

**TEAM MOVES AND PROTECTING EVIDENCE:  
LOBBING YOUR BLACKBERRY INTO THE THAMES!**  
**A lecture by Kate Payne and Daniel Burne, Elborne Mitchell LLP**  
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These notes are derived from a talk by Kate Payne and Daniel Burne of Elborne Mitchell LLP, given at Lloyd's Old Library on Monday 28 November 2011.

Where specific reference is made to the law it is to English law as at 28 November 2011.

For specific advice, you should please contact Kate Payne or Daniel Burne at Elborne Mitchell LLP.

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**Team moves and protecting evidence:**  
**Lobbing your Blackberry into the Thames!**

1. I do not know about you but I must admit that I have been sorely tempted, on quite a number of occasions, to hurl my Blackberry into the Thames. I suspect many of you have felt that same urge as well.
2. However, if you are currently in the process of moving job I would suggest that you try and suppress this urge for a liberating moment. I will come back to my reasons for that shortly.
3. Now many of you will be aware that, in the insurance market, (and particularly amongst brokers,) it is not uncommon for whole teams to move onto a different, competitive firm. And in fact many of you will know what it is like to be both poacher and gamekeeper!
4. Teams obviously vary in size and composition, but what they have in common is that they are a group of people who work together and whose group dynamic and contacts make them more valuable as a unit than individually.
5. There are clear commercial advantages for an employer acquiring a team if they can get both the people, and business, all in one fell swoop.
6. On the other hand, there is a corresponding disadvantage for the employer who loses the team – potential for substantial financial loss in varying degrees and disruption to their business.
7. Teams of people moving can often be very emotionally charged – and this, combined with this win/lose scenario, is why team moves can often be the battleground for fiercely contested disputes - and in any such dispute the issue of evidence can be key.
8. One of the questions I'm often asked is whether it is actually possible to recruit a team without breaching some obligation or another. I am confident that the answer is yes – it is technically possible; it is important to remember that recruiting a team in itself is not unlawful. However, particularly in this market, where personal relationships remain a key ingredient, there are a number of potential pitfalls – Daniel will talk about these later.

## Evidence

9. Turning back to the question of lobbing your Blackberry into the Thames – as I have already mentioned, one of the key issues in any team move is the question of evidence, because without some evidence, any allegation of illegal or improper behaviour is not going anywhere.
10. Employers do need to have a well-managed plan for trawling through emails and collecting evidence. On this front, do not overlook the fact that many modern photocopiers actually scan and store a copy of any document which has been copied on them, (this was a very useful way of collecting evidence in a case I have really been involved.)
11. With regard to what evidence is, it is anything which might be subject to disclosure during litigation. It ranges from the obvious, for example telephone records/text messages/emails/Blackberry communications, documents such as business plans and computer data. Furthermore, the law in this area has generally caught up with technology so evidence also includes Facebook chat, Skype traffic and all types of instant messaging.
12. You will be pleased to know that communications directed through lawyers, for the purpose of taking legal advice, are not disclosable. So if you have any questions, please do not hesitate to contact us!
13. A less obvious type of evidence is changes in patterns of behaviour, which can be particularly relevant in a team move context. For example - prior to resignation -:
  - (a) a sudden rash of lunches with junior team members;
  - (b) a change in working habits (early starts or late finishes, or working from home more often);
  - (c) an unusual amount of photocopying;
  - (d) requests for secretaries to put together business information without an obvious business reason.
14. Despite an obligation to preserve evidence as soon as litigation is contemplated, employees often suffer an understandable desire to destroy incriminating material.
15. The classic method of destruction was shredding documents and faxes - although I have to say that supposedly shredded documents had a habit of turning up – classic methods also include using pay as you go mobile telephones.

