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TURNING THE TURNCOATS:

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Constructive Dismissal and Mutual Misbehaviour

1. As anticipated by those who view factual merits as important, the Court of Appeal has rejected the appeal of BGC in the bitter feud between Tullett Prebon and BGC.

2. By way of reminder, BGC poached a team of inter-dealer brokers from one of its competitors, Tullett Prebon. The facts gave rise to a successful application for interim injunctions that were re-considered at a "speedy" trial by Jack J, the trial taking place 6 months after the application for interim relief and lasting a matter of months rather than days. Jack J held that the brokers had behaved in some cases dishonestly, in breach of duty and as part of an unlawful means conspiracy with BGC. He held that "BGC's conduct showed a cynical disregard for the law and for employee's duties".

3. The approach adopted by the Court of Appeal seems to centre on the quality of the judgment – in the view of Maurice Kay LJ, who delivered the leading judgment, Jack J's judgment was "meticulous" despite being "produced … in a relatively short space of time".

4. The principal issues on appeal were, in summary, (1) whether the constructive dismissal claims of certain of the departing inter-dealer brokers should have been accepted and (2) whether BGC should have succeeded in a claim for damages in respect of three who had signed contracts with BGC but then decided to stay with Tullett Prebon.

5. On the first issue, the brokers submitted that Tullett Prebon's attempt to persuade them to stay when they had already signed forward contracts with BGC was itself a breach of trust and confidence. The factual challenge was rejected with little detailed consideration on the basis that the issue of constructive dismissal is truly a matter for the judge.

6. The legal challenge depended on a submission that breach of trust and confidence needs to be considered objectively whereas the judge had placed some reliance on the fact that the Tullet Prebon had intended its actions to enhance the bond between it and the departing brokers. Again, the Court of Appeal had little

difficulty in rejecting the submission by noting that the aim was to assess objectively the true intention of members of the Tullett Prebon hierarchy which permitted consideration of what their true intentions were.

7. The second issue gave rise to a more interesting set of legal issues concerning forward contracts – contracts to commence employment at some future date when free to do so. The argument accepted by Jack J at trial was that trust and confidence obligations arose between the departing brokers and BGC from the point of signing the forward contracts and thus BGC's dishonest behaviour was capable of breaching the obligation of trust and confidence, permitting the departing brokers to terminate their future contracts and remain with Tullett Prebon.

8. The Court of Appeal accepted that the extent of the obligation of trust and confidence is context dependent, and thus was willing to hold that the flagrantly dishonest conduct of BGC entitled to departing brokers to terminate their forward contracts prior to the commencement of employment.

9. In doing so, the Court paid tribute to the approach adopted in the first edition of Employee Competition: Covenants, Confidentiality and Garden Leave, Paul Goulding QC (Ed.). The Court of Appeal's acceptance of the idea that trust and confidence is attenuated during garden leave may be the most important point in the judgment.

10. It is worth noting that Lord Justice Hooper devoted his short judgment to doubting the lawfulness of forward contracts of the type used by BGC. His view was that forward contracts which contain indemnities for any breach of the existing contract of employment and substantial incentives to join the new employer and serious penalties for failing to resign in accordance with the expectation of the new employer may not be consistent with the obligations of the employee to his existing employer.

11. In the light of this decision, an important step is to reconsider the earlier trust and confidence cases to identify the true effect of the Court of Appeal's judgment.

Trust and Confidence

The Orthodox View

12. The obligation of trust and confidence is an obligation[1]:

    12.1. not, without reasonable and proper cause,

    12.2. act in such a way as is calculated or likely

    12.3. to destroy or seriously damage

    12.4. the relationship of trust and confidence inherent in the employment relationship.

13. Breach of that obligation can sound in damages, as in *Mahmud* where the breach was not even known to the employees until after the termination of employment, or can give rise to a constructive dismissal claim.

14. The constructive dismissal claim can take two very different formats:

    14.1. a claim in the employment tribunal for constructive unfair dismissal;

    14.2. a claim in the High Court for damages representing the notice period and/or for a declaration that by reason of the constructive dismissal, the notice period and restrictive covenants have fallen away.

15. In a Tribunal claim the following requirements apply[2]:

    15.1. there must be a breach of contract;

    15.2. that breach must be sufficiently serious to justify resignation (or the last in a series of acts which taken cumulatively are so serious;

    15.3. the employee must leave in response to the breach and not for some other reason;

[1] *Mahmud v BCCI* [1997] ICR 606
[2] *Western Excavating v Sharp* [1978] ICR 221

15.4. he must not delay too long.

