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NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 13/S
AUCKLAND REGISTRY

C.P. NO.370/93

SSO

BETWEEN AUSTRALIAN MUTUAL
PROVIDENT SOCIETY