16. Nowadays evidence is much more difficult to destroy and there are various arguments about whether you can or cannot permanently delete some things. “Destruction” also includes “loosing” your laptop, Blackberry or mobile, “forgetting” your passwords, destroying electronic files and diverting emails to personal email accounts.
17. Going back to my own Blackberry being thrown into the Thames, I understand from our IT department that when I do so, the only data which would be lost – i.e. not be retrievable without the handset - is the text and instant messages. But some larger, more sophisticated systems can have these saved as well.
18. The consequences of destroying evidence were highlighted in a recent case, *Tullett Prebon v BGC Brokers* [2010] EWHC 484. This is an important and helpful judgment on the issue of team moves. In this case a former senior employee sought to recruit whole desks from Tullett Prebon, an inter-dealer broker. The plan was unquestionably ambitious and large scale and resulted in extensive litigation.
19. During the poaching period much of the vital evidence was destroyed by the protagonists. Blackberries were repeatedly lost. The main instigator of the poaching, for instance, went through 8 Blackberries over the course of one year. Blackberries also had a particular habit of “disappearing” once Tullett Prebon had asked for them to be delivered up.
20. You do need to keep in mind that judges are not stupid and the judge in *Tullett Prebon* was very unimpressed by all this and observed,

*“It is however, inconceivable that all these items went missing or became unavailable as they did, when they did, without an improper intention in at least some of the cases.”*
21. In addition to these serious credibility issues - be warned - attempted destruction often doesn't work
22. On this front, you may remember the case of a broker moving from Marsh to Aon, who was keen to hide the contents of his laptop. When ordered by the court to make disclosure, the broker decided his best course of action was to throw his laptop, which contained the incriminating work he had done for the poacher, into a pond. Unfortunately for him this was discovered. The consequences were twofold. Nearly 60% of the data was still readable. Secondly, contempt of court proceedings were brought against him (although subsequently dropped when the case settled).
23. From all this, I think you will have gathered that a major downside of destroying evidence is how such behaviour may be construed later. Judges tend to be very

unimpressed. Also destroying evidence will also affect an employee's credibility more generally, throughout the conduct of any mediation or litigation.

24. There are two further brief issues on evidence that I wanted to mention before passing you over to Daniel.
25. Firstly - as part of the court's armoury in dealing with these disputes, the court can, in certain circumstances, order that individuals provide signed affidavits before proceedings are actually issued. But, just be aware, if you get swept up in US proceedings, the additional method of gathering evidence by deposition can be ordered by a US court and the deposition of an individual can be carried out over here. However, we have been involved in establishing Court of Appeal authority that you do not necessarily have to co-operate with these types of US proceeding, so it is a point to check if it happens to you.
26. The final point I want to mention relates to the use of indemnities. It is quite common, particularly in a team recruitment context, for a recruiting employer to provide their new recruits with an indemnity to cover any liabilities which the individual might incur as a result of them moving jobs, e.g. damages, account of profits and legal fees.
27. These indemnity documents are generally disclosable in any litigation and they can be viewed by the court in a somewhat negative light.
28. The judge's approach in the Tullett Prebon case is a typical example of this attitude; he regarded the indemnities as an acknowledgment by the recruiting employer that the brokers' conduct might indeed be unlawful.
29. Despite this, for obvious reasons, indemnities are commonly regarded as a necessary evil in a team recruitment context. But all is not lost - one thing to keep in mind is, there are quite a number of drafting techniques which can be deployed to assist with the presentational issues that these type of agreements create.
30. As I said earlier, a question I'm frequently asked is whether it is actually possible to move a team without some kind of breach and Daniel is going to give you some top tips on this and how to minimise the risks when doing so.

31. I am going to begin by talking a little about the obligations that you, as employees, owe to your employers. This provides a vital backdrop to understanding how to legally conduct a team move.
32. There can be 3 sources of obligation: your employment contract; implied duties and fiduciary duties.

