Neutral Citation Number: [2018] EWHC 990 (Comm)

Case No: CL-2016-000438

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2018

Before :

MRS JUSTICE MOULDER

- -

Between :

MOTORTRAK LTD	**Claimant**
- and -	
FCA AUSTRALIA PTY LTD	**Defendant**

- -
- -

HUGH NORBURY QC and ADIL MOHAMEDBHAI (instructed by **Russell-Cooke LLP**) for the **Claimant**
NIGEL TOZZI QC and MATTHEW LAVY (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing dates: 26 February-1 March, 5-7 March, 12,13,15 March 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is a claim arising out of outstanding invoices under an agreement entered into between the claimant ("Motortrak") and the defendant ("FCAA") which provided for the supply of web based marketing services by Motortrak to FCAA. The sole director and principal shareholder of Motortrak is Mr Gary Pask. FCAA is the Australian subsidiary in the Fiat Chrysler group. It sells vehicles in Australia under the Chrysler, Jeep, Dodge Fiat and Alfa Romeo brands. FCAA denies liability asserting that payments made by Motortrak to a company associated with the defendant's then managing director, Mr Clyde Campbell were in effect bribes to procure that FCAA entered into the agreement and claims damages for loss suffered.

Chronology

2. The chronology so far as relevant to the issues, in my view, is as follows:

3. On 4 January 2008 the claimant entered into a consultancy agreement (the "Consultancy Agreement") with ACN124 ("ACN"), a company owned by Mr Campbell's wife, for Mr Campbell to provide consulting services including "foreign market strategic advice" and "facilitation of services to potential clients" in return for a payment of AU$20,000 per month.

4. It is Motortrak's case that, in early 2009, Motortrak then entered into a licence agreement (the "Licence Agreement"), again with ACN, for Mr Campbell to market and sell Motortrak's services in the Asia-Pacific ("APAC") region.

5. In May 2009 Mr Campbell incorporated a company, Motortrak Pty Ltd ("MPL"), to service the existing Australian clients of the claimant which up until that point had been serviced through Motortrak Australia Pty Ltd ("MAPL").

6. From mid-2009 to October/November 2010 discussions took place between the claimant and Dealer.com for a potential sale of Motortrak to Dealer.com, a US competitor.

7. It is also Motortrak's case that, in May 2010 Mr Pask, on behalf of Motortrak, agreed orally with Mr Campbell to terminate the Licence Agreement and a licence termination agreement was signed on 30 June 2010 (the "Licence Termination Agreement"). Under the terms of the Licence Termination Agreement Motortrak agreed to pay to ACN AU$2.5 million within four years.

8. In August 2010 Mr Campbell was interviewed for the role of managing director of FCAA and was subsequently appointed, commencing his role on 3 October 2010.

9. As of 23 December 2010 an agreement was entered into between Motortrak and FCAA for Motortrak to provide web based services to FCAA for a period of three years from 1 January 2011 (the "Original Agreement") at a cost of AU$690 per dealer per month. The services to be provided by Motortrak were dealer websites, dealer vehicle administration system, used car locator and vehicle searches.

10. On 16 May 2012 the Original Agreement was amended and its term extended to 31 August 2016 (the "First Extension"). Additional services were to be provided to an

increased number of dealers and the charges were increased to AU$1695 per dealer per month.

11. On 15 August 2012 the Original Agreement was further amended and its term extended to 31 December 2017 (the "Second Extension"). The services were extended to include SEO (search engine optimisation) and the charges increased to AU$4100 per dealer per month from 1 January 2013.

12. On 30 April 2013 Mr Campbell resigned as managing director of FCAA and went to run Fiat Chrysler's New Zealand distributorship. He was replaced by Ms Veronica Johns with effect from 1 May 2013.

13. On 1 April 2014 the Original Agreement was further amended to include additional services and extended to 31 December 2019 (the "Third Extension"). The charges remained at AU$4100 per dealer per month.

14. On 1 December 2014 Ms Johns was replaced as managing director by Mr Dougherty.

15. In May 2015 FCAA instituted proceedings against Mr Campbell alleging that he had acted in breach of duty in relation to a number of contracts with third parties.

16. In May 2015 and October 2015 subpoenas were served on Motortrak ordering Motortrak to produce various documents in connection with the Australian proceedings.

17. In May 2016 FCAA applied to join Motortrak to the Australian proceedings. An order was made in June 2016. However Motortrak issued an anti-suit injunction application in July 2016 relying on the exclusive jurisdiction clause in the Original Agreement and on 5 August 2016 FCAA discontinued the Australian proceedings against Motortrak.

18. On 30 June 2016 FCAA informed Motortrak through its lawyers that it required Motortrak to cease to provide services under the Agreement.

19. The claim form and particulars of claim were issued by Motortrak in these proceedings in July 2016.

20. In September 2016 the Australian proceedings against Mr Campbell were settled.

Evidence

21. For the claimant I heard oral evidence from Mr Pask, his wife Sharon Pask, Mr Cox, Chief Operating Officer of Motortrak, Mr McClure, Head of Client Services at Motortrak, and Mr Ducker. The evidence of Mr Lidstrom, a lawyer at FCAA involved in the negotiation of the Original Agreement, was admitted as hearsay (he has unfortunately died since preparing his witness statement). In closing submissions, counsel for the defendant identified certain paragraphs of the witness statement of Mr Lidstrom which the defendant says it would have challenged had it had the opportunity to do so and I bear this in mind in considering his evidence. The evidence of Mr White, the sales and marketing director of Motortrak from May 2015 to April 2017, was agreed and he was not called to give oral evidence. Mr Rae was finance director of Motortrak from February 2016 to May 2017. His evidence was accepted

by FCAA except in relation to his opinion evidence in paragraph 9 of his witness statement.

22. For the defendant I heard oral evidence from Mr Manley, Mr McCraith, Mr Dougherty and Mr Kett. At the time the original agreement was entered into Mr Kett was CEO of Chrysler Asia-Pacific operations based in Shanghai. Mr Campbell as CEO of FCAA reported to Mr Kett and was interviewed by him for the role. Mr Kett reported to Mr Manley who at that time was Executive Vice President for International Sales and Global Product Planning Operations of FCA US. Mr Dougherty succeeded Ms Johns as CEO of FCAA. Mr McCraith was Director of Marketing at FCAA from May 2013 to April 2015. The evidence of Mr Phillippo, a lawyer with the ultimate parent company of dealer.com, was agreed. The evidence of Mr Dasgupta, IT director of FCA US, was agreed subject to certain qualifications set out in the claimant's closing submissions and to which I have regard in preparing this judgment.

23. I also had the benefit of expert evidence. Mr O'Leary, appointed by the claimant, prepared a report dated 18 December 2017 and a supplemental report dated 1 February 2018. Mr Olver, appointed by the defendant, prepared a report dated 15 December 2017 and a reply dated 2 February 2018. There was also a joint statement of the experts dated 22 January 2018.

24. In preparing this judgment I have had the benefit of rereading the daily transcripts of the evidence. Both counsel prepared written opening and closing submissions which I have also taken into account; a failure to refer to a particular submission, either oral or written, in the course of judgment does not mean that it was not considered by the court in reaching its conclusions.

25. In this judgment references to the "Agreement" are to the "Original Agreement" as amended by the First Extension, the Second Extension and the Third Extension except where otherwise stated.

Issues for the court

26. Following the trial it seems to me that the principal issues which the court has to determine are as follows:

    i) Bribery: Was the Licence Termination Agreement a genuine document? If the Licence Termination Agreement was a genuine document, were the payments made to Mr Campbell (through ACN) by the claimant made pursuant to the Licence Termination Agreement?

    ii) Did the defendant affirm the Agreement in 2015? (It is now common ground that when the Third Extension was entered into in 2014, that could not amount to affirmation by the defendant of the Agreement as there is no evidence that Ms Johns knew of the payments to Mr Campbell.)

    iii) Is FCAA liable to pay invoices submitted prior to 1 July 2016 in respect of the quarter commencing 1 July 2016 and is Motortrak's claim for loss of profit excluded by virtue of the limitation of liability clause (clause 9.5) in the Original Agreement?

iv) If the payments made to Mr Campbell amounted to bribes,

a) Is FCAA entitled to recover the amount of the bribes?

b) Has FCAA established that it has suffered loss as a result of entering into the Agreement? If so what is the amount of that loss?

The parties have agreed that the question of whether FCAA breached the exclusive jurisdiction clause in the Original Agreement by bringing proceedings against Motortrak in Australia should be left to the consequential hearing following judgment being handed down.

Bribery: Relevant law

27. I understand from the closing submissions that the law on bribery is common ground. I therefore infer that the following propositions set out in the Defendant's skeleton argument as to what constitutes a bribe are agreed:

> *"… for the purpose of the civil law a bribe means a payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that the person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent." (Industries and General Mortgage Co Ltd v Lewis [1949] 2 All E.R. 573 at 575)*

28. Further there is "*no need to establish dishonesty or corrupt motives. This is irrebuttably presumed*" (*Novoship (UK) Ltd v Vladimir Mikhaylyuk* [2012] EWHC 3586 (Comm) at [106]) and there is no need to establish that the bribe in fact had any influence on the recipient: *Ship v Broadwood* [1899] 1 QB 369 at 373:

> *"I wish to state again emphatically that in such a case as this it is an immaterial inquiry to what extent the bribe or the offer of it influenced the person to whom it was given or offered. A contrary doctrine would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe; and, further, the real evil is not the payment of money, but the secrecy attending it."*

29. I note the submissions however of counsel for the claimant that it is for the defendant to establish bribery and in relation to the circumstantial points relied on by the defendant, it must show that those matters cumulatively are inconsistent with there not being bribery, not merely that they are consistent with there having been bribery. Secondly counsel submitted that although dishonesty is not an element which needs to be proved, dishonesty is an essential consequence of the allegations that are made by the defendant or, at the very least, "commercially very inappropriate" behaviour.

Licence Agreement

30. According to the evidence of Mrs Pask **(**paragraph 14 of her witness statement) the Licence Agreement was drafted by her. She said she was asked by her husband to prepare a memorandum of agreement setting out terms which had been agreed between Motortrak and ACN regarding the rights to the APAC region which Mr Pask had agreed to grant to ACN. She said that it was intended that the parties would enter into a longer form licence agreement however this did not happen.

31. By its terms the Licence Agreement provided for Motortrak to licence its technology relating to its database and systems. Pursuant to clause 4 Motortrak was obliged to make a contribution to ACN's costs for the first 12 months. ACN was obliged to pay commission to Motortrak equal to 70% of the subscriptions received.

32. Mrs Pask said (paragraph 15 of her witness statement) that Mr Pask told her at the time that as part of the arrangements with Mr Campbell/ACN, but outside of the memorandum of agreement, Mr Campbell agreed to look after Motortrak's existing Australian clients that had been signed up by MAPL and its owner Mr Pratt. She said that MAPL had been operating as Motortrak's licensee in Australia since approximately 2005 although no formal agreement had been reached. She said that in July 2009 the arrangements with Mr Pratt were terminated.

Was the Licence Termination Agreement a sham?

33. A copy of the Licence Termination Agreement apparently signed by Motortrak and ACN was before the court. The Licence Termination Agreement purports to be made between the claimant and ACN. The recital reads:

> *"Motortrak is considering a sale of its global business and wishes to terminate the arrangements with ACN for the Asia-Pacific region set out in the [Licence Agreement]. ACN is willing to terminate and cancel the Agreement and this letter records our agreement as follows:"*

34. There are eight clauses in the one page agreement. Clause 1 terminates the Licence Agreement with effect from 30 June 2010. The other clauses, so far as material to the issues before the court, are as follows:

> *"3. In consideration of ACN agreeing to the termination of the Agreement, Motortrak shall pay to ACN the sum of AU$2,500,000 to be paid within four years of the date hereof or as agreed between the parties.*
>
> …
>
> *5 In the event that Motortrak fails to pay the amount referred to in clause 3, ACN shall be entitled to exercise the rights set out in the Agreement.*
>
> *6 Within three months of the date of this Agreement, ACN shall transfer any and all shares in Motortrak Pty Ltd to Motortrak*

> *or such other entity, as Motortrak shall advise. ACN shall have no further interest in Motortrak Pty Ltd*" [emphasis added]

Claimant's submissions

35. It is the claimant's case that the payments made by Motortrak to ACN from 30 June 2010 to 9 December 2013 were in consideration of the termination of the 10 year licence granted by the Licence Agreement. In consideration of the early termination of the Licence Agreement, Mr Pask and Mr Campbell orally agreed that Motortrak would pay AU$2.5 million within four years of 30 June 2010, although no specific payment schedule was agreed. It is the claimant's case that Mrs Pask drafted the Licence Termination Agreement to reduce that oral agreement to writing which was signed on 30 June 2010.

36. Counsel for the claimant submitted that both Mr and Mrs Pask were credible witnesses who gave an honest account to the best of their ability bearing in mind the key relevant events occurred some eight years ago. Counsel for the claimant acknowledged that the standard of proof in this case is the civil standard of the balance of probability but submitted that cogent evidence is required to overcome the unlikelihood that anyone would act in the manner alleged: Lord Nicholls in *Re H (minors)* [1996] AC 563 at 586. Further counsel submitted that Mrs Pask had an unblemished career as a solicitor working for Sky as Deputy Head of Legal and Business Affairs and the consequence of the defendant's case is that Mrs Pask would not be telling the truth regarding the Licence Termination Agreement. Counsel referred the court to the remarks of Henderson J in *Cherney v Neuman* [2011] EWHC 2156 (Ch) at [106] and the "*inherent improbability of a solicitor deliberately misleading the court in evidence given under oath*".

37. Further counsel for the claimant submitted that Mr Pask was already a successful businessman whose business had been valued at around $25 million at the time of the negotiations for its sale with dealer.com and it was therefore "inherently implausible" that Mr Pask would jeopardise that by bribing Mr Campbell to procure one contract with one company in one geographical market.

Defendant's submissions

38. Counsel for the defendant submitted that the defendant accepted that the factual witnesses called by Motortrak, other than Mr and Mrs Pask, were truthful. However in so far as providing evidence relevant to the issues, counsel submitted that none of these witnesses knew what Mr Pask's arrangements were with Mr Campbell. In relation to both Mr and Mrs Pask counsel submitted that they were unreliable witnesses. Counsel submitted that ultimately the case turned on Mr Pask's explanation for the payments. Counsel for the defendant accepted the statement of law of Lord Nicholls in *Re H* as the correct approach. However counsel submitted that the starting point is that payments were made by Motortrak to Mr Campbell via ACN during the period when he was managing director of FCAA and those payments were not disclosed by Motortrak or by Mr Campbell. It is against that background that the truth of Motortrak's explanation has to be examined.

