has discovered that the Officer Defendants deliberately and dishonestly without authorization took (whether directly or by procuring third parties to take them from the Plaintiff) and/or used for their own personal gain (whether directly or through third parties) at least²⁸ the Plaintiff’s Documents and Information identified in Schedule 1 to this Re-Re-Amended Specially Indorsed Writ of Summons...”

223.The dishonest conduct is particularised by D1 and D2’s purported secrecy and their alleged attempts to conceal their taking, procuring and misuse of the Schedule 1 Documents. Paragraph 39.e of the RRASOC reads:

²⁸ At the hearing the Court was informed that the words “at least” will be removed.

“Further, the Officer Defendants and those acting on their behalf took steps to conceal their misconduct from the Plaintiff. They used personal email addresses in order to conceal their communications, the fact that the Plaintiff’s Documents were being taken, and the use to which they were being put. Further, the Officer Defendants manipulated the Documents and Information in order to attempt to disguise their uses by the Officer Defendants and the Third Defendant. The Plaintiff will rely on these efforts to conceal the Officer Defendants’ activities (as further particularised in f., below) as evidence of the Defendants’ dishonesty. In addition, the Plaintiff relies upon the particulars of dishonesty and/or lack of good faith set out in Schedule 2 to this Re-Re-Amended Specially Indorsed Writ of Summons.”

224. So, two primary allegations of fraudulent and dishonest conduct are made by the Plaintiff against D1 and D2. The first is the accusation that they fraudulently and dishonestly took, procured and/or misused the Schedule 1 Documents. The Plaintiff says that this conduct was deliberate and dishonest. The second primary allegation is that D1 and D2 were dishonest in taking steps to conceal their misconduct from the Plaintiff.

225. The particulars of their taking, procuring and misuse of the of the Schedule 1 Documents is fully addressed in the preceding section of this Ruling. Accordingly, I will move on to consider the Plaintiff’s case in relation to the second primary allegation that D1 and D2’s dishonesty is shown by their attempts to conceal their misconduct.

226. At paragraph 39.f.iv of the RRASOC, the Plaintiff particularises D1’s and D2’s efforts to conceal in stating that, on 10 December 2016, D1 asked D2 to convert the term sheet documents attached to the 10 December 2016 email into a pdf before circulating it. The Plaintiff’s case is that D1’s motive for making this request was to remove any metadata which would disclose D1’s involvement in creating the term sheets. At paragraph 39.f.iv of the RRASOC the Plaintiff states:

“[O]n 10 December 2016, the First Defendant sent to the Second Defendant and others term sheets for the Second Defendant to use in a meeting with a potential investor in the Third Defendant (or what came to be known as the Third Defendant); the First Defendant asked the Second Defendant to turn the document into a PDF before circulating it, so the metadata in the document would not reflect the First Defendant’s involvement in creating it (KENN00119286; KENN00077663)”.

227. In my judgment, paragraph 39.f.iv **adequately particularises** the Plaintiff’s **primary allegation of dishonesty** against **D1** in relation to his conduct on **10 December 2016** in respect of the Plaintiff’s case on his misuse of the **term sheets** sent on that date. This necessarily ignores the Defendant’s pleaded response to this allegation, which is a matter for trial.

228. The Plaintiff's allegation of dishonesty permeates through all of the allegations of misuse on the Plaintiff's pleading. The Plaintiff is perfectly entitled to invite a trial judge to use this allegation, if proven, as a factual basis from which to infer that D1 was continuously dishonest in his obtaining of any of the Schedule 1 Documents for sending to D2, Mr. Daula or a potential investor in D3 during the period in which D1 continued to serve as a Board member of the Plaintiff and after D2 had resigned and was actively involved in the setting up of D3. That is clearly the Plaintiff's pleaded case, which references the relevant Schedule 1 Documents by their bates numbers. Again, this has the effect of further particularising the Plaintiff's primary allegations. The primary allegations of fraud and dishonesty clearly apply to every properly particularised allegation of misuse in respect of the Schedule 1 Documents.

