



Accepting a breach of the obligation of trust and confidence: *RDF Media v Clements*

A hard fought case where both parties' actions would have amounted to a breach of trust and confidence permitting the other to terminate the employment contract summarily.

By Tom Croxford

Alan Clements sought to leave the RDF Media Group, which had acquired a company of which he was co-owner, less than two years into a three year covenant period.

The facts as found at a hard-fought trial were that he had engaged in substantial and inappropriate discussions with the competitor before resigning that amounted to a breach of the duty of trust and confidence.

However, after he resigned on notice, but before the employer knew about his misbehaviour, the employer gave an inappropriately vitriolic off-the-record briefing to a newspaper journalist. Thereafter, Mr Clements resigned summarily claiming constructive dismissal.

It was found that, if viewed in isolation, both Mr Clements behaviour and RDF Media's behaviour would have amounted to a breach of trust and confidence permitting the other to terminate the employment contract summarily.

However, Deputy Judge Bernard Livesey QC, having given detailed and careful consideration to the scope of the duty of trust and confidence, provided a somewhat Delphic conclusion to the judgment.

As the primary basis for the decision, the Judge held that a party in breach of the mutual obligation of trust and confidence was not permitted to accept a breach of that same obligation by the other party so as to bring the contract to an end. This conclusion was based on the clear (but much criticised) House of Lords authority of *Bremer Vulkan*. It may be (and was) said that a case about the effect of mutual delay in arbitration proceedings is not the most promising basis for a wide-ranging principle that a party in breach of a mutual contractual obligation cannot terminate a contract in response to the other party's breach of that same obligation.

Significantly, but less obviously, the Judge held as an alternative basis of his decision that the obligation of trust and confidence is context dependent and thus, whilst the briefing to the press was a prima facie breach of trust and confidence, there was no trust and confidence left to destroy because of Mr Clements' prior breach such that RDF

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Media's actions were in fact lawful. This secondary conclusion was perhaps both a stronger and a more orthodox basis for the decision.

Sadly, for the author, the case was settled before Mr Clements' appeal to the Court of Appeal and thus reconsideration of the two bases for the judgment will have to await another occasion.