BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2009/388

BETWEEN:

CURTIS ZIMMERMAN
Dba THE ZIMMERMAN AGENCY

Claimant

and

BRITISH VIRGIN ISLANDS TOURIST BOARD

Defendant

Appearances: Mr John Carrington for the Claimant
Ms Tana'ania Small for the Defendant

JUDGMENT

[2011: 15, 27 June]

(Contract for services - assessment of damages – inquiry when Defendant's repudiation accepted by Claimant – whether Claimant entitled to be paid fixed monthly retainer until acceptance of repudiation – quantum of damages following acceptance of repudiation – whether specific damage proved)

[1] On 30 July 2010 I handed down a written judgment upon an application by the Defendant Board ('the Board') to set aside a judgment entered against it in default of defence by the Claimant. I declared the Claimant to be entitled to certain payments from the Board, ordered an inquiry as to the date when the Board's repudiation of the agreements which were in issue was accepted and an inquiry as to damages. This is my judgment on those inquiries and assessments.

[2] The Claimant is an advertising and public relations agency which had the benefit of two contracts in writing each made between itself and the Board on 1 July 2008. One contract was for the provision of advertising services ('the advertising agreement') and the other for the provision of

public relations services ('the public relations agreement') (together 'the agreements'). Each contract was for a fixed term of 24 months. Under the advertising agreement the Claimant was entitled to a retainer of US$50,000 per month. The retainer for the public relations agreement was US$25.000 per month. It is common ground that by letter dated 27 February 2009 the Board repudiated each agreement by stating (a) that it wished the Claimant to undertake no new work under either of them and (b) that it would not pay retainer under either agreement after the expiry of three months following the date of the letter (i.e. after the end of May 2009). When this letter was written the Board was in arrears in respect of payments due to the Claimant under the two agreements which, by the end of May 2009, had reached nearly US$1.4m. Although the precise date when they were finally paid off was not in evidence, I accept the evidence of Ms Hadassah Ward, Director of Tourism of the Board ('Ms Ward') that they were discharged by the end of June 2009. No invoices in respect of any period later than 31 May 2009 were submitted to the Board by the Claimant.

[3] By letter dated 18 June 2009 US Attorneys, Ausley & McMullen, wrote to the Board pointing out (correctly) that there were no provisions in either agreement permitting the Board to terminate on notice before 1 July 2010 and stating that the Claimant was not willing to relinquish its contractual right to serve under the agreements. A week or so later, the same Attorneys wrote again to the Board stating that the agreements remained in full force and effect through 30 June 2010. They nevertheless said that the Claimant was willing to discuss varying the agreement and ended by saying that if they did not hear from the Board by close of business on 26 June 2009, they would sue for damages, legal fees and costs. There was no response from the Board to either of these letters.

[4] On 17 August 2009 McW. Todman & Co wrote to the Board asserting that the Board had wrongfully terminated the agreements and had thus caused the Claimant loss of income for the balance of their terms. The letter went on to say that the Claimant had always been willing to perform for the full terms of the agreements and demanded that the Board admit liability for its breaches and compensate the Claimant by paying the balance of the fees due, said to amount to US$1.2m (that is to say, sixteen months worth of the aggregate fees stipulated for by the two agreements). The multiplier of sixteen was calculated by adding to the thirteen months between 1 June 2009 and 30 June 2010 a three month notice period, but I have already held in my judgment

setting aside the default judgment that the Claimant was not entitled, as a matter of construction of the agreements, to any payment after 30 June 2010. The letter ended by saying that in the absence of a response by 31 August 2009 the Claimant would commence proceedings against the Board for breaches of the agreements.

[5] Those proceedings followed on 9 November 2009. They claimed (1) loss of monthly fees (US$1.2m) (2) damages for breach of contract and (3) interest, costs and further or other relief. Judgment in default of defence was entered for the whole of the US$1.2m and costs on 24 December 2009. On 30 July 2010 I set aside the judgment as irregular and replaced it with judgment in the terms summarised in paragraph [1] above. In fact, as will already have become apparent, the first item in the judgment given on 30 July 2010 had been satisfied by the end of June 2009.