229. At paragraph 1.a. of Schedule 2, the particulars of D1's knowledge in the dishonesty sense is grounded in the alleged belatedness of the timing of his resignation which is said to have occurred only when D3 was incorporated and in a position to commence business. The particulars of D1's knowledge that his acts constituted breaches of fiduciary duty are pleaded under paragraph 5b. of Schedule 2. The Plaintiff says that the D1 knew or ought to have known that he was required to resign once he was in pursuit of D3's competing business interests. Instead, says the Plaintiff, D1 continued as a director for a further year whilst providing Athene's documents to D2, knowing that D2 also had a strong interest in the commercial success of D3. The Plaintiff's case of dishonest knowledge against D1 is also particularised by its allegations that D1 solicited investments in D3 by drawing comparisons to Athene by reference to Athene's own confidential information and by soliciting the assistance of senior employees of Athene and Apollo.

230. Paragraph 1.b. says that D2 resigned and took the initial steps to set up D3. D2 is said to have received and used the Plaintiff's Documents and Information, notwithstanding that it was identified to be of value and interest to a competing business. The competing business on the Plaintiff's case is the Third Defendant. (The request for particulars of the "competing business" has been addressed in a preceding section of this Ruling.) The particulars of D2's knowledge that his acts constituted breaches of fiduciary duty is pleaded under paragraph 5c. of Schedule 2. The Plaintiff's case is that by the time D2 resigned on 30 June 2016 to pursue his commercial interests in D3, the plans to set up D3 were sufficiently advanced. The Plaintiff says that D2 therefore knew that D1 was required to resign but had not done so. The Plaintiff says that D2 also knew that D1 was not entitled to send him Athene's confidential documents nor was he, D2, entitled to receive them. Further, the Plaintiff states that D2 knew that neither he nor D1 were entitled to pursue Company A or Company B, whether by soliciting investments or by drawing comparison from Athene's confidential information which both he and D1 are alleged to have done.

231. Setting out some detail as to the Defendants' knowledge and participation in Athene's efforts to pursue Company A and Company B, at paragraph 22 of the RRASOC the Plaintiff avers that both D1 and D2, while officers of Athene, were entrusted with the full extent of Athene's highly confidential and commercially sensitive information, which is said to have included Athene's:

- (a) analysis of the financial position of potential acquisition targets;
- (b) assessment of the operational environment and capacity of potential acquisition targets;
- (c) valuations and methods for valuation;
- (d) plans to finance acquisition and the potential internal and external sources of such financing;
- (e) plans for use of its unique acquisition structures;
- (f) anticipated accounting treatment of potential acquisitions;
- (g) plans regarding the reserving practices of potential target companies; and
- (h) reinvestment, reinsurance, and tax-related opportunities associated with such potential acquisitions.

232. The Plaintiff alleges that D1 and D2's access to this information evidences the extent of their involvement in Athene's efforts to analyse and potentially acquire Company A and Company B over a period of years. Further particulars on the extent of D2's involvement in the Plaintiff's acquisition pursuits of Company A are provided at paragraph 23 of the RRASOC. This relates to a presentation said to have been made by D2 to 22 of the most senior executives and officers of Athene, including D1. That presentation is said to have also entailed discussion on the recommended approaches for Athene to take in the pursuit to acquire Company A.

233. These are all particulars of the pleaded material facts alleging that both D1 and D2 knew that they had no entitlement to pursue Company A or Company B through D3 and that they knew that they had no entitlement to misuse Athene's highly confidential and commercially sensitive documents and information to further D3's pursuits of Company A and Company B.

234. It is obviously the Plaintiff's case that both D1 and D2 were dishonest in their participation of this scheme and that the Plaintiff's case is that this dishonest intention flowed through to the end of D3's bidding for Company A and Company B. These are the dishonest purposes alleged to have led to D1's and D2's misuse of Athene's allegedly confidential information. So, clearly the Plaintiff's case is that the dishonest conduct continued from July 2016 through to the point when it became known that Company A would not be acquired by D3. That end date would be marked by 18 October 2020 when Company A is said to have publicly announced its partnership with Brookfield Asset Management Inc. (Company B had been acquired prior thereto by Blackstone in 2017 and subsequently sold to Fidelity National Financial Inc in February 2020, as stated on D2's pleaded case [paras 10.6(v)-(ix)]).