16. In a High Court Claim, the third requirement is not necessary - the employee may justify a summary termination on grounds other than his subjective reasons for termination or indeed, for reasons wholly unknown to him at the time of summary termination.[3]

Recent cases

17. *Bournemouth University v Buckland* [2010] ICR 908 provides some interesting guidance on certain aspects of constructive dismissal in the Employment Tribunal.

18. Professor Buckland held the chair of environment archaeology at Bournemouth University. He marked the 2006 papers of his students, which were then second-marked as normal. Of the 16 resits, he failed 14. The Board of Examiners then checked and confirmed the results.

19. The course leader then took it upon himself to remark the papers without the authority of the Head of the Board of Examiners. When he found out this had been done, he caused there to be a fourth marking of the papers. These new marks (which were, of course, higher than Professor Buckland's marks) were then approved by the Board of Examiners without reference to Professor Buckland.

20. An enquiry was then set up which was critical of the Board of Examiners band broadly vindicated Professor Buckland.

21. Professor Buckland, who had himself made a series of unwarranted accusations about the conduct of the enquiry then resigned on notice and brought a claim in the Tribunal for constructive unfair dismissal. He was successful in the Employment Tribunal because it found that the act of the Board of Examiners in procuring and accepting the remarking of papers had committed an unequivocal affront. The EAT held that the Enquiry, in vindicating the Claimant, had cured the breach.

[3] *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339 but note that a contrary argument was run but not fully considered by the Court of Appeal in *Cook v MSHK*.

22. The Court of Appeal held as follows:

22.1. the test for whether there has been a repudiatory breach is the same in relation to an employment contract as in relation to a commercial contract, thus it is viewed objectively. There is no direct relevance in considering whether an employer has subjectively behaved reasonably. However, reasonableness may be a useful tool when assessing whether actions objectively amount to a breach;

22.2. a repudiatory breach, once committed, cannot be cured. Thus the enquiry was incapable of remedying the breach because the breach had already occurred before it was set up. An employer may seek to mollify an employee and persuade him not to exercise the right to accept a repudiation but it cannot withdraw the repudiation;

22.3. where there is a constructive unfair dismissal, the Tribunal must consider whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason – see 98(4) Employment Rights Act 1996. The Court of Appeal held that this, when analysed, required consideration of whether the employer had behaved reasonably in undermining his status. The Court of appeal said this question didn't need asking in this case because it "could not intelligibly seek to justify something it said it had not done".

22.4. Lastly, and *obiter*, the Court diverged on the test for affirmation in such cases: Sedley & Carnwath LJJ encouraged a robust approach to the question of affirmation, requiring an employee to act swiftly where the employer is offering to make amends whereas Jacob LJ said that "it takes rather a lot to find affirmation".

23. The comments that perhaps need to be made in relation to this decision are as follows:

23.1. the test for a breach of the trust and confidence term made no mention of the first element of the term: "without reasonable and proper cause". This

is a curious omission given that it might have been very important on the facts – did the marks objectively justify a remarking?

23.2. that element of reasonable and proper cause is another means by which reasonableness of conduct may be brought into consideration;

23.3. the assumption that one cannot justify something that one has not admitted to oneself is far from self-evident as a proposition. It is certainly not the approach adopted in relation to discrimination – see e.g. *Seldon v Clarkson Wright & Jakes* [2010] EWCA Civ.

23.4. in any event, the University could have at least sought to justify its actions in conducting a re-marking without admitting that such acts necessarily undermined status;

23.5. its comments on affirmation did not consider the recent leading case on the issue – *Cook v MSHK* (as to which see below).

Mutual Misbehaviour

24. *RDF Media v Clements* [2008] IRLR 207 is authority for the proposition that if the employee is in breach of the mutual obligation of trust and confidence, he may not accept a repudiation by the employer consisting of a breach of the same mutual term.

25. The facts bear recitation:

25.1. Mr Clements had sold his shares in the television production company for which he worked to RDF Media for a substantial sum of money. In return he had committed not to compete for three years and to continue in employment with the production company;

25.2. Just 15 months after the sale, at a time when he was extolling his commitment in the media and to his colleagues, he was offered (and accepted) a role with a direct competitor, SMG plc, seeking to start work forthwith. He discussed this proposal with key industry contacts prior to

discussing it with his employer because he wished to be sure that those industry contacts would continue to commission programmes from him once he was at SMG. When he resigned from RDF Media, he appeared to be unclear as to the scope of his covenants and refused to commit to abide by them. He was placed on garden leave from where he made repeated and continued attempts to free himself from his obligations by making utterly uncommercial offers to RDF Media and by colluding in a press strategy with SMG that was designed to secure his early release;

25.3. RDF Media also briefed the press, and in the course of an off the record interview, one of Mr Clements' colleagues described his behaviour as "dishonourable" because "if you take the money you do the bloody job".

