IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2013-085-000164
[2018] NZDC 25898

BETWEEN	ALEX FERGUSON KNOWLES Plaintiff
AND	GRAEME LESTER FARR Defendant

Hearing: 23 November 2011

Appearances: J Haig for Plaintiff
J Porter for Defendant

Judgment: 24 January 2019

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] This is an application for summary judgment for $105,000 being the total of nine payments made by the plaintiff to the defendant during 2010 and 2011 pursuant to a series of written agreements signed by both of them.

[2] The plaintiff claims that the payments were personal loans repayable at the expiration of the two-year term of each loan. The defendant asserts that they were never intended to be personal loans to him, but were advances to the account of a company or companies to be formed which both parties would own. They would only be repayable by him if he failed to set up the jointly owned businesses which the parties contemplated would be established at the time the advances were made. As one such business, Car Giant, was established, the advances ceased to be loans repayable by him.

[3] The defendant also asserts that summary judgment ought not to be granted as the plaintiff has failed to comply with certain essential procedural requirements.

Factual Background

[4] The plaintiff lives in California but he maintains various business interests in New Zealand. In 2002, he met the defendant who was also involved in business, at the funeral of a mutual friend.

[5] Over the following years they kept in touch to discuss various potential business ventures. In 2009 the plaintiff decided to become involved in two ventures proposed by the defendant: the development of a shopping mall at Bell Block, New Plymouth and a "car supermarket" operation.

[6] In general terms, it was understood that the defendant would undertake the work required to establish the businesses and the plaintiff would supply the capital required. A company, Mangati Holdings Limited, had already been formed by the defendant for the purposes of the Bell Block development and he held all the shares in it. He also held all the shares in Car Giant Limited, the company incorporated on 21 July 2010 for the purposes of the car supermarket operation. Over the period May 2010 to April 2011, the plaintiff paid a total of $105,000 to the defendant in nine separate payments. Each payment was made pursuant to a written agreement drafted by the defendant and signed by both of them.

[7] Although significant expenses were incurred on the proposed Bell Block development, it did not proceed, apparently because the land could not be acquired. However, the "car supermarket" operation did proceed. On 1 July 2011, the plaintiff and defendant entered into a further agreement relating to Car Giant Limited ("the Shareholding Agreement"). That Agreement was also drafted by the defendant. In essence, it contemplated advances being made by the plaintiff to Car Giant Limited in consideration of which the plaintiff was given the right to acquire all the shares in the company with detailed provision for the defendant to reacquire up to 50% of the shares within certain time limits conditional upon all loans owing to the plaintiff by Car Giant

being repaid. It also included an undertaking by the defendant to pay the plaintiff 50% of monies lost by him in the event of the failure of the company.

[8] The plaintiff (or trusts controlled by him) started advancing funds to Car Giant Limited in late 2011. The plaintiff estimated that the total advances to Car Giant Limited amounted to $1.7 million. The business commenced operating in about November 2012. Initially, the defendant was in charge of running it but issues quickly arose between him and the plaintiff and he ceased to have any involvement from May 2012. The business subsequently failed and the company ceased trading in May 2015. It has been put into liquidation.

The Agreements

[9] The first eight agreements followed the same format. The operative provisions are not lengthy and are set out in full below (using the first of them):

[10] It is hereby agreed the following:

> 1. Knowles will provide a personal loan to Farr for the sum of $20,000 in a lump sum on the execution of this agreement.
>
> 2. This loan will be interest free unless agreed otherwise by both parties
>
> 3. The term of the loan is 2 years from the date of execution.
>
> 4. Farr grants Knowles an option for 2 years to acquire for the sum of One Dollar either 20% of the shareholding in Mangati Holdings Ltd or 20% of the shares in CarSuperCo, or 10% of the shares in both entities or any other amount on a pro rata basis provided the total shareholding is equivalent to the above.
>
> 5. The amount of shareholding acquired in either entity is totally at the discretion of Knowles.
>
> 6. It is acknowledged by Farr and Knowles that this arrangement is an interim one and a formal shareholding arrangement will be entered into when the entities start business activity. At this future time, the allocation of shares to be acquired by the parties may be different to the present arrangement.
>
> 7. Farr acknowledges Knowles interest in the entities and all major decisions are to be entered into with the agreement of both parties. This includes all decisions that would normally require a Special Resolution by a vote of shareholders.
>
> 8. The interests of Farr and Knowles in the entities is not transferable to other parties unless by mutual agreement.