When did the Claimant accept the Board's repudiation?

[6] It was common ground that the repudiation was accepted by at the latest 9 November 2009, when the claim was issued.

[7] Ms Small, for the Board, submitted that the repudiation had been accepted by April 2009. She relied upon the following matters.

[8] On 7 April 2009 Ms Ward had emailed Mr Zimmerman, the President of the Claimant, asking for the photography and other creative assets generated by the Claimant on behalf of the Board to be transferred by 15 May 2009. In cross examination Mr Zimmerman explained that these were materials such as photography, illustrations, film footage and music. Mr Zimmerman replied on 14 April 2009 with a schedule of what were described as outstanding balances. The email stated that once all the balances and obligations due to the Claimant had been satisfied, the Claimant would ensure that all assets were transferred. He explained that industry practice was to return such assets to the client once the client's total obligations had been satisfied.

[9] On 19 April 2009 Mr Zimmerman asked Ms Ward to provide the Claimant with a letter on 'BVI stationery' stating that the Claimant was no longer responsible for media and associated media

payments, which could be distributed to the media together with confirmation from the Claimant. The email went on to say that:

> 'That will allow us to get your account closed faster and get your creative assets returned to you for your use.'

[10] Mr Zimmerman maintained in his evidence that the only reason that he asked for the letter from the Board was because the Claimant had been receiving invoices for media space or time booked directly by the Board on its own account but billed by the relevant media to the Claimant. Mr Zimmerman appeared to be suggesting by this evidence that the reason for the request for the letter on BVI stationery was nothing to do with any acceptance on the part of the Claimant that the agreements were at an end, but merely in order to rectify a confusion arising from the fact that media were mistakenly billing the Claimant for media placements booked directly by the Board. While I accept Mr Zimmerman's evidence that the Claimant had been inadvertently invoiced for media placements booked by the Board direct[1], that does not take away from the fact that the Claimant wished to tell the industry that there was no longer any connection between the Board and the Claimant.

[11] In my judgment the Claimant had accepted the Board's repudiation by at the latest 19 April 2009. It is no criticism of Mr Zimmerman that he responded in this way. His evidence was that his agency had been supporting the Board by carrying arrears in the region of US$1m on a regular basis. He must have been aware, and I find, that the relationship could not continue on the terms set out in the agreements. So he bowed to the inevitable and, as shown by his email of 2 June 2009, the Claimant did little or no work for the Board after the end of February 2009[2].

[12] Subsequent communications and events are consistent with and explicable only on the basis that that was the case.

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[1] that seems to be consistent with the difference between the figures contained in the Claimant's email of 2 June 2099 and the figures in the aged debt report of 4 June 2009, which suggests (1) that the Board had placed its own media after the end of March (as confirmed by Ms Ward in her evidence) and (2) that invoices attributable to the Board had been wrongly directed to the Claimant during May and subsequently settled directly by the Board

[2] I assume that the 'media' element of each invoice referred to placements made during the preceding month

[13] On 24 April 2009 the Board sent out a Request for Proposal ('RFP') for the provision of marketing and advertising services in the United States and Canada. One of these was sent to the Claimant. On 28 April 2009 Mr Zimmerman emailed the Board asking if this was merely a courtesy or whether (I paraphrase) the Claimant was in with a chance. The response from the Board was that the RFP had been sent to the Claimant at the request of the Board's Chairman and that it represented an opportunity to begin on a new page. On the same day Mr Zimmerman emailed the Board asking it to accept the email as evidence of its intention to submit an RFP for creative advertising. Various exchanges followed concerning the format to be adopted in the Claimant's tender document, but before they could be acted upon the Claimant delivered the required number of hard copies to the Board by the deadline.

[14] On 4 May 2009 the Claimant indicated its intention to submit a response to an RFP distributed by the Board asking for tenders for Strategic Marketing and Public Relations. The Claimant submitted a response on 20 May 2009.