235. Ms. Lucas KC argued that Schedule 2 adequately addresses the Plaintiff's particulars on the alleged dishonest conduct of D1 and D2. However, Mr. Mansfield KC submitted that the Plaintiff's pleadings on dishonesty, notwithstanding the proposed Schedule 2, continue to be excessively vague without elucidating the case which the Defendants will be expected to meet at trial. D2's position is that the language employed by the Plaintiff's pleadings is unhelpful because it is expansive and non-exhaustive.

236. By way of example, D2 makes this complaint in respect of paragraph a. in which the Plaintiff alleges that D1 and D2 embarked on a scheme whereby they would compete with the Plaintiff by pursuing the acquisition of Company A and Company B, "among others". D2 correctly points out that no other acquisition pursuits are pleaded which leaves the Defendants unfairly exposed to the risk of being accused of other acquisitions for the first time at trial. In my judgment, this complaint has merit and the term "among others" ought to be removed unless the Plaintiff particularises the other acquisition pursuits. It thus follows that the same direction would apply to the inclusion of the words "at least" in paragraph 1.

237. By extension, where the Plaintiff uses the term "in particular" or the term "for example" in providing its particulars of dishonest conduct on the part of D1 and or D2, it ought not to be construed as a license for the Plaintiff to adduce evidence at trial of unpleaded or unparticularised material facts.

238. Subject to the above, I find that the Plaintiff's pleaded allegations on fraud and dishonesty against both D1 and D2 are sufficiently particularised.

ANALYSIS AND DECISION:

Particulars of loss and damage

239. Prior to any consideration of the question of a split trial, I now consider the Plaintiff's case in respect of loss and damage.

240. The Defendants ask for particulars of the Plaintiff's alleged loss and the profits the Defendants allegedly gained as a result of the misuse of what the Plaintiff contends to be its confidential information. The Defendants say that any such particulars should be pleaded in respect of each of the selected portions of the Documents said to contain trade secret, proprietary and confidential information.

241. The Plaintiff claims for “damages and /or equitable compensation in an amount to be determined at trial” for what it claims to be its “loss of confidentiality, opportunity and/or competitive advantage, and/or by reference to the gain or benefit obtained by the Defendants through the misappropriation” of the relevant documents and information “and/or improperly remaining as an Officer of the Plaintiff”. The Plaintiff also claims for an Order of the Court requiring each Defendant “to account for and disgorge all profits obtained by way of their breaches...or income”.

242. Paragraphs 56 to 63 of the RRASOC apply to the Plaintiff’s position on loss. It is clear from paragraph 56 that the Plaintiff’s claim for damages is not intended to be measured only by reference to Company A and/or Company B. At paragraph 56, the Plaintiff states:

“56. By reason of the matters aforesaid, the Plaintiff has suffered loss and damage and will continue to suffer loss and damage, and/or the Defendants gained significant benefits and advantages, and the Defendants are liable to pay damages and/or equitable compensation and/or are liable to account to the Plaintiff for any and all profits derived from the Documents and Information whether respecting Company A, or Company B or otherwise.”

243. At paragraph 56.a. of the RRASOC, the Plaintiff describes the relevant information as “*intrinsically valuable and gives it a competitive advantage in the business in which it operates*”. The value of the relevant information is said to be in Athene’s pricing of annuity offerings, its acquisition modeling and the execution of its investment activities. The Plaintiff stated in the RRASOC [17]: “*This Information is hugely valuable to the Plaintiff and its development was enormously costly and time-consuming, both directly and through fees paid to Apollo to assist in its development. It would be immensely valuable to the Plaintiff’s competitors.*” Further explaining the costs of obtaining its Information from Apollo, the Plaintiff stated in the RRASOC [27]: “*Athene paid Apollo for its investment management services ...*”