9. The agreement here is to be treated as confidential to the parties.

10. Costs in progressing both projects are to be borne entirely by Farr until the option is exercised after which costs are on a pro rata basis of shares held.

11. Farr is obliged to ensure the progress of both projects to the best of his abilities and keep Knowles informed of progress on a regular basis.

[11] The only differences between each of these agreements were:

- the date of each agreement
- the amount involved, which was $20,000 in the first two, $5,000 in the third and $10,000 in each of the remaining five
- the shareholding percentages in clause 4 which were proportionate to the amount advanced eg. in the first agreement reproduced above the advance was $20,000 and the option to purchase was 20% of the shares in either company or 10% of both; in the third agreement the advance was $5,000 and the option was to purchase 5% of the shares in either company or 2.5% of both
- In the first four agreements, the car supermarket company was named as "CarSuperCo" but in the fifth agreement dated 2 November 2010 and subsequently it was named as "Car Giant Ltd". There were corresponding changes in the "Definitions" section of the agreements in which "CarSuperCo" had been referred to as "a company to be formed".

[12] The ninth and last agreement is quite different. It is reproduced below:

LOAN AGREEMENT BETWEEN ALEX KNOWLES AND GRAEME FARR

28th April 2011

I, Graeme Farr acknowledge the receipt of a personal loan of ten thousand dollars ($10,000) from Alex Knowles. The full amount is to be repaid on the receipt of a tax return of approximately $25,000 due to me in approximately four to six weeks from the day of this agreement and I undertake that first $10,000 of that refund will be paid to settle this loan.

This is the only one of the agreements which is specifically referred to as a "loan agreement."

Submissions of the Parties

[13] The plaintiff's submission is that this is a straightforward claim for recovery of a series of personal loans. The plaintiff maintains that the agreements are clear on their face and there is nothing to suggest that the defendant was ever released from his obligation to repay the loans recorded in them. The defendant's assertions that he received the advances as a mere agent or nominee of a company or that repayment would no longer be required from him once either business was established or that he was released from liability subsequently have no foundation in the relevant documents or in evidence.

[14] In relation to the procedural arguments raised by the defendant's counsel at the hearing, counsel for the plaintiff complained of ambush but, in written submissions received after the hearing, asserted that they were without merit in any event.

[15] A notice of opposition and statement of defence were filed by the defendant before the hearing. As the statement of defence was required to answer a notice of claim filed under the 2009 Rules, it followed the form of a response under those Rules. The defences raised can be summarised as follows:

- The advances to the defendant were made to him as agent or nominee of a company or companies formed for the purpose of the proposed business ventures.

- That with the exception of the ninth, the agreements were "interim arrangements" which were varied by subsequent oral agreements so that the defendant would only remain liable for repayment if the business venture or ventures did not proceed

- The "car supermarket" venture did become established in the form of Car Giant Limited.

- The agreement of 1 July 2011 relating to Car Giant Limited further varied the nine agreements so that the defendant was not liable to repay the sums advanced under them.

- The plaintiff has a remedy against Car Giant for repayment of the advances.

Procedural Issues

[16] In written submissions presented at the hearing which were not earlier provided to counsel for the plaintiff, the defendant raised a defence which had not been raised in the notice of opposition. This was the plaintiff's alleged failure to comply with DCR 12.4(6) in that he had failed to verify the allegations in the statement of claim or to depose to a belief that the defendant has no defence to them. It was submitted that those omissions were fatal to the application. Given the lack of notice given to counsel for the plaintiff who was understandably surprised, I reserved leave for the plaintiff to file written submissions in reply after the hearing which has been done.

