Powell v Ogilvy New Zealand Ltd

District Court Wellington CIV-2009-085-1129
24 February; 15 June 2010
Judge Broadmore

Contract — Sale of business — Agreed sum under contract unpaid — Whether guarantee given that clients would transfer and stay with new owners — Breach of guarantee — Misrepresentation — Hague Rules, art 3, r 6 — Fair Trading Act 1986, ss 9 and 43; Contractual Remedies Act 1979, s 4; Employment Relations Act 2000.

The plaintiff was the director and sole shareholder in Persuasion Ltd, which was an advertising agency. The defendant was a much larger advertising agency based in Auckland. In 2007 the defendant decided to try and take over Persuasion to further its objective of increasing its overall client base and turnover.

The managing director of the respondent, Mr Partington, stated that the plaintiff had assured him that her relationship with her clients was rock solid, and that if she was paid the amount she was looking for and if the defendant was willing to employ her, that she would guarantee that the Persuasion clients would not go anywhere so long as she remained employed by the defendant.

On that basis, Mr Partington said, he went ahead with the purchase. He said that he would not have dealt with the plaintiff at all but for her guarantee. After the takeover was completed, all of the Persuasion clients transferred over to the defendant. However, over the next little while the clients left one by one, with the last client leaving in August 2009.

The plaintiff applied for summary judgment against the defendant to recover the sum of $184,228.00 which she claimed to be due to her under the contract. The defendant argued that it was not obliged to pay the sum because of a misrepresentation and breach of guarantee given by the plaintiff prior to the contract being signed.

Held (reserved decision granting the application)

1 Any contract such as this, involving essentially the sale of goodwill, was vulnerable to clients becoming uncomfortable with the new regime and taking their business elsewhere, no matter how honest, diligent and expert all involved might be. And, as a highly experienced advertising executive involved in sales and purchases of advertising businesses, Mr Partington was in an excellent position to know that (see [30]).

2 Further, and decisively, had the representation and guarantee been given as asserted, then, having regard to the critical significance attributed to them by Mr Partington, it was beyond comprehension that he would not have instructed the company's solicitors to include them in the agreement which they went on to produce (see [36]).

Cases mentioned in judgment

Aries Tanker Corpn v Total Transport Ltd, The Aries [1977] 1 All ER 398, [1977] 1 WLR 185 (HL).

Brownlie v Shotover Mining Ltd CA181/87, 21 February 1992.

David v TFAC Ltd [2009] NZCA 44, [2009] 3 NZLR 239.

Kewside Pty Ltd v Warman International Ltd (1990) ASC 55-964, (1990) ATPR (Digest) 46-059.

Krukziener v Hanover Finance Ltd [2008] NZCA 187, [2010] NZAR 307, (2008) 19 PRNZ 162.

PAE (New Zealand) Ltd v Brosnahan [2009] NZCA 611, (2009) 12 TCLR 626, (2009) 9 NZBLC 102,862 (extract).

Application

The plaintiff applied for summary judgment against the defendant in respect of money due under a contract between the parties.

M Dalmer for the plaintiff.

CT Patterson for the defendant.

JUDGE BROADMORE.

Introduction

[1] This application for summary judgment arises from the claim of the plaintiff, Ms Powell, to recover from the defendant, Ogilvy New Zealand Ltd, the sum of $184,228.00 which she claims to be due to her under a contract. The contract concerned the sale of all the shares in a business owned by her called Persuasion Ltd. Ogilvy New Zealand maintains that it is not obliged to pay this sum because of a misrepresentation and breach of a guarantee allegedly made and given by Ms Powell prior to the contract being signed.

[2] The main legal issue of difficulty which arises in the case relates to the application of the provisions of the Fair Trading Act 1986 in the circumstances of the case. The parties filed written submissions on this issue after the oral argument, the last of such submissions being received on 19 March. There are also issues as to whether a potential cross-claim foreshadowed by Ogilvy New Zealand is correctly classified as a counterclaim or a claim to a set-off; whether such a claim would fall within the exclusive jurisdiction of the Employment Court; and whether any complaint by Ogilvy New Zealand can be pursued in the light of time limitation provisions in the contract.