Evidence

39. In my view the principal points which arise from the evidence and which are persuasive in relation to the issue of whether or not the Licence Termination Agreement was a genuine document, are as follows:

i) Absence of an original document/contemporaneous emails: In cross-examination Mr Pask accepted that no one apart from himself and his wife, and Mr Campbell and his wife, had seen the Licence Agreement and he did not recall how and when he signed it, he did not know where the original signed copy was kept and there were no contemporaneous documents that referred to that agreement. In relation to the Licence Termination Agreement Mr Pask accepted that he did not have an original, he had only a copy. Further Mr Pask could not disclose any contemporaneous emails to which the Licence Termination Agreement was attached. Mr Pask's explanation was that this was because his Motortrak emails were migrated in March 2014 and the archive deleted.

ii) Contemporaneous correspondence: A discussion took place by email between Mr Campbell and Mr Cox in November 2009 regarding reimbursement of Motortrak's expenses. In the course of the exchange Mr Campbell asked Mr Cox:

> *"finally, whilst not raised in the past, shall I include my expenses for any work overseas aimed at securing further MB business?"*

Mr Cox responded:

> *"I am not privy to the commercial arrangement between yourself and Gary for overseas work so best you discuss that one with him direct*."

Mr Campbell then replied, copying the email to Mr Pask:

> "*again, apologies for any confusion here, but given that we need to progress the global relationship with MB, I am keen to get a clear framework and agreement in place for us going forward (i.e. not meant to be a retrospective comment) and to that end look forward to your thoughts and I shall also discuss separately with Gary*." [Emphasis added]

Neither Mr Campbell nor Mr Cox referred to the Licence Agreement in this exchange. Mr Pask said that Mr Cox was aware of the relationship and the fact that Motortrak had acquired the business back from Mr Pratt and awarded it to Mr Campbell although Mr Cox had not seen the Licence Agreement. It was put to Mr Pask in cross-examination that the reference to a need to "*get a clear framework and agreement in place … going forward*" indicated that there was no agreement in place in November 2009. Mr Pask said there was an agreement in place and Mr Campbell was alluding to the fact that the Licence

Agreement was for the APAC region. The understanding was that if Motortrak UK won any global business, Mr Campbell would be entitled to his 30% of the APAC region and vice versa. Mr Pask said there was an understanding between them in relation to the other territories.

iii) Absence of disclosure of the Licence Termination Agreement in connection with proposed sale to dealer.com: from mid-2009 Motortrak was in discussions with dealer.com. An NDA was entered into in November 2009 and by March 2010 a potential acquisition of Motortrak was being discussed. A deal was not reached because Motortrak and dealer.com did not agree a price: dealer.com offered $25 million but Mr Pask wanted $35 million. The negotiations involved financial information being provided to dealer.com. Mr Cox was not aware of the Licence Termination Agreement even though he handled the negotiations on behalf of Motortrak for the proposed sale to dealer.com. In his witness statement Mr Cox said that he recalled Mr Pask informing him that he "bought back the rights from Mr Campbell" but in cross-examination Mr Cox agreed that the only arrangement which he knew about between Mr Pask and Mr Campbell related to ownership of MPL. Mr Pask did not disclose to dealer.com the obligation to pay AU$2.5 million to Mr Campbell pursuant to the Licence Termination Agreement in the course of the negotiations. Mr Pask's evidence in cross-examination was that the obligation was not a liability; had he not paid Mr Campbell the rights would have reverted to Mr Campbell under the Licence Agreement and Mr Pask said he saw it as a "*potential obstacle*" to the sale and if it got to the point where the price had been agreed, he would have disclosed it [Day 3/43].

iv) Liability not shown in the accounts: the liability to pay Mr Campbell under the Licence Termination Agreement was not shown on the face of the accounts of Motortrak. Mr Pask's explanation was that under the Licence Termination Agreement the rights would revert back to ACN if Motortrak failed to make the payments and he was advised by his accountant, Mr Hollis, that it was not necessary to show it in the accounts of Motortrak as a liability.

v) Calculation of the amount payable: Mr Pask's evidence was that the sum of AU$2.5 million was the outcome of a negotiation with Mr Campbell which reflected the remaining term of the Licence Agreement and what Mr Campbell had given up to take on the licence arrangements. However the evidence was that Mr Campbell had not secured any contracts during the period of the Licence Agreement.

vi) Ownership of MPL: clause 6 of the Licence Termination Agreement provided for the transfer of shares in MPL to Motortrak or an entity selected by Motortrak. The shares in MPL were transferred to Mr Webb; Mr Pask said that he was told that he needed to have an Australian director for an Australian company. His evidence was that he had a "verbal arrangement" that Mr Webb would hold the shares on behalf of Motortrak. The official company records show the registered office of MPL as the address of Mrs Campbell until the company was deregistered in November 2013. Further, bank statements of MPL for March 2011 show that these were addressed to the home address of Mrs Campbell even though the transfer of shares by ACN should have taken place by 1 October 2010. Bank statements of ACN show payments of

AU$5940 were made to Mr Webb by ACN on 24 December 2010 and 31 January 2011 by ACN.

vii) Evidence of Mrs Pask: Mrs Pask's evidence was that she was asked by her husband to draft the Licence Termination Agreement. In her witness statement she set out the background leading up to that: she referred to discussions with dealer.com and how they moved to discuss a potential sale. At paragraph 17 she described how Mr Pask and Mr Campbell held meetings at the Melbourne Grand Prix and that sometimes she and Mrs Campbell were present. She then described subsequent meetings in Monaco in May when Mr Pask negotiated the price for the Licence Termination Agreement with Mr Campbell and again says that she was present for some of them at which the amount of AU$2.5 million was agreed. Mrs Pask disclosed a diary entry for May 2010 which gave Mr Campbell's email address and had the words "send doc to him". Her evidence was that she recollected being asked to send the document directly to Mr Campbell which is what she did.

Discussion

40. The Licence Agreement dated back to early 2009 and therefore it is plausible that Mr Pask did not recall how the agreement was signed or where the original was kept. In his witness statement Mr Pask explained how the hard drive on the family computer had failed and he had lost access to part of its data.

41. The evidence of Mrs Pask is that she drafted the Licence Termination Agreement, that she was present for part of the meetings in Monaco when the price was agreed with Mr Campbell and that the diary entry referred to sending the Licence Termination Agreement to Mr Campbell.

42. The evidence of Mrs Pask is key evidence in support of Motortrak's case. If Mrs Pask did not draft the Licence Termination Agreement at the relevant time, then the inference would be that she conspired with Mr Pask to concoct a plan to explain the payments and as part of that plan, she was prepared to draft, or put her name to a document, which was created purely to deflect the allegation of bribery and was also prepared to give false evidence to the court on oath not only that she drafted the document but also concerning the circumstances in which it was negotiated, by reference to the meetings which she said she attended, and her diary note. In determining the weight which I give to this evidence I take into account that she was a solicitor over many years working for a large corporation and although she is no longer working in that position, she is still on the Roll of solicitors. I have to weigh the very serious nature of the allegations that she has conspired with her husband to advance the claimant's case based on a sham document against her background, to determine whether it is "more likely than not" that she has acted in the way alleged and then given false evidence to the court on oath. Counsel for the defendant submitted in effect that her credibility had been undermined by her response in cross-examination that notwithstanding her evidence generally that she had no involvement in the business of the claimant, she was aware of Motortrak making a contribution towards ACN's costs. Counsel for the defendant submitted that Mrs Pask had sought to support the claimant's case but when pressed in particular as to whether the payments had been made to ACN rather than MPL, had withdrawn from her initial response. In my view, in cross-examination, Mrs Pask initially expressed a "belief"

that Motortrak had made such a payment towards ACN's costs but when pressed on the detail, she said she could not recall. In my view the particular exchange in cross-examination relied upon by FCAA does not lead me to conclude that her evidence generally was undermined; my impression from hearing her evidence and rereading the transcript is that she sought to answer questions so far as she was able but where she could not provide any details she accepted that she could not do so. Accordingly I do not accept that her credibility was undermined by her evidence in this regard.

43. I therefore weigh the evidence of Mrs Pask against the other factors referred to above which tend to undermine the existence of the Licence Termination Agreement:

i) the absence of an original document is not conclusive when an agreement is being concluded between parties in different countries. It is not unknown for emails to be migrated to a different system and not retained and this was a relatively small business not a large corporation.

ii) There are unexplained questions concerning the records of MPL and the payments to Mr Webb. The record-keeping may have been an oversight. There is no explanation as to why Mr Webb was not called and whilst the payments to Mr Webb by ACN are also unexplained the evidence of the two payments does not establish that they were salary payments as FCAA submitted.

iii) With regard to the provision in the Licence Termination Agreement that the shares in MPL would be transferred to Motortrak, the shares were transferred to Mr Webb and the evidence of Mr Pask was that the shares were held on behalf of Motortrak. This agreement was not in writing and this is consistent with the evidence of the way in which Mr Pask did business – he had no written agreement with Mr Pratt who ran the previous Australian company.

44. There is also a doubt as to whether the Licence Agreement itself was genuine and I refer in particular to the absence of any explanation of the email exchange between Mr Cox and Mr Campbell in November 2009 referred to above.

45. I bear in mind that the burden of proof of establishing bribery lies on the defendant. Whilst I accept that the claimant is a company owned and controlled by Mr Pask and that the financial position of both Mr and Mrs Pask may well be significantly affected by the outcome of this case, the evidence is not sufficient to persuade me that, contrary to her evidence on oath to this court, Mrs Pask fabricated the Licence Termination Agreement and lied in her evidence not only in relation to the Licence Termination Agreement but also that she fabricated her other evidence concerning the Licence Termination Agreement referred to above, namely her account of the meetings in Monaco and sending the document to Mr Campbell and although there is evidence which is consistent with the Licence Termination Agreement being a sham, on a balance of probabilities I find that the defendant has not established that it was a sham. I therefore proceed on the basis that the Licence Termination Agreement was a genuine document.

If the Licence Termination Agreement was a genuine document, were the payments to ACN made pursuant to the Licence Termination Agreement?

46. In relation to the payments which were made, it is common ground that instructions were given by Motortrak to its bank to make the payments set out in the table below, to ACN in the period from 30 June 2010 to 9 December 2013 totalling AU$2,528,716.39. (The actual amounts transferred were slightly different due to bank charges.) Further the evidence shows the following invoices issued by ACN and the amounts of such invoices during that period.

Date of invoice	Amount of invoices	Date of payment instruction	Amount of instruction (AU$)
		1.9.2010	104,127.48
		18.12.2010	209,459
		4.5.2011	239,524
1.7.11	90,097.96	22.7.11	90,097.96
1.10.11	92,451.00	16.1.12	92,451
1.1.12	238,453.11	9.3.12	238,453.11
1.4.12	98,594.90	5.6.12	98,594.90
1.7.12	96,733.95	5.9.12	96,733.95
1.10.12	156,266.94	21.11.12	156,266.94
1.1.13	267,359.25	30.4 .13	267,359.25
		15.2.13	154,040.05
		2.7.13	201,000

		30.10.13	269,647.50
		9.12.13	310,961.25

It is the claimant's case that the payments were made pursuant to the Licence Termination Agreement.

Evidence

47. In my view the principal points which arise from the evidence and which are persuasive in relation to the issue of whether or not (assuming that the Licence Termination Agreement was a genuine document) the payments were made pursuant to the Licence Termination Agreement are the following factors, as explained below: the timing of payments/the issue of cash flow; the amount of the payments; the invoices; the books and records of Motortrak; the circumstances in which the Original Agreement was signed; and the nature of the response from Motortrak to the Australian proceedings.

48. Timing of payment/the issue of cash flow: although as shown in the table, 14 separate payments were made to ACN from 30 June 2010 to 9 December 2013, the Licence Termination Agreement made no provision for payment to be made in instalments: the Licence Termination Agreement provided for payment to be made by Motortrak "within four years". In its response to the RFI made by the defendant, Motortrak said:

> *"no specific payment schedule was agreed because Mr Pask and Mr Campbell agreed orally in Monaco in or around 16 May 2010 that the claimant would only be required to pay ACN 124 as and when the claimant's cash flow would permit a payment. It was also intended that Mr Campbell would be paid from the proceeds of sale of the claimant or its business; not agreeing a payment schedule allowed this to be done as and when the sale took place."* [Emphasis added]

However in cross-examination Mr Pask's evidence was that:

> *"it was not just down to the cash flow alone. So there may have been occasions when we had more cash available and I could have made a larger payment, it was just what I chose to pay at that particular time for whatever reason."* [Emphasis added]

Mr Pask continued:

> *"there was no payment schedule, it was literally it was four years to pay and I paid it as and when it suited me to"* [Day 3/92 – 94] [Emphasis added]

49. Mrs Pask's evidence in cross-examination was that there was "*an understanding*" between Mr Pask and Mr Campbell that if the company was sold Mr Pask would pay Mr Campbell [Day 2/48/24]. However her evidence was that she was not asked to

draft the Licence Termination Agreement on that basis: the agreement was that Mr Pask had four years to pay the money and that is what Mrs Pask was asked to reflect in the agreement.

50. Looking at the amounts which were paid, Mr Pask stated in his witness statement (paragraph 51) that the first payment of AU$104,127.48 on 1 September 2010 was made from his personal account because "*Motortrak had insufficient cash flow at that time*".

In the particulars of claim (paragraph 17.6) the claimant pleaded that this amount comprised AU$30,000 owed by Mr Pask to Mr Campbell and AU$74,127.48 paid by Mr Pask on behalf Motortrak to ACN pursuant to the Licence Termination Agreement. In the claimant's response to the defendant's RFI the claimant stated that the first payment included an additional payment of AU$30,000 which was owed by Mr Pask to Mr Campbell for expenses incurred at the Monaco Grand Prix. The response also stated that Mr Pask wanted to ensure the timely transfer of the shares in MPL and the first payment was made by Mr Pask to encourage Mr Campbell to transfer the shares in MPL. At the start of giving oral evidence, Mr Pask amended paragraph 51 of his witness statement and said that the payment of AU$30,000 had been rounded and the amount was in fact AU$28,700. In cross-examination Mr Pask said he arrived at this figure of AU$28,700 by reverse engineering to arrive at a figure of AU$2.5 million and acknowledged that he had no independent recollection of £17,000. In relation to subsequent payments Mr Pask's evidence in cross-examination was that he would look at the cash balances across the various bank accounts and assess whether or not Motortrak could afford to make payment.

