



Tullett Prebon v BGC

Judgment was handed down yesterday by the High Court in *Tullett Prebon v BGC* ([2010] EWHC 484), the much anticipated 'team move' case involving rival inter-dealer brokers.

BGC, Mr Lynn (President and senior officer in Europe) and Mr Verrier (Executive MD and GM) were found to have entered into an unlawful conspiracy to poach ten brokers and to have induced them to breach their employment contracts. What are being referred to in the press as 'astronomical' damages and legal fees are to be determined at a later stage if the parties fail to agree amounts.

With the judgment running into some 130 pages this briefing summarises the decision and distils some of the key points arising from it.

In February 2009 ten brokers resigned from Tullett to join BGC. They resigned as a result of an action plan by Mr Verrier, former COO at Tullett, to recruit them soon after he joined BGC in January 2009, after an acrimonious split from Tullett. Whilst working out their notice the brokers resigned, claiming constructive dismissal as a result of alleged misconduct by Tullett. The constructive dismissal claims failed. The desk heads were held to be in breach of their employment duties to Tullett by assisting the recruitment of their desks.

A garden leave period of 12 months was upheld by injunctive relief in respect of all but one of the brokers (where a lesser period of eight months was upheld).

The brokers had been employed by Tullett on initial lengthy fixed terms followed by notice provisions and six-month restrictive covenants. The expiry of the initial fixed terms ranged from one to four years after the employees resigned. Tullett's claims for repayment of signing, retention and loyalty bonuses due on resignation in the initial fixed term succeeded.

Key points

1 The legality of the initial 'approach to poach'

- There is nothing wrong in a desk head responding to an approach to recruit. If his contract obliges him to report that approach to his employer, he is obliged to do so. Such a provision is not a restraint of trade. Some brokers are very happy to inform their employer, because if the employer values the broker, he is likely to make a counter-offer.

- Where attempts are made to recruit a desk as a whole, or the greater part of the desk, it is very likely that the desk head will be approached first with the object of 'sounding him out'. He is then in a difficult and sensitive situation. While the desk head may see his obligation to his desk as being to get the best for them, his duty in law as desk head is to act in the interests of his employer and not that of the desk. His employer's interest is to prevent the recruitment of the desk. The desk head is therefore obliged to inform his employer that the rival company is seeking to recruit the desk and would be obliged to follow his employer's instructions to prevent that happening.
- The desk head must not do anything to assist the recruitment of his desk. Information may or may not be categorised in law as confidential. But where he provides information which he knows is requested for the purpose of furthering the recruitment, this is a breach of his duty to his employer. Where a desk head decides that he is in favour of the recruitment of his desk and thereafter assists the recruitment in such small or large ways as may arise, he is in plain breach of his duty: he has crossed the line between observing his duty to his employer and acting in the interests of his employer's rival.

2 The relevance of fiduciary duties

- Fiduciary duties arise from the factual situation in which an employee finds himself. An employee is liable as a fiduciary to account for monies, usually the profits or proceeds of his conduct. Fiduciary duties can extend beyond directors and senior employees.

A junior employee in the accounts department of a company who steals, or a junior employee who is paid two months wages in one month in error and dishonestly retains the money, or disposes of it, may find himself treated as a fiduciary and be liable to account for profits.

3 Constructive dismissal?

- The courts will scrutinise in great detail any constructive dismissal arguments that employees (particularly highly paid individuals) who have already secured alternative employment with a competitor prior to resigning, constructed as a means of avoiding notice periods and restrictive covenants.
- Breach of the duty of trust and confidence can be used to justify an employee's leaving, whether or not he left because of it. An employer would fail in any action brought against an employee, whether for damages or for an injunction if an employee after the date of leaving becomes aware of grounds justifying his leaving.

4 What counts as confidential information?

- 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 the rival and to harm his employer. His duty is to protect his employer's interests.
- The information which Mr Verrier carried in his head from having worked at Tullett, such as the ability of brokers, the earnings of desks and the remuneration of brokers was not confidential information which Tullett was entitled to protect. This was information falling short of trade secrets, which he inevitably carried with him and could not put out of his mind in carrying on lawful recruiting activity on behalf of a new employer.

5 Use of forward contracts

- There is nothing unlawful in the use of forward contracts (employment contracts entered into with a new employer with a future commencement date) to recruit employees.

6 Use of sign-on payments

- The use of sign-on payments to attract new staff from a competitor is not in itself unlawful. Tullett pointed to the feature that part of the payments was payable

on signing, instead of on taking up the employment (as is more usual). Tullett relied on this as part of the conspiracy claim.

7 Use of indemnities

- The use of indemnities (from the recruiter to the employees) is not in itself unlawful. Indemnities are regularly requested and given in inter-dealing recruitment. But indemnities carry two dangers. Firstly, a recruit who has an indemnity is more likely to break, or run the risk of breaking, his existing contract if he is covered by an indemnity. Secondly, the indemnity is likely to have the following provision (as here): 'It is a condition precedent that the company has given prior approval to all and any steps taken in connection with this indemnity', or to similar effect. While this does not enable the recruiting company to tell the employee what to do, it comes close to it.

8 Concealment of approaches by the recruiter

- Concealment of approaches by the recruiter is not in itself unlawful, but it may be the first step towards an early exit strategy of an accumulation of recruits. Where, as here, the recruit's contract with his employer requires him to report an approach, encouraging the employee not to do so in knowledge of the term, will be inducing a breach of contract and tortious.