25.4. Mr Clements resigned claiming constructive dismissal, the effect of which, he contended, was to reduce the period of the non-compete covenant to two years;

25.5. in an attempt to uncover evidence that the off the record briefing had been provided by RDF Media, he had caused his wife's secretary to hack into his colleague's email inbox.

26. The judge held that, prior to the off the record briefing by RDF Media, Mr Clements was already in breach of the obligation of mutual trust and confidence.

27. His particular findings, some of which are not that easy to divine from a particularly poorly reasoned judgment were as follows:

27.1. On one view, by the authorities of *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd* [1981] AC 909 at 986B-D, 987G, and *Paal Wilson v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 909 C-D, Mr Clements was not entitled to accept any repudiation by RDF Media in circumstances where he was himself in repudiatory breach of the mutual obligation of trust and confidence (paragraph 140);

27.2. Alternatively, bearing in mind the *de facto* state of the employment relationship and the need to balance the interests of employer and

employee (as in paragraph 120), Mr Clements's prior misconduct in repudiating his own employment contract had caused such serious damage to the relationship of trust and confidence between the parties that RDF Media's subsequent conduct, when weighed against it, either was not in fact a breach at all or did not amount to repudiation capable of acceptance in this instance (paragraph 141).

The Bremer Vulkan Point

28. In more detailed terms, the argument on the first point proceeded as follows (and would have so proceeded in the Court of Appeal but for a settlement very favourable to RDF Media):

28.1. the decision of the majority in the House of Lords in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 as followed in *Paal Wilson v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 was binding in relation to the ability of a party to accept a repudiation of a mutual obligation where he is himself in repudiatory breach of the same obligation;

28.2. The *Bremer Vulkan* case concerned an arbitration. In such an arbitration, Lord Diplock held that, where delay had arisen, both parties were under a mutual obligation to apply to an arbitrator for appropriate directions to put an end to the delay – 986B-D.

28.3. If neither party so applied, both were therefore in breach of a mutual obligation. As such, neither party was entitled to accept the repudiatory breach of the other – 987G-988A.

28.4. In *The Hannah Blumenthal*, the House of Lords was asked to depart from the decision in *Bremer Vulkan* (895B-896A, 898D-899D). The House of Lords declined to do so - 909C-D, 912D-E, 917D-E, 920B-C, 922G-923A, E-F. It declined to do so despite the criticism of the decision by the Court of Appeal – 888E-889G.

28.5. It should be noted that the extent of the criticism of Kerr LJ (in the Court of Appeal) was as to the scope and nature of the mutual obligation rather than whether mutual breach prevented acceptance of the other's repudiation – 887B-888E.

28.6. The link between the mutual obligation in the arbitration context and the obligation of trust and confidence is seen in Kerr LJ's (flawed) analysis of the duty as a duty of cooperation, that being the essential nature of the duty of trust and confidence – *Malik v BCCI* [1998] AC 20, 45H.

28.7. The link between Mr Clements's breaches and RDF Media's *prima facie* breach was particularly evident in relation to Mr Clements's co-operation with SMG in SMG's press strategy which was designed to free Mr Clements from his contract at the earliest opportunity. That was continuing conduct of exactly the sort which gave rise to RDF Media's prima facie breach.

29. The counter argument was based upon the reasoning of Kerr LJ in *STC v Golodetz* [1989] 2 Lloyds 277, 286 Col 1 but that is, in the main, not inconsistent with the thesis in that it accepts the proposition that there may be circumstances where A is precluded from claiming that B has committed a repudiatory breach. However, Kerr LJ asserted that the only circumstances in which the A's prior breach is relevant is where that prior breach by A prevents the actions of B from amounting to a breach at all.

30. RDF Media contended that on the authority of *Bremer Vulkan,* mutuality of obligation and continuing breaches are both a necessary and a sufficient condition to prevent acceptance of the other's breach. It is part of the *ratio* of *Bremer Vulkan* that both parties were in fact in breach of the mutual obligation and neither party was entitled to accept the other's repudiation.

31. The primary basis for decision in *RDF Media* has been unpopular with most commentators and judges. It was doubted in *SG&R v Boudrais* [2009] IRLR 770 where it was said that where the breaches were sequential the reasoning in *RDF Media* could not apply.

32. However, it was found to reflect the common law of Scotland in *Aberdeen City Council v McNeill* [2010] IRLR 374 where the onerous mutuality of an employment contract was central to the decision.

33. The issue also cropped up in the all encompassing decision of *Tullett Prebon v BGC* [2010] IRLR 648. At paragraph 83, Jack J states that, "it was tentatively suggested that where an employee was himself in repudiatory breach of the employment contract he could not accept a breach by his employer to bring the contract to end".