51. Amount of payments: Mr Pask's evidence in cross-examination was that the amount of any payment was whatever he chose to pay at that particular time and that he was just paying down the amount due "*in a comfortable way that suited the business at the time*" [Day 3/92 – 94]. Mr Pask's evidence was that he would convert a sterling amount into Australian dollars and then pay that sum, even though it was not a round amount, so that he knew "*exactly where I was in pounds sterling*".

52. Invoices: there is evidence in the form of invoices submitted by ACN in the period after the Licence Termination Agreement from 1 July 2011 to 1 January 2013 (invoices beyond this date were not before the court). The wording of the invoices submitted by ACN continued to be the same as the wording used in the invoices issued at the time the Consultancy Agreement was in effect even though by this time, according to the claimant, the licence (and the consultancy arrangement) had been terminated. The invoices referred, amongst other things, to "*mediation services provided in contractual negotiations"* and "*facilitation services to potential multinational clientele*". In his witness statement Mr Pask said that his recollection was that he received the invoices only after the payments had been made by him**.** Mr Pask's evidence in cross-examination was that he received the invoices but could not remember exactly when. He said that he did not pay attention to them merely passing them to Mr Hollis. He said:

> *"I do not know why he was sending them, maybe it suited his purposes"*

When he was asked why he did not challenge Mr Campbell about the invoices, Mr Pask said that he "*probably*" did speak to him but it was a matter for Mr Campbell. Mr Pask said:

> *"if I do not know what an invoice is for, then I would query it… These invoices meant nothing to me, they had no meaning."*

53. Books and records: there was a letter dated 7 December 2015 from Mr Hollis, to Mr Pask written for the purposes of the Australian proceedings. That letter "confirmed" that :

> *"the payments made by Motortrak to ACN between 24 December 2010 and 24 December 2013 inclusive are recorded in the Motortrak books and accounts as being for the buyback of rights originally granted to ACN in 2009 and treated as purchases in those books and accounts."* [Emphasis added]

However Mr Pask said that the claimant did not prepare management accounts in the period 2010 – 2013 or profit and loss statements or cash flow statements. Further Mr Pask said that the ACN payments were not in the Sage records (the bookkeeping system used by Motortrak) because he did not pass them to the financial controller.

> *"I was paying off the 2.5 million liability so I would not have processed [the invoices] through the business because they would have been totally recorded in a false way."*

Mr Pask said that information about the payments to ACN was not given to the financial controller; Mr Pask said that he was in control of the business and would expend various amounts of money which were attributed to his director's loan account. At the end of the year he would pass his bank statements and credit card statements to Mr Hollis. As a result he accepted that the invoices did not record the buyback rights and the bank statements only showed payments to ACN. Mr Pask said that Mr Hollis was saying in his letter that the payments were recorded in the accounts. Mr Pask said that Mr Hollis knew the payments were in respect of the licence buyback because Mr Pask had told him.

54. Circumstances in which the Original Agreement was signed: the evidence is that the Original Agreement was signed very quickly, in a matter of days in December 2010. Counsel for Motortrak relies on the evidence of Mr Kett that there was pressure to turn the APAC business around and that Mr Kett did not intervene and "went along with it".

55. The evidence of Mr Kett in his witness statement is that when he interviewed Mr Campbell the interview was focused on the actions which the candidates believed would help drive sales growth and improved awareness of FCAA's brands. He said that (paragraphs 26 and 27):

> *"…we focused on marketing and the role of digital marketing. We also discussed tracking mechanisms that could assist in assessing the effectiveness of the marketing dollar invested."*

> *"At the interview Mr Campbell spoke about how digital marketing would improve the Australian business and how digital marketing and lead management might be developed. I formed the view that Mr Campbell would be able to manage the transition of the business."*

In cross-examination Mr Kett was taken to an email sent to him by Mr Campbell in November 2010 in which Mr Campbell stated:

> *"we all agree that our digital marketing is woeful… Sam has a clear plan to take back control in this area through an integrated website programme rolled out from us and down through the network, with the aim of going live by March next year."*

Mr Kett's evidence was that:

> *"I see this as a re-confirmation of the plans and the weaknesses that we identified through not only the interview process but a review of OP11, which is the plan for that following year in 2011. So to me this is a reinforcement of the priorities of that organisation, and now a timeframe under which those changes would be instituted."*

It was put to Mr Kett that the strategy at that time was to invest heavily in marketing, particularly digital marketing in order to achieve an aggressive growth strategy. Mr Kett's evidence was that

> *"I think there was a combination of things that Clyde had implemented. Many of them were repositioning of certain pricing for products, a strengthening of the network's acceptance of the brand and their pricing, and marketing was most definitely a part of that within the confines of OP11's fixed cost structure, yes."*

Mr Kett agreed that the aim of all those activities was aggressive growth.

56. Counsel for FCAA criticised the procurement process as inadequate and superficial. In an email dated 24 December 2010 to Mr Harding, FCAA's finance director, Mr Bonthorne wrote:

> *"As requested, please find attached a few points to assist with your assurance that the Motortrak contract can be signed based on a thorough evaluation process including other parties...."*
>
> *In short the process went as follows:*
>
> *It was brought to numerous upper management's attention that we are losing customers through our brand website linking through to multi-franchise sites….*

> *It was decided that a solution be implemented to provide a united online dealer "frontage"*
>
> …
>
> *Multiple parties were met with and the situation discussed and first pass costings provided*
>
> *These parties included Motortrak, Manheim Fowles, Carsales/Datamotive and an additional software provider whose name escapes me*
>
> *Based on Sam Tabart's system, James Watkins prepared an evaluation matrix with weightings across several criteria ranging from price to timing, experience and service level.…*
>
> *Each of us independently found Motortrak to be a standout leader…"* [Emphasis added]

57. Mr Harding followed up that exchange with an email on 4 January 2011 to Mr Watkins asking him to provide him with "*whatever you have in relation to the selection process*". He said:

> *"the issue was that there was a rush to get the process started, but it could not start until the contract was signed by me. I was not comfortable signing the contract as I had not seen the due diligence you went through."*

Mr Watkins responded to Mr Harding sending him quotes from Manheim Fowles and Sitecore and said that in relation to Carsales, the costs were based on "*verbal discussions and the long-standing relationship we have with them for our ELM system*".

58. Manheim Fowles provided a one page email headed "*Manheim Fowles ballpark quote*". The email dated 13 December 2010 to Mr Bonthorne read, so far as material:

> *"Thanks for the opportunity to talk to you today about your initiative.*
>
> *The following is a ballpark quote for each element of your initiative as discussed.…*
>
> *I hope this helps you with your discussions internally…"* [9/2309] [Emphasis added]

59. Mr Watkins produced an "evaluation matrix". This stated that it was the result of "meetings and internal investigations with Motortrak, Manheim Fowles and Carsales." This showed Manheim Fowles as significantly more expensive than Motortrak, with Manheim Fowles charging AU$670,000 per annum (over a three-year period) as against Motortrak charging approximately AU$491,000. Carsales was shown as cheaper than Motortrak but overall was ranked below Motortrak on the factors of "trust" and "ability to deliver". The commentary in the evaluation matrix

stated that Carsales had a "*proven history of mismanagement*", was "*slow to make changes*" and that FCAA was proven to be "*low priority*" due to Carsales' interest in all manufacturers.

60. In an email sent on 7 December 2010 from Mr Webb to Mr McClure, Mr Webb attaches a proposal document from Motortrak which he said "*constitutes the overall scope for DWS and locator*". He refers to having been on the phone and email with Mr Bloomfield of Motortrak over the past week. Mr Webb says that it is "*not a done deal yet as I need firm pricing to go back to the client with*". However he notes that FCAA require pricing to be agreed and contracts signed by 14th December. Attached to his email, is an eight-page detailed proposal. This version appears to have been developed and on 13 December 2010 Mr Webb sent to Mr Tabart a longer version of the proposal.

61. Motortrak response to freezing order: A freezing order application was made against Mr Campbell in Australia in May 2015 and reference was made in that application, to the Motortrak contracts. A statement was prepared by Motortrak for Motortrak clients with the assistance of Australian lawyers. To prepare that statement a background document was produced by Mrs Pask for the Australian lawyers and this referred to ACN agreeing to relinquish its rights under the Licence Agreement. However the document which was ultimately sent to clients stated:

> "*Mr Campbell does not hold and never has held any interest in Motortrak. His only role in connection with Motortrak's business was under a consultancy agreement which ended in early 2010.*" [Emphasis added]

Discussion

62. Counsel for the claimant submitted that it is nonsensical to conclude that the Licence Termination Agreement is genuine but that the payments were not made under it. It is not the case advanced by FCAA but I note that the possibility remains that the Licence Termination Agreement was a genuine document but payment was contingent upon a sale of Motortrak which in the event did not occur: as referred to above, Mrs Pask's evidence was that this was the "understanding" between Mr Campbell and Mr Pask.

63. The initial payment was made from Mr Pask's personal account so this would not appear to be consistent with the claimant's case as advanced in the response to the RFI that the timing of payments was dependent upon Motortrak's cash flow. Counsel for the claimant submitted that in relation to cash flow, the understanding of Mr Pask and Mr Campbell was not that the payment was forbidden, "unless" Motortrak's cash flow allowed it and there was a good reason for such payment. In my view there was a positive shift by the claimant from the pleaded case that payments would be in effect dictated by cash flow to a position where in cross examination Mr Pask said he chose the amount without reference to cash flow, provided the company could actually make the payment.

64. In relation to the invoices submitted by ACN, the claimant accepts that the invoices are not consistent with its case regarding the Licence Termination Agreement. Counsel for the claimant however submitted that Mr Pask provided his explanation

that he did not rely on the invoices to make the payments and that the invoices must have been produced after receipt of the relevant payment by Mr Campbell for his own reasons.

65. Mr Hollis was not called to give evidence. Mr Hollis has apparently retired but Mr Pask made reference to having spoken to Mr Hollis in the course of the trial and thus there appears to be no good reason why Mr Hollis should not have been called as a witness to support the claimant's case. His absence is particularly striking given Mr Pask's evidence that Mr Hollis was aware of the Licence Agreement and that it was he who alerted Mr Pask to the fact that it was a potential obstacle to the sale, knew what the payments to ACN were for and that Motortrak was buying the rights back, and he advised Mr Pask on the question of whether the liability should be shown in the accounts. Mr Hollis could have provided independent evidence from a professional person.

66. In the absence of Mr Hollis and Mr Campbell, both of whom might have provided support for the claimant's case that the payments to ACN were made pursuant to the Licence Termination Agreement, Motortrak's case in relation to the nature of the payments largely depends on the court accepting the account of Mr Pask. In assessing the evidence of Mr Pask and the weight to be afforded to such evidence, I take into account the following matters:

i) The way in which Mr Pask's evidence appears to have changed to meet the arguments advanced by the defendant: in particular, as referred to above, his evidence concerning the relationship between the timing of the invoices and the payments, his evidence concerning the amount of expenses comprised in the first payment to explain why the amount to be transferred did not amount to AU$2.5 million precisely, and his evidence on the extent to which payments were determined by the cash flow position of Motortrak. This is not a case where it can be said a witness is mistaken because memory is faulty. The claimant specifically pleaded that there was an oral agreement reached in Monaco around 16 May 2010 that the claimant would only be required to pay ACN as when the claimant's cash flow would permit. This was not a provision which was included in the Licence Termination Agreement but the claimant pleaded that it had been orally agreed. Yet in cross examination Mr Pask sought to change the emphasis so that the agreement was only that the claimant would not be required to pay if it could not afford it. Further as to the timing of such agreement, in his witness statement Mr Pask said:

> *"Eventually we agreed that Motortrak would pay the sum of 2.5 million over a four year period as and when Motortrak's cash flow would allow payment."*

However when it was put to Mr Pask in cross examination that if that was clearly part of the agreement it would have been included in the document Mr Pask said it formed part of a "subsequent discussion".

ii) Mr Pask's failure to give plausible explanations to the court in the face of clear evidence: Mr Pask was asked about two invoices which Motortrak submitted in relation to cars purchased by Motortrak at Mr Campbell's request which were provided to certain celebrities pursuant to the defendant's Ambassador

programme. The description on the invoices stated "SWEH Programme update" and "HKSK Programme update" respectively. Mr Pask's evidence in cross-examination was that SWEH referred to the cricketer Shane Warne and Elizabeth Hurley the actress. He said that it should have said "Ambassador programme update" rather than programme update but it was an "update" to the Ambassador programme that FCAA were running in Australia and Motortrak were asked to assist them in obtaining some vehicles. Mr Pask's evidence was that this was wording he was asked to put on to the invoices and he denied that it was an attempt to disguise the invoices as being for services supplied by Motortrak [Day 4/99/].

Mr Pask was also asked about an email sent from Ms Johns to Mr Campbell in February 2013 concerning a replacement car for Elizabeth Hurley whose car had been stolen in the UK. Mr Campbell stated in the email:

> *"I can get Gary to buy one and invoice us for IT."*
> [Emphasis added]

Mr Pask in cross-examination stated that the email should be read as though the capitalised term was merely the word "it". This explanation to the court of the email from Mr Campbell flew in the face of the obvious interpretation and was in my view patently false.

Mr Pask said that Mr Campbell called him and asked him to assist to provide a car and that is what he did. Counsel for the claimant submitted that Motortrak did not stand to gain anything from the arrangement and was simply assisting a client. However in my view, the invoices suggest that at best Mr Pask saw no difficulty in submitting invoices which did not reflect the reality of what was happening.

iii) The evidence referred to above that Motortrak clients were apparently not told in May 2015 of any connection or any ongoing liabilities by virtue of the termination of the Licence Termination Agreement. Mrs Pask's explanation in cross-examination was that it had been stated in the press reports that Mr Campbell was a director of Motortrak in the UK or that he had a shareholding in the claimant and that is what that statement was designed to address [Day 2/105/23]. However in my view it is evidence that Motortrak was prepared to conceal its relationship with Mr Campbell from its own clients and is some evidence that Mr Pask was willing to advance publicly statements which were untrue in order to safeguard his business.

iv) Mr Pask's failure to give a satisfactory explanation of events: Mr Pask is a successful businessman but provided no satisfactory explanation of why the figure of AU$2.5 million was arrived at as the value of the termination of the Licence Agreement, why the four-year period was chosen, why he made the payments to Mr Campbell when he did, or how the relationship with Mr Campbell worked in relation to the APAC region. He has built a very successful business from which I infer he has a strong grasp of the economics of his business and yet he provided no credible explanation to the court in relation to these matters.

> Taking into account all these matters Mr Pask has in my view damaged his overall credibility as a witness and this affects the weight which I give to his evidence.