[15] The Claimant's response to the Strategic Marketing and Public Relations RFP is not in evidence, but that relating to advertising is. It is sufficient for immediate purposes to note that its proposals for remuneration are inconsistent with the fee and payment structure contained in the advertising agreement. The proposed new agreement could not have stood together with the advertising agreement.

[16] Although Mr Carrington bravely attempted to submit that the delivery of these two responses was not necessarily evidence that the Board's repudiation had been accepted (because, he submitted, the new agreements might not take effect until the Claimant's advertising and public relations agreements had expired), in my judgment the submission of these documents amounted to a indication to the Board on the part of the Claimant that it regarded the existing arrangements as terminated. Indeed, an email sent by Mr Zimmerman on 7 May 2009 to Ms Ward telling her that hard copies of the Claimant's response to the advertising RPF had been shipped ended by saying that:

> 'While I don't hold out a great deal of hope, it is my sincere wish that this effort will lead to us continuing to work together.'

[17] On 2 June 2009 Mr Zimmerman sent the Board an aged debt report with a request for payment of the amount of US$1.37m then outstanding. Understandably anxious to get this debt paid, he pressed again on 8 June 2009. In that email he told Ms Ward that the Claimant's attorney, in response to a request from the Board, was reviewing how to transfer the obligation of paying media bills directly to the Board. As I have said, the ending of these arrangements and the fact that the Board was now making arrangements direct for media placements is another clear indication that the agreements were accepted by both sides as no longer on foot.

[18] The Claimant, as part of the services provided under the agreements, maintained a website for the Board[3]. At the end of May the Claimant disabled[4] the website. In early June Ms Ward asked Mr Zimmerman if he would keep the website up and running through June, after which time the Board expected to have its own internally managed site. Mr Zimmerman agreed to do this and said in cross examination that he did so as a courtesy. He took the site down again at the end of June. On 2 July 2009 he was asked to keep the site up until 24 July 2009. The Board offered to pay for this facility. Mr Zimmerman complied with the Board's request and continued to keep the site available until some time in late July. In an email of 2 July 2009 he told the Board that he did not think that it was necessary for the Board to pay for this assistance.

[19] Mr Carrington submitted that the assistance over the website was provided pursuant to the agreements and shows that the Claimant was acting on the basis that they were still on foot. In my judgment, the evidence points in precisely the opposite direction. Mr Zimmerman was helping the Board out as a favour. No doubt he considered that it might help with the Claimant's responses to the RFP's. There is nothing wrong with that, but I do not consider that these events show that the contract remained on foot after 19 April 2009.

[20] Finally, reliance was placed by Ms Small upon letters written by the Claimant to the Mexican and Jamaican Tourist Boards on, respectively, 11 and 8 June 2009. Each letter contained the following passage:

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[3] it appears that the link to the website was the subject of a separate 'hosting' agreement, but no copy of that agreement was before the Court and in any case nothing material appears to turn on the terms of that separate agreement

[4] that is to say, made it inaccessible to the public

'As a result of a new Government and changes in the Tourist Board our relationship with the British Virgin Islands is coming to a conclusion. We are actively seeking a relationship with a major Caribbean destination.'

Mr Zimmerman explained in his evidence that the Jamaican Tourist Board would not engage an agency to handle its advertising and public relations if that agency was also acting for another competing island. These letters, while not themselves amounting to an acceptance of the Board's repudiation, seem to me to be consistent only with the fact that it had indeed been accepted.

[21] This subsequent material confirms my finding that the Board's repudiation had been accepted by 19 April 2009. The attempt on 18 June 2009 by the Claimant's US Attorneys to maintain that the agreements remained on foot was too late. They had already come to an end.

Damages

[22] Because the agreements came to an end in April 2009, the Claimant was not entitled to be paid any of the retainers thereafter. The Board did, in fact, pay the retainer which would have fallen due for May had the agreements not been discharged, but this was because of the promise contained in its letter of 27 February 2009 rather than because the Board, when the money was paid, was under any continuing obligation to do so. Its liabilities under the agreements had come to an end when its repudiation of them was accepted.