[17] In light of the defendant's submission that these points are determinative, it is sensible to address them at the outset. The first issue is whether the Court should even consider the points raised given the lack of notice. The plaintiff submits that DCR 7.32(5) requires the defendant to obtain leave to file the submissions at the hearing and that, as the absence of prior notice amounted to a deliberate attempt to ambush the plaintiff, leave should be refused.

[18] DCR 7.32(5) is requires that the parties file and serve a written synopsis of their argument before the hearing of a defended interlocutory application. The rule is designed more to assist the Court at the hearing than to define the issues to be decided. In the summary judgment procedure DCR 12.9 provides the latter function:

> **12.9 Notice of opposition and affidavit in answer**
>
> (1) A party who intends to oppose an application for judgment under rule 12.2 or 12.3 must, at least 3 working days before the date for hearing the application, file in the court and serve on the applicant—
>
> (a) a notice of opposition in form 19; and
>
> (b) an affidavit by or on behalf of the party intending to oppose the application in answer to the affidavit by or on behalf of the applicant.
>
> (2) For the purposes of subclause (1), **in answer to** means,—

(a) in the case of a defendant, setting out the defence to the cause or causes of action that are subject to the summary judgment application; or

……..

(3) If an opposing party does not file and serve the documents required by subclause (1), the party may not be heard in opposition to the application without the leave of the court.

(4) Rule 7.17(2) and (3) applies, with all necessary modifications, to a notice of opposition filed under subclause (1)(a).

[19] DCR 7.17 relevantly provides:

7.17 Notice of opposition to application

(1) A respondent who intends to oppose an application must file and serve on every other party a notice of opposition to the application within—

(a) the period of 10 working days after being served with the application; or

(b) if the hearing date for the application is within that period, 3 working days before the hearing date.

(2) The notice of opposition must—

(a) state the respondent's intention to oppose the application and the grounds of opposition; and

(b) refer to any particular enactments or principles of law or judicial decisions on which the respondent relies.

(3) The notice of opposition must be in form 19.

[20] The notice of opposition filed by the defendant makes no reference of any sort to the procedural points now raised in breach of DCR 7.17 (2). The typewritten submissions in which these points were first raised were obviously prepared before the hearing. The fact that they were not served until the moment they were to be presented orally by counsel at the hearing suggests that there was a deliberate decision made not to forewarn the plaintiff's advisors, presumably to prevent them from remedying any technical defects exposed. Indeed, counsel for the defendant made reference to his preference for the "old fashioned" approach when protest was made about that.

[21] The days of trial by ambush in the civil jurisdiction have passed. Procedural justice requires parties to be given proper notice of arguments to be made so that the Court can decide cases with the benefit of considered argument on all the issues from both sides. The object is to provide the parties with a substantive decision of the highest quality possible, not to reward the party who has most successfully kept his cards up his sleeve.

[22] In those circumstances, I am not prepared to grant the leave for the notice of opposition to be amended which is strictly necessary before these additional grounds of opposition can be raised. In coming to that decision, I have taken into account that whatever technical merit they might have, they lack any real substantive merit. The fact that the plaintiff has sworn an affidavit in support of the application for summary judgment provides reasonable assurance that he believes the defendant has no defence to the allegations in his notice of claim which are straightforward. Indeed, his affidavit states in Para 2, *"For the reasons set out below I believe the defendant Graeme Farr has no defence to my claim against him for failing to repay personal loans totalling $105,000."*

[23] Although he has not expressly verified the allegations in the notice of claim in those words, in substance his affidavit does that. The point about making demand for repayment has no substantive merit. The letters attached to counsel's submission in reply show that had this defence been raised in the notice of opposition as it should have been, it would have easily been answered by an affidavit in reply. Furthermore, there is nothing apparent to me from the various affidavits which have been filed on either side on both the application to set aside judgment and the summary judgment application which suggest any relevant material has been withheld.