67. It was submitted for the claimant that it was "inherently implausible" that Mr Pask would jeopardise his business by bribing Mr Campbell to procure one contract with one company in one geographical market. There was evidence that Mr Campbell received information from someone working at Mercedes-Benz giving details of the other tenders. Mr Pask was asked in cross-examination whether this was information which was shared with all tenderers. Mr Pask responded:

> *"I had no idea… Mr Campbell had worked there, he had his own relationships there, so clearly he was leveraging those to gain whatever competitive advantage that he could."*

68. Counsel for the claimant submitted that what happened with the Mercedes-Benz tender is not relevant to the question whether Motortrak paid a bribe to ACN. In my view it is some evidence that Mr Pask would seek to use contacts within another business where they would benefit the business and he saw nothing wrong in doing so. As counsel for the claimant accepted in closing submissions, dishonesty is not an element which needs to be established in order for the allegation of bribery to succeed.

69. Further in response to the submission that it was implausible that Mr Pask would jeopardise his business to procure one contract, it should be noted that the anticipated value of the Motortrak contract over the period to 31 December 2017 was some AU$24 million. Counsel for the claimant focused in his submissions on the amount paid by FCAA in the period to December 2013 which by the time Mr Campbell left, amounted to AU$9.4 million of which ACN had received more than one third of that amount. Counsel for Motortrak submitted that this was an "*extraordinarily high amount for a bribe*". However given the accepted evidence that the revenue to Motortrak from the Agreement was largely profit and the significant value of the contract to Motortrak, it seems to me that no support can be gained for Motortrak's case by reference to the percentage amounts paid to Mr Campbell.

70. Counsel for Motortrak further submitted that there was "nothing like the secrecy that one would normally associate with a bribe": Mr Campbell gave FCAA a "*broad description*" of his deal with Motortrak. However the evidence does not support a conclusion that Mr Campbell was frank with FCAA. When Mr Kett, in an email of 17 December 2010, raised the obvious conflict of interest of using Motortrak as his "former company", Mr Campbell responded that he was "*completely removed from Motortrak*". Further Mr Campbell said in the same email:

> *"I also told them that if they wanted to continue talking to Motortrak then they would have to exclude Motortrak Australia (which is the franchised operation I had control over) and go with Motortrak UK which has completely different and separate ownership."* [Emphasis added]

Mr Manley's evidence in cross examination, when asked whether he thought that Mr Campbell had some sort of ownership interest was:

> *"My recollection of it was that he was open that he had an ownership interest and it was -- he in fact said that he wanted to return to an OEM and that it was ending or ended. Specifically of those two I couldn't tell you."*

However Mr Manley was not challenged on his evidence in his witness statement that there was no mention of Mr Campbell selling his interest over a four-year period. Further Mr Manley interviewed Mr Campbell but Mr Campbell in his CV (sent to Mr Manley by Mr Kett on 19 August 2010) described himself as "*Managing Director, Motortrak Pty Ltd*" and gave the dates as "*Jan 2008 – now"*. There was no reference to any ongoing obligations owed by Motortrak to Mr Campbell arising out of the termination of his role.

71. The evidence of Mrs Pask does not assist me in respect of the nature of the payments: apart from her evidence concerning payments to ACN in respect of set up expenses, her evidence was that she had not seen the invoices and had no involvement in the day-to-day business.

72. I have to weigh against the evidence therefore of Mr Pask and having regard to the matters referred to above, the invoices which in my view are strong evidence in the circumstances that the payments were not made pursuant to the Licence Termination Agreement. I reach that conclusion for the following reasons:

i) the description on the invoices is inconsistent with the payments being under the Licence Termination Agreement and even assuming that the Licence Termination Agreement was a genuine document, suggests that the true nature of the invoices was for some reason being disguised. Whilst this could be attributable to Mr Campbell, there is no evidence to support this and even if the wording can be attributed to Mr Campbell, Mr Pask did not see fit to challenge the wording which on his case was contrary to the nature of the payments. Mr Pask's evidence that he did not pay attention to the invoices lacks credibility: if he had concluded the invoices had no meaning, it is difficult to understand why he would then have passed the invoices to his accountant.

ii) The timing of the payments leads to an inference that they were made in response to the invoices which were submitted. Again this is an instance where Mr Pask failed to provide a satisfactory explanation to the court. It is an unlikely coincidence in my view that it occurred to Mr Pask to make a payment under the Licence Termination Agreement in each case within a relatively short period of the invoice being submitted, as is demonstrated by the table set out above. Given the apparent link between the invoices and the payments, the fact that the payments themselves were not regular is in my view not persuasive.

iii) Further Mr Pask's instruction to Motortrak's bank to make payment in the amount of the invoice suggests that they were linked yet Mr Pask's evidence was that he determined the amount according to what he felt was appropriate to pay. I do not accept his explanation which seems to me to be implausible given that the amount paid was not a round number but an amount in dollars and cents which coincided with the invoice amount. Even if Mr Pask had

determined the amount prior to seeing the invoice, there is no explanation why Mr Pask would choose to discharge a fixed amount in Australian dollars through payments which were not round amounts.

73. In addition to the invoices, I also take into account the circumstances in which the Original Agreement was entered into. I accept the commercial backdrop at the relevant time, in particular the growth strategy referred to by Mr Kett in his evidence and the resultant pressure on Mr Campbell to deliver results, but given the failure by Mr Campbell not only to disclose his ongoing link with Motortrak in his emails with Mr Kett but his positive assertion that he was "*completely removed*" and that his involvement was with Motortrak Australia and not with Motortrak UK, this is evidence from which the court can infer that Mr Campbell may have failed to disclose the true position due to payments received from Motortrak. Further the description of the selection process in Mr Bonthorne's email to Mr Harding set out above, that "*multiple parties were met with*" was clearly not borne out by the evidence. No quotation appears to have been obtained from Carsales prior to the "evaluation matrix" being prepared and Mr Watkins stated in his email that it was based on "verbal discussions" without specifying anything further. The email from Manheim Fowles appears to have been obtained at the very last minute and was only a "*ballpark*" quote and not a response to a request for any formal or considered quote. Whilst therefore Manheim Fowles appear on the face of that email to be more expensive, it is impossible to judge whether in fact this was a like-for-like comparison. By contrast Motortrak was given time to prepare a detailed proposal. In the circumstances the evidence suggests that little real attention was given to the possibility of appointing an alternative provider and the only real provider under consideration was Motortrak. Whilst not conclusive that the payments to Mr Campbell were bribes, it is evidence in support of FCAA's case.

Conclusion

74. As discussed above Mr Pask's evidence in cross-examination suggested that he was willing to change his account to try and fit the case which Motortrak has advanced and this together with the other matters referred to above, calls into question the reliability of his evidence and the weight which I give to his evidence. For the reasons discussed above, the payments made to ACN in the period 30 June 2010 to 9 December 2013 are in my view inconsistent with the explanation advanced by Mr Pask and these explanations have themselves changed in the course of the proceedings. The invoices suggest that the payments have been made for a purpose other than pursuant to the Licence Termination Agreement and taken together with the positive assertions by Mr Campbell that he did not retain links with Motortrak and the lack of real investigation of alternative providers, lead me to conclude that the payments were not made pursuant to the Licence Termination Agreement. Whilst the onus is on the defendant to establish bribery, having rejected the claimant's explanation for the payments, the only conclusion open to the court on the evidence and on the balance of probabilities is that they were bribes.

Did FCAA affirm the Agreement?

75. On the basis that the court has found that the payments were bribes, FCAA seeks a declaration that it was entitled to rescind the Agreement. Motortrak's case is that

notwithstanding the court's finding that the payments were bribes, FCAA lost its right of rescission as it affirmed the Agreement.

76. FCAA accepted in closing submissions, in the light of the evidence of Mr Dougherty, that by October 2015, FCAA was aware of the payments made by Motortrak to ACN, believed them to be bribes and thought that it was able to terminate the Agreement as a result of those payments. However counsel for the defendant submitted that FCAA had good reason to wait until June 2016 before taking steps to terminate the Agreement or to inform Motortrak of its decision to do so. Motortrak was providing dealer websites to FCAA's entire dealer network and before FCAA could terminate the Agreement it had to have alternative services in place. Selecting an alternative provider took several months. Termination of the Agreement without replacement services being in place would have caused significant disruption to the business of FCAA. Accordingly counsel for the defendant submitted that FCAA's delay in seeking to terminate the Agreement was reasonable and it was difficult to see that FCAA had any choice but to act as it did.

77. It is common ground that a right to rescission is lost if a contract is affirmed and affirmation is a question of fact. Counsel referred me to an extract from *Snell's Equity* (33rd edition) at 15 – 013:

> "*where a right of rescission exists, it will be lost if the person entitled to rescind elects to waive that right and affirm the contract after the material facts conferring the right have come to their notice… Examples are where, with full knowledge of a fraud upon him, a person nevertheless takes a benefit under a contract or claims damages for its breach. Both the facts which gave rise to the right of rescission and the existence of that right must be fully known to the entitled party before they can be considered to have waived the right. Affirmation requires express words or unequivocal conduct, but an intention to affirm is not required.*" [Emphasis added]

78. The defendant relied on Moore Bick J in *Yong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604 at 608 that:

> *"the court… should not be willing to hold that the contract has been affirmed without very clear evidence that the injured party has indeed chosen to go on with the contract notwithstanding the other party's repudiation"*

Counsel for the defendant submitted that given that the right to rescission could not realistically be exercised until the replacement service provision was in place, neither passage of time nor FCAA's continued payments for services should be treated as an unequivocal act amounting to affirmation.

79. The evidence of Mr Dougherty was that by January 2016 there was no prospect that Motortrak was going to be used for further services. A new contract was entered into with Shift Digital on 26 February 2016 so there was no opportunity for Motortrak to provide further services by this point. However Mr Dougherty accepted in cross-examination that during the course of 2016 Motortrak was being encouraged in the

normal course of a business to continue to provide the full range of services that they had been providing. Although Mr Laymac had a meeting with Motortrak in April 2016, Mr Dougherty accepted in cross-examination that he had no intention of continuing with Motortrak and as far as he was aware, no one else in a senior position had an intention of continuing with Motortrak. In his witness statement, Mr White (paragraph 58) described the meeting with Motortrak at Auburn Hills. Mr White's evidence is that Mr Wilton said that FCAA wanted to get out of the contract with Motortrak and for the contract to be replaced by the end of the year. Mr White states that this was a complete shock to him:

> *"after the immensely positive feedback we had received from Mr Laymac and our discussions about FCAA replicating Motortrak services in other markets."*

80. In cross-examination Mr Dougherty was taken to a document entitled "Dealer Digital Landscape. Vision and roadmap" dated 24 June 2016. In that document FCAA stated:

> *"FCAA is employing a business as usual approach with Motortrak until 30 June 2016.*
>
> *Post that date, Shift Digital will be the new provider for all dealer digital solutions, starting with dealer websites as of July 1."* [Emphasis added]

Mr Dougherty accepted that this document accurately reflected what was going on in FCAA at the time.

81. In the light of the evidence, it is clear that the acts of FCAA amounted to affirmation of the contract. There is no legal basis advanced for the proposition that the commercial reasons which lay behind its decision to act in the way that it did, namely to ensure there was no disruption to the business, do not prevent the acts amounting to affirmation.

82. Accordingly I find that FCAA affirmed the Agreement. By its letter of 30 June 2016, FCAA through its lawyers informed Motortrak that it was required to cease providing the services and Motortrak accepted that by letter of the same date from its lawyers. Accordingly on that date FCAA was in repudiatory breach of the Agreement.

Remedies for FCAA's repudiatory breach

83. Having found that FCAA was in repudiatory breach of the Agreement in June 2016, Motortrak claims

    i) payment for its outstanding invoices for the period July to September 2016, totalling AUS $2,066,400, alternatively damages in the said sum for breach of FCAA's obligation to pay those invoices; and

    ii) damages for loss of profits on the remainder to the term of the Agreement.

84. It is FCAA's case, however, that the invoices did not arise for payment and that Motortrak's claim for loss of profits is excluded by reason of clause 9.5.2 of the Original Agreement.

Motortrak's claim for unpaid invoices

85. On 20 May 2016 Motortrak issued four invoices for the period July to September 2016. Motortrak claims payment for these outstanding invoices.

86. It is common ground that the invoices were not paid but it is the defendant's case that the unpaid invoices did not arise for payment as they related to services to be delivered in the period July to September 2016 and Motortrak terminated the Agreement on 30 June 2016.

87. Schedule 2 of the Original Agreement stated:

> *"all Core and Subscription Charges are payable quarterly in advance."*

Clause 7.1 of the Original Agreement provided that FCAA:

> *"shall pay Motortrak's invoices provided for the Charges set out in Schedule 2 for the Services within 30 days of the date of invoice."*

88. It is the claimant's case that the invoices were therefore payable by 19 June 2016 and the liability to pay arose prior to termination of the Agreement.

89. It is the defendant's case that either the entitlement to raise an invoice did not arise until 30 days prior to the start of the quarter to which the invoice charges relate, or the obligation to pay does not arise until the start of the quarter to which the charges relate. Counsel for FCAA submitted that otherwise, Motortrak would be able to issue invoices however far in advance it liked and require them to be paid, which counsel submitted, would be "commercially absurd".

90. Counsel for the defendant refers the court to 3 authorities:

i) in *London & Westminster Loan Co and London & North Western Railway* [1893] 2 QB 49 the court considered the phrase "*quarterly in advance*". In that case rent was payable quarterly on the usual quarter days and Vaughan Williams J said:

> *"it seems to me that the intention of the parties was that the rent should always be due at the commencement of each quarter; but that it should not be treated as in arrear, nor the landlords entitled to enforce their remedies for non-payment until after demand for payment had first been made."*[Emphasis added]

ii) In *Tonnelier v Smith* (1897) 2 Com. Cas. 258 a charterparty required the charterers to pay hire monthly in advance and the Court of Appeal held that the charterers were liable to pay for a month's hire at the beginning of each month even if it was clear the ship would be re-delivered before the month expired.

iii) *Tonnelier v Smith* was approved by the House of Lords in *French Marine v Compagnie Napolitaine* [1921] 2 AC 494. In that case a charterparty hire charge was payable monthly in advance. Viscount Finlay treated the hire charge as payable in full on 10th of each month.

The court in the two shipping cases assumed that hire was payable at the beginning of the period but did not have to address the issue of whether payments in advance can be claimed prior to the start of the period. The authority of *London & Westminster Loan Co* turned on the construction of the particular agreement. It did however draw a distinction between the point at which payment became due (the commencement of the quarter) and the point at which the rent became payable (after demand).