[3] The claim is suitable for summary judgment because it concerns the interpretation of a detailed contract; and it is well possible to reach a decision as to whether or not the defendant has an arguable defence based on the affidavit evidence provided by the parties and the legal arguments raised by them in their submissions.

Facts

[4] In 2007, Ms Powell was the director and sole shareholder in Persuasion Ltd, which was an advertising agency. Persuasion was small but apparently successful: it numbered amongst its clients the Wellington Rugby Football Union, the Universal College of Learning and the organisers of the Wellington Sevens Tournament.

[5] Ogilvy New Zealand is a much larger advertising agency based in Auckland. Its managing director, Mr Partington, said in his affidavit that in 2007 Ogilvy decided to try and take over Persuasion further to its objective of increasing its overall client base and turnover. Apparently it purchased a number of other smaller advertising agencies at about that time.

[6] Mr Partington stated in his affidavit that there were three critical factors involved in determining the price Ogilvy New Zealand would pay for Ms Powell's shares in Persuasion:

(1) whether the Persuasion client-base would "transition" into Ogilvy New Zealand's business;
(2) what that client-base would spend with Ogilvy New Zealand based on historic accounting data; and
(3) how long the client-base would remain with Ogilvy New Zealand.

[7] Mr Partington referred to many discussions which he had had with Ms Powell in April and May 2007 concerning these three matters, and went on to say this:

> Julie Powell assured me, in no uncertain terms, that her relationship with the clients was rock solid. She went on to tell me that if I paid her the amount she was looking for and if Ogilvy was willing to employ her that she would guarantee that the Persuasion clients would not go anywhere so long as she remained employed by Ogilvy.

That is the extent of the evidence advanced to support the claim of a representation and warranty by way of defence to the application for summary judgment.

[8] On that basis, Mr Partington said, he went ahead with the purchase based on an agreement which he arranged for Ogilvy New Zealand's solicitors to prepare. He said that he would not have dealt with Ms Powell at all but for her guarantee.

[9] Mr Partington went on to say that after the takeover was completed, all of the Persuasion clients transferred over to Ogilvy New Zealand; but that over the next little while they left one by one – "systematically", Mr Partington said. The last client left in August 2009. If Mr Partington's use of the word "systematically" is intended to imply that that the clients left as part of a campaign orchestrated by Ms Powell, then there is no evidence, not even a hint, of that.

[10] In an affidavit in reply, Ms Powell denied that she ever gave a guarantee in the terms described by Mr Partington. She maintained that:

> ... it would simply not be possible to provide that sort of open-ended guarantee.

[11] She maintained that she made proper arrangements to ensure that all her clients transitioned to Ogilvy New Zealand, and notes Mr Partington's acceptance that this in fact occurred. She went on to say that:

> To the best of my knowledge and belief, when I signed the agreement none of my clients were intending to terminate their agreements with Persuasion or to cease or materially reduce their business with Persuasion as a result of the sale to the defendant.

[12] And she "expressly denied" that she gave representation or guarantee in the terms asserted by Mr Partington and set out in [7] above. She said that:

> The only representations and warranties that I gave were those specifically recorded in the agreement.

[13] It is also necessary to refer to a further affidavit filed on Ms Powell's behalf, sworn by Ms Livia Esterhazy. Ms Esterhazy had been managing director of the Wellington office of Ogilvy New Zealand at the time of the takeover and until April 2008. When she swore the affidavit she was the Wellington general manager for Saatchi and Saatchi.

[14] Ms Esterhazy asserted that at the time of the Persuasion takeover she visited all the Persuasion clients to explain the benefits of transitioning to Ogilvy New Zealand and to reassure them as to any concerns they might have. Ms Esterhazy went on to say that two months later she again visited all the ex-Persuasion clients, all of whom appeared to be "very happy" with the new arrangements and service.

[15] Ms Esterhazy expressed her conclusion in the following way:

> I have no doubt that the Persuasion clients that were brought into the Ogilvy fold were well transitioned and were happy with the service they were receiving. Some subsequently did leave Ogilvy for what I understand to be many varied reasons including change of strategy and pitch processes. However, this is a normal part of any advertising business.

[16] Ms Esterhazy expressed the view that Ms Powell did everything asked of her at the time of the takeover, and confirmed that all Persuasion clients were successfully transitioned.