[23] Because of the Board's accepted breach, however, the Claimant, while no longer entitled to the benefit of the agreements, is entitled to an award of damages putting it in the same position financially as it would have been had both sides continued to perform them until 30 June 2010. If it claims to have suffered financial loss as a result of the early termination, it is for the Claimant to prove the amount of that loss. It cannot, however, claim for losses which could have been avoided in the ordinary conduct of its business (e.g. by attracting and accepting new clients to fill the gap left by the loss of the work flowing from the Board or by reducing staff to take account of any diminution in its workload or income stream).

[24] Where a party loses a profitable contract as a result of its breach by the counterparty the general rule is that the innocent party will be able to recover, subject to reasonable steps having been

taken in mitigation, the profit lost as a result of the early termination of the contract. Where a contract is for the provision of goods and services, the net profit derived from the contract will be the difference between the contract price and the cost of materials and apportioned overheads[5]. Gross profit will be the difference between the contract price and the cost of the materials used in production[6].

[25] Where a contract is, as in the present case, for the provision of services only, the profit (if any) will be the difference between (1) the amount of fees receivable under the contract and (2) the overheads (staff, rent, insurance etc) attributable to its performance. General monthly overheads (including what might be referred to as the salaries of back office staff) may be attributed to the present agreements by dividing the amount of Claimant's total general overheads per month by its total revenue per month and multiplying the result by US$75,000.

[26] Where, as appears to be the present case, a company holds itself out as being in the business of providing services of the sort which were provided under the agreements, it is self evident that it must maintain a core staff in order to enable it to service both existing and any new work which it can obtain. It is no doubt a matter of some skill for an employer in this line of business to judge what permanent staff it needs to maintain, what staff it can engage rapidly in the market to cope with peaks in demand for its services and upon what terms it can engage staff in order to be able to shed them on the most advantageous terms when work is scarcer.

[27] If against this type of commercial background a term contract under which a recurring fee is payable is lost as the result of the client's breach of contract without any prior warning having been given, the loss may ordinarily be expected to have an immediate impact feeding through directly to the service provider's bottom line (in other words, there will be an immediate loss of profit equivalent to the amount of the recurring fee currently payable under the contract). But if the service provider reacts reasonably, this situation will persist only so long as the service provider is unable, by taking no more than reasonable steps, either (a) to lay off staff to compensate for the loss or (b) to attract new work in substitution for the lost contract or (c) to compensate for the lost

[5] **Western Web Offset Printers Ltd v Independent Media Ltd** [1996] CLC 77
[6] ibid

contract by a combination of the two. The amount actually recoverable from a defendant in any given case will therefore depend upon a claimant's reasonable resort to such measures.

[28] In the present case the Claimant has provided no financial statements or statements of income, which might, when considered by reference to the Claimant's overheads, have evidenced a shortfall in its monthly revenues after 31 May 2009 attributable to the loss of the agreements. There is no evidence that the Claimant was obliged to make staff redundant as a result of the loss of the agreements, although Mr Zimmerman said that some natural wastage (which he put at less than half the average for the industry) was not replaced. No employment records were produced to the Court to provide details of these matters.

[29] In his witness statement Mr Zimmerman lists the employees assigned to the Board's account. There are twenty in all, including himself (out of a total workforce of 140). During his evidence he gave surprisingly precise evidence as to the amount of the time of each employee which he said was dedicated to the Board's account. He said that 50% of his own time was so dedicated, although since he also said that the Claimant had some thirty accounts in all, of which the Board's account was in the top third, I did find that quite difficult to accept. Ms Ward, whose evidence I found convincing on all matters, said that communications with Mr Zimmerman were mainly on the subject of payment and that there was a considerable turnover in the identity of staff visiting the BVI and that until the appointment of Trish Smith in around August 2008 there had been no fixed point of contact with the Claimant.

[30] In his witness statement Mr Zimmerman says that it was only once it was appreciated in November 2009 that the Board was not going to honour the agreements that the Claimant took steps to reassign the dedicated personnel to other work. He says that this process took until May of 2010 and that while it continued the remuneration for non-reassigned staff cost the Claimant US$54,481 for salaries and benefits each month (or US$65,070 including unidentified overheads).