244. At subparagraph b. the Plaintiff avers that the Defendants gained a significant commercial benefit by taking and using the relevant documents i.e. the Schedule 1 Documents, and for that the Defendants are liable to compensate the Plaintiff. The Plaintiff further states that the Defendants, in using the relevant documents and information, expedited their readiness to seek capital and investment opportunities, thereby lessening the associated time and costs that they would have otherwise incurred in creating, purchasing and/or licensing the relevant documents. From this pleaded analysis, the Plaintiff claims for:

- damages calculated by reference to the head start advantages obtained by the Defendants; and /or

- hypothetical license fees that the Defendants ought to have paid to the Plaintiff.

245. At subparagraph c. the Plaintiff says that D1 is liable to account for profits made by him, whether directly or not, from the sale of the shares in the Plaintiff following the IPO. The Plaintiff's pleaded case is that D1 knew or ought to have known that he was required to resign once he was in pursuit of D3's competing business interests. Effectively, the Plaintiff's case is that D1 should have retired by July 2016. So, the Plaintiff says that he wrongly benefitted from the price increases arising from the December 2016 IPO.

246. Mr. Todd KC complained that these allegations of loss are insufficiently particularised. He said the allegations "do not speak for themselves" before pointing to the JAMS 2 proceedings where the Arbitrator found that neither Athene nor Apollo suffered loss. Mr. Todd KC also put forth his client's position that D3 has not profited from any of the relevant information. Mr. Siddiqui, in his affidavit evidence, also pointed out that under the Award the Arbitrator found that Apollo suffered no loss arising out of the non-acquisition of Company A. He deposed that neither he nor D3 ever came to acquire Company A or Company B and that there was no viable prospect of the Plaintiff acquiring Company A, given the Plaintiff's own assessment of its value. D1 says the same is so for Company B which was acquired in 2017 by a corporate entity of no affiliation with the Defendants.

247. The Plaintiff in my judgment has set out a basis for its claim for loss, notwithstanding that it is not asserted to be loss resulting directly from its non-acquisition of Company A and Company B. There is loss claimed nonetheless. The loss claimed is linked to the alleged profits of the Defendants for which the Plaintiff wants an account and the financial impact on the Plaintiff of the alleged misconduct by the Defendants, that misconduct being their alleged breach of duties aimed to put D3 in a position to compete with Company A and/or Company B.

248. Ms. Lucas KC grounded these claims in legal principles settled in the English Court of Appeal's reasoned decision in *Towers v Premier Waste Management Ltd*, 2011 WL 2747891 (2011). In that case Mummery LJ quoted from a passage in *Regal (Hastings) Ltd v Gulliver* [1967] AC 134 at 144 addressing the liability of a fiduciary to account for the profit made by use of his position:

"...in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the

mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned, cannot escape the risk of being called upon to account.”

249. Following this quote, Mummery LJ added:

“Equity's response of strict liability to account for breach of a fiduciary duty is similar whether the liability is triggered by an event which breaches the loyalty duty, or the "no conflict principle", or the "no profit principle.””

250. The Plaintiff at paragraph 58 states that the Plaintiff incurred “*significant fees and costs in seeking to uphold the performance by [D1 and D2] of the Relevant Fiduciary Duties, and the Duty of Confidence*”. This is particularised by the Plaintiff’s statement that it incurred fees by “investigating the Defendants’ misconduct and defending against and obtaining the dismissal of the legal actions brought by the Defendants in New York.” The Plaintiff further states that it expects to incur further fees and costs in the future.

251. Highlighting the facts in *Towers v Premier Management Ltd*, Ms. Lucas KC pointed out that in that case Mr. Towers had been found liable for breach of duty and that the damages award made by the judge at first instance was based on a quantification of the benefit obtained by Mr. Towers. In an attempt to distinguish this case from the circumstances of the present case, Mr. Mansfield KC pointed out that the judge also found that there was both loss and profit. However, as I have found, the Plaintiff in this case also makes a proper claim for loss.