The Law

Summary Judgment Principles

[24] The principles to be applied in an application for summary judgment are well established. They were set out by the Court of Appeal in *Krukziener v Hanover Finance Ltd*[1] and usefully summarised by Osborne AJ in *Bell v Bell*[2].

(a) Commonsense, flexibility and a sense of justice are required.[3]

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.[4]

(c) The Court will not hesitate to decide questions of law where appropriate.[5]

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.[6]

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.[7]

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is

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1 [2008] NZCA 187 at [26]
2 [2015] NZHC 3059 at [27]
3 *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].
4 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
5 *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.
6 *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21.
7 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).

under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.[8]

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.[9]

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.[10]

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.[11]

Principles of Contractual Interpretation

[25] The substantive law applicable to this dispute is the law relating to the interpretation of written contracts. In New Zealand, the Courts have adopted the principles of interpretation expounded by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[12]. These were summarised by Tipping J in the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [13]:

> Interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is

8 *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).
9 *Jowada Holdings Ltd v Cullen Investments Ltd* CA 248/02, 5 June 2003 at [28].
10 *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).
11 *Pemberton v Chappell*, above n 4
12 [1998] PWLR 896 at 912 - 913
13 [2010] 2 NZLR 444 at [61]

> generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The nature and ordinary meaning should not lead to a conclusion that flouts business common sense.

Discussion

[26] There is a difference in principle in respect of the substantive defences raised. The assertion that the advances were made to the account of a company or companies, either existing or contemplated, must relate to the meaning of the agreements at the time they were made. The same applies to the argument that the agreements should be interpreted as meaning that the advances made under them would not be repayable in the event that one or other of the contemplated business ventures was successfully established. These arguments are founded on provisions contained in the first eight agreements which do not appear in the ninth.

[27] The argument that the agreements were varied to release the defendant from potential liability by subsequent oral agreements and/or by the Shareholding Agreement of 1 July 2011 proceeds on a quite different conceptual basis. It involves an evidential assertion rather than a mere question of contractual interpretation.

[28] Before addressing these arguments, it is pertinent to record that none of them seem to be relevant to the terms of the ninth agreement which was not the subject of any discrete submission on the defendant's part, despite its obvious differences from the first eight. It was made some months after the last of the series of eight. It contained no internal linkage to either of the business ventures with which the parties were involved. In contrast to the earlier series, the time and manner of repayment were specified and were linked to the imminent receipt of a tax refund by the defendant.

[29] It appears that no arguable defence has been raised to the claim in respect of the advance made under that agreement and I can see none. Accordingly, the discussion below relates to the balance of the claim in respect of the earlier eight advances.

[30] I do not think the argument that the advances were intended to be to the account of a company, existing or otherwise, rather than to the defendant personally, is tenable. Clause 1 of the agreements is as clear as it could be: "*Knowles will provide a personal loan to Farr for the sum of $.....*" *"Farr"* is specifically defined as meaning the defendant. The companies which would undertake the two contemplated business ventures were also named and defined in the *"Definitions"* section of each agreement. If the loans were intended to have been to their account that could easily have been stated. Indeed, there would have been no need to involve the defendant at all. Mangati Holdings Limited was already in existence at the time of the first agreement and Car Giant Limited had been incorporated by the time of the third. The phrase *"personal loan"* in context must mean a loan to the defendant personally.

[31] The argument that the agreements should be interpreted to mean that the defendant would be released from personal liability upon the establishment of one or the other business is based upon cl 6. That clause must itself be read in the light of the preceding clauses 4 and 5 as the "*arrangement*" referred to in cl 6 is clearly the arrangement of the shareholding in the two companies which, when the agreements were signed, would potentially have been affected by the application of clauses 4 and 5.

