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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1253/90

**NOT
RECOMMENDED**

BETWEEN THE NEW ZEALAND INSURANCE
 LIFE LIMITED

Plaintiff

2071

A N D PETER COLEMAN

Defendant

Hearing and
Judgment: 4 October 1990

Counsel: Mr E C Gray for Plaintiff
 Mr M Sherratt and Mr Smith for Defendant

JUDGMENT OF DOOGUE J

This is an application for summary judgment. The Defendant was employed by the Plaintiff as a life insurance representative from 28 October 1986 to October 1988 pursuant to a written agreement entered into in November 1986. Under that agreement the Defendant was entitled to certain commissions in respect of new business and other matters referred to in the agreement. In most circumstances the right to receive and or retain the commission was conditional upon the Plaintiff receiving and retaining premiums for a period of two years from the date of commencement of any particular policy.

The agreement provided for the Plaintiff at its option to pay or credit advances against commissions to the Defendant. Such advances constituted a debt to the company and were recoverable on demand. Subsequent to the termination of the Defendant's employment as a commission agent, the Plaintiff has sought to recover from him the amount which it claims is due and owing by virtue of that agreement in respect of various advances and other items. The amount now claimed as due is \$32,080.74.

The Defendant disputes that the agency agreement was terminated. The essence of the Defendant's opposition to judgment being entered relates to a submission that the Plaintiff is estopped from recovering most of the amounts claimed against the Defendant by virtue of representations made to the Defendant between September 1987 and April 1988. This is the core of the defence which it is submitted the Defendant has to the claim.

In addition there is a particular dispute as to whether part of the claim relating to monies alleged to be payable to the Plaintiff in respect of mortgage instalments totalling \$4,969.36 are payable because of there being a settlement of all monies owing by the Defendant to the Plaintiff under the particular mortgage.

The primary issue is whether or not there is a defence in respect of the alleged representations by the Plaintiff to the Defendant. This part of the case arises in respect of the alleged formation of a group known as the Kaimai Group. The Defendant submits that because the Plaintiff entered into negotiations for the creation of this group as a corporate agency and was agreeable to participating within the company to be formed to operate that corporate agency, that statements made by the Plaintiff's representatives to the Defendant and the result of the negotiations constitute representations giving rise to an estoppel.

The essence of this aspect of the case is that the Plaintiff had agreed in general terms to the formation of a company, with the Plaintiff to have a shareholding in that company and with the Defendant and others also to have an involvement in that company. The company was to be formed on 1 April 1988. For reasons which are not entirely clear it was not formed. It does seem reasonably clear that at that time there was no final agreement between the Plaintiff and the other parties interested as to the final form of the company.

The Defendant's evidence is that he relied upon statements that the company was as good as incorporated,

and to the like effect, and that as a result he operated as if the company was incorporated. He says that because of that he paid various commissions to the "Kaimai Corporate Agency". He says that the commissions were used for costs in the setting up of the company and he did not receive the benefit of those monies as they were placed in the corporate agency commission account for the benefit of all salary earners. He says that the Plaintiff was aware of that arrangement but is now purporting to debit him personally. He says that that should not be permitted because as a result of the Plaintiff's representations he did not obtain the benefit of the commission credits.

He asserts that his individual agency agreement ceased to be effective as at 1 April 1988. He further says that as a result of a breach of the Plaintiff's representations, it failed to incorporate the company on the terms agreed but that in any event, from 1 April 1988 he was no longer operating under his agency agreement but was operating in and contributing to the corporate agency. It is his submission that it is the corporate agency that is liable for the debits, not only in respect of commissions but also in respect of an item relating to a car loan and a further item relating to a personal computer. He submits that he changed his position to his detriment as a result of the representations of the Plaintiff's representatives.

If the matter rested there it may be that it would be difficult for the Plaintiff to satisfy the Court that there was no defence to the claim, notwithstanding that it is clear that no final agreement was ever reached as to the incorporation of the company and it was not entered into, as the Defendant must have been aware from his presence at meetings after 1 April 1988 relating to the company. The company was not being created by the Plaintiff through its own resources but a solicitor was acting for all the parties interested in the formation of the company.