9 Conspiracy

- It is not necessary that a claimant establish that the defendant's dominant intention or purpose was to injure the claimant's business. It is sufficient that he intended to injure the claimant's business as a means to an end.
- BGC intended to advance its business by recruiting Tullett's employees. That would necessarily injure Tullett's business. That is a sufficient intention if the element of unlawful means is also satisfied.

10 Inducing breach of contract by BGC

- To be liable for breach of contract, it is necessary that the party knows he is inducing a breach of contract. A conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact.

- Tullett did not have to show that BGC positively intended that the brokers should be in breach of their contracts with Tullett when they left. Lesser states of mind will do – such as being ‘indifferent to whether it is a breach or not’. 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.

11 Inducing breach of contract by Tullett

- Tullett induced three brokers (‘the Tullett Three’), who had accepted contracts with BGC, to repudiate their contracts and remain with Tullett. Tullett agreed to indemnify these employees against claims by BGC and to repay monies owed to BGC.
- The duty of BGC not to destroy or seriously damage the relationship of trust and confidence applied as between the brokers and BGC even though the brokers were not yet in BGC’s employment – they had signed contracts but had not yet started employment.
- BGC’s conduct had only been fully established during the course of the trial. The Tullett Three (and through them Tullett) were not prevented from relying on it by reason of any omission to rely on it at the time. A party may rely on any conduct to justify the termination of a contract whether or not it was known to him, or relied on by him, at the time he terminated the contract.
- The conduct of Mr Verrier was such that the Tullett Three could have no trust and confidence in him and BGC as their future employer. A person can have no trust or confidence in an employer who has recruited him with a cynical disregard for the law and for employees’ duties, and should not be obliged to serve him. The Tullett Three were entitled to repudiate their contracts with BGC and to treat their obligation to join BGC when free to do so, as ended.

12 Garden leave injunctive relief

- 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 restrictive covenants.
- 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. The court

will consider whether it is reasonable in the interests of the parties and the interests of the public. 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 by the ex-employee.

- The interest which Tullett sought to protect was the relationship with the traders which it had through the brokers. It sought to prevent a broker moving to BGC taking with him his trader clients. It asked that it have a reasonable time to rebuild the connection following the departure of the broker in question. BGC questioned the reasonableness of the period sought.
- Here, any confidential information which the brokers may have had, had long since lost its value.
- The court will look primarily at what is required for the reasonable protection of the relevant interest, (here trade connection) and will also take account of the situation of the employee. Here the brokers were on garden leave as a result of having walked out from their employment in reliance on indemnities from BGC without having grounds to do so; they suffered no financial loss, because under the undertakings from Tullett they were receiving salary and were also indemnified for bonus by BGC, so were in fact better off as a result of what happened. The court also had in mind the strong public interest in employees being held to contracts which they have freely entered into for substantial remuneration.
- The court may consider that the period for which the employer is entitled to protection extends beyond the period which is available for garden leave and into the period covered by an enforceable post termination restriction or covenant. The court will then exercise its discretion as to the enforcement of the restriction for the whole or such part of the period provided by the terms of the restriction as is appropriate
- Here, it was appropriate that the brokers be held on garden leave for 12 months (bar in respect of one employee, where eight months was appropriate).

13 Restrictive covenants

- In the two cases where the period of 12 months ran past the dates on which the contracts expired, it was necessary to consider the relevant post termination restrictions and their enforceability.
- Where a clause takes no account of the possibility of garden leave it is not as a result made unreasonable. 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 built in by the law.
- In those two cases, the relevant covenants were enforced for such period as would provide a total of 12 months when taken with time on garden leave.

14 Springboard Injunction

- When interim relief was granted on 2 April 2009, BGC had carried on an unlawful course of conduct against Tullett and Tullett was entitled to a springboard injunction (an injunction used to restrain someone who has misused confidential information during employment or the restrictive covenant period to gain a head start) to stop it. 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.
- There was no justification for any further substantial extension of the springboard relief. The court assumed that the exposure of BGC's conduct as set out in the judgment would curb unlawful recruitment in the future.

15 Repayment of signing, retention and loyalty payments

- The court ordered repayment of re-signing, retention and loyalty payments, due on resignation during what were lengthy initial fixed terms. Such repayment provisions are not in restraint of trade. They do not affect the employees' ability to work after leaving. Such amounts are substantial sums paid to highly paid employees as a reward for loyalty.
- Such provisions are not penal. A penalty is a sum provided by a contract payable in the event of a breach of contract, which sum is inserted other than as a fair estimate of the loss which may be

occasioned by the breach. Here, the provision for repayment is not a term which has anything to do with compensation for breach. The employee is given a large additional sum of money if he continues working for the company and does not give notice before the date when the minimum term ends (and when he is then entitled to give notice). If he does not do so, he has to give it back. The law relating to penalties is wholly inapplicable.

- The brokers here were intelligent, successful men capable of driving a bargain with Tullett. The court's view was that the law should not look for ways for them to avoid the provisions of their contracts.

For further information please contact

Kathleen Healy
Partner
T +44 20 7832 7689
E kathleen.healy@freshfields.com

Nicholas Squire
Partner
T +44 20 7832 7419
E nicholas.squire@freshfields.com

Susan Doris
Associate
T +44 20 7427 3213
E susan.doris@freshfields.com

If you would like to receive our employment law updates please contact

Magdalena Flynn
T +44 20 7716 4857
E magdalena.flynn@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.