[32] Indeed, not only should the individual clauses in each agreement be read in the context of the whole agreement, each agreement needs to be read in the context of the series as a whole. In that light, there is an obvious connection between the loans provided for in clause 1 and the options to purchase shares given by the defendant to the plaintiff in clause 4 arising from the fact that the amount of each loan appears to have dictated the shareholding percentage in respect of which the option was given. That connection is strengthened by the concurrent two year term for both the loans and the options.

[33] Although unstated by the (unqualified) draftsman, business common sense strongly suggests that the parties intended that if the plaintiff chose to exercise his option, the corresponding loan would be treated as repaid on the basis that the price for each percentage of the shares in either company would be $1,000 ie. $20,000 for a 20% shareholding. This interpretation follows, not only from the connection between

the amount of each loan and the extent of the corresponding option but also from the fact that the agreements specify only a nominal consideration to be paid by the plaintiff should he choose to exercise the option.

[34] In the event, there is no evidence that the plaintiff exercised any of the options given which in total would have enabled him to acquire 95% of either company. The defendant pointed to his email dated 6 December 2010[14] as evidence that it was the understanding of the parties that the plaintiff had become the beneficial owner of the relevant proportion of the shares in Car Giant Limited simply by virtue of the making of each advance. However, the email read as a whole does not support that construction. Indeed, it shows that the defendant understood that the option for the plaintiff to acquire shares in *either* Mangati Holdings Limited *or* Car Giant Limited still subsisted and also that the loans were personally owed by him at that time.

[35] As I understand it, the defendant's argument also involves the proposition that the mere establishment of an operating business by either company would extinguish any personal liability of the defendant – either they would be written off or, perhaps, become solely the liability of the relevant company.

[36] There is no doubt that clause 6 anticipated that in the event that either of the companies set up to operate the contemplated businesses started business activity, a formal shareholding agreement for either or both would be entered into in which shares might be allocated differently to the way in which they were held at that time. However, it does not follow that simply because one or the other company had commenced business activity, the loans would be forgiven or transferred to the relevant company.

[37] First, cl 6 of the agreements plainly does not say that. Secondly, that result would make no business sense. When the agreements were signed the defendant owned all the shares in both companies (or would do so in respect of the contemplated car company). Although the plaintiff had options to buy shares from the defendant proportionate to the advances made to him, he was under no obligation to buy any. If, as it transpired, the plaintiff did not exercise any of his options to acquire shares in

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[14] Exhibit AK5 to the plaintiff's affidavit dated 10 September 2018

either company, the defendant would remain the owner of a 100% shareholding in both. Why then should the plaintiff release him from personal liability under the loans?

[38] The reality is that cl 6 amounts to no more than a statement of the parties' intention to review the shareholding arrangements, whatever they might be, if and when business activity commenced. It did not bind either party to making any arrangement different to the one existing at that time.

[39] The alternative argument advanced for the defendant is that there has been a subsequent agreement to vary the agreements which involved release of the defendant's personal liability for the advances. Such subsequent agreement is alleged to have been made either orally and/or by virtue of the Shareholding Agreement in respect of Car Giant Limited.

[40] The assertion of an oral agreement is so weak that it is unsustainable in the summary judgment context. The parties are two business people. The evidence of the nine agreements and the Shareholding Agreement shows that they documented the important aspects of their business relationship in formal documents, albeit without professional legal assistance. They lived in different countries, they communicated with each other at least in part, if not wholly, by email. Email correspondence has been exhibited by both parties. None of it suggests the parties intended to vary any of the nine agreements so as to release the defendant from personal liability under the loans. Nor does the evidence disclose any commercial reason for the plaintiff to do that prior to the making of the Shareholding Agreement.

[41] The argument that there has been an agreed variation is based alternatively or additionally on the proposition that the obligation to repay the advances was subsumed by the Shareholding Agreement. It is important first to record the business context in which that was made. It was made some months after the last of the eight agreements, that is, when the plaintiff had already advanced a total of $95,000, but had not acquired any shares in either company. The defendant continued to hold 100% of the shares in both. It was made *before* the Car Giant business had been actually established as an

operating business. Although it is not entirely clear from the evidence, it appears that the parties had accepted by then that the Bell Block venture would not proceed further.