However, it is clear that in November 1988, by an exchange of documents dated 2 November 1988, the Plaintiff and the Defendant agreed as follows:-

"NZI agrees to take no action against our clients except for the principal balances outstanding on our client's car, house and handcuff loans and the commission account debit balances. Our clients are to be given 60 days to refinance their car, house and handcuff loans and commission account debit balances."

It is also pertinent to note that as late as 4 May 1989 the Defendant wrote to the Plaintiff, inter alia:-

"I should like to point out that the life agency agreements of myself and the other partners were in our individual names. No agency was held by Kaimai so it would therefore be irrelevant to refer to the Receivership as grounds for not discussing and in fact

honouring your word in respect to my agency agreement as indicated in your letter of termination dated the 7 October 1988."

It is the contention of the Defendant that the agreement of 2 November 1988 between the parties constituted a fresh agreement between the parties as to any liability of the Defendant to the Plaintiff and that notwithstanding the Plaintiff's subsequent letter of 4 May 1989, that the Plaintiff was not entitled to rely upon the agency agreement entered into in November 1986.

In my view that submission is doomed to failure. There was no fresh agreement between the parties in respect of the Defendant's liabilities to the Plaintiff. The Plaintiff forebore from taking any action against the Defendant other than for the principal balances outstanding on his car, house and for present purposes the commission account debit balances. It further forebore to take any steps for 60 days after 2 November 1988.

The Defendant seeks to rely on later events as well in support of its defence and on other matters relating to the documentation of the original agreement with reference to other documents before the Court. In my view, none of those matters assist the Defendant.

The simple fact of the matter is that the Plaintiff is taking action under its original agreement, having agreed to take no other action. It gave the Defendant the period of forbearance contained within the agreement just referred to above. It is not setting up any fresh agreement as is submitted by the Defendant. It is forced to rely upon its original agreement and that is what it is doing. It is plain the agreement of 2 November 1988 did not constitute any fresh contractual liability between the parties as to matters currently outstanding between them at that date in respect of the Defendant's agency. On this central issue, therefore, the Defendant has not satisfied me that he has any arguable defence whatever and I am satisfied on this issue that the Defendant has no defence.

There is a secondary issue in respect of what sums, if any, are owing under the mortgage. The Plaintiff wrote to the Defendant on 15 February 1989 through its solicitors claiming that a certain sum was payable to settle the mortgage and setting out its calculations. That sum was paid by the Defendant and the mortgage discharged. The Plaintiff now seeks to claim further purported mortgage instalments totalling \$4,969 which is said to comprise monthly instalments debited to the Defendant's commission account at his request.

The evidence before the Court indicates clearly that such debits as have not been dealt with in that letter of 15 February 1989 do not on their face correspond with the amount at present claimed. Counsel for the Plaintiff is unable to reconcile the figures to my satisfaction. The Plaintiff has not satisfied me that the Defendant does not have a defence in respect of the claimed mortgage instalments of \$4,969.36. I note a credit has been given in respect of mortgage interest rebate of \$937.50. No doubt that credit forms part of the same area of dispute.

In my view, the Plaintiff is entitled to judgment in the sum of \$28,048.88 being \$32,080.74 less \$4,969.36 plus \$937.50. In addition the Plaintiff is entitled to interest at the rate of 11% in accordance with s.87 of the Judicature Act 1908 on the said judgment amount from 3 August 1990.

The Plaintiff is entitled to costs in respect of the judgment amount of \$1,500.00 together with reasonable disbursements to be fixed by the Registrar in accordance with Item 34 of the Second Schedule to the High Court Rules.

In respect of the outstanding amount claimed of \$4,969.36 less the mortgage interest rebate of \$937.50,

that matter must be dealt with as an ordinary proceeding and it will accordingly proceed in accordance with the Rules.

Padagogin 7.

Solicitors: Simpson Grierson Butler White, Auckland
for Plaintiff
McElroy Milne, Auckland for Defendant