252. The challenges otherwise mounted by the Defendants are focused more on the merits of the Plaintiff’s claim for loss rather than its particularization. The Plaintiff has claimed and particularised its case for loss by its allegation that D1’s overdue resignation enabled him to sell his shares with the benefit of the price increases arising from Athene’s IPO. The Plaintiff’s case is that the sale of D1’s shares for \$30,000,000.00 represents unfair profit to D1 and a loss to the Plaintiff.

253. I also find that the Plaintiff has provided adequate particularization to allow the Defendants to understand the basis for its claim for damages to be assessed by what it says are the head-start advantages secured by the Defendants and/or hypothetical licence fees. The same is so for the Plaintiff’s claim for fees and costs, which is also claimed as part of its loss.

254. For these reasons, I reject the Defendants’ request for the Plaintiff to provide the requested Schedule of Loss by way of further particulars.

ANALYSIS AND DECISION

The Plaintiff's Application for a Split Trial and Leave to Adduce Expert Evidence:

255. Under RSC Order 33/3 the Court is generally empowered to direct that any relevant question or issue is to be tried separately from the trial of the main cause or matter. Rule 4(2) confers the same power on the Court, but specifically for writ actions.

256. In seeking a split trial direction, the Plaintiff asks this Court to first determine the issue and extent of liability. Ms. Lucas KC argued that this would prevent unnecessary hypothetical assumptions on the part of the expert witnesses when it comes to assessing loss and quantum. Ms. Lucas KC touted this as the best-case management approach. Outlining the Plaintiff's concern, Ms. Lucas KC pointed out the possibility of the Court finding liability for one or two Defendants but not the other(s). This also raises the possibility of liability on one or some of the claims but not the entirety of the claims brought. In such a case, the Plaintiff says that the Court's findings will shape the experts' focus.

257. The Defendants say that a trial on liability alone conjures more questions than solutions because the Plaintiff has not divulged the losses it intends to claim. Mr. Todd KC leaned on the Final Award as it relates to the Arbitrator's finding that neither Apollo nor Athene (Athene not being party to the JAMS 2 proceedings) had suffered loss in relation to D3's acquisition pursuits for Company A and Company B.

258. The Defendants' collective position is that the Plaintiff's request for a split trial is also its way of avoiding its obligation to particularise its losses as requested. Mr. Siddiqui stated in his Eleventh Affidavit [para 8]: "*There is no doubt in my mind that the Plaintiff is unable to identify any loss flowing from the alleged breaches.*" In Kennedys' 19 March 2024 letter to the Plaintiff's Counsel [para 8], D2's objection to a split trial is summarised as follows:

"We oppose the application for a split trial, including for the reasons set out in MDM's various letters on the subject. We share the concern expressed by MDM that the application for a split trial is a transparent attempt by the Plaintiff to avoid having to engage with the fact that it has not suffered any loss for which it can prove the Defendants are responsible."

259. The Defendants also say that the Plaintiff has long been in a position to know and plead its loss. Their Counsel emphasised that the legal burden is on the Plaintiff to prove the purported loss suffered and that failure to prove loss amounts to an improper claim for damages. The Defendants' position is that the contentious issue of loss ought to be tested at the same time as the issue of liability.

260. Mr. Siddiqui in his evidence pointed out that for a 5 ½ year period, the Plaintiff made no request or suggestion of a split trial. He accused the Plaintiff of bringing an application for a split trial as an ill-motivated measure of provoking delay. In doing so, he expressly and robustly rejected the Plaintiff's suggestion that a split trial would better provide a settlement opportunity for the parties. Mr. Siddiqui gave an account of the background to the parties' failure to settle any part of the claims to date. This history, according to Mr. Siddiqui, illustrates the Defendants' assertions that the Plaintiff has no genuine interest in settling its claim but rather prefers to punish them by protracting this litigation.

261. Within the primary grounds of objection advanced by the Defendants is the issue of delay which would inevitably result from a split trial if this Court was to find in favour of the Plaintiff on liability.