[42] The Shareholding Agreement is drafted in a formal way. It has an extensive preamble which assists in ascertaining the business plan of the parties in respect of Car Giant at that point in time. It provided inter alia:

> 1. Knowles and Farr intend to open a car supermarket which will stock between 500 and 1000 cars on a high profile site of approximately 2 hectares at 9-39 Western Hutt Road in Petone.
>
> 2. The name is intended to be Car Giant and Farr has formed a company Car Giant Ltd to own and operate the car supermarket.
>
> …
>
> 6. Farr holds 100 percent of the shares in Car Giant at the signing of this document and this agreement will describe Knowles rights over those shares.
>
> 7. Farr is the sole director of Car Giant at the signing of this document.
>
> 8. Knowles has agreed to provide capital for the establishment of the car supermarket subject to this document and other requirements agreed between Farr and Knowles which are not necessarily part of this document.

[43] Consistently with those stated intentions, the first operative clause provided that *"Knowles will lend Car Giant funds sufficient to cover set-up costs and initial trading losses, the exact amount being an agreed amount between Knowles and Farr and based on the budget prepared by Farr"*. Clause 2 provided that the funds would be made available as required by Car Giant.

[44] Clause 3 provided that *"in exchange for the loan facility Knowles has the ongoing right to acquire all of the shares and therefore complete ownership of Car Giant"*. Consistently with that, clause 5 provided that the defendant would hold all the shares in Car Giant on behalf of the plaintiff and would transfer the shares to the plaintiff as requested. While the shares were never formally transferred to the plaintiff, the subsequent behaviour of both parties shows that both understood that the plaintiff was the sole beneficial owner of the company.

[45] There is no specific reference in the Shareholding Agreement to the advances made to the defendant under any of the agreements which are the subject of this claim. Nor is it possible to read the Agreement as containing any implied release of the defendant's liability for those advances. Indeed, the terms of it show that the plaintiff was to acquire the defendant's shareholding in Car Giant Limited in consideration of loans *to be made* to the company in accordance with a budget prepared by the defendant. The language used by the defendant when he drafted the agreement is not apt to encompass the intended extinction of his personal liability for the existing advances made to him in the period May 2010 to January 2011. Nor is there any suggestion in the evidence that the budget made any reference to those loans.

[46] The defendant pointed to an email exchange of 31 May 2011 in the period leading up to the signing of the Shareholding Agreement. That exchange in fact indicates that the defendant understood that he was personally liable for the advances (*"or should really be paid from our shared profit after I have bought in – otherwise* ***I am paying you back*** *from money the company, owned 100% by you, is earning"*). The exchange signifies no more than that it was anticipated that profits from Car Giant Limited might be used for repayment, the repayment of all loans made by the plaintiff to Car Giant being a prior condition for the reacquisition of shares in the company by the defendant.[15] In the event the loans made by the plaintiff to Car Giant were never repaid and the defendant never reacquired beneficial ownership of the shares.

[47] I have come to the conclusion that the various defences advanced by the defendant are not reasonably arguable. The assertions by the defendant of a contractual relationship which does not accord with that recorded in the agreements (including the Shareholding Agreement) are so lacking in contemporary documentary corroboration and so inherently improbable both commercially and when assessed against the wording of the agreements, that they are incapable of creating a genuine factual conflict.

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15 Cl 10,11,12 of the Shareholding Agreement

Result

[48] The application for summary judgment is granted for the principal sum of $105,000. The original notice of claim sought discretionary interest under the District Courts Act. It should not be assumed that that will be automatically granted given the procedural history of this claim. If the parties cannot agree on an appropriate sum for interest, costs and disbursements, the plaintiff is to file and serve a memorandum setting out the amount sought. The defendant will have seven days to file a memorandum in response and the file is then to be referred to me.

C N Tuohy
District Court Judge