[17] Although Ms Esterhazy's affidavit was sworn on 23 October 2009, it was not filed until after Ogilvy New Zealand's notice of opposition to summary judgment and Mr Partington's affidavit. However the position seems to be that Ogilvy New Zealand's lawyers were aware of it prior to Mr Partington's affidavit being sworn, so that he was in a position to reply to it if he chose. He did not address it in his affidavit, nor seek to file any further affidavit rebutting it.

[18] Finally as to the facts, I refer to an email Mr Partington sent to Ms Powell dated 22 July 2009, while she was still employed at Ogilvy New Zealand. He drew her attention to the fact that Ogilvy New Zealand had purchased the Persuasion business but that there was by then "nothing left" of it. He then went on to say this:

> With the sale and purchase agreement comes a moral and ethical obligation to guarantee the clients continue to deliver. Never at any stage during the sale

> and purchase transaction did you represent that the clients were vulnerable. You never said that the clients would walk away, one after the other, in quick succession.

[19] With reference to Mr Partington's use of the word "systematically" (see [9] above), and this comment, I observe that Mr Partington has nowhere said or even implied that Ms Powell had anything to do with the departure of the Persuasion clients, or that she had seduced them away from Ogilvy New Zealand after she left that company's employment. Nor is there anything in Mr Partington's affidavit to support any assertion that Ms Powell was negligent in managing the transitioned clients – an issue signalled by Mr Patterson, counsel for Ogilvy New Zealand, in his written submissions.

The agreement

[20] The agreement was a bespoke document drawn up, as I have noted earlier, by Ogilvy New Zealand's solicitors. It contains much boilerplate of the kind typically found in agreements for the sale and purchase of shares, sets out the price to be paid and the mechanism for paying that price by instalments, and relevantly includes a number of warranties, some of which are particularly relevant in the present circumstances.

[21] I draw attention to the following aspects of the agreement:

(1) The 5th recital records that the parties have agreed on the sale and purchase of the shares in the company "on the terms and conditions set out in this agreement".

(2) Clause 10.3 contains an acknowledgement by Ms Powell that Ogilvy New Zealand has relied upon the truth of the statements contained in the warranties, the fulfilment by her as vendor of her obligations, and full disclosure of material matters prior to settlement.

[22] Clause 10.6 is in the following terms:

> All representations, warranties and conditions which would otherwise be implied in this agreement are excluded to the maximum extent permitted by law and the purchaser acknowledges that neither the vendor nor the company nor any person acting on behalf of either of them has made any representation or given any warranty in relation to the company other than representations and warranties expressly contained in this agreement.

[23] Clause 10.8 requires Ogilvy New Zealand as purchaser to give notice of any potential warranty claim within 30 days of becoming aware of such a claim or potential claim.

[24] Clause 18 comprises an entire agreement clause which provides that the agreement "supersedes and extinguishes all prior agreements and understandings" concerning the transaction.

[25] The warranties themselves are included in a lengthy schedule to the agreement. Two of them are relevant:

(1) Warranty 6.8, contained in a section of the schedule entitled "information warranties", requires the vendor to have taken and to continue to take all reasonable steps to see that existing contracts are held and maintained.

(2) A further warranty bearing the lettered identification (l), contained in a section of the schedule entitled "Full schedule of asset warranties relating to the assets and business of the company", provides as follows:

> To the best of the knowledge and the belief of the company and the vendor [after settlement] ... no customer of the company will terminate any agreement with the company, or cease or materially reduce its business with the company.

[26] Finally I refer to two general statements in the agreement which appear to me to be relevant. First, each part of the schedule of warranties and representations commences with an acknowledgment by the vendor that in entering into the agreement the purchaser is relying on the representations made by the vendor, which it is clear are those set out in the schedule. Secondly, Part I(B) of the schedule consists of a provision to the effect that the warranties, etc, in the schedule are subject to any formal disclosure letter from the vendor to the purchaser prior to settlement.

Discussion

Introduction

[27] Although it is necessary to analyse the facts in terms of both the Contractual Remedies Act 1979 and the Fair Trading Act, the starting point for such analysis is to consider whether there is credible evidence that Ms Powell in fact gave the representation and guarantee in the terms alleged by Ogilvy New Zealand and set out in [7] above.