91. Counsel for the claimant submitted that there is nothing in the Original Agreement which would support either construction advanced by FCAA and FCAA has not advanced anything by way of relevant factual matrix which would support its construction. Mr Pask did send an email on 8 June 2016 in which he told Mr Dougherty that the invoices were only payable on 1 July 2016, however counsel for the claimant submits that Mr Pask's subjective interpretation is irrelevant to the interpretation of the contract, a submission which I accept.

92. Clause 7 on its face imposes no limit on the timing of the invoices. However the construction of a contract is not just a question of the literal interpretation: *Wood v Capita Insurance Services* [2017] UKSC 24 at [10]:

> *"the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on the parsing of the wording of particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.…"*

93. The court must therefore have regard to the context and consider the contract as a whole including the relevant sentence in schedule 2 providing that the charges are payable quarterly in advance. Whilst clause 7.1 is on its face without temporal limit, the relevant sentence in schedule 2 could be interpreted to mean, as the defendant contends, that the invoice cannot be submitted more than 30 days prior to the quarter to which charges relate and that payment is not due prior to the start of the quarter. There is no factual matrix to which the court has been referred to assist in the construction of the relevant clauses. However in deciding which construction is correct, the court checks the alternative interpretations against the provisions of the contract and investigates its commercial consequences: *Wood v Capita* at [12]. On a literal construction of clause 7.1, Motortrak could claim payment at any time although the claimant contends that the clause should be interpreted such that Motortrak could only claim payment up to 3 months before the start of the quarter in which the services are to be delivered. There is no basis on the face of the clause for the limitation which is advanced by counsel for Motortrak. It is unlikely in my view that as a commercial matter this is what the parties intended, given that FCAA would be

paying (even on Motortrak's limited construction) for a service up to 3 months before it began to receive it. It seems to me that a distinction is to be drawn between the obligation becoming due and the obligation becoming payable. The construction which is more consistent with business common sense (and consistent with the authorities to which I referred above) is that payment became due at the start of the quarter and the obligation is payable within 30 days of the invoice being rendered, but that the obligation is not payable earlier than the due date. In other words, notwithstanding the broad language of clause 7.1, an invoice cannot be rendered which would have the effect of making the debt payable prior to its due date, which in accordance with the relevant sentence in schedule 2, I find to be the first day of the relevant quarter.

94. Accordingly for the reasons set out above, the payments claimed under the four invoices for the quarter July to September 2016, only became due on 1 July 2016 and given the termination of the Agreement on 30 June 2016, there is no obligation on FCAA to pay those invoices.

Motortrak's claim for loss of profits: exclusion clause

95. Motortrak claims damages for loss of profits for the outstanding term of the Agreement. It is the defendant's case that the claim is excluded by reason of clause 9.5.2 of the Original Agreement which excludes liability for loss of profit.

96. Clause 9.5 provides:

> *"neither party shall be liable to the other for:*
>
> *9.5.1 any indirect or consequential loss or damage at all; or*
>
> *9.5.2 any loss of business, capital, profit, anticipated saving, reputation or goodwill, arising out of or in connection with the Agreement or its subject matter."*

97. It is the claimant's case that clause 9.5.2 should be interpreted so that the exclusion for loss of profit only applies where the loss is suffered "in connection with the performance" of the Agreement and not profits lost where the other party refuses to perform the Agreement. Whilst a claim for loss of revenue is not excluded by clause 9.5.2, in the present case Motortrak's claim consists almost entirely of loss of profits due to the nature of the way the claimant ran its business: Mr Cox in his witness statement (paragraph 87 – 88) gave evidence that the way the Motortrak business operated was that there was an initial investment and thereafter the business would achieve profitability as it signed up more clients.

Submissions

98. Counsel for Motortrak submitted that clause 9.5.2 does not have the effect of excluding a claim for revenue (or resulting profits) lost by the non performance of a payment obligation in the contract. Counsel relied in particular, on the line of authority from *Suisse Atlantique Societe d'Armement* [1967] 1 AC 361 at 482 that:

> *"the parties cannot in a contract have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent."*

99. Counsel for Motortrak submitted that the construction contended for by the defendant would render the agreement meaningless from Motortrak's perspective. The effect of the construction adopted by FCAA is that Motortrak would be deprived of its real loss. Counsel for Motortrak therefore submitted that the court should read into the clause a limitation that the exclusion only extended to a claim for loss of profits arising out of the performance of the agreement and not a claim for loss of profits arising out of a refusal to perform the agreement.

100. Counsel for FCAA submitted that the language of clause 9.5 is clear. An exclusion clause should be construed in the same way as any other term: *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154. Further unlike clauses 9.2, 9.3 and 9.4, which operate for the benefit of Motortrak alone, clause 9.5 is for the benefit of both parties. Counsel submitted that FCAA could not suffer loss of profit in connection with performance of its obligations and therefore would be unable to rely on the clause should Motortrak's interpretation be accepted.

101. Counsel for the defendant further submitted that the obligation on FCAA to make payment was an independent obligation and therefore it was open to Motortrak to have refused to accept FCAA's repudiation. Counsel for Motortrak submitted that it was not open to Motortrak to have elected to affirm the contract because it could not have performed the contract without the cooperation of FCAA.

Discussion

102. Dealing first with the submission that the obligation on FCAA to make payment was an independent obligation and therefore it was open to Motortrak to have refused to accept FCAA's repudiation.

103. Motortrak rely on the judgment of Popplewell J in *Barclays Bank plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm) where he set out the principles in relation to the general rule that if one party to a contract repudiates it by refusing to carry out its obligations, the innocent party has a right of election to accept the repudiation or to keep the contract in effect.

> *"[104] White & Carter confirmed the general rule that, if one party to a contract repudiates it by refusing to carry out its obligations, the innocent party has a right of election to accept the repudiation and sue for damages or to keep the contract in effect….*
>
> *[105] there are two limitations to the principle. The first limitation is that in many cases the party in breach can compel the innocent party to restrict his claim to damages by refusing cooperation: see White & Carter at page 428 and Geys at [114] – [116]. This is because, if the contract is kept alive, it is kept alive for both parties and so the innocent party must also*

> *perform its contractual obligations if it is to earn the right to claim the price that is due to be paid by the party in breach. If the innocent party cannot earn the right to claim the price due to it for its performance without the cooperation of the party in breach, it will not be able to pursue a debt claim and will be limited to a claim in damages. The limitation does not apply in this case because Barclays payment obligations are triggered only, if positive steps are taken by Unicredit to claim payment upon the occurrence of a Credit Event; if Unicredit do nothing, their own payment obligation to Barclays will simply accrue on a quarterly basis but Barclays will not itself be obliged to make any payments.…"* [Emphasis added]

104. Counsel for FCAA submitted that Motortrak could have affirmed the Agreement, continued to offer to provide services and continued to raise quarterly invoices for the remainder of the term. Had Motortrak chosen this course, FCAA would have been under an ongoing liability to pay quarterly invoices as and when they fell due for the duration of the term. Counsel submitted that even if Motortrak needed FCAA's cooperation in some aspects of the performance of the services, that is no bar to affirmation as the exception to the general rule in *White & Carter* is a limited one as explained by Nicholas Strauss QC in *Ministry of Sound (Ireland) Ltd v World Online* [2003] EWHC 2178 (CH). Counsel submitted that as a matter of construction of the Agreement, Motortrak's entitlement to payment was an independent right which arose each quarter in advance of the provision of services.

105. In my view this is not a case where the right to receive payment can be said to be independent of the obligation to deliver the services. It is submitted for FCAA that following the reasoning of Nicholas Strauss QC in Ministry of Sound, there was nothing which Motortrak needed to do in order to claim payment other than submit an invoice and therefore the obligation on FCAA to make payment was independent of the obligation to deliver the services.

106. Nicholas Strauss QC in *Ministry of Sound* refers to a dictum of Lord Reid in which he states that *"in most cases the circumstances are such that an innocent party is unable to complete the contract and earn the contract price without the assent or cooperation of the other party*". Relying on this dictum Nicholas Strauss QC then seeks (at paragraph 41 of the judgment) to limit the principle to cases in which the contract price can be "earned" without the assent or cooperation of the other party. To the extent that Nicholas Strauss QC in the *Ministry of Sound* seeks to limit the scope of the exception identified by Lord Reid in his judgment in *White & Carter*, it seems to me there is no basis for such a limitation particularly having regard to the context of that particular sentence in the judgment of Lord Reid which is addressing a different point. It seems to me that the general principle is as stated earlier in the judgment of Lord Reid:

> *"of course, if it be necessary for the defender to do or accept anything before the contract could be completed by the pursuers, the pursuers could not and the court would not have compelled the defender to act, the contract would not been completed and the pursuers only remedy would have been damages. But the peculiarity in that case, as in the present*

> *case, was that the pursuers could completely fulfil the contract without any cooperation of the defender."* [Emphasis added]

107. In my view therefore the principle is that the obligation will only be independent where the contract can be performed without any cooperation on the part of the other party. Even if I am wrong on the scope of the legal principle, in my view, the facts of this case can be distinguished from both the *Unicredit* case and the *Ministry of Sound:* the *Unicredit* case related to a financial instrument with entirely separate payment obligations on each party and in the *Ministry of Sound* the payment obligations were found to be independent of performance by the other party. In this case, notwithstanding the obligation to pay quarterly in advance, in my view the right to payment in this case is "dependent" on the performance of services which cannot be carried out without the cooperation of FCAA: in particular there are obligations in clause 3 of the Original Agreement on FCAA to permit Motortrak to access "*such technical infrastructure, hardware and software and confidential information*" as is necessary to enable Motortrak to provide the services and to provide Motortrak with "*all information required*" to perform the services "*in a timely manner*". Accordingly in my view Motortrak would not have been able to affirm the contract and claim the amount due as a debt.

108. As a consequence I accept that Motortrak had no alternative but to claim damages and were I to accept FCAA's construction of the exclusion clause, Motortrak would have no remedy in the circumstances for the refusal of FCAA to perform the contract (other than a claim for wasted costs). I take this into account in balancing the competing factors to be considered in construing clause 9.5.

109. Turning then to the language of clause 9.5, as referred to above, *"the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement."*

110. The language of clause 9.5 on its face is clear and unambiguous and it would require the court to read into the clause additional wording in order to arrive at the meaning for which the claimant contends. However the approach of the Supreme Court in *Wood* makes it clear that the approach to construction should not be a literalist exercise focused solely on the parsing of the wording of the particular clause but that the court must consider the contract as a whole.

111. In *Wood* Lord Hodge JSC said:

> *" [11]… Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest..."*
>
> *[12] this unitary exercise involves an iterative process by which each suggested interpretation is checked against the*

> *provisions of the contract and its commercial consequences are investigated… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."* [Emphasis added]

112. Although it is an exclusion clause, the clause is a mutual clause and the parties in my view were of equal bargaining power and thus the clause is not to be construed *contra proferentem* against FCAA: *Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372* at [19] – [21].

113. The parties referred to the Court of Appeal decision in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Limited* [2013] EWCA Civ 38. Counsel for Motortrak submitted that in that case, Tomlinson LJ drew a distinction between defective performance of the contract and refusal to perform it or to be bound by it (at [27]). Counsel also relied on the dicta of McCombe LJ (at [32]) that the result advanced on behalf the respondent "*would defy business common sense*" and that he would have been prepared to interpret the words "*in relation to this Agreement*" to be taken to mean "*in performance of this Agreement*".

114. In *Kudos* the defendant operated a conference centre and the claimant contractor provided catering services. The defendant purported to terminate the agreement for the provision of the catering services and the claimant claimed damages for lost profits that would have been earned for the remaining term of the agreement. The defendant relied on the exclusion in clause 18.6 in the agreement which provided, in material part,:

> *"the contractor hereby acknowledges and agrees that the company shall have no liability whatsoever in contract, tort, including negligence, or otherwise for any loss of goodwill, business, revenue or profits…"*

115. Clause 18.6 was part of a section of the agreement headed "*Indemnity and Insurance*". In essence the structure of clause 18 was as follows: Clause 18.1 provided for the contractor to indemnify the company against costs, claims etc. arising out of the provision of the catering services other than costs and claims etc. resulting from the negligence of the company. Clause 18.4 provided that the company would indemnify the contractor against all claims costs etc. arising out of the provision of any property arising out of the negligence of the company. Clause 18.6 then provided that the company had no liability for loss of profits "*suffered by the contractor or any third party in relation to this agreement"*.

116. The Court of Appeal held that the judge at first instance fell into error in thinking that the ascertainment of the meaning of apparently clear words was not itself a process of contractual construction and failed to consider the words of the clause in their wider context. Tomlinson LJ held at [26]:

"both its position and its content show that clause 18.6 is intended to qualify the extent of the indemnity afforded by clause 18.4. Thus one finds a reference to third-party liability, which can only sensibly be read in context as qualifying the extent to which the Company must, pursuant to clause 18.4, indemnify the Contractor against third party claims, since plainly any provision in this contract will be ineffective to protect the company from third-party claims made directly against it. Similarly the express reference to negligence of the last line of clause 18.6 is a reflection in my view of the limited scope of clause 18.4…"

[27] I cannot… accept that clause 18.6 serves only to qualify the extent of the indemnity afforded by clause 18.4. The language "no liability whatsoever in contract, tort (including negligence) or otherwise" cannot sensibly be read as simply restricting an indemnity which is itself expressed only to arise in the event of the company's negligence. Something more is intended. The key to the proper construction of this provision is in my view that it excludes heads of loss "suffered by the contractor or any third party in relation to this agreement"… In the context, as I have already remarked, the third-party loss which is referred to in clause 18.6 can only be a loss suffered in consequence of negligent performance by the company of its contractual obligation, express or implied. It is only such third-party losses which will, if brought home to the contractor, generating the company an obligation to indemnify. Such a loss presupposes defective performance of the contract but not refusal to perform it ought to be bound by it. The company does not undertake to indemnify the contractor against liability which it incurs to third parties in consequence of the refusal of the company to perform the contract. In my judgment it is a similar type of loss which is intended to be excluded or qualified whether suffered directly or indirectly by the contractor, i.e. a loss arising out of flawed performance of the contract, and it is that reason that such loss is in each case described as "loss suffered… in relation to this agreement". Had it been intended simply to exclude all liability for loss of profits etc. in the event of any breach of contract by the company, including a simple refusal to perform, there would have been no need to refer to third-party losses as a separate category, since they would have been excluded from the scope of the indemnity by the general words. Reference to third-party losses in my view informs the proper construction of the clause, indicating that the circumstances in which the company's liabilities intend to be qualified are similar to, albeit not coextensive with, those which might also give rise to the obligation to indemnify the contractor against third-party losses. In order to construe the provision consistently with business common sense, I would regard the expression "in

> *relation to this agreement" as meaning in this context "in relation to the performance of this agreement", and thus as not extending to losses suffered in consequence of a refusal to perform or to be bound by the agreement….*
>
> *[29] the parties could had they so wished have provided that there should be an exclusion of all liability for financial loss in favour of the company, but not the contractor, in the event of a refusal to perform.… Had the parties intended such an exclusion of all liability for financial loss in the event of refusal or inability of the company to perform, I would have expected them to spell that out clearly, probably in a freestanding clause rather than in a subclause designed in part to qualify an express and limited indemnity, and in one which moreover forms part of a series of subclauses dealing with the provision of indemnities and insurance to support them.… In my judgment however by the language and the context in which they used it they demonstrated that the exclusion related to defective performance of the agreement, not to a refusal or to a disabling inability to perform it."* [Emphasis added]

117. Although the Court of Appeal in *Kudos* drew a distinction between losses arising out of defective performance and losses arising out of refusal to perform, it seems to me that the conclusion was driven primarily by the position and context of the relevant sub clause. The interpretation of clause 18.6 was reached in the light of the context of the type of loss which could arise from the obligation on the company to indemnify: in context, the third-party loss could only be a loss suffered in consequence of negligent performance by the company with the result that the court found that such a loss presupposed defective performance. Although counsel for Motortrak relied on the passage where Tomlinson LJ stated that he was construing the provision consistently with business common sense and in a manner which did not defeat its commercial object, it seems to me that the judgment turns largely on the interpretation of the subclause in the context of clause 18.

