

## Employment Alert No 188: Court of Appeal Dismisses BGC's Appeal in Tullett Prebon plc v BGC Brokers LP

February 25, 2011

### Background

On 22 February 2011, the Court of Appeal handed down its judgment in the long running team move case, Tullett Prebon Plc v BGC Brokers LP, in which the London McDermott Employment Team acted.

### Facts

In March 2010, Mr Justice Jack in the High Court found that BGC's recruitment of ten brokers from Tullett Prebon had been unlawful. BGC appealed against certain aspects of that decision including the Court's findings:

- that the brokers had not been constructively dismissed by Tullett (in circumstances where Tullett sought to persuade them to comply with their contracts by calling them into meetings at which Tullett made clear what the consequences would be if the brokers did not comply with their contracts); and
- that three target brokers (the "Tullett 3") (who had signed forward start contracts to join BGC) were entitled to change their minds because, acting as it had, during the recruitment process, BGC had breached the implied term of trust and confidence in forward contracts. BGC argued that it was not in fact under any duty of trust and confidence, as the Tullett 3 had not yet commenced work under the forward contracts.

### Decision

The Court of Appeal rejected BGC's appeal and held that:

- BGC had not shown that Tullett's conduct, in seeking to persuade some of the brokers to stay with Tullett, had amounted to a repudiatory breach of the implied term of trust and confidence. The question was, whether looking at all the circumstances objectively, Tullett had clearly shown an intention to abandon, and altogether refuse to perform, the contract. The Judge had been quite entitled to find that Tullett had not intended to do so. Tullett's intention was not irrelevant (as BGC had contended). In order to address the issue of whether or not there had been a repudiatory breach in the relevant circumstances, the Judge had had to objectively assess Tullett's true intention and, having done so, he reached the conclusion that the intention was not to attack, but rather to strengthen, the relationship;

- the forward start contracts signed by the “Tullett 3” had been subject to the implied term of trust and confidence that exists in all contracts of employment. This was the case even though the Tullett 3’s employment with BGC had not begun at the relevant time.

Tullett Prebon’s claim for damages will be heard in the High Court by Mr Justice Jack next month.

## What does this mean for employers?

The Court of Appeal’s decision serves to reinforce the lessons of the High Court’s judgment. It is a reminder for defecting employees and recruiting employers of the potential consequences of their actions.

Although it did not form part of the binding decision, the judgment also raises some interesting questions in relation to forward start contracts.

The Court of Appeal did not disturb the High Court’s finding that forward start contracts are lawful, but comments by one Judge cast doubt on the idea that forward start contracts are compatible with an employee’s obligations towards an existing employer. The Judge considered terms of particular concern to be those that encourage an employee to resign, for instance by offering substantial sign-on payments or expressly stating that the person will commence employment at the earliest possible time. These terms, viewed cumulatively with indemnity provisions that protect the employee in the event of legal action, may actively encourage an employee to run the risk of breaching his existing contract and obligations to his existing employer.

Please look out for the invitation to a MWE round-table discussion specifically focusing on this high profile case and the implications it has for employers.

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