



## LESSONS FOR POACHERS AND GAMEKEEPERS: TULLETT PREBON v BGC Daniel Oudkerk QC

### Overview

- 1 This talk considers the implications of the *Tullett Prebon v BGC* litigation. It considers the legal remedies available to the gamekeeper both by way of injunction and damages, the pitfalls faced by the poacher, and the legal and strategic lessons to be drawn from this long running claim.
  
- 2 The Tullett Prebon litigation can be broken into three tranches:
  - (1) The interim relief and the trial of the issues of liability (*Tullett Prebon v BGC* [2010] IRLR 648)
  - (2) The decision of the Court of Appeal (*BGC v Tullett Prebon* [2011] IRLR 420)
  - (3) The damages action which settled last month, three weeks into the trial.
  
- 3 At the liability stage the High Court upheld Tullett Prebon's claims in conspiracy, breach of contract and inducing breach of contract. It enforced a period of garden leave/PTR relief for a period of 1 year and upheld the interim "no poach" injunction prohibiting both lawful and unlawful recruitment granted on 2 April 2009. It dismissed the Defendant brokers' claims for constructive dismissal and BGC's Part 20 Claim for inducing breaches of its forward contracts.
  
- 4 During the course of the litigation from the first injunction on 2 April 2009 thorough to the conclusion of the trial on liability and injunctive relief the Court had an opportunity to address many of the issues that practitioners in this field have grappled with in recent years. The first instance Judgment deals with:
  - (1) the scope of Springboard and *quia timet* relief;
  - (2) the relationship between periods of garden leave and Post Termination Restraints ("PTRs") and whether a contractual offset mechanism is required;
  - (3) the role and scope of indemnities;
  - (4) the lawfulness of forward contracts;
  - (5) the disclosure obligations of senior employees;
  - (6) the protection of commercially sensitive information which may not "confidential" in

the *Faccenda Chicken*<sup>1</sup> sense;

- (7) the recoupment of employees' loyalty bonuses and sign on payments and the application (if any) of the doctrine of the restraint of trade and the rule against penalties;
- (8) the principles governing constructive dismissal and whether *RDF Media Group plc v Clements* [2008] IRLR 207 was correctly decided.

5 When the case came before the Court of Appeal many of those issues were still live. However, following three days of argument Court of Appeal was able to deal fairly economically with the appeal. In headline terms the Court of Appeal decision addresses:

- (1) The role of "objective intention" in assessing whether there is a breach of the T&C term in circumstances where the "gamekeeper" takes steps which are intended to retain his employees but which the employees contend are a breach of T&C.
- (2) The lawfulness of forward contracts, the role of *attenuated* T&C and anticipatory breach of a forward contract.

6 Whilst the Court of Appeal did not give a judgment on the relief issues it heard detailed argument and the dismissal (on withdrawal) of that part of the appeal served to endorse the Judge's approach to injunctive relief. Moreover, the wide-ranging argument before the Court of Appeal provided some insight into the way in which this area of law is likely to develop and the relationship between springboard relief, quia timet relief and the Court's broad power to grant an injunction under Section 37 of the Senior Courts Act 1981.

7 BGC's application for permission to appeal to the Supreme Court was dismissed.

8 The final tranche of the litigation, the damages action, settled last month towards the end of the four week trial. Whilst the settlement is confidential it is instructive to consider the various heads of damages claimed. Damages in poaching claims can be overlooked when the focus is on injunctive relief. However, compensatory remedies will often be an important part of the claim. In addition to "ordinary" damages there are a numerous tools at the Court's disposal to enable it to assess loss in complex case including disgorgement remedies, an account of profits, Wrotham Park damages, and exemplary damages.

### **The factual background**

9 It is convenient to start with the facts of the Tullett Prebon litigation.

10 Tullett Prebon and BGC are interdealer brokers ("IDBs"). Over the years they, in

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<sup>1</sup> *Faccenda Chicken Ltd v Fowler* [1987] 1Ch 117

common with the other leading IDBs, have each made a substantial contribution to the IRLRs and other specialist employment law reports reflecting their concern to protect their principal assets, namely teams of highly paid brokers. Those brokers are all employed on minimum term contracts of 2 or 3 years or more and the contracts are usually staggered to make it difficult for the brokers to move as a team. The contracts contain garden leave provisions, six month PTRs and express disclosure obligations in the event of an approach by a competitor.