262. Mr. Siddiqui explained in his evidence that for as long as these proceedings continue, he continues to suffer personal stress and prejudice to his professional life. He said that as he has to constantly explain the possible impact of the Plaintiff's serious allegations to his professional colleagues and others whom he encounters in the course of operating the multi-billion-dollar business he currently serves as CEO. In his Eleventh Affidavit Mr. Siddiqui said [para 29]; "...I believe that the motive of the Plaintiff is to keep these proceedings alive as a [sic] long as possible to cause me as much professional embarrassment as possible." Mr. Siddiqui also implored this Court to bear in mind that a second trial would exacerbate the costs of this litigation. By way of example, it would likely require the Defendants and others to return to Bermuda from the US to undergo a second round of live evidence.

263. I have rejected the Defendants' submissions for particulars of loss on the asserted basis that the Plaintiff has not adequately claimed for loss. As I have earlier stated throughout this Ruling, it is not for me, at this stage, to decide trial issues. Whether the Plaintiff's case will flatline on its claim of loss is a matter for trial. This Court's analysis of the question of a split trial on liability and quantum is primarily from a case management perspective.

264. Ms. Lucas KC submitted that it is regularly the case than an English Court would order that issues of remedy and/or quantification of damages be determined after findings of liability in breach of fiduciary duty and breach of confidence cases. As an illustration, she referred to multiple previous cases including *Foster Bryant Surveying Ltd v Bryant* [2007] 2 BCLC 239 at [47]; *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2023] EWHC 3280 (Comm) [2023] EWHC 3280 (Comm) and the *Recovery Partners GP Ltd v Rukhadze* case.

265. Ms. Lucas KC also submitted that a split trial has cost saving advantages. She pointed out that if the Court finds that the Defendants are not liable, a second trial will not be needed in any event. She also pointed out that if the Court does find that liability is established, then it will

know by its specific findings, how to frame the remedy issues. Conversely, if the trial is not split between these issues, then the Court would have to hear and make a determination of all such possible issues in one strike. This is particularly key as it relates to the management of expert evidence and loss.

266. What the Plaintiff proposes is as follows [paragraph 41 of the Plaintiff's written submissions]:

a. Phase 1, the Court would determine:

- i. The nature of D's role and duties owed by Ds to P;
- ii. The information taken by Ds relating to P;
- iii. Whether or not, and the extent to which the Schedule 1 to the RRASOC documents are confidential, or whether (as Ds suggest) they contain publicly available information, or information that was stale when it was taken (or is now stale) and what the impact of that might be, or otherwise contain information available generally within the insurance and reinsurance industry;
- iv. The use that Ds made of the Schedule 1 to the RRASOC documents;
- v. Whether or not D1 or D2 sought to divert any maturing business opportunity to his own benefit;
- vi. Whether D1 breached his fiduciary duties and/or the duty of confidence he owed to P, and was fraudulent and/or dishonest;
- vii. Whether D2 breached his fiduciary duties and/or duty of confidence he owed to P, and was fraudulent and/or dishonest and/or failed to act in good faith and/or in a manner he believed to be in P's best interests;
- viii. Whether D2 dishonestly assisted D1 in D1's breaches of fiduciary duty;
- ix. Whether D3 knowingly received P's documents and information and/or breached a duty of confidence owed to P; and
- x. Whether, in light of the Court's findings, Ds are, liable to repay the monies paid by P on their behalf for their defence of these proceedings.

b. In Phase 2, the Court would determine issues of remedy and quantum:

- i. Whether P is entitled to seek an account, if so from whom, and what directions are required;
- ii. Whether P is entitled to seek equitable compensation and/or damages in light of the findings of “use” made at trial, and if so, against whom and on what basis (negotiating fees; licensing fee or otherwise);
- iii. Whether P is entitled to an injunction and/or order for delivery up of documents taken;
- iv. The appropriate remedy in the exercise of the Court’s equitable discretion;
- v. The amount payable to P whether by way of taking of an account, and/or equitable compensation/damages.