118. Further although McCombe LJ stated at [32] that he also considers the result advanced for the defendant would defy business common sense, he does so "in the context of this agreement as a whole" and he places emphasis on the context, in particular the services to be provided and the framework of the agreement referred to at paragraph 17 of Tomlinson LJ's judgment.

119. *In AstraZeneca v Albemarle International [2011] EWHC 1574 (Comm)* the defendant supplied di-isopropyl phenol ("DIP") to the claimant, AstraZeneca, which the claimant then used to manufacture propofol. There was provision in the supply agreement between the parties that if AstraZeneca decided to cease manufacture of propofol, Albemarle would have "the first opportunity and right of first refusal to supply propofol" to AstraZeneca. Albemarle alleged that AstraZeneca was in breach of this provision (clause H) and one of the issues at trial was whether the claim by Albemarle for loss suffered as a consequence of AstraZeneca's breach of clause H was limited or excluded by clause M of the agreement. Clause M provided:

> *"no claims by Buyer of any kind, whether as to the products delivered or for non-delivery of the products, or otherwise, shall be greater in amount than the purchase price of the product in respect of which such damages are claimed;… In no case shall Buyer or Seller be liable for loss of profits or incidental or consequential damages."* [Emphasis added]

120. It was argued that any claim for damages by Albemarle was excluded by the second sentence of clause M. Flaux J held that the provision did not exclude Albemarle's right to claim damages for loss of profits suffered as a consequence of breach by AstraZeneca of its obligations under clause H. He reached that conclusion for two reasons, firstly that:

> *"[311]… the clause overall should be construed as referring to the sale and purchase of DIP not to the distinct question of whether the contract might be replaced by different product, propofol…*
>
> *[312] second, AZ's construction of the second sentence of clause M is one which leaves Albemarle with no effective remedy for AZ's breach of clause H. This has the effect of making clause H, so far as AZ is concerned, little more than a statement of intent, which would in a very real sense achieve for AZ its narrow construction of clause H through the back door, in circumstances where the court has held, contrary to AZ's case, that the provision obliges AZ to provide details of any third-party offer and give Albemarle the opportunity to match the offer. Viewed cynically, if any right of Albemarle to claim for its loss of profits suffered as a consequence of AZ's breach of that obligation is excluded, there is little incentive for AZ to comply with that obligation."* [Emphasis added]

121. In *Kudos* the Court of Appeal did draw a distinction between defective performance and a refusal to perform but as discussed above, in my view it turned largely on the context of the particular sub clause. In this case sub-clause 9.5.2 is part of a clause dealing with liability in general: clause 9 is headed "Limitation of Liability". Clause 9.1 deals with liability for fraud and personal injury or death; subclause 9.2 relieves Motortrak for any liability to FCAA due to telecommunication faults or failures of third parties; subclause 9.3 limits Motortrak's liability in aggregate to the amount of the charges due to it from FCAA and subclause 9.4 requires FCAA to give notice of any claim within three months. Thus subclauses 9.2, 9.3 and 9.4 are for the protection of Motortrak. By contrast subclause 9.5 is for the mutual benefit of both parties. Although it was submitted that subclause 9.5 was a "boilerplate" provision, there is no specific evidence before the court which would provide factual context in this regard to assist in the interpretation of the clause. The provisions of subclauses 9.2, 9.3 and 9.4 would not appear to be "boilerplate" to the extent this label is intended to lead to an inference that the parties had not addressed their mind to the clause: subclause 9.2 addresses the risk to Motortrak from a failure of telecommunications providers which is obviously specifically relevant to the nature of Motortrak services, the provision limiting Motortrak's liability in aggregate to the charges is again indicative of a provision which has been specifically considered to fit the circumstances of

Motortrak's contract. Unlike for example the position in *Kudos* and in *AstraZeneca*, there is nothing in sub clauses 9.1 to 9.4 which would suggest that sub clause 9.5 should be construed more narrowly than a literal construction would suggest.

122. In relation to the argument that it would reduce the clause to a mere declaration of intent, counsel for FCAA relied on the limitations placed on the principle in *Suisse Atlantique* in the judgment of Moore-Bick LJ in *Transocean Drilling.* Moore-Bick LJ said that:

> *"[27] the principle to which the judge referred has been recognised and applied in a number of cases, including [Tor Line and Kudos]… However it should be seen as one of last resort and there is authority that it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which he has purported to undertake… Only in such a case could it be said that the contract amounted to nothing more than a mere declaration of intent.*
>
> *[28] I fully accept that where the language of an exclusion clause leaves room for doubt as to its meaning, the principle applied in these cases may provide a valuable tool for ascertaining its correct meaning and in some cases it may lead to the conclusion that a restricted meaning must be given to the clause in question in order to achieve the parties common objective. But it does not in my view provide sufficient justification overriding the party's intention where that has been clearly expressed. The principle of freedom of contract, which is still fundamental to our commercial law, requires the court to respect and give effect to the parties agreement.…"*

123. In *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) Fujitsu brought a claim against IBM. IBM provided IT and other services to the DVLA under a main contract and Fujitsu provided aspects of those services under a subcontract with IBM. Fujitsu alleged that IBM had failed to subcontract services to Fujitsu in accordance with the subcontract. Fujitsu claimed for loss of revenue as a result of having been deprived of work under the subcontract. IBM relied on clause 20.7 of the subcontract to exclude liability to Fujitsu. Clause 20.7 provided:

> *"neither party shall be liable to the other under this subcontract for loss of profits, revenue, business, goodwill, indirect or consequential loss or damage… "*

Carr J found that IBM's liability was excluded by clause 20.7. Her reasons were that the language was clear and unambiguous, there was nothing in the context or surrounding clauses that pointed to a different construction and consideration of all the relevant circumstances provided support for a straightforward application. In particular the sub contract was negotiated by two highly sophisticated commercial parties with the benefit of legal advice, there were detailed provisions governing the parties' rights to remedies, on the face of the contract the parties had applied their minds to the scope of the clause providing the detailed and specific exceptions, there

were clear words rebutting any presumption that the parties did not intend to abandon their remedies for loss of profit and the clause applied equally to loss suffered by both parties.

124. Having regard to the relevant circumstances identified by Carr J in *Fujitsu*, there is no evidence that Motortrak used lawyers to draft the contract, however it is not an "informal" document, FCAA used their in-house lawyer to negotiate the Original Agreement and as stated above, sub clauses 9.2-9.4 would suggest by their content, to be the result of deliberate drafting to address specific risks relating to Motortrak.

125. Further clause 9.5 applied equally to loss suffered by both parties rather than existing for the benefit of one party. It was submitted for FCAA that if the words of clause 9.5.2 were to be construed as limited to losses in connection with "the performance of the agreement", whilst this would have a benefit for Motortrak it would have no meaning for FCAA whose obligation was to pay for the services. There is an obligation of confidentiality in the Agreement on FCAA and there are obligations on FCAA (as referred to above) to permit Motortrak to access FCAA's technical infrastructure to enable Motortrak to provide the services and for FCAA to provide Motortrak with information required to perform the services. However it is difficult to see that these limited obligations could give rise to a claim of any real substance by Motortrak for loss of profit arising out of defective performance by FCAA.

126. The claimant submits that FCAA's construction of clause 9.5 is one which leaves Motortrak with no effective remedy for FCAA's breach. This was one of the reasons given by Flaux J for reaching his conclusion in *AstraZeneca* (as set out above) and counsel for Motortrak relied on paragraph 313 of his judgment:

> *"[313] In construing an exception clause against the party which relies upon it, here AZ, the court will strain against a construction which renders that parties obligation under the contract no more than a statement of intent and will not reach that conclusion unless no other conclusion is possible. Where another construction is available which does not have the effect of rendering the parties' obligation no more than a statement of intent, the court should lean towards that alternative construction. This is an application of the principle enunciated by Lord Roskill in Tor Line A/B v Alltrans Group of Canada Ltd (the TFL Prosperity)…"* [Emphasis added]

127. However as set out above, two reasons were given by Flaux J and the other reason given was that the clause overall should be construed as referring to the sale and purchase of DIP and not what Flaux J referred to as the "distinct question" of whether the contract might be replaced by another. Accordingly it seems to me that his conclusion in *AstraZeneca* was dependent in part on the context of the relevant provision namely that the second sentence of the relevant clause had to be construed in the context of the overall clause and the first sentence of that clause was expressly concerned with the supply of DIP under the agreement. This had the effect of limiting the scope of what was otherwise a broad provision in the second sentence of the relevant clause.

128. In *Fujitsu*, it was argued by Fujitsu that if the effect of the clause was to exclude liability for breach by IBM of its obligations to allocate work to IBM, then a central element of the parties' bargain was deprived of all contractual force or turned into a mere statement of intent. It was submitted that the contract should therefore be construed so as to avoid such a result in line with *Suisse Atlantique* and the other authorities. Carr J distinguished *AstraZeneca* as very different on its facts. Carr J stated that:

> *"[49] …the "statement of intent" rule, if such it be, is of little assistance in circumstances where, as here, the wording is plain, the exclusion clause of mutual benefit and detailed in its form"*

Further "*even if there were scope in principle for the court to strain its construction in favour of [Fujitsu]",* Carr J found that the effect of clause 20.7 was not to empty the contract of content. It did not exclude a claim the debt for non-payment of an invoice. Further Fujitsu could bring a claim for declaratory relief and/or injunctive relief. Carr J held:

> *"[61]… The question is not whether FSL would have adequate remedies but whether or not IBM's construction of clause 20.7 would deprive the contract… of all contractual force. It does not"*

129. In this case whilst it can be said that FCAA's construction will leave Motortrak without a claim for lost profits for FCAA's repudiation of the contract, there is nothing in the language which would support Motortrak's interpretation. The dicta of Flaux J in paragraph 313 set out above, in my view are limited to the situation where another construction is possible on the literal reading of the clause. In my view this is not such a case. Further although Motortrak, on the defendant's construction, would be left without a claim for loss of profits, the clause does not preclude a claim for wasted costs arising out of the repudiation of the contract. It is a feature of Motortrak's business that the revenue to be earned from this particular contract was largely, if not wholly, profits but there is no evidence that this was part of the factual matrix against which this agreement was concluded. Accordingly (adopting the approach of Carr J in *Fujitsu*) it cannot be said that FCAA's construction would deprive the contract of all contractual force.

130. The court has to balance the indications given by the literal interpretation of the words used and the provisions of the contract against the factual background and the implications of the rival constructions. In my view in this case there is nothing in the factual background or the contract as a whole to override the language used in sub-clause 9.5. The commercial consequences, whilst adverse to Motortrak, are not in my view such as to have the effect that the court can find that the objective meaning of the language of subclause 9.5 is other than as it appears on its face. It is a clear exclusion in the context of a clause which taken as a whole appears to have been drafted with some precision from the perspective of Motortrak and in relation to subclause 9.5, to the mutual benefit of both parties. As stated in *Wood* the court has to be alive to the possibility that one side may have agreed to something which in hindsight did not serve his interest.

131. For all these reasons I find that Motortrak's claim for loss of profit arising out of the failure by FCAA is excluded by reason of clause 9.5.

FCAA claim for damages

132. FCAA seeks to recover in damages:

i) the amount of the bribes;

ii) damages for loss on the basis that it would not have entered into an agreement with Motortrak at all or would not have entered into a contract Motortrak on the terms that it did.

Submissions

133. Counsel for the defendant submitted that if the court concluded that Mr Campbell had been bribed, FCAA is entitled to the amount of the bribe as of right:

> *"it is unnecessary to prove motive, inducement or loss up to the amount of the bribe" (Hurstanger Limited v Wilson [2007] 1 WLR 2351)*
>
> *"there is no need for the principal to prove… that the principal suffered any loss or that the transaction was in some way of unfair: the law is intended to operate as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe" (Daraydan Holdings Limited v Solland International Limited [2005] Ch 119)*

134. Counsel for the defendant submitted that FCAA is entitled to recover the bribe notwithstanding that it affirmed the Agreement. There is an "*irrebuttable presumption… that the principal has suffered damage in the amount of the bribe" (Novoship at [108]).*

Counsel for the claimant submitted that the basis on which a principal can usually recover an amount equal to the bribe is that he is regarded as having been unjustly enriched by the amount of it: *Clerk & Lindsell on Torts (22nd edition)* at para 18 – 56. However, counsel submitted that it would be perverse to view Motortrak as having been unjustly enriched by the amount of the alleged bribe in circumstances where FCAA affirmed the Agreement.