[28] It is clear from Mr Partington's affidavit, as well as those of Ms Powell and Ms Esterhazy, that an assessment of the "longevity" of clients is a matter of judgment, informed by appropriate inquiry and due diligence. Mr Partington's affidavit refers to lengthy discussions with Ms Powell as to the three critical matters referred to in [6] above, to a satisfactory review of Persuasion's financials, and to a careful review of each of the clients' business with Persuasion on a month-by-month and year-by-year basis.

[29] Mr Partington said that Ogilvy New Zealand could not find anything that suggested that the clients would not stay post-purchase, and concluded by saying this:

> However, there is only so much you can achieve in due diligence. Due to the nature of Julie Powell's relationship with each of them [the clients] we were totally dependent on the information and representations provided by Julie Powell to us.

[30] That last comment is, in my view, the key to the case. Any contract such as this, involving essentially the sale of goodwill, is vulnerable to clients becoming uncomfortable with the new regime and taking their business elsewhere, no matter how honest, diligent and expert all involved may be. And, as a highly experienced advertising executive involved in sales and purchases of advertising businesses, Mr Partington was in an excellent position to know that. He knew that due diligence on the written record and the financials could go only so far; in the end he was dependent not only Ms Powell's statements as to her clients' position

at the time, but also on those clients making their own decisions after the sale as to whether to continue to deal with the new agency. Further, armed with that knowledge, Mr Partington instructed Ogilvy New Zealand's lawyers to prepare the agreement.

[31] I add that there is no evidence to contradict Ms Powell's assertion, in para 5 of her affidavit in reply, that none of the Persuasion clients were contemplating departure.

[32] The agreement prepared by Ogilvy New Zealand's lawyers did not record any absolute warranty along the lines asserted by Mr Partington and set out in [7] above. It contained only a clause as to Ms Powell's "knowledge and belief" as set out in [25](2) above. Further, it contained an "entire agreement" clause, as described in [24] above. And, to buttress that, Clause 10.6, referred to in [22] above, excludes all warranties to the maximum extent permitted by law. The other provisions from the agreement to which I have referred in [21]–[26] above support the view that each party was committed to what was set out in the agreement to the exclusion of any other provision.

[33] The evidence, even that of Mr Partington, is that all clients did in fact "transition" to Ogilvy New Zealand after the takeover, and generated substantial revenues for Ogilvy New Zealand.[1] The evidence of Ms Powell and Ms Esterhazy is that Ms Powell worked hard to ensure that her former client base remained with Ogilvy New Zealand. Mr Partington does not deny that. He himself, as noted earlier, accepts that the initial financial return to Ogilvy New Zealand from the Persuasion client base was in line with expectations.

[34] Mr Partington's own evidence, as well as that of Ms Powell and Ms Esterhazy, and common sense, indicates that the loyalty of the client base of an advertising agency being purchased, and its longevity under the new arrangements, cannot be guaranteed. Mr Partington referred to the hard work he had put in over many years in ensuring that his clients remained loyal to whatever organisation he was for the time being working for – an observation which clearly carries with it the implication that even heroic efforts might fail. In his email of 22 July, referred to in [18] above, he referred only to a "moral and ethical obligation" in respect of transitioning clients. That no doubt explains why he paid so much attention to the issues of transition and longevity in his pre-contract explorations with Ms Powell and the due diligence that went with them: he was aware from his experience that there could be no effective guarantee of lasting transition; and he would have to make a judgment as to the degree of risk Ogilvy New Zealand faced.

[35] Accepting that those matters are critical in a business sense, it seems rather more likely that the high watermark of any pre-contract representations made by Ms Powell is reflected in the email of 22 July to which I have just referred. In that email, Mr Partington's complaint is not that Ms Powell was guilty of a breach of any express representations and

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1 The revenues were for all practical purposes the same as the purchase price of the shares – a little over $730,000. And, for a substantial period of Ms Powell's employment with Ogilvy New Zealand, were tracking ahead of Mr Partington's expectation of revenues of $2 million over five years.

guarantees, but rather that she did not represent that the clients were vulnerable, and that she did not say that the clients would walk away.