34. It seems surprising to refer to the ratio of *RDF Media* as a tentative suggestion. As such, it was not possible for Jack J to decline to follow the decision unless he was sure that it was wrong. He did not so assert.

35. As set out above, whilst *Golodetz* provides the strongest argument against *RDF Media*, it is not clear that the result is inevitable where the obligations are truly mutual.

The Trust and Confidence Point

36. At paragraphs 100 to 110 of the Judgment, the Judge in *RDF Media* accepted the proposition that the duty of trust and confidence is context dependent rather than unvarying.

37. Further, he accepted the undisputed proposition put forward by both parties that the *Boston Deep Sea Fishing* principle applied to the obligation of trust and confidence such that there might be attenuation of the duty by reason of circumstances unknown to the person owing that duty – paragraphs 110 and 120.

38. In this context, having correctly directed himself that the test was severe (paragraph 105), the Judge found that "all other things being equal", the conduct of RDF Media amounted to a breach of the obligation of trust and confidence (paragraph 133).

39. He thereby found that there was a *prima facie* breach, subject to consideration of the other matters. Having brought such other matters into account, the Judge concluded that all other things were not equal and that the conduct of RDF Media

had not in fact seriously damaged or destroyed the then extant relationship of trust and confidence given that:

39.1. it had been attenuated by the resignation and garden leave (paragraph 134) and

39.2. then further attenuated by the conduct of Mr Clements.

40. It is that which rendered what would otherwise be a breach by RDF Media into something of which Mr Clements was not entitled to complain.

41. In determining that the issue was one of causation, the Judge focussed on the state of the relationship of trust and confidence at the time of breach.

42. The Judge also considered that the matter could be viewed in equitable terms in the sense that the conduct criticised by Mr Clements was not such as to cause any further damage to the relationship given that which Mr Clements had already done.

43. In *Tullett Prebon*, Jack J took issue with this approach on the basis that damage to the trust and confidence reposed by one party in the other did not diminish the other party's entitlement to repose trust and confidence in the other.

44. However, he held that "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. There may in practice be little difference with the approach suggested [in *RDF Media*]".

45. In that context Jack J considered that the claims for constructive dismissal by the affected employees had to be considered in the context that they were disaffected employees, assisting in a recruitment exercise to the detriment of their employer and working with their new employer to provoke conduct which might be relied on in support of a claim for constructive dismissal.

46. Unsurprisingly in that context, the employees were unsuccessful.

47. The Court of Appeal have approached matters in a subtly different way whilst reaching the same conclusions:

47.1. It reminded itself that the test for repudiation is whether "the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract";

47.2. It noted that this was to be considered objectively;

47.3. It drew a distinction between cases such as *Malik* where the conduct was not aimed at the employee but had only an indirect effect on the employee and cases where it is the employer's conduct directed at the employee which is in issue;

47.4. It accepted the proposition identified in *Employee Competition* that trust and confidence duties may be attenuated depending on the factual circumstances, particularly in garden leave cases;

47.5. By analogy, prior to the employment commencing, there may be trust and confidence duties dependent on the factual circumstances.

48. This approach is very similar to both the secondary approach in *RDF Media* and the approach in *Tullett Prebon* at first instance.

49. The unanswered question, other than by the judge in *RDF Media*, is whether the concealed (and thus unknown) conduct of an employee is relevant to the question of whether there has been breach of the obligation of trust and confidence by the employer. Put another way, is the objective bystander omniscient?

Conclusion on Turning Turncoats

50. The approach in *Tullett Prebon* should give most employers of departing employees greater confidence in their dealings with those employees.

51. Objectively viewed, the old employer will always be able to rely upon the apparent desire to retain the services of the employee, which will almost invariably be seen

as an objective indication of the maintenance of trust and confidence rather than anything consistent with its destruction.

52. Plainly, if there has been no wrongdoing by the new employer, the old employer is in danger of an effective claim for inducing breach. However, given the requisite state of mind for founding that tort, it may well be possible to argue that there was no intention to breach because the old employer believed that the employee was entitled to renege on that contract given the behaviour of the new employer.

53. Furthermore, the nature of the forward contracts may well itself be an inducement by the new employer to the employee to breach their contracts. The damages sustained by reason of that breach are likely to include the additional sum to persuade the employee to return to the old employer.

54. In any event, the old employer may be more willing to take the risk of a claim:

    54.1. If he fails to get the employee to return, he should still be able to enforce covenants;

    54.2. If he succeeds in getting the employee to return, he may well have a claim for the additional costs of retaining the employee against the putative new employer. He may well also have a defence to any claim that is brought against him.

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24 March 2011