- 11 In about February 2009 Tullett Prebon discovered that it was facing a raid on its business directed by BGC and, amongst others, Tony Verrier. Mr Verrier is the former number two at Tullett Prebon and since 2 January 2010 has been the CEO of BGC.
- 12 The key feature of the BGC raid was that it was directed at Tullett Desks and the heads of those Desks were being used by BGC as recruiting sergeants.
- 13 Other features of the raid included:
  - (1) the payment of very substantial upfront sign on payments;
  - (2) the use of indemnities;
  - (3) a guarantee that the brokers would not be out of pocket if they were out of the market pending their joining BGC and guaranteed bonuses for two years after they joined BGC;
  - (4) an “early exit strategy” to obtain the early release of the brokers using “constructive dismissal” claims to “walk them out” of Tullett Prebon before the expiry of their fixed term contracts and regardless of whether or not the brokers were in fact entitled to walk out.

### **The issue of proceedings**

- 14 On 25 March 2009 Tullett Prebon issued proceedings for damages for breach of contract, inducing breach of contract, unlawful conspiracy, damages, an account of profits and injunctive relief.
- 15 At that stage the proceedings were against BGC, its president Mr Shaun Lynn, its CEO Mr Verrier and one of the recruiting sergeants, Mr Hall, a Tullett Prebon Desk Head. Mr Hall was served and suspended on 25 March 2009.
- 16 On 26/7 March 2010 nine brokers walked out of Tullett Prebon and asserted that they had been constructively dismissed. The main plank of the constructive dismissal claims was an allegation that when Mr Hall was suspended on 25 March 2009 he had been “frog

marched” off of the premises. The brokers asserted that Mr Hall had been made an example of and they thought they would be next.

### **The Interim Order**

17 Regrettably interim Orders are rarely reported in the law reports notwithstanding their importance for practitioners. It is instructive to consider what was sought and ordered in this case at the interim stage.

18 When the case came before Jack J on 1 April 2009 Tullett Prebon sought:

(1) A “no poach” injunction to prevent the Respondents from recruiting or attempting to recruit Tullett Prebon brokers whether lawfully or not.

(2) An injunction to prevent the Respondents from inducing breaches of contract.

(3) Disclosure orders against BGC, Mr Lynn, Mr Verrier and Mr Hall.

(4) Delivery up of Mr Hall’s BlackBerry.

19 Following a contested hearing Jack J granted the no-poach injunction together with an injunction preventing the Respondents from inducing breaches of contract ([2009] EWHC 819). Those injunctions were granted on Springboard principles following ***UBS v Vestra*** [2008] IRLR 965. In addition the Court accepted garden leave undertakings over to a speedy trial.

20 The Judge also made disclosure Orders which required the Defendants to swear affidavits setting out the Tullett Prebon employees that they had approached using Mr Hall as a recruiting sergeant. The BlackBerry of Mr Hall had been “lost” shortly after service of the application for delivery up and an affidavit as to use and circumstances of the loss was ordered. Note that whether or not disclosure Orders are granted at the interim stage is a matter in the Court’s broad discretion. For a case in which disclosure Orders were refused see the decision of MacKay J. in ***AON v JCT*** [2009] EWHC 3448.

### **The trial of the issues of liability and injunctive relief**

#### ***The evidence***

21 A conspiracy case will often be inferential and the poacher may have taken steps to cover

his tracks. It is therefore essential that the Claimant's representatives consider at an early stage precisely what evidential material is available to prove the case.

- 22 One of the more colourful aspects of the Tullett Prebon case was the deliberate disposal by some of the Defendants of their BlackBerries. The Claimants obtained disclosure of the telephone records and it was clear from those records and in particular the pattern of calls and text messages that the poaching operation had been coordinated using calls and text messages. Unlike an email, (which can be recovered from a server) a text message can ordinarily only be retrieved from the BlackBerry or PDA from which or to which it was sent. Accordingly the disposal of the BlackBerries put important evidence beyond the reach of the Court. The Judge held (paragraph 65):

*"I am satisfied that it was Mr Verrier's gambit to 'lose' blackberries whenever he thought they might contain inconvenient material, and that his instructions were the cause of at least some of the mobiles being lost. I am satisfied that the inaccessibility of the contents of his last blackberry due to a missing password was a deliberate ploy."*

- 23 The evidential gap was filled at least in part by a detailed analysis of the Defendants' telephone records. These were merged electronically to provide a complete, and compelling, picture of the pattern of communication between the Defendants (and in particular the role played by the Desk Head recruiting sergeants) on particular days.