[36] Further, and in my view decisively, had the representation and guarantee been given as asserted, then, having regard to the critical significance attributed to them by Mr Partington, it is beyond comprehension that he would not have instructed the company's solicitors to include them in the agreement which they went on to produce. The key warranties actually included are set out in [25] above – the requirement to take all reasonable steps to see that clients transitioned; and the further warranty, limited by reference to the knowledge and belief of Ms Powell, that no client would terminate or materially reduce its business with the company.

[37] Had Ogilvy New Zealand tendered a draft agreement which, instead of those entirely proper and unexceptionable warranties, included the absolute representation and guarantee asserted by Mr Partington, then I have no doubt but that Ms Powell would have objected. As noted in [10] above, she regarded open-ended commitments of that nature as impossible in practical terms.

[38] In weighing these considerations, I have had regard to the authorities as to dealing with conflicts of evidence in summary judgment cases. The following observations, taken from *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162, are typical and helpful:

> [26] ... [the Court] need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[39] I therefore conclude, on the basis of the evidence of pre-contract negotiations and inferences to be drawn from that evidence, of events and statements postcontract, and from the logic of the agreement itself and its drafting by Ogilvy New Zealand's solicitors, that Mr Partington's assertion that the representation and guarantee were in fact made and given is "inherently improbable".

[40] As the existence of the representation and guarantee is critical to any challenge to Ms Powell's claim, whether by way of defence, set-off or counterclaim, any such challenge has, in my judgment, no prospect of success; and Ms Powell should succeed on the facts.

What if representation and warranty in fact given?

[41] This question has to be addressed in the light of both the Contractual Remedies Act and the Fair Trading Act.

[42] Under the Contractual Remedies Act, the issue is whether the Court can give effect to the entire agreement clause and the other provisions of the agreement to which I have referred because of s 4 of the Act. Under that section, the Court can be precluded by such provisions

from giving effect to representations and guarantees of the kind alleged by Ogilvy New Zealand only if:

> The Court considers that it is fair and reasonable that the provisions should be conclusive between the parties, having regard to all the circumstances of the case, including the subject matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party is represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

[43] If the Court is unable to conclude that the entire agreement clause and the other provisions to which I have referred are fair and reasonable, then Ogilvy New Zealand may in principle rely on the Act.
[44] Under the Fair Trading Act, the issue is whether the provisions of the agreement can override the provisions of s 9 of the Act, or alternatively whether in the exercise of its discretion under s 43, the court should give effect to s 9.
[45] In my view, both of these issues are authoritatively resolved in Ms Powell's favour by those elements of the decision of the Court of Appeal in *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2009) 12 TCLR 626) which concern reliance on extra-contractual representations.
[46] In *PAE*, as in this case, the parties were vendors and purchasers of all the shares in a company; and effected the transaction pursuant to a formal written agreement. The agreement relevantly contained an entire agreement clause and certain warranties, though not nearly as detailed as those required of Ms Powell in this case. There was no warranty in respect of the accuracy of the company's accounts; but in the proceeding the purchasers sought damages for misrepresentation in respect of an overvaluation of the shares said to result from errors in the accounts. In response, the vendors relied on the entire agreement clause and the absence of any warranty in the agreement in respect of the accounts.
[47] The purchasers' claim arose under s 6 of the Contractual Remedies Act; and the question for the Court of Appeal in respect of that Act was whether, in terms of s 4(1), it was "fair and reasonable" for the vendors to rely on the entire agreement clause, as Mallon J had held in the High Court. The Court of Appeal agreed with Mallon J. The reasoning is almost entirely relevant to the circumstances of this case:

(1) The provisions of the agreement upon which the respondents relied were inserted by PAE's own lawyers, so that it was not easy to see how PAE could assert that such provisions were not fair and reasonable.
(2) The parties had agreed that whatever had occurred previously, the only operative representations and warranties were those contained in the agreement and no others. The Court approved of the observation of McKay J in *Brownlie v Shotover Mining Ltd* CA181/87, 21 February 1992 at 33 that:

> It would be a matter of concern if commercial people acting in good faith could not, in entering into a transaction such as this, achieve certainty by a written contract excluding liability for prior

statements by one of them if that is what they wished to do.

(3) PAE had every opportunity to require inclusion in the agreement of the representation and warranty which it was asserting.