### **Employees' duties to their employers**

#### **A: Contractual obligations**

33. Firstly, there are contractual obligations.
34. We tend to find that surprisingly few people have read their employment contract in detail. Even those that have scoured over the finer print often feel that they are in a weak negotiating position when they're signing up to it – unless they are lucky enough to have been headhunted. But the employment contract is, unsurprisingly, the primary source of our obligations to our employers.
35. So it should come as no surprise when I say that anyone considering moving jobs should suppress the urge to lob their Blackberry into the Thames, and instead take a careful look at their contract. Doubtless you will want to consider any clauses relating to your notice period, the timing of bonus payments and to your release from any share scheme. But it is also essential to bear in mind your key contractual obligations:
  36. Firstly, many contracts contain restrictive covenants. Typically, these aim to prevent you from:
    - (a) poaching employees;
    - (b) dealing with, or soliciting, former clients; and
    - (c) working for a competitor - or otherwise competing.
  37. Restrictive covenants will apply for a stated fixed period, perhaps 6 or 12 months – after you have left
  38. Another set of contractual duties that frequently arise are confidentiality obligations. These try to prevent you misusing of any of your employer's confidential information.
  39. Again, this also applies after you have left but, unlike restrictive covenants, this is not a time limited duty: it is an on-going obligation.
  40. Less commonly, there may also be an express requirement for you to inform your employer if you receive an offer of a job elsewhere. This obligation used to be quite

rare and, whilst they are still much less common than restrictive covenants and confidentiality obligations, we are increasingly seeing it crop up. In the recent *Tullett Prebon and BGC* case, the court held that a clause imposing this duty was enforceable.

41. Of course, in the insurance industry, it may not be such a bad thing to reporting a job offer to your employer. As the judge pointed out in the *Tullett* case, it can be a useful tool to elicit a counter offer from your current employer, and so to negotiate a salary increase. But whilst a pay rise is probably on everyone's Christmas wish list, making up imaginary job offers to try to inflate your salary is not recommended.
42. These sorts of contractual duties are relatively straightforward. Questions may of course arise as to how enforceable they in fact are as a matter of law.
43. And if your exit is being settled by a compromise agreement, it may be possible to negotiate a release from some or all of your restrictive covenants.
44. But the obligations themselves, or rather the intended obligations, are clearly set out in black and white in your contract.
45. However, you may be surprised to learn that you also owe quite onerous duties beyond those written in your contract: these are "Implied Duties".

#### B: Implied duties

46. Broadly speaking, you're required to be loyal. Your employer is entitled to have **trust and confidence** in you.
47. I am going to break this down a little further so that you can see what this actually means in practice.
48. You must **not compete** with your employer. This is quite a wide ranging duty:
  - (a) You must not work in competition with your employer during your working hours, or in your spare time;
  - (b) You must not solicit your employer's customers for your own purposes, or for the purposes of a rival;
49. And, whilst still employed, you must not entice fellow employees to leave;
  - (a) You must not disrupt your employer's business; and
  - (b) You must disclose something you're aware of which is likely to cause damage to your employer's business.