Discussion

135. It seems to me that the principle is as set out by Lord Diplock in *Mahesan v Malaysia Housing Society* [1979] AC 374 at 383. Having referred to the earlier authorities in which it was said there was an "*irrebuttable presumption of loss or damage to the amount of the value of the bribe*", Lord Diplock said:

> *"Upon analysis, what these rules really describe is the right of a plaintiff who has alternative remedies against the briber (1) to recover from him the amount of the bribe as money had and*

> *received, or (2) to recover, as damages for tort, the actual loss which he has sustained as a result of entering into the transaction in respect of which the bribe was given; but in accordance with the decision of the House of Lords in United Australia Limited and Barclays Bank Ltd [1941] AC 1 he need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them."*
>
> *"This extension to the briber of liability to account to the principal for the amount of the bribe as money had and received, whatever conceptual difficulties it may raise, is now and was by 1956 too well established in English law to be questioned. So both as against the briber and the agent bribed the principal has these alternative remedies: (1) for money had and received under which he can recover the amount of the bribe as money had and received or, (2) for damages for fraud, under which he can recover the amount of the actual loss sustained in consequence of his entering into the transaction in respect of which the bribe was given, but he cannot recover both."*

136. This seems to me to have been followed by Christopher Clarke J in *Novoship*. Having stated, as quoted above, that there is an irrebuttable presumption that the principal has suffered damage in the amount of the bribe, and cross referring to authorities including *Mahesan*, Christopher Clarke J went on to rely on Lord Diplock's judgment, as referred to above, and stated that:

> *"[111] the agent/fiduciary and the payer of the bribe/secret commission are jointly and severally liable not only to account to the principal for the amount of the bribe but also in damages for fraud for any loss suffered by the principal. Consequently, the agent and the third-party payer are jointly and severally liable to the principal (1) to account for the amount of the bribe in restitution as money had and received; and (2) for damages for any actual loss suffered by the principal from entering into the transaction in respect of which the bribe or secret commission was given or promised. But these are alternative remedies and the principal must elect between the two remedies prior to final judgment being entered."* [Emphasis added]

137. It seems to me that the defendant is entitled to recover the amount of the bribe as money had and received and the affirmation of the contract by FCAA does not affect that principle: it is presumed that Motortrak has gained at least to the extent of the bribe.

138. However on the authorities to which I was referred and quoted above, to the extent that the defendant is seeking damages for actual loss, it would appear that FCAA cannot also claim for the amount of the bribe as money had and received. Subject to hearing argument on the point at a consequential hearing following hand down of this

judgment, it would appear that the defendant has the option, and the obligation, to elect between the two remedies prior to final judgment being entered.

Damages for loss

139. Counsel for Motortrak accepted that in principle FCAA was entitled to recover damages for actual loss sustained as a result of entering into a transaction in respect of which a bribe was given. Counsel for Motortrak conceded in closing that, contrary to his opening submissions, Motortrak was not suggesting that affirmation of the contract removed any right that the defendant has to claim damages.

140. I also understand it now to be common ground that the defendant's claim for damages is only for the period up to the end of 2017 (when the Original Agreement as extended by the Second Extension would have terminated) as the defendant accepts that Ms Johns had by signing the Third Extension, accepted the terms of the Agreement going forward.

Submissions

141. Counsel for the claimant submitted that there was no valid damages claim: firstly that there was no overpayment; and secondly that the defendant claiming damages has to show what contract it would have entered into and how much the contract would have cost. Counsel for Motortrak submitted that there was no adequate evidence from the defendant that it would have entered into a different form of contract and that it would have been a cheaper contract so that it suffered loss. There is no basis for suggesting that a cheaper alternative was available – Manheim Fowles came out with a more expensive quote**.**

142. Counsel for FCAA submitted that their primary claim was calculated at just over AU$26.8 million as set out in Appendix 5 to their opening submissions. In the alternative, counsel for the defendant submitted that if the court was minded to have regard to Mr O'Leary's evidence as to the typical prices charged in the United States, then in Appendix 7 to their closing submissions, the defendant had taken the figures provided by Mr O'Leary in US dollar terms, namely $500 per dealer for the Original Agreement, $1200 for the First Extension and $3000 for the Second Extension and converted them back into Australian dollars using the exchange rates prevailing at the relevant time. This has given rise to an alternative loss calculation based on Mr O'Leary's figures of AU$9,681,995.58.

143. It is FCAA's case that, had there been a "proper competitive tendering exercise and proper negotiation", FCAA would have concluded that it did not need the full range of services offered by Motortrak. In particular counsel for FCAA submitted that in relation to the Second Extension, the vast majority of FCAA's dealers did not need additional SEO and to the extent that some of the larger urban dealers might have been interested, it would have been for a limited time period only.

Evidence

144. One of the questions which was put to the experts was:

> *"to what extent (if at all) did the platform provided by Motortrak pursuant to the Original Agreement and each of the Extensions include functionality that the Australian dealer network and automotive manufacturers already had and/or did not need."*

Mr Olver in his report said, amongst other things, in response to this question (paragraph 4.17):

> *"from a dealer perspective, therefore, there was very little that the Motortrak platform offered that they did not already have."*

Further Mr Olver said (paragraph 4.29) that applications such as the National Used Vehicle Locator were not required at all.

145. In cross-examination, Mr Olver accepted that although he had put forward in his report a solution which involved constructing a platform from scratch, it was "*a perfectly reasonable option*" to use someone like Motortrak to buy in the product and to mandate that across the network. He also accepted that given FCAA's commercial objectives, there was a need for the services (other than the used vehicle locator and inventory management) that Motortrak contracted to provide. [Day 9/95]. However it was put to him that the Motortrak offering was for a product that included the components that Mr Olver said were individually unnecessary and there was no process for the separation out of those elements [Day 9/98]. Mr Olver said that this was an unknown. It was then put to Mr Olver that it was reasonable to go with the Motortrak solution to which he responded:

> *"I said the Motortrak solution is fine. I think as a product it is fine. But the process of acquiring it by the business and the lack of scrutiny on other products and other services available at the time, I am not…"*

146. It was put to Mr Olver that a substantial minority of significant manufacturers were using used vehicle locators. Mr Olver replied [Day 9/105] that there were "some". Counsel for Motortrak put it to Mr Olver:

> *"if we look at the other aspects of Motortrak's product offered by the First and Third Extensions, so leaving out search services for the moment which we will come to, I think it is your evidence that subject to pricing,… you do not have a problem with any of the modules that were included in those extensions."*

147. Mr Olver responded:

> *"no I think my [words] (sic) are not so much the modules, but I think the first and third extensions in terms of, you know, acceptable digital marketing practice were fine. I have no problems with that. My point there was price."*

148. Under the Second Extension, the services under the Original Agreement were amended to include SEO services and the charges were increased to AU$4100 per dealer per month. In relation to the services which were provided pursuant to the Second Extension, the description of SEO in the contract was as follows:

> *"For each dealer Motortrak will develop a brand-specific monthly SEO work template to create model, news items and department-specific landing pages, local content and reviews, as well as make updates to keyword and meta information. Selected national content, campaigns and brand relevant news can also be promoted on each site. Motortrak will work with dealers to add relevant website content, keywords and internal links to dealers sites to make them more visible in free search engine listings."*

149. Mr Cox's evidence in his witness statement (paragraph 48) was that the delivery of the SEO services was a "*significant undertaking which required substantial investment.*" Mr Cox's evidence was that in order to deliver what Motortrak had contracted to provide to FCAA 12 individuals were hired and Mr Ducker was transferred to oversee the client relationship.

150. Mr McCraith was asked in cross-examination about Mr Hardy, the then finance director of FCAA, who sent Mr McCraith an email on 8 June 2013 concerning the marketing spend for the year-to-date stating:

> "*something is really wrong with the Motortrak costs"*

Mr McCraith was asked in cross-examination about an email which Mr Ducker sent to Mr Cox on 19 June 2013 in which Mr Ducker referred to a telephone conversation with Mr McCraith. Mr Ducker reported that Mr McCraith said that he "*totally understood Motortrak*" and "*the value of digital and the SEO programme*" but that "*finance*" did not get the value. Mr McCraith agreed that he was impressed with the system but was having difficulty with Mr Hardy. Counsel put it to Mr McCraith:

> *"I would suggest the message you are giving to Mr Ducker and to Motortrak is: the system is great, but I've got this guy in finance, Mr Hardy, and he's being a pain over the costs."*

Mr McCraith responded:

> *"You could say that, yes."*

Mr Hardy then sought to raise the matter directly with Ms Johns in an email of 1 August 2013. Mr McCraith's evidence was that Mr Hardy was concerned about the cost and agreed that as a busy finance director, Mr Hardy did not see the value of the services.

151. Mr McCraith was also taken to an email sent by Mr Ducker on 8 January 2014 to various individuals at FCA including Mr McCraith, containing the "leads report" for 2013. Under the heading "Overall 2013 Summary" it stated that total leads were up

74% on 2012 and average monthly leads were up 55%. Mr McCraith agreed that these results were very good.

152. On 1 February 2014, Mr Ducker sent a further email to Mr McCraith concerning the January 2014 leads. The email read:

> *"just a quick heads up on the leads for last month January… in summary Jan 2014 has smashed all previous records for both franchises"*

Mr McCraith responded on the same day:

> *"Congratulations David. We owe you a big lunch based on these results. Please pass on my thanks to all at MT."*

153. In cross-examination Mr McCraith said that it was the combination of all the marketing channels working together that delivered that lead result not just Motortrak. He said:

> *"So we changed the start of 2014 the way that the TV calendar works, it starts January through to December, and we front-loaded our TV and we brought a new thing called Big Bash League Cricket which Shane Warne was playing in, and that had enormous ratings. So the combination of all the marketing channels working together did deliver that lead result, that wasn't just Motortrak…*
>
> *They were important, but they weren't the most important. There was a lot of other elements, such as the creative television work being brought by Maxus and work being done by Digital Dialogue as well."*

154. Mr Olver was asked about the SEO services. Mr Olver was sceptical of the value of SEO describing it as a "*very low return source of traffic*" [Day 9/114]. However he accepted that without knowing the detail of what was actually done to boost visits to the sites through SEO, it was hard to assess the merit or value of the services. Mr Olver was taken to various documents showing the source of website visits. However, although counsel for Motortrak submitted that visits to the site were generated "to a large extent" by Motortrak's SEO program, the reports did not provide sufficient data to confirm that visits were in fact so generated.

155. Mr O'Leary's opinion as expressed in the joint report (paragraph 7) was that:

> *"SEO was a highly valuable long-term strategy focused on longtail keyword and site optimisations focused on the aggregation of marginal gains".*

156. Counsel for FCAA put it to Mr O'Leary in cross-examination that SEO was:

> *"an expensive program, on an ongoing basis is a game of diminishing returns on a dealer level…"*

Mr O'Leary responded:

> *"…In SEO, it is actually referred to as the long tail strategy, which is as the returns diminish they become more valuable. So fewer in number but of increasing value. "*

It was put to him that:

> *"no sensible dealer would sign up for a 5-year term paying $2,405 a month for SEO?"*

Mr O'Leary rejected that proposition.

157. In the joint report (paragraph 9) Mr O'Leary referred to the proposal submitted by Digital Dialogue for a range of services under the title of SEO. The proposal stated:

> *"Digital Dialogue recommends a combined SEO and SEM strategy if your budget allows. If not, we recommend concentrating on SEO however please note it will take three – six months to achieve great results. Once you are happy with the volume of leads your Dealership is receiving, you may be able to reduce your SEO budget, however it is not recommended to stop SEO altogether as this will negatively impact the work performed to date."* [Emphasis added]

Counsel for FCAA put it to Mr O'Leary that by this proposal, Digital Dialogue were not suggesting a long-term commitment to SEO. Mr O'Leary responded that:

> *"I think when they say it is not recommended to stop SEO altogether, I think that implies quite the opposite, that it is a long-term commitment."*

158. The experts were asked whether there were standard contract terms for marketing and digital service providers at the time of the Original Agreement or any of the Extensions. In particular the experts were asked how the Original Agreement and the Extensions compared in relation to their term. Mr O'Leary's evidence (paragraph 52 of his report) was that OEM agreements were typically three years in length at the outset with moderate pricing incentives given to the OEM for the longer agreement (four or five years). He said that he knew of "*no OEM website program engagement of less than three years during the time of the Original Agreement and the Extensions"*. In the joint report (paragraph 3) the experts stated that they agreed that:

> *"there were standard contract terms (in the sense of typical) for marketing and digital service providers where manufacturers were charged on the basis of a monthly fee for service on a per dealer basis with contract length varying from 1 to 5 years."*

159. Mr Cox's evidence (paragraph 90 of his witness statement) was that:

> *"Contract terms which Motortrak entered into are typically 3 to 5 years."*

160. Whilst Mr Olver's evidence was that in his commercial career he had not seen any long-term contract for these types of services, he accepted, in cross-examination, Mr O'Leary's evidence that they were typical, responding:

> *"Look, absolutely, if he has seen the contracts, yes, sure, I would respect that…"*

161. The experts were asked to opine on the "*fair market price for the suite of platform features and services provided by Motortrak*". FCAA rely on the costs estimated by Mr Olver in his report. However Mr Olver's approach (paragraph 5.16 – 5.19 of his report) was that in order to establish a "*fair price*" for the functionality and services that Motortrak was offering under the Original Agreement, he considered the "*alternative means*" by which a manufacturer could have obtained the same benefits as offered by Motortrak and estimated how much those alternatives would have cost in 2010. Although he identified three options to obtain the benefits offered by Motortrak, the approach which he adopted in his report and which he costed, was to estimate the cost to design, build and provide ongoing management of a website. In other words, he estimated the cost of configuring and customising an "*open source CMS*" to provide all the functionality that he identified as having been provided under the Original Agreement and then costed it by reference to the local developer market. However he accepted that this alternative, to build from the bottom up, was not "*the only game in town*" but to him it was the right option to get "*a more serviceable product at a better price*". His evidence was that his approach was "*to not try and rebuild what Motortrak was offering*"; his approach was designed to "*deliver a similar <u>functional</u> outcome" [emphasis added]* and "*he certainly never wanted to compare it directly to what Motortrak's offering was about*" [Day 9/54].

162. Mr O'Leary's approach was to look at prices charged by other providers in the US market, particularly dealer.com (for whom Mr O'Leary worked from 2009 to 2013). His analysis (at paragraph 87 of his report) commences with the statement that:

> *"the original cost structure was equivalent to AU$690 per dealer per month or approximately US$500 per dealer per month for a base OEM website package which was typical by US standards."*

163. When Mr O'Leary came to give oral evidence he stated that in preparing his report, he had used the exchange rates current at the time he prepared the report, to convert Australian dollars into US dollars and if the actual rates of exchange at the time of entering into the Original Agreement were used, the equivalent amount in US dollars was approximately US$690 and not US$500.

164. The effect of the difference in exchange rates is that converting the US dollar amounts endorsed by Mr O'Leary of USD $500 for the Original Agreement, USD $1,200 after the First Extension, and USD $3,000 after the Second Extension, produces amounts in Australian dollars of AU$497.51 for the Original Agreement, AU$1,208.46 after the First Extension and AU $2,854.42 after the Second Extension compared with the actual amounts of AU$690, AU$1695 and AU$4100.

