

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 255 of 2000

BETWEEN

FIJICARE INSURANCE LIMITED a limited liability company having its registered office at Level 9, FNP House, 343 – 359 Victoria Parade, Suva, Fiji.

PLAINTIFF

AND:

GRAHAM BARNETT trading as **G. BARNETT CONSULTANTS** previously of 6th Floor, Ratu Sukuna House, Victoria Parade, Suva, Fiji but present address unknown to the Plaintiff

DEFENDANT

BEFORE : Justice K. Kumar

COUNSEL : Prakash, R and Kenilorea, P for Plaintiff

: No Appearance for Defendant

Date of Hearing : 29 May 2007

Date of Judgment: 28 June 2013

JUDGMENT

- 1.0** On 14 June 2000 Plaintiff filed a Writ of Summon together with Statement of Claim seeking following relief against the Defendant:
- (a) Judgment in the sum of \$69,998.62;
 - (b) Cost of this action;
 - (c) Damages;
 - (d) Interest; and
 - (e) Any other Order that this Court deem fit.
- 2.0** Plaintiff's claim is based on an alleged brokerage Agreement between the parties ("the Agreement") whereby Defendant agreed to act as an insurance broker and pursuant to the Agreement was required to collect premium and remit it to the Plaintiff.
- 3.0** Plaintiff in its Statement of Claim alleged that the Defendant collected premiums for the months of July and August 2006 totalling \$69,998.62 on behalf of the Plaintiff but failed to remit the premium to the Plaintiff.
- 4.0** Defendant in his statement of defense filed on 1st September 2000 denied the existence of a brokerage Agreement between him and the Plaintiff which required him to remit the premiums collected by him within 15 days **but** did admit that he acted as a broker for the Plaintiff.
- 5.0** Defendant in his statement of defense also admits collecting premiums on behalf of the Plaintiff but state that such premiums were offset against long outstanding commissions claim that Plaintiff admitted owing to the Defendant.
- 6.0** Pleadings in this matter was completed and this matter was set down for hearing on 29 May 2007.

- 7.0** At this stage it is to be noted that on 1st February 2006 Messrs Mitchell Keil and Associates were granted leave to withdraw acting for the Defendant and since then no appearance has been entered on behalf of the Defendant. No formal application was filed by Defendant's solicitors pursuant to Order 67 Rule 6 of the High Court Rule 1988.
- 8.0** Plaintiff's claim was heard on 29 May 2007 by His Lordship Justice Jitoko (as then he was) and was adjourned for Ruling on Notice.
- 9.0** Ruling not being delivered this matter was then referred to his Lordship Justice Hettiarachchi (as then he was) who also did not deliver the Ruling prior to his departure.
- 10.0** On 7 June 2013 I caused this matter to be called when Counsel for the Plaintiff agreed for me to deliver the Ruling on the basis of pleadings filed, notes taken by the trial judge and submissions filed.
- 11.0** On date of hearing Mr. Peter McPherson, the then Managing Director of Plaintiff gave evidence for the Plaintiff. From the Trial Judge's notes I accept Mr. Macpherson's evidence that:-
- (i) There was a brokerage agreement between the Plaintiff and Defendant which Defendant signed on 29 March 1995 as appears from Exhibit P1 – Appendix Two where under the heading item Defendant states: “B U/R Agreement (I signed 29/2/95)”;
 - (ii) Pursuant to the Agreement and Insurance Act Cap 217 Defendant was required to forward the premiums collected on the fifteenth of the month following the month of receipt;

- (iii) Defendant received premiums on behalf of the Plaintiff in July 1996 which was to be remitted to Plaintiff by 15 August 1996 and in August 1996 which was to be remitted to the Plaintiff by 15 September 1996;
- (iv) Defendant despite demands being made by Plaintiff and its Solicitors had failed to remit the premiums received as aforesaid to the Plaintiff.

12.0 Defendant at paragraph 4 of his statement of Deferment sates that:-

“4. With respect of paragraph 6 the Plaintiff’s claim the Defendant and admit that he collected premium on behalf of the Plaintiff but state that such premiums were offset against long outstanding commission claims that the Plaintiff admitted owing to the Defendant.”

13.0 In fact this is the only possible defense defendant raise which is rejected on the grounds that Defendant has failed to particularise his claim for set off and also he could have filed a counterclaim in respect to commission allegedly owed to him by the Plaintiff which of course he failed to do. In any event Defendant had no right to keep the premiums which belonged to the Plaintiff.

14.0 Even though broker is an agent of the insured the Defendant or as a matter of fact any broker by receiving premium on behalf of the insurer creates a fiduciary relationship as between the insurer and the broker in respect to the premium received by the broker for the insurer.

15.0 The relationship of fiduciary is not confined to any particular category but is established where one party places confidence in the other to act for the benefit of the first party.

In **Burdick v Garrick (1870) L P 5 Ch.App 233 at 243 Sir G.M. Giffard LJ**, stated:

“There was a very special power of attorney, under which the agents were authorised to receive and invest, to buy real estate, and otherwise to deal with the property; but under no circumstances could the money be called theirs; under no circumstances had they the least right to apply the money to their own use, or to keep it otherwise than to a distinct and separate account; throughout the whole of the time that this agency lasted the money was the money of Mr Garrick, and not in any sense theirs. Under these circumstances, I have no hesitation in saying that there was, in the plainest possible terms, a direct trust created between these gentlemen and Mr Garrick. I do not think that that trust was put an end to when Mr. Garrick died; **and I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.**” (emphasis added)

16.0 The Defendant under no circumstances could hold the money with him for any reason whatsoever.

17.0 The Agreement also required the Defendant to remit the premium received by him on behalf of the Plaintiff to the Plaintiff.

18.0 Plaintiff also relied on Section 65 of the Insurance Act Cap which provides as follows:-

“65.(1) An agent or broker who receives a premium or other payment under a contract of insurance shall within fifteen days remit it to the insurer.

(2) An agent or broker who contravenes sub section (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred dollars:

Provided that it shall be a defence to a charge under this subsection if the agent or broker proves that he was prevented by illness or other cause beyond his control from complying with the provisions of that subsection and that he has subsequently paid the premium or other payment to the insurer.

(3) An agent or broker payment who contravenes subsections (1) shall also be liable to the insurer and to the person for whom he is acting for any loss resulting from such contravention.”

19.0 These provision as from 1st January 1999 has been replaced by Section 7 of the Insurance Act 1998 which require the broker to pay any money received on behalf of the Insurer to the insurer as soon as possible but no later than 7 days after receipt of the money.

20.0 The Defendant by agreeing to collect the premium on behalf of the Plaintiff had duty to act honestly and with candour towards the Plaintiff which of course he failed to do.

21.0 I do find that the Defendant had breached his contractual and statutory obligation to remit to the Plaintiff premiums received by him

for the month of July and August 1996 totalling \$69,998.62 and accordingly Plaintiff is entitled to judgment on this sum against the Defendant.

22.0 Plaintiff also prayed for damages in its statement of Claim. However, Plaintiff has failed to provide any particulars under this head of damage and also did not provide any evidence in this regard as such Plaintiff's claim for damage is dismissed.

23.0 Plaintiff claims interest at commercial rate pursuant to Section 3 of Law Reform (Miscellaneous Provision) (Death and Interest) Act Cap 27.

During Mr. Macpherson's evidence he sought interest at commercial rate. However no evidence was produced in Court as to what is the commercial rate and whether Plaintiff was claiming commercial rate applicable to overdraft or deposits.

Be that as it may, Plaintiff is entitled to interest as it has lost opportunity to use the premiums received by the Defendant for Plaintiff's benefit.

In considering rate of interest, I take the following factors into consideration:

- (i) Plaintiff's cause of actions arose in September 1996 when Defendant failed to pay August 1996 premium.
- (ii) Plaintiff filed this action on 14 June 2000 (lapse of 4 years)
- (iii) After filing of the Defendant's Affidavit Verifying List of Documents on 27 August 2001 this matter went to sleep until 19 February 2004 when Plaintiff filed Notice of Intention to Proceed upon expiry of one (1) month from that date.
- (iv) Again no action was taken from 27 November 2004 to 17 November 2005 when Plaintiff filed another Notice of Intention to Proceed.

It is apparent that the Plaintiff did not prosecute its claim diligently and if it had done so this matter would have been finalized in the year 2001 or 2002.

Accordingly I award interest on the judgment sum of \$69,998.62 at the rate of 6% per annum from 29 May 2007 date of trial to date of this Judgement.

24.0 In determining issue of costs I repeat the comments made at paragraph 14 to 20 of this Judgment and note that this action only arose because of breach of trust and confidence placed by the Plaintiff on the Defendant.

Accordingly I award costs against the Defendant in the sum of \$3,500.00.

25.0 Conclusion

I make the following Orders:-

- (i) Defendant do pay Plaintiff the sum of \$69, 998.62.
- (ii) Defendant do pay the Plaintiff interest on the said sum of \$69,998.62 at the rate of 6% per annum from 29 May 2007 to date of this Judgment.
- (iii) Defendant do pay the Plaintiff costs of this action which is assessed at \$3,500.00.

Delivered at Suva this 28th day of June, 2013.

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Justice K. Kumar

JUDGE

Solicitor for the Plaintiff – Mishra Prakash & Associates