50. Importantly, these duties still apply even when there are no express non-compete, non-solicit and non-poach restrictive covenants in your contract.
51. Crucially, you must not **misuse confidential information**. More specifically, you must not disclose to third parties, or use for your own purposes, any confidential information obtained during your employment.
52. So what is ‘confidential information’? It is actually quite widely defined. It does not include trivial information, or anything which is already in the public domain. But it does include information which you’re told is confidential, or which is obviously confidential from its character. It can include lists of business contacts; terms of business; and financial information – including details of salaries and bonuses. This information remains confidential, even if you keep it in your head and it becomes part of your own skill and knowledge: Memorising information doesn’t make it any less confidential.
53. This duty to maintain confidentiality continues after your employment ends, even if there is no express obligation in to do so in your contract. This is worth bearing in mind, as – especially when moving to a competitor – where it might be advantageous to draw on that information or knowledge.
54. But it is also worth noting that, where there are no contractual confidentiality provision, the implied post-termination duty of confidentiality is usually limited to preserving **trade secrets**. Trade secrets are effectively a narrower subset of confidential information. For example, a Coca Cola employee who knows the secret recipe for Coke will be under a perpetual obligation to keep it secret, even after he’s left the Coca Cola company.
55. You may be wondering why there’s a picture of a chicken. The key case on implied duty of confidentiality is Faccenda Chicken. Faccenda Chicken is a company which supplies fresh chickens and is the second largest chicken processing company in the UK, capable of processing some 2m chickens per week. Faccenda Chicken ended up having their day in court against the aptly named Mr Fowler, an ex-sales manager who set up a competing business and employed a number of Faccenda’s staff. The court set out that the factors to consider whether confidential information is a trade secret being:
- (a) the nature of the employment and the employees status;
  - (b) the nature of the information;
  - (c) whether the employer has stressed the confidentiality of the information to the employee; and
  - (d) Whether the information could be isolated from other non-confidential information.

56. Mr Fowler had no express contractual duties, and the court decided the sales information from Faccenda he used in setting up his own company was not a trade secret.
57. However, if you take, copy or memorise the more broadly defined **confidential information** during your employment, with a view to using it afterwards, this is arguably still a breach because you have – whilst still employed – used the information in an unauthorised manner.
58. It is worth remembering that confidential information is commercially and financially valuable, so employers will often go to great lengths to protect it. Therefore, it is common to see **express contractual restrictions** confining its use after employment ends in a much more restrictive way than the implied duty alone imposes.

### C: Fiduciary duties

59. Over and above the implied duties I've already set out, some of you will also owe your employers much more restrictive obligations – known as fiduciary duties. “Fiduciary” sounds like classic legalese, so what exactly is it?
60. It effectively arises where there is a legal relationship of trust [and/]or confidence between you and your employer. Fiduciary duties are mainly owed by Directors. These duties may not necessarily be owed by all directors, such as those in name only. However, actual directors, who sit on the board, will be subject to fiduciary duties.
61. Certain other employees also owe fiduciary duties. They are usually, though not exclusively, senior managers or those given particular positions of trust.
62. Fiduciary duties are quite onerous. They include:
- (a) The duty not to make **secret profits** from your conduct;
  - (b) The duty to act solely in your **employer's interests**, disregarding even your own interests;
  - (c) The duty to **disclose circumstances** where your own personal interests conflict with those of your employer; and
  - (d) The duty to disclose your own misconduct or wrongdoing – and that of colleagues; and
  - (e) The duty to report steps taken by competitors to poach a team;
63. So they are obviously important to bear in mind when you are thinking about moving jobs, as the example of the recent case, *Kynixa and Hynes*, shows. In this instance, several employees were found to have breached their fiduciary duties. They had failed to inform their employer that they had been approached by a competitor and that a damaging team move was in prospect.

64. You might think – so what? Well, in that case, the three employees ended up being ordered to pay the claimant’s legal bill, which were estimated to exceed £1m. I hope for their sake they had managed to negotiate indemnities from their new employer to cover this bill.
65. It also neatly illustrates how important it is to bear these duties in mind in a team move context.
66. It is also worth mentioning here that by the time we have been instructed, there has often been some spilt milk. Clients may be keen to protest that they have never done anything wrong, or at least, nothing that is particularly bad! Yet often something emerges from the woodshed – like the shredded fax that Kate mentioned. These sorts of things have the habit of emerging at the most inopportune of moments. Usually the result of such a discovery is that it destroys your credibility and forces you to settle.
67. So if you have breached any of your duties to your employer, or otherwise done something a little less than ideal, it is best to come clean to your lawyer at the first possible opportunity. Whatever has happened can be managed, no matter how bad it may seem.