Discussion

165. Counsel for the defendant submitted that Mr O'Leary lacked relevant experience of the Australian market and that, possibly due to his sales background, he lacked impartiality. Counsel for FCAA referred in particular to Mr O'Leary's supplemental report where he stated that:

> *"it is possible the sheer level of detail presented has the net effect of obscuring the simple truth of this case: there is simply nothing unreasonable about the terms agreed by FCAA the Motortrak to provide a manufacturer website platform or to improve on the platform by the contract extensions."* [Emphasis added]

Although this expression of his opinion was in my view unfortunate, there is in my view no real basis on which to challenge his impartiality. His evidence as to the prices charged by dealer.com to various manufacturers and the explanation of how the price varied according to the number of dealers appeared to me to be factual and was not challenged. Counsel for FCAA submitted in closing submissions that Mr O'Leary had been evasive in cross-examination. This was not a view which I took at the time and upon rereading the relevant passages from Mr O'Leary's evidence, I remain of the view that Mr O'Leary was not evasive in his answers.

166. At the start of his oral evidence Mr O'Leary stated that although the use of the wrong exchange rates was an oversight,

> "*it does not fundamentally alter my view on pricing that I have expressed in the reports."*

167. Counsel for the defendant submitted that US pricing was not relevant to the Australian market. In particular the Australian market was unique in the dominance of Carsales. In oral closing submissions however counsel stated that the relevance of Carsales was in respect of the services provided, that:

> *"The relevant point is that because the dealers have access to Carsales, and through Carsales the Pentana system, they didn't need all of the features which Motortrak was selling to FCAA for the dealers to use. They already had them, effectively."*

168. Mr O'Leary in his report (paragraph 12) stated that from his evaluations of the Australian market whilst he was at dealer.com, Australia was not a fundamentally unique international market and product and price assumptions from the US and Canada were broadly applicable to Australia. In cross-examination Mr O'Leary was asked about these evaluations, he said that he did not prepare the evaluation but was part of the management team who reviewed the evaluation. Although counsel for the defendant made the point that Mr O'Leary could not speak to the precise methods by which they investigated the Australian market and had not seen the presentation since he left dealer.com (about six years), Mr O'Leary said that it was part of his job to be aware and informed of all international automotive trends. It seems to me that Mr O'Leary, whatever his enthusiasm for these type of products, and even without access

to the detailed underlying report, was qualified to say whether prices in the US market were relevant to prices charged to manufacturers in Australia.

169. Although Mr Olver described his approach as "*fair market value for the outcome you're getting*", his approach of costing an alternative does not enable the court to use his estimate of costs for such a build as a valid comparison with which to value Motortrak services as he has not attempted to value the services that Motortrak was offering but provided a different solution to what he perceived as the need.

170. In cross-examination Mr Olver said that the US market with 18,000 dealers was a very different market from the Australian market, that once the platform had been built, the opportunity to resell it multiple times was critical to what the providers were doing. He suggested that there was not enough volume in Australia for dealer.com to survive. It was put to Mr Olver that Motortrak were offering prices in line with US prices but to the much smaller market. In other words, they were prepared to absorb the fact that they did not have such economies of scale and apply the product in Australia instead of just the US. It was put to him that that made Motortrak's offering "*all the more reasonable*". [Day 9/60] Mr Olver did not provide a satisfactory answer to that question on Motortrak's pricing. He insisted that the volume in the other markets drove a very profitable business model whereas in Australia there are only three or four manufacturers that are running these programmes.

171. Mr Cox's evidence in his witness statement (paragraph 32) was that Motortrak based their initial pricing on the pricing for Mercedes-Benz USA because the requirements for technology and service model were very similar and also because FCAA were proposing to use Motortrak's latest website platform which had recently been developed and deployed for Mercedes-Benz USA.

172. In the light of the above evidence of both the experts and the factual witnesses, it seems to me that the comparison with the prices charged in the US market is relevant to the issue of Motortrak's prices charged to FCAA. It was a product which was capable of being sold across a global market in terms of technology and although the difference in the volume of dealers in the Australian market as compared with the US market, would tend to suggest a higher price could have been charged in the Australian market, the evidence from Motortrak is that it based their pricing on Mercedes-Benz US. I therefore find that pricing in the US market is relevant to determine what was a fair price for Motortrak services. Mr Olver was not able to assist the court in relation to whether Motortrak's prices were out of line with US prices: he accepted that Mr O'Leary was the US expert.

173. Counsel for Motortrak submitted that Mr O'Leary had provided a range of prices and the amounts charged by Motortrak, even after the exchange rates had been corrected, remained within the range of what could be said to be typical.

174. However the percentage increase in dollar terms in the prices when the correct exchange rates are used, is in my view significant and are of a magnitude which in my view take them outside the range indicated by Mr O'Leary in his report. Mr O'Leary gives in his report (paragraph 88) the prices charged by dealer.com to Chrysler and Subaru at US$399 per month and Acura at $500 per month. Although he refers to dealer.com having a base price range up to US$1299 he said that dealer.com would typically discount prices by US$500-US$700. He then went on to say that dealer.com

standardised its base price to $699 but again with discounts based on dealer volume. He describes Motortrak's price "at a little more than US$500 per month" to "*fit almost perfectly*" into dealer.com's price range on the basis of product and volume of dealers.

175. In cross-examination Mr O'Leary said that:

> *"the fundamental basis for not altering my opinion is that a base website for Dealer.com was set by me at US$699 at precisely that timeframe"*

However as noted above, in his report, Mr O'Leary actually states in his report that US$699 was the "base price" but was then discounted.

Further in cross examination he stated:

> "*When reviewing the exchange rate issue I went back and looked at this, and so there is a range of pricing here. So US$500 per dealer per month for an OEM website package would have been for a website with significantly more volume than FCAA was providing. So it is still within the range. I think that's a fair statement."*[Emphasis added]

However this evidence appears to be at odds with his report where he stated that:

> *"Motortrak's price (at a little more than US$500 per month for FCA dealers) fit almost perfectly into dealer.com's price range on the basis of product and volume of dealers. They charged slightly more than dealer.com charged Acura at $500."* [Emphasis added]

Earlier in his report Mr O'Leary had noted that Acura had about 250 dealers.

176. In relation to the First Extension, Mr O'Leary said in his report (paragraph 100) that it added "*significant functionality*" and that the increase in price to AU$1695 per month or about US$1200 was:

> "*well in line with industry pricing for a more robust tool set*".

177. In cross-examination it was put to Mr O'Leary that in fact at the date of the First Extension, using the exchange rates at that date, the US dollar equivalent is US$1706, US$500 higher than Mr O'Leary had put in his report. Mr O'Leary agreed that it was a "*big difference*" but stated that it was:

> "*not outside of the range of what we were accustomed to seeing in the market at that time."*

178. A comparison was made with what dealer.com was charging which Mr O'Leary agreed amounted to US$1500 in total. Mr O'Leary referred in his report (paragraph 105) to the increasing cost of base packages but in cross-examination accepted that he could not provide details of precisely what the manufacturers were getting under the dealer.com programmes referred to. Mr O'Leary also provided a table of prices

charged to BMW US (paragraph 107 of his report). However these were prices charged to dealers who could choose the level of package which it wanted to purchase. Further the table reflected prices from 2016 – 2017 and not prices in 2012. Mr O'Leary in cross-examination insisted that there was a range of pricing and the trend has been upwards.

179. The table of prices charged to BMW US does not reflect prices in 2012 and therefore does not assist the court. In relation to the other prices provided they are still lower than the price charged by Motortrak and it is not possible to ensure that the comparison with other providers was for identical services. Accordingly it seems to me that Mr O'Leary's assertion that, notwithstanding the effect of using the correct exchange rate, the price charged by Motortrak remained within the range seen in the market was not borne out by the evidence and by his own report which in my view was likely to be a more considered view than his response in cross-examination.

180. As to SEO, in his original report Mr O'Leary worked on the basis that the Second Extension increased the price by approximately US$3000 per month and stated that (paragraph 110 of his report) that managed SEO programmes are typically priced between $1000 and $3000 per month depending on the level of service provided so the addition of roughly US$1800 per month was well within the range of industry norms for the services offered. In his supplemental report (paragraph 9), Mr O'Leary provided a table purporting to show that Motortrak was priced competitively if compared with US programmes with a premium website platform and SEO offering. In the table the total monthly cost for Motortrak is shown as $3,101 whereas if the correct exchange rate is used the cost is $4,309. Whilst this is less than some of the alternatives listed, in cross-examination it was established that the figures provided by Mr O'Leary in the table reflected 2017 prices and not 2012. Further that the dealers had a range of options which they could choose and the table did not show how the services provided compared with the Motortrak offering.

181. In the joint report (paragraph 9) Mr O'Leary referred to the proposal submitted by Digital Dialogue to FCAA for a range of services under the title of SEO that ranged in price from $2150 per dealer per month for the "lite" plan aimed at rural dealers to $4000 per dealer per month for the "ultimate" plan aimed at certain Metro dealers. Mr O'Leary noted that from both the price point and service list it appears the price was greater than the comparable level of service from Motortrak which was charging in effect AU$2,405 per dealer per month.

182. In cross-examination it was put to Mr O'Leary that the services were about

> "*managing the content of a website for SEO purposes.*"

Mr O'Leary rejected that statement. Mr O'Leary said that the phrase "*relevant website content"* meant that the dealers could ask Motortrak to do almost anything. Mr O'Leary noted that Motortrak had a ratio of about 16:1 in terms of people who were doing this work and he therefore presumed that

> *"there was substantially more work being done in terms of content than would have been typical under a narrowly defined SEO program."*

He accepted however that he could not speak to the actual work that they did on a day-to-day basis because he was not present. However Mr Cox gave evidence about the number of individuals that were employed to give effect to the obligations to provide SEO, and although I accept that the scope of the SEO services (and thus its value) at the time of entering into the Second Extension could not be determined with any precision by reference to the contractual description, it seems to me that it is open to Mr O'Leary in giving expert evidence to the court about the value of the SEO services to have regard to what was actually provided within the scope of the general description in the Second Extension.

183. Mr Olver's evidence as to the price of the SEO services was around AU$110 per month (paragraph 5.35 of his report). However this was based on his approach of building a bottom-up estimate to provide services sufficient to the functionality that he identified as having been provided. For the reasons set out above I do not accept that this is a basis on which to value the Motortrak services which were provided. Mr Olver's evidence in cross examination was that he did not challenge Mr O'Leary's evidence that the pricing of the SEO services of $2,405 was in line with US prices at the time. However he also said:

> *"my assessment at this point on those products when I looked at them in the US market. What became quite clear to me was there was no fixed term for many of those, or at least we don't know what that fixed term was. It's a very different market, and it didn't fit to what the Australian market was doing at the time. That level of SEO investment is just unheard of in this marketplace.*
>
> *"But I did satisfy myself that it would be unlikely that a dealer would sign up for five years of SEO work at $2,400 per month."* [Emphasis added]

It was unclear from Mr Olver's responses in cross examination how he had arrived at this conclusion.

184. Mr Olver was taken in cross-examination to the Digital Dialogue pricing set out in an email dated 6 March 2012 showing a price of $4,000 per dealer per month. Mr Olver objected that the term of the services was not given. This was consistent with his Reply expert report (paragraph 9.16) where he said that there was:

> *"a big difference between a programme that allows individual dealers to sign up for some short-term SEO activity and the Motortrak/FCA agreement which entailed FCA paying for its entire dealer network for 36 continuous months."*

185. Further he observed in his oral evidence to the court, that:

> *"Look, if I think that the period was sort of circa three to six months, I could accept there would be some short term value in implementing some comprehensive SEO. It's just a point beyond that that it becomes really difficult to justify that level of ongoing investment."* [Emphasis added]

186. In my view Mr Olver, conflated the concept of the value of SEO which as referred to above, he did not accept, and the price being charged by Motortrak for the SEO services that it provided. Mr Olver insisted that his role was to assess the contract value and in his mind, this involved a judgment on his part of the need for the services provided and the quality of the services provided. Whilst Mr Olver was seeking to assist the court, unfortunately his approach did not provide evidence which went directly to the issue of whether the price charged by Motortrak was a fair market price for the services provided by Motortrak. For the reasons set out above I do not accept his alternative approach which led to his much lower estimate of the cost of the SEO services provided.

Conclusion

187. In my view on the evidence FCAA have not established that, had the Agreement been the subject of a "proper negotiation" or the subject of a tender, FCAA would have entered into a different agreement with Motortrak or an agreement with another provider which would not have included the full range of services offered by Motortrak. In particular, although Mr Olver was sceptical about the merit of SEO, he accepted that it was hard to assess the merit or value without further work on the underlying data. The evidence of Mr McCraith was that FCAA saw value in SEO, the issue was the cost. Further the evidence of the leads reports showed a significant increase in leads and I infer from the contemporaneous emails that Mr McCraith acknowledged that the increase was due to Motortrak's efforts, in significant part, even though he sought to downplay it in cross-examination, and I accept that other factors will have contributed as he described. As to the term of the Agreement, the evidence of Mr O'Leary was that typically agreements were for three years or with incentives 4 to 5 years and Mr Olver did not contradict this.

188. In relation to the price paid by FCAA in my view the US market is a valid comparison for the price of the services for the reasons discussed above and I accept the evidence of Mr O'Leary as to the market at the time of the Original Agreement. However because of the effect of the exchange rate, I find that the cost of services would have been the amount stated by Mr O'Leary in US dollars and not the revised amount in US dollars which in my view is not justified on the evidence for the reasons set out above. In relation to the First Extension, again there is a significant difference once the correct exchange rate is applied and the evidence is that dealer.com were paying less. The BMW table is not relevant given its date and the fact the products were optional.

189. In relation to the Second Extension, the opinion of Mr O'Leary in his original report does not withstand the adjustment to the exchange rate. I do not accept that Digital Dialogue was more expensive as it was not necessarily for a comparable term. I accept Mr O'Leary's evidence that the US market is relevant but again take the view that in calculating FCAA's loss, the prices need to be adjusted to reflect the actual exchange rate at the time.

190. Accordingly I find on the balance of probabilities, that FCAA would have entered into a contract on the same terms as the contract entered into with Motortrak but that the price payable per month per dealer would have been the following: AU$497.51 for the Original Agreement, AU$1208.46 after the First Extension and $2854.42 for the Second Extension.

Addendum

After sending the judgment out in draft to counsel in the usual way, two points were raised by the parties:

1. Counsel for FCAA requested an express finding that FCAA would, on the balance of probabilities, have entered into a contract with Motortrak for the same range of services and on the same terms but at the prices set out in paragraph 164. That was my intention in paragraphs 187, 188 and 189 of the judgment. Since the matter has been queried, I have added a new paragraph 190 putting the matter beyond doubt.

2. The parties requested that the court consider clarifying the date of affirmation and whether the defendant was entitled to damages after that date. This will be addressed in a supplemental judgment having heard oral submissions.