267. In order to fully assess this question, I must now consider the issues regarding the expert evidence.

268. Part IV of RSC Order 38 applies to expert evidence. Rule 36 restricts the adducing of expert evidence to cases in which the Court has granted leave or where all parties have agreed. It is within the discretion of the Court, under Rule 38, to direct for expert evidence to be served in the form of a written report.

269. The Plaintiff seeks leave for the parties to adduce expert evidence from both a forensic expert and an industry expert.

270. In the written submissions of Counsel for D2, agreement is expressed for the use of forensic expert evidence, save that they oppose the Court’s receiving of any opinion evidence as to whether the Defendants sought to disguise the source of any documents taken or received. In D2’s 19 March 2024 letter, it is also proposed that the parties formulate specific questions on which the experts will be asked to comment.

271. The Plaintiff, however, insisted on the need for an expert to opine on the means by which the Defendants sought to conceal their misconduct. This, the Plaintiff contends, would entail an examination of metadata in order to draw conclusions on the likely source of documents and the means of manipulation applied. Ms. Lucas KC argued that this evidence underpins its claims of dishonesty and breach of duty. Ms. Lucas KC also proposes for a forensic expert to opine on the downloading of documents by Mr. Dang, subject to the willingness of the Defendants to agree that this was done, whether at the instruction of the Defendants or not.

272.As for an industry expert, Ms. Lucas KC insisted on the importance and necessity for this evidence given the real delta between the parties on the confidentiality issues relating to the Schedule 1 Documents. In the Plaintiff’s written submissions, it says [paragraph 67]: “...*the Court will be assisted by hearing independent evidence on such points from experts with broad experience in the relevant industry, rather than just the evidence of the protagonists in this case.*”

273.In my judgment, there is ample justification for both forensic and industry expert evidence, framed to cover the issues proposed by the Plaintiff. This Court is not bound by expert opinion evidence. The acceptance or rejection of tested expert opinion is a matter for the trial judge having regard to all of the evidence before the Court and its own assessment of the weight to be attached to the evidence.

274.Returning to the question of a split trial, I find that a forensic expert will likely prove necessary only for the trial on liability, particularly on the Plaintiff’s case of concealment.

275.That said, I find that an industry expert would likely be necessary witnesses for both the liability and remedy quantification issues. For example, an industry expert would speak to both the question of the confidentiality of the Schedule 1 Documents and misuse on the liability side and the alleged profits gained by the Defendants in relation to damages claimed.

276. I see no reason why the issues of profits allegedly gained by the Defendants cannot be addressed by the industry expert during the trial on liability. Those issues are:

- damages calculated by reference to the head start advantages obtained by the Defendants; and/or
- hypothetical negotiating and/or license fees that the Defendants ought to have paid to the Plaintiff; and
- the profit allegedly gained by D1 in selling his shares with the benefit of the share value increases onset by the December 2016 IPO.

277.If these issues are dealt with in the trial on liability, any need for a separate trial on quantum is reduced solely to the question of injunctive relief and any other remedy in the exercise of the Court’s equitable discretion. These points do not, in my judgment, warrant a separate trial.

278.For those reasons, I **grant leave for the parties to adduce the expert evidence proposed** but I **decline to grant the Plaintiff’s application for a split trial.**

POSTSCRIPT

279. I take this opportunity to express my gratitude to Counsel for their kind and respectful patience in awaiting this decision which I had hoped to deliver sooner. The extended timeframe for the delivery of this Ruling was largely caused by the significant demands of two other priority judicial projects under my assignment. (See Post-script in *Corbin Erisa Opportunity fund ltd v Argo Group International Inc* [2024] SC (Bda) 69 civ. (3 December 2024), per Subair Williams J for a more detailed outline).

280. Additionally, I would observe that the issues raised on these applications clearly required extensive time and careful consideration.

CONCLUSION

281. I leave it to the parties to draw an agreed Order arising from this Ruling.

282. Issues of costs arising out of this Ruling may be heard by any party filing a Form 31D.

Dated this 31st day of January 2025



**THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**