[31] This evidence is unsatisfactory, to say the least. First, because it asserts that it was not until November 2009 that the Claimant came to appreciate that the Board was not going to honour its agreements, whereas there is plain evidence, and I have found, that it accepted the Board's repudiation in April. Secondly, because it assumes that there was (a) a constant and precise amount of time during which each dedicated employee was allegedly unoccupied throughout each

month between November 2009 and May 2010 and (b) that that empty time, having persisted at a constant level over a period of some six months, was filled in its entirety in May 2010. Thirdly, and despite Mr Zimmerman's evidence that there was some natural wastage over time, it assumes that there was no such natural wastage among the personnel said to have been dedicated to the agreements with the Board. And finally, because it is unsupported by any wage slips confirming the earnings of each dedicated member of staff or timesheets showing what they were engaged upon during the period mentioned by Mr Zimmerman.

[32] I reject this evidence. After at the latest 19 April 2009 the Claimant was free from any requirement to service the agreements. I do not accept, as Mr Zimmerman asserted, that the staff who had worked on the Board's agreements could not be found other work within the organisation or, if necessary, put on short time or even dismissed. The Claimant published press releases indicating projected capitalised returns for 2009 of US$150m and for 2010 of US$160m, based upon a workforce of 140. Although these figures do not represent simple revenues, they are a strong indication that the Claimant was in a healthy and expanding state during those two years. It could not have been trading so successfully if, each time a contract was lost or came to an end, staff who had worked on that contract, wholly or in part, were kept on and left wholly or partly idle until a replacement contract suitable for their identical particular talents was obtained. Certainly it could not have done so had such staff been kept wholly or partly unoccupied for 12 months, which is the effect of Mr Zimmerman's evidence if one works back to the actual date of the Claimant's acceptance of the Board's repudiation.

[33] Ms Ward's evidence, which I accept, is that when the Claimant sent teams to visit the BVI, they did not consist of the same personnel on each occasion. In her witness statement she points out that in its response to the advertising RFP the Claimant proposed that it be remunerated on an alternative basis. Either it would take US$15,000 per month, plus 15% on media placements up to UUS$1m, 10% on placements between US$1m and US$3m and nil thereafter; or it would take a flat fee of US$38,500 with no commission on placements. These figures must be contrasted with the flat rate of US$50,000 per month together with commission on media placements that operated under the advertising agreement. Ms Ward points out that if the Claimant could afford to do business on the proposed new terms, it must have had the ability to shed or reallocate staff in order to compensate for the reduced income. I agree with her.

[34] Mr Zimmerman said that the Claimant obtained a new account with Cooper Tires in June 2009 and another with an organization called Party City in July 2009. A further new account was obtained with another organization, called, according to my note, Firehouse Subs, possibly in August of 2009. No particulars were provided as to the profitability of any of this new work, but Mr Zimmerman said that members of staff dedicated to the tourism/hospitality market could not be deployed on such account, which involved companies in different market sectors, since their expertise would be of no use. I accept that some staff will have had particular expertise in particular areas and that hospitality and tourism would be one such. What I am not prepared to accept is that staff familiar with and skilled in servicing hospitality and tourism contracts could not turn their minds and skills to advertising and public relations work in the context of other industries. There was some rather sporadic evidence about new work obtained in tourism/hospitality and a figure of some US$20,000 per month was attributed to this new work.

[35] As I have said, I accept that the sudden loss of a term contract generating recurring fee payments will generally have an immediate effect on a service provider's bottom line and that that effect may persist, while usually diminishing, over a period. In the present case, the Claimant had six weeks after accepting the Board's repudiation before any such impact would be felt. I have no idea whether in fact any such impact was felt after the end of May 2009, but it was for the Claimant to prove that it was and in my judgment it has failed to do so. This claim therefore fails.

Edward Bannister

Commercial Court Judge

27 June 2011