### **Team Recruitment**

68. As Kate has already pointed out, recruiting a team of employees from a competitor is not, in itself, unlawful. But it can be, if it is not approached properly. So, recruiting a team comes with higher risks than recruiting individuals, not least because it is accompanied by the spectre of costly, and potentially high profile, litigation.
69. For the employees being recruited, there is the risk that they may find themselves in breach of their duties.
70. For the recruiting employer, the three main pitfalls to avoid are:
- (a) misusing confidential information
  - (b) becoming involved in an unlawful conspiracy; and
  - (c) inducing prospective employees to breach their legal obligations to their current employer
71. I’m going to talk about each of these three typical hazards in more detail, from the perspective of those doing the recruiting

#### **A: Main pitfalls**

##### **i) Confidential information**

72. As you've already heard, employees are not allowed misuse confidential information: filling up a memory stick with client details on your last day is hardly going to go down well. But this is exactly the sort of thing that regularly comes up before the courts.
73. Similarly, recruiting employers are not allowed either to obtain or to misuse a competitor's confidential information, whether that information has come from their own employees, or from potential recruits.
74. This is an on-going obligation. Once the team members have moved across, the new employer should ensure that it, and the new team, does not use any confidential information from the team's old employer. For example, do not upload it onto a computer system. If the old employer suspects wrongdoing, it could bring a legal action. It could obtain the relevant computers through a search order and have them reviewed by forensic IT expert capable of recovering deleted information and potentially find out when and how files were accessed and transferred. Therefore, as a recruiting employer, you should make it clear in correspondence that you want the employees for their expertise, not for either their client lists or any other confidential information they hold.
75. You should also be careful to avoid encouraging unlawful conduct. In one case, the defendants, after leaving their employer, contacted their old clients whilst claiming to still be acting for their old employer. You should warn potential recruits against acting unlawfully; if you were to encourage them in similar actions this too would be unlawful.

#### ii) Conspiracy

76. The employer should not unlawfully conspire in any team recruitment scenario. You must not agree with the team, or anyone else, to further your own interests where acting on that agreement injures a third party. For example, in *Tullett*, BGC, BGC's president and Tullett's former COO conspired against Tullett. They were involved in a "common design" to persuade a group of Tullett's staff to walk out, in breach of contract. This included contriving constructive dismissal claims, misusing confidential information and concealing their approaches to recruit Tullett's staff. That claim succeeded. However, Tullett's claims of conspiracy against some of their former brokers failed. The court found that they moved to BGC because it suited them, not because they were part of the conspiracy and wanted to cause harm to Tullett. This judgment may initially sound a little illogical: the more selfish your reasons are for moving to another employer, the more likely it is that you will not be found guilty of conspiracy. But what the decision really does is penalise conspiracy over selfishness, which makes rather more sense.

### iii) Inducing a breach of contract

77. No matter how valuable you think the team you are targeting will be, and despite any rivalry there might be between you and your competitors, you should not induce any potential recruit to breach their own contractual duties to their current employer. So, for example, you should not encourage them either to recruit their colleagues, or to solicit clients for your purposes.
78. You might be thinking that you can get around this rule by following a ‘don’t ask, don’t tell’ approach. But you cannot simply turn a blind eye. If you are able to discover that you are inducing a breach of contract but deliberately ignore any suspicions that you might be, you can still be liable. If you claim in your defence that you simply did not know about the contractual restrictions, judges – who as Kate said are not stupid – may not be convinced. So you will be met with some scepticism, especially if you are a sophisticated commercial organisation.
79. So those are some of the main pitfalls for recruiting employers to avoid. The consequences of falling into them can include, as Kate has mentioned, litigation, injunctions and search orders.