- 24 It is essential in claims of this nature that careful consideration is given to disclosure and in particular electronic disclosure and claims of privilege. Several files of key documents were disclosed by the Defendants at a very late stage in the trial. Many of the documents were attendance notes and emails passing between the Defendant brokers and their solicitor under the cloak of privilege.

- 25 Several of these documents evidenced the "early exit plan" alleged by Tullett Prebon. For example, one attendance note between Mr Verrier, a Tullett Prebon broker, and the broker's solicitor read:

*"Attending Kevin Cohen [a Tullett Prebon broker] and Tony Verrier  
Resignation 2<sup>nd</sup> February  
Release within 6 weeks  
Cannot put in writing  
Put in writing too dangerous  
Take it on trust=not binding*

*Indemnity*

*Not prepared to lie in court..."*

- 26 The way in which key documents emerged during the course of the trial was at best unhelpful to the Defendants' case.

***The principal issues at trial***

- 27 The principal issues at trial were:
- (1) Whether there was an unlawful conspiracy to poach Tullett Prebon staff.
  - (2) Whether BGC had induced Tullett Prebon brokers to breach their contracts of employment.
  - (3) Whether Tullett Prebon was entitled to injunctive relief based upon either garden leave and/or the PTRs.
  - (4) Whether Tullett Prebon was entitled to a "no poach" injunction prohibiting BGC from recruiting its brokers whether lawfully or not.
  - (5) Whether the Defendant brokers were released from their obligations by reason of alleged repudiatory breaches on the part of Tullett Prebon (the constructive dismissal claims).
  - (6) Whether Tullett Prebon had induced breaches of the BGC forward contracts of three Tullett Prebon brokers (the "Tullett Three") who blew the whistle on the BGC raid and decided to stay at Tullett Prebon (the Part 20 Claim).

***The key findings***

*Conspiracy and inducing breaches of contract*

- 28 The Judge found that BGC induced the Tullett Prebon brokers to leave in breach of contract and that the claims in conspiracy for conspiring to induce those breaches of contract were made out against BGC, Mr Lynn and Mr Verrier. As to whether BGC had the requisite intention the Judge held:<sup>2</sup>

*"Tullett do not have to show that BGC positively intended that the brokers should be in breach of their contracts with Tullett when they left.... For the intention of Mr Lynn and Mr Verrier was that the brokers should leave whether or not they had good grounds for claiming constructive dismissal. The situations which are referred to in OBG where there was no liability are very different to the present. There, as quoted*

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<sup>2</sup> Judgment paragraphs 179-180

above, Lord Nicholls stated in paragraph 202 “An honest belief by the defendant that the outcome will not involve a breach of contract is inconsistent with him intended to induce a breach of contract.” BGC had no honest belief. I therefore hold that BGC is liable for inducing the defendant brokers to breach their contracts with [Tullett Prebon]...

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

#### Garden leave and its relationship with PTRs

- 29 The Judgment on the period of garden leave and the relationship with the PTRs follows the **Credit Suisse** line of authority<sup>3</sup> and contains a useful summary of the relevant principles (at paragraph 219):

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

- 30 And at paragraph 222:

*“Where the issue is garden leave, the court looks at the situation at the time enforcement is sought. The Court will look primarily at what is required for the reasonable protection of the protectable interest, here trade connection. It will also take account of the situation of the employee. That brings in here the facts that the brokers are on garden leave as a result of having walked out from their employment in reliance on their indemnities from BGC without, as I have held, having grounds to*

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<sup>3</sup> **Credit Suisse Asset Management Limited v Armstrong** [1996] ICR 882

*do so; that they are suffering no financial loss because they are receiving salary from Tullett and will be indemnified for bonus by BGC and are in fact better off as a result of what has happened by reason of their signing payments from BGC. The court will also have in mind the strong public interest in employees being held to contracts which they have freely entered into for substantial remuneration. That interest pulls in the opposite direction to the public interest in employees being freely able to exercise their skills in work by transferring from one employer to another. It is also a factor that the brokers will take time to get back up to speed once they begin to work again. It is also ironic that under their contracts with BGC they will have rather less freedom of future movement than under their contracts with Tullett. These are all factors which are subsidiary to the main issue as to the time required for the reasonable protection of the employer's protectable interests."*