(4) There was no imbalance in the respective bargaining strengths of the parties. The comments of the Court on this aspect, at [23], are directly applicable in the present situation, and I repeat them verbatim. PAE was an affiliate of a multinational:

> [23] ... experienced in takeovers and acquisitions and familiar with the due diligence process. The company had access to and obtained independent ... legal advice. It had ample opportunity to safeguard itself against the adverse consequences of any pre-contractual misrepresentations other than those specified if that was its objective. It would not be fair and reasonable ... to allow PAE to invoke the statutory protection to circumvent the event of provisions which it had deliberately structured for its own benefit.

(5) It is highly desirable that written contracts should be so drawn as to state all the terms of the contract, and so avoid the uncertainties which can arise from allegations of verbal representations or collateral warranties. If parties have not agreed to include express warranties in their written contract, then it is reasonable for them to state expressly that they are excluded.

[48] I adopt this reasoning. Even if I am wrong in concluding that there is no credible evidence that Ms Powell made the representation and gave the guarantee asserted by Ogilvy New Zealand, it is fair and reasonable for Ms Powell to rely on the entire agreement clause to exclude their effect.

[49] Turning to the Fair Trading Act 1986, s 9 provides as follows:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[50] In *PAE*, as in this case, the purchasers argued that the alleged representation and warranty amounted to misleading and deceptive conduct, so that they could invoke the remedies specified in s 43. The Court rejected that argument, again for reasons that are directly applicable to this case.

[51] The first point is that the issue is not one of "contracting out" of the provisions of the Fair Trading Act, because it is an overarching statutory provision which applies to parties conducting themselves in trade. Rather, bearing in mind that remedies under s 43 of the Act are discretionary, the question is whether the Act should apply in the circumstances of any particular case.

[52] In *PAE*, as in this case, the parties had agreed that the written agreement constituted their entire agreement, and that the warranties specified in that agreement would be the ones that applied between them. What that meant was that what had been said and done before the agreement no longer mattered. Put another way, the relevant clauses of the agreement had the effect of depriving the respondents' alleged conduct of the quality of being misleading or deceptive – see French J (the present

Chief Justice of the High Court of Australia) in *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR (Digest) 46-059 (cited in a lengthy passage from the earlier Court of Appeal case of *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239 set out in [43] of *PAE*).

[53] With respect, I agree with the observation of the Court of Appeal in [46] that:

> [46] ... There is nothing in this agreement and its particular commercial context which is contrary to public policy, or to the underlying purpose of the Fair Trading Act.

[54] I therefore conclude that, even if I am wrong in rejecting Ogilvy New Zealand's assertions as to the representation and guarantee on the facts, neither the Contractual Remedies Act nor the Fair Trading Act provides a legal basis for giving effect to them in the circumstances.

Other matters

[55] In the light of the conclusions I have already reached, there seems little point in considering whether Ogilvy New Zealand's assertions are advanced by way of defence, set-off or counterclaim. On any view, they fail. A counterclaim cannot, of course, be raised as a defence to an application for summary judgment.

[56] Similarly, there seems little point in considering the points raised concerning whether any claim by Ogilvy New Zealand under the alleged guarantee should be dealt with under the Employment Relations Act having regard to Ms Powell's post take-over employment by Ogilvy New Zealand.

[57] Finally, it seems unnecessary to deal in detail with Ms Powell's argument that Ogilvy New Zealand's claims are time-barred by virtue of cl 10.7 of the agreement. (I am inclined to agree with Mr Dalmer, counsel for Ms Powell, that cl 10.7, like art III, r 6 of the Hague Rules, is a provision which extinguishes the claim rather than simply barring the remedy: see *Aries Tanker Corpn v Total Transport Ltd, The Aries* [1977] 1 All ER 398, [1977] 1 WLR 185 (HL)).

Outcome

[58] I grant Ms Powell's application for summary judgment. She is entitled to recover the sum of $184,228 together with interest pursuant to the agreement at 5.95 per cent, "calculated and compounded" in accordance with cl 5.7 of the agreement. She is also entitled to costs which, subject to any prior agreement between the parties or the existence of a *Calderbank* letter, should be calculated on a 2B basis. She is also entitled to disbursements as fixed by the Registrar if not agreed.

Reported by: Rachel Marr, *Barrister and Solicitor*