### B: Risk minimising strategies and recommended approaches

80. So what strategy can you follow to minimise the risk associated with team moves? I will now provide a few tips, which I hope you will find helpful in a team move scenario.
81. I am going to begin by explaining the “dos and don’ts” if you are the employer making an approach to team members

#### (i) The “Dos”:

82. As an employer, you **can** approach potential recruits directly. If you intend to recruit more than one team member, each individual should be approached **separately and independently** of the others.
83. You can also use what is known as a “**recruiting sergeant**” to approach potential recruits. A recruiting sergeant is a person employed by you who knows - and ideally has a good relationship with - the relevant individual(s) in the target team. Crucially, they must not be bound by any relevant restrictive covenants prohibiting him/her from making the approach. Often the recruiting sergeant will have worked for the competitor, quite possibly in the actual team you are seeking to recruit.

84. However, if you do use a recruiting sergeant, it is still important to exercise caution. Employers may use various methods to get to the bottom of things if they suspect misconduct. For example, in a recent case, the recruiting employer tried to argue that the poaching was co-ordinated by an ex-employee of UBS who was not subject to any contractual restrictions. However, the 'gamekeeping' employer routinely taped telephone calls. They reviewed them, and discovered numerous conversations between staff about the defection. It is not surprising that the parties settled their dispute.
85. You can also use **adverts and/or a headhunter** to attract employees. Using a headhunter has advantages: it puts a barrier between you and the employees. It does not, however, provide complete immunity from claims. The headhunter should establish a clear trail to show that information about team members - their skills, track record and remuneration - has been obtained independently as evidence of the headhunter's activities could also be used against you, if you were aware of them. The risk is that the headhunter, as your agent, could be falling into the pitfalls, such as inducing breach of contract. Obviously, this should be avoided. So you need to give the headhunter clear instructions and document those instructions. Otherwise, if you are aware of what the headhunter is doing, evidence of the headhunter's activities could be used against you.

(ii) The Don'ts

86. If you decide to make the approach(s) yourself, rather than via a headhunter or recruiting sergeant, it should not be guided or assisted in any way by the team leader (or any other member of the team).
87. Also, individual team members must not (and should not) be encouraged by you to approach other team members.

Further Tips

88. I also have a few more general tips. These are not about destroying evidence, but rather, about creating and retaining it.
89. Lawyers constantly like reminding their clients to keep a record of all relevant conversations with employers, so I am not going to disappoint. This advice also applies to a team move scenario.
90. You should carefully document the steps taken to acquire a team. In the event of a challenge, such records can help demonstrate that the recruitment is legitimate and so dispel any suspicion of wrongdoing. For example, record and retain:
- (a) any investigations into the restrictions in the team's employment contracts;

- (b) your instructions to headhunters; and
- (c) any evidence of the headhunter having independently researched potential candidates.

91. It is also worth noting that if you fear that one of your teams is going to be poached, you should also remind your employees of any relevant express contractual restrictions and also their implied duties. And, of course, it will do you no harm to keep records showing that you've reminded them.

### **What should you do if you're an employee thinking of moving to another team**

92. Before your employment ends, you should ensure that you comply with your express and implied obligations to your employer, as well as with any fiduciary duties you owe.

93. You should also be very careful when approaching clients just before your employment ends and/or during your garden leave. For example, we were involved in one case - *BMS and CJC* - where the judge noted that friendships of brokers and clients may extend beyond, I quote, "*the type of business friendship which may exist between insurance brokers and their clients*". However, in that case, an ex-BMS employee had met with one of his former clients shortly after leaving BMS. This raised suspicions as to whether the meeting was – as claimed – genuinely purely social, or whether business was also being discussed.

94. Finally, I am afraid I am unlikely to advise you to destroying your IT equipment with a golf club - not matter how great the temptation.

### **Conclusion**

95. We hope we have managed to convince you that lobbing your blackberry into the Thames is not the best way forward when you are faced with a team move scenario! As Kate and I have illustrated today, there are plenty of steps that you can take to ensure that a team move is carried out legally – or is prevented, if you find yourself as the gamekeeper.

96. As is customary, we will not be taking questions now – but Kate and I would be very happy to talk to you over a drink in the foyer.

**Kate Payne**  
**Daniel Burne**

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