- 31 The Judge held that a total protected period of 12 months was justified in the cases of nine of the 10 brokers. In respect of the remaining broker, Mr Yexley, the Judge held that 8 months was justified. It is worth noting that in practical terms Tullett still obtained a 12 month injunction against Mr Yexley because the Judgment was not handed down until 12 months after the interim injunction was granted. BGC subsequently sought to bring a claim for compensation in respect of the additional period of 4 months under Tullett's cross undertaking in damages. The Judge dismissed the claim summarily. BGC and Mr Yexley had made a rod for their own backs and it would be inequitable to permit them to rely upon the cross-undertaking.
- 32 Tullett Prebon's contracts provided for non-compete PTRs of six months. The Judge held that Tullett could reasonably expect these to operate in conjunction with periods of garden leave. Where there was sufficient time left under the contracts to enforce garden leave for the whole of the 12 months the Court imposed garden leave for the whole period. Where there was insufficient garden leave available under the contract, the Court imposed a mixture of relief using garden leave and PTR relief to make up the whole period. The Judge held that it did not matter if the PTRs did not contain an offset for all (or any) period spent on garden leave (paragraph 237):

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

*in a worse position than a clause which takes no account.”*

The no-poach injunction

- 33 At the interim stage the Judge granted the no poach injunction on a Springboard basis on the grounds that Tullett Prebon’s workforce had been destabilised. At the trial he concluded that Tullett Prebon was entitled to the injunction and that it should be continued but that it could be justified on a simpler basis:<sup>4</sup>

*“It seems to me that here the basis for the interim injunction is better put more simply. BGC was carrying on an unlawful course of conduct against Tullett and Tullett was entitled to an injunction to stop it. It is a kind of quia timet injunction. As BGC had shown an intention to recruit unlawfully it was not appropriate simply to injunct unlawful recruitment but all recruitment, because of the risk and likelihood of further unlawful means and the difficulty of detecting them...*

*In my judgment it was appropriate that Tullett should have the protection it did until the delivery of this judgment. There is no justification for any further substantial extension of the relief. The court must assume that the exposure of BGC’s conduct as set out in the judgment will curb unlawful recruitment in the future. BGC is a substantial and ostensibly responsible company. The relief against BGC will be continued for 12 days from the delivery of the judgment, so the judgment may be absorbed. It will then end.”*

- 34 Accordingly it was unnecessary for the Judge to resolve the conflict between the decision of Arnold J. in **Vestergaard Frandsen A/S v Bestnet Europe Ltd** [2009] EWHC 1456 (paragraphs 42 to 93) and the **Midas IT Services v Opus** line of authority.<sup>5</sup> However, it is submitted that in so far as the **Vestergaard** case purports to restrict Springboard relief to interim as opposed to final injunctions and to cases involving misuse of confidential information only it is wrongly decided. Strikingly neither **Midas** nor the more recent decision in **UBS** were cited to or considered by Arnold J. in **Vestergaard**.

- 35 The Court of Appeal heard extensive argument on the non-poaching injunction and whether quia timet relief was appropriate. The Court was plainly satisfied that that relief was fully justified and as Maurice Kay LJ put it, BGC “wisely” withdrew this part of its appeal. The practical effect of the dismissal of BGC’s arguments on withdrawal is to endorse the approach of the trial Judge. It now clear that quia timet relief is an important

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<sup>4</sup> Judgment paragraphs 250-253

<sup>5</sup> Blackburne J. 21 December 1999.

tool for practitioners seeking to prevent an unlawful poaching raid or to stop a conspiracy in its tracks. The principles are set out below.

- 36 The jurisdiction of the High Court to grant an injunction (including a *quia timet* injunction) is conferred by section 37(1) of the Senior Courts Act 1981:

*“37(1) The High Court may by order (whether interlocutory or final) grant an injunction... in all cases in which it appears to the court to be just and convenient to do so.  
Any such order may be made either unconditionally or on such terms and conditions as court thinks just.”*

- 37 Claims involving threatened breaches of an employment contract, inducement of breach of contract and conspiracy fall within the Court’s jurisdiction to grant *quia timet* relief. That jurisdiction is a broad one.<sup>6</sup>

- 38 In order to justify *quia timet* relief there must be at least some real risk of an actionable wrong (***Fletcher v Bealey*** (1885) 28 Ch D 688).

- 39 In ***Tullett*** the case for *quia timet* relief was particularly compelling. The Court was not concerned only with threatened unlawful conduct. There had already been actual unlawful conduct of the type feared, i.e. BGC had used forward contracts to walk brokers out from Tullett in breach of contract.

- 40 As the prohibition on lawful recruitment demonstrates the Court is not powerless to grant effective relief which will frustrate a dishonest scheme. A poacher who chooses to dress up unlawful recruitment as lawful recruitment will not be able to complain if, as a result, the Court considers it necessary to restrain both lawful and unlawful recruitment.

*The constructive dismissal claims*

- 41 The allegations of constructive dismissal were dismissed on their facts. However the Judge held that:

- (1) an employee can rely on his employer’s repudiatory breach of contract even if he does not leave as a result of it (***Meikle v Nottinghamshire County Council*** [2005] ICR 1, explained);<sup>7</sup> and
- (2) the reasoning in ***RDF Media Group plc v Clements*** [2008] IRLRL 207 (which held that an employee who was himself in repudiatory breach of contract could not accept a breach by his employer) was wrong.<sup>8</sup> Few will mourn the passing of the much criticised ***RDF*** reasoning. Jack J. held that the better analysis was that “...the

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<sup>6</sup> ***Proctor v Bayley*** (1889) 42 Ch D 390

<sup>7</sup> Judgment paragraphs 77-80

<sup>8</sup> Judgment paragraphs 82-84

*conduct of the employee may be relevant in this way. Whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him objectively judged, is to be judged in all the circumstances. The circumstances will include the employee's own conduct to the extent that it is relevant to that question".<sup>9</sup>*

- 42 On appeal the principal challenge to the Judge's findings on the constructive dismissal claims was that the Judge had referred to and relied upon Tullett's "intention" in finding that there had been no breach of T&C by Tullett. Three of the broker defendants contended that during the course of various meetings Tullett had sought to persuade them to stay at Tullett and not to join BGC under the forward contracts that they had signed. They contended this was a repudiatory breach of T&C. The Judge found:

*"104. Looked at objectively the second purpose of the meetings [held between Tullett and brokers who had entered into forward contracts with BGC] was to persuade the ... brokers to renege on their contracts with BGC and remain at Tullett, the first purpose being to persuade them not to walk out early...*

*106. Tullett's conduct was not **intended** to attack the relationship between Tullett and the brokers, but was intended to strengthen it." (emphasis added)*

- 43 Dismissing the appeal, the Court of Appeal held that employment contracts, like any other contract, are repudiated when one party evinces an intention no longer to be bound. This intention is to be judged objectively, against the background of all the circumstances known to a reasonable observer.
- 44 Maurice Kay LJ dealt with the well-known dictum of Lord Steyn in *Malik v BCCI SA* [1997] IRLR 279 HL by distinguishing the nature of the breach as follows [§26-27]:

*"In Malik, the breach did not arise from the way in which the employer treated its employees but from the way in which it conducted its business in general. It ran the business in a corrupt and dishonest way and when innocent employees later lost their jobs because of the liquidation, they suffered loss in the labour market because they became associated with their former employer's malefactions.*

*The present case is manifestly different. At its heart, it is concerned with the specific dynamics between employer and employees, not with the indirect effect of corporate behaviour on employees. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract-breaker towards the*

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<sup>9</sup> Judgment paragraphs 85

*employees is of paramount importance.”*

- 45 In team moves, the “specific dynamics between employer and employees” are directly in issue. The employer wants the employees to stay; the employees are looking for their chance to go. In these circumstances, the objectively assessed intentions of the parties are of “paramount importance”.
- 46 An intention to preserve the contract is all the more relevant where the term relied upon is the implied duty of trust and confidence; *“In the way [the implied trust and confidence term] has always been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee.” Johnson v Unisys* [2003] 1 AC 518 at paragraph 46 (emphasis added).
- 47 From the gamekeeper’s perspective, the Court of Appeal Judgment in Tullett provides comfort that an employer may take reasonable steps to try to hold on to valuable employees. The facts of Tullett were extreme but more commonplace scenarios of trying to retain valued employees would have been affected. The decision of the Court of Appeal accords with commercial commonsense.
- 48 From the new employer/employee’s perspective, the Court of Appeal reminds us that the fact that an employee is looking for a repudiatory breach and his contemporaneous reaction to conduct later complained of are both relevant factors to weigh in the balance when assessing whether a breach is repudiatory. As Maurice Kay LJ described it [§17] *“the view of the Judge, if I may paraphrase it, was that the reaction of the brokers was conditioned by considerations of tactics and timing”*. In the context of team moves, however, considerations of tactics and timing are not insignificant. An employee needs to call it correctly; his contemporaneous reaction to the conduct later complained of can count against him.

*The recoupment claims*

- 49 The Judge also upheld the recoupment provisions in the Defendant brokers’ Tullett Prebon contracts. Tullett Prebon was entitled to recoup the re-signing and retention payments<sup>10</sup> and the loyalty element of the bonuses.<sup>11</sup> This part of the case was not appealed.

*BGC’s part 20 claim*

- 50 The Part 20 claim, which was dismissed by the trial Judge, provides a useful example of the pitfalls of using forward contracts to recruit teams.

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<sup>10</sup> Judgment paragraphs 259-270

<sup>11</sup> Judgment paragraphs 271-4

- 51 The trial Judge found BGC had repudiated the forward contracts with the Tullett Three (at paragraph 205):

*“In my Judgment the conduct of Mr Verrier was such that the Tullett Three could have no trust and confidence in him and BGC as their future employers... BGC’s conduct showed a cynical disregard for the law and for employees’ duties... A person can have no trust or confidence in an employer who has recruited him in such a manner, and should not be obliged to serve him. The Tullett Three were entitled to treat their obligations to join BGC when free to do so, as ended.”*

- 52 On appeal BGC argued that there was no T&C in a forward contract and that there was therefore no breach of T&C This argument failed. The Court of Appeal held:<sup>12</sup>

*“While the relationship at that time is not purely and simply one of current employment, it seems to me that, depending on the context, obligations of trust and confidence can arise, in the words of the Judge, “as appropriate, taking account of [the circumstances]”*

- 53 The Court noted that the fact that T&C existed in a forward contract had implications for both parties to the contract:<sup>13</sup>

*“A secretary signs a contract of employment which requires her to start work in a week’s time. The day before she starts she is sexually harassed by her intended employer and accused of being under qualified for the job. Surely she is entitled to say that trust and confidence is at an end and that she will not be taking up her post the following day. However, on BGC’s case she must join the new employer and if she does not she will be in breach of contract. Mr Oudkerk submits that it would be surprising if that were the law. I am satisfied that it is not. Nor is the law a one-way street. Take, for example, a man who goes for a job interview and accepts an offer of employment on being told confidential details of the prospective employer’s business plan. He then returns to his current employer, intending to hand his notice in, but is persuaded not to move, whereupon he divulges the confidential details of the now rejected employer’s business plan to his present and future employer, a competitor. In those circumstances, it seems to me that he would be in breach of an obligation of trust and confidence vis-à-vis the rejected employer.”*

- 54 As the Court of Appeal explained T&C in a forward contract of employment may be attenuated:<sup>14</sup>

*“The fact of the continuing contracts of employment between the Tullett Three and Tullett may have an effect on the “attenuation” of the obligation as between the Tullett Three and BGC, but there is no legal or logical inconsistency about the concurrence of the obligations, whatever difference there may be in relation to the respective contents. In short, the Judge’s “as appropriate” formulation was entirely appropriate.”*

- 55 Where complex forward contracts are being used to recruit employees both parties must be alive to the role of T&C in its attenuated form since a breach of trust and confidence

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<sup>12</sup> Judgment paragraph 41

<sup>13</sup> Judgment paragraph 42

<sup>14</sup> Judgment paragraph 45

will permit the innocent party to repudiate the forward contract.

56 The Court of Appeal set out the relevant principles as to breach at paragraph 46:

*“Assuming the existence of the obligation, what then is the correct analysis of the question of breach? It is that, provided the Judge’s approach to the facts withstands scrutiny, BGC committed an anticipatory and repudiatory breach of the forward contracts of the Tullett Three in accordance with the principle expounded in the well-known case of Hochster v De La Tour (1853) 2 E&B 678. Perhaps the clearest modern formulation is that of Buckley LJ in Gunton v Richmond Borough Council [1980] 3 WLR 714, 729A-B:*

*‘The basis of the doctrine is that where a party to a contract before the date for performance has arrived evinces an intention not to perform his part of the contract, he has committed no breach until the date for performance arrives. Nevertheless the innocent party will be relieved of his obligations under the contract, if he so chooses, so as to render him free to arrange his affairs unhampered by the continued existence of those obligations. It is for the innocent party to elect whether he wishes to be so relieved, which he does by accepting the repudiatory act of the guilty party as a repudiation of his, the guilty party’s obligations under the contract.’*

*The use of forward contracts in poaching raids*

57 Sophisticated “Forward contracts” were at the heart of BGC’s poaching raid on Tullett.

58 BGC signed up Tullett brokers using contracts which offered employment after the brokers’ employment with Tullett had terminated and their post termination restrictions had come to an end. If the brokers did not, ultimately, join BGC they were liable to pay liquidated damages. Those contracts went hand in hand with very substantial signing payments in the form of “forgiveable loans”. A substantial proportion of these loans was paid up front on signing; the remainder was paid when the broker eventually started work at BGC. The contracts went hand in hand also with comprehensive indemnities. Those formal indemnities (and a series of side letters) both protected the brokers against the legal costs of any action by Tullett and also ensured that they would not be out of pocket as a result of their decision to move.

59 The practical impact of these contracts and the associated agreements was stark. The remaining terms on the brokers’ minimum term Tullett contracts were long. In some cases the Tullett brokers being targeted were not free to join BGC until several years after the date on which the forward contracts were signed. In the intervening period they were protected against loss should Tullett keep them out of the market or seek to recoup past loyalty or retention bonuses. At the same time, they received the ‘sweetener’ of hundreds of thousands of pounds by way of upfront payments. One Tullett Desk Head, subsequently found to have been a recruiting sergeant, was paid £800k gross in early 2009 within a fortnight of signing a contract to move to BGC, although he was not free to make the move for at least a further two and a half years.

60 At trial, Jack J found that the BGC contracts were not in and of themselves unlawful. He was reassured by the fact that the provisions of each contract would only come into effect upon signing “as appropriate”.<sup>15</sup>

61 On appeal, Tullett relied upon both inconsistency (and the justification defence) and the ex turpi causa doctrine to argue that BGC’s appeal on the Part 20 Claim should be dismissed. In the event, the Court of Appeal did not find it necessary to determine these additional points. It endorsed Jack J’s simple conclusion that there was no actionable inducement. As the Judge put it below, “while Tullett induced the Tullett Three to end their contracts with BGC, the Tullett Three were entitled to do so; that is, Tullett induced them to do something which they were entitled to do”. He reached that conclusion on the basis of BGC’s “illegal and dishonest conduct”. On appeal, Maurice Kay LJ put the matter in more colourful terms:

*“...The prospective employer with whom the Tullett Three had entered into forward contracts was doing its utmost, by “illegal and dishonest conduct”, to “cripple” its competitor by which they remained employed. It is difficult to imagine circumstances affording greater justification for prospective employees at this level of the financial services sector seeing the conduct of their prospective employer as a repudiatory breach of the obligation of trust and confidence. BGC’s case denying repudiatory breach is built upon criticism of the Judge’s reference to Mr Verrier’s subjective intention in paragraph 201(3) of the judgment (see paragraph ... , above). In the context of a catalogue of “illegal and dishonest conduct”, that is an exercise in cherry-picking, albeit of a somewhat putrid cherry, which goes nowhere. ..”*

62 Nevertheless, Hooper LJ added, obiter, that he should not be taken to agree that the forward contracts used by BGC were lawful, when the terms were viewed cumulatively and against the background of an obligation to take up employment with BGC at a future date:

*“I agree and add only this. Jack J found that forward contracts of the kind used in this case were not unlawful (paragraph 3 above). Although it is not necessary to resolve this issue for the purposes of this appeal, I would not wish it to be thought that I necessarily agree that the terms of the forward contracts and associated agreements of the kind used in this case are compatible with the employee’s duties to Tullett.”*

63 Tullett did not suggest that all forward start contracts were, by their nature, unlawful. Indeed, Tullett has successfully enforced such a contract in a claim liquidated damages

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<sup>15</sup> Judgment paragraph 142(a)

***Tullett Prebon Group Ltd v El-Hajjali*** [2008] IRLR 760. The issue at trial was rather whether the particular terms of the BGC forward contract were unlawful, either taken alone or read together, or whether the contract was to be performed unlawfully, such as in either case to give rise to a defence of justification.

64 Hooper LJ. He identified four terms which caused concern, across the contracts, indemnities and forgivable loan agreements (at paragraph 58):

*“The terms which, viewed cumulatively, give cause for concern are the following terms, against the background of an obligation to take up employment with BGC at some date well into the future.*

*i) A requirement to “take all such lawful action (including resigning from your current employment) as shall be necessary to comply with your obligations under this agreement and commence your duties with [BGC] at the earliest possible time.”*

*ii) The provision of an indemnity should the current employer take action against its employee for resigning in breach of the contract of employment between them.*

*iii) The provision of substantial salary and commission payments together with substantial signing-on payments, as to which see paragraph 6 of the judgment of Maurice Kay LJ.*

*iv) The obligation on the part of the person entering into a forward contract with BGC to pay a very substantial sum in liquidated damages should he not resign from his current employment when he was legally entitled to do so. (In the case of Mr Sully the agreed sum should he not resign from Tullett when entitled to do so appears to have been one year’s salary, a bonus payable to him and other benefits multiplied by 0.4, a minimum of over £325,000).”*

65 Hooper LJ also noted the terms of the indemnities and the findings Jack J made as to the degree of control they gave BGC over Tullett’s employees (at paragraph 59).

66 In light of Hooper LJ’s comments, prospective employers should plainly be concerned to ensure that the particular mix of terms in their forward agreements are (i) transparent; and (ii) sufficiently moderated to ensure that the cumulative effect of the provisions and the degree of de facto control assumed by the new employer is consistent with the recruits’ existing contracts.

### Misuse of confidential information

67 The misuse of confidential information is where many team moves come legally unstuck. In Tullett the trial Judge held that Mr Verrier had used Desk Heads to assist him in the recruitment of their desks by, amongst other things, providing confidential. However, the Judge went on to hold that: *"It may be a breach of an employee's duty to provide any information confidential or not to a rival of his employer if he knows that the information is to be used to assist a rival and to harm his employer. For his duty is to protect his employer's interests. In such circumstances it is immaterial whether or not the information is 'confidential' as the word is used in the law."*<sup>16</sup>

### The damages trial

68 The initial focus in a team move cases is, inevitably, on the injunctive relief. However, it is important to have in mind from the outset that the damages (compensatory or gain based) often form a central part of a team moves claim. In Tullett there was a substantial claim for damages. A detailed analysis would warrant a separate paper. However, the heads of damages set out below provide an illustration of the nature of the compensatory claims that team moves throw up. Tullett claimed:

(1) Loss of profits on the revenues which would have been generated but for the unlawful conspiracy to poach Tullett's Forward Cable brokers under "Project Wire" (which succeeded in relation to Messrs Hall, Sully, Bishop and Harkins).

(2) Tullett's loss of profits on the revenues which would have been generated but for the unlawful conspiracy to poach Tullett's Short Sterling OBS brokers under "Project Phoenix" (which succeeded in relation to Messrs Bowditch, Cohen, Temple, Wilkes and Matthews).

(3) Tullett's loss of profits on the revenues which would have been generated but for the unlawful conspiracy to poach Tullett's Dollar Cash brokers under "Project Toscana" (which succeeded only in respect of Mr Yexley).

(4) Further and in the alternative to (1) – (3), Tullett claimed Wrotham Park damages<sup>17</sup> i.e. the sums that would have been payable for the release of the Defendant Brokers in a hypothetical negotiation in January/February 2009.

(5) The cost of the garden leave payments made by Tullett to the Defendant Brokers to prevent them joining BGC immediately pursuant to the unlawful conspiracy (as they

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<sup>16</sup> Judgment paragraph 140

<sup>17</sup> See *Giedo van der Garde BV v Force India Formula One Team Limited* [2010] EWHC 2373

threatened to do).

(6) The cost of the steps taken by Tullett to safeguard its interests when in January 2009 Mr Verrier began the implementation of the conspiracy to lift substantial numbers of brokers from Tullett's Rates and Treasury divisions. Tullett claimed the retention payments made to its brokers to protect its interests, or to adopt BGC's words, the costs of the "commercial operation to lock down staff".

(7) The sign-on payments paid by BGC to Messrs Hall, Bowditch and Yexley as bribes or secret commissions.

(8) Sums (including bonuses) received or to be received by Mr Lynn and Mr Verrier in consequence of their unlawful activity.

(9) The wasted management time spent investigating and mitigating the conspiracy.

(10) The legal costs incurred by Tullett on behalf of the Tullett Three (Messrs Comer, di Palma and Stevenson).

69 It would, of course, have been open to Tullett to elect to seek an account of profits.

### **Conclusions**

70 The Tullett Prebon litigation serves to confirm the availability of effective relief for the employer who is faced with an unlawful poaching raid by a competitor. It also highlights the many pitfalls faced by the employer who plans to recruit from a competitor and serves to underscore the importance of an early and careful review of the lawfulness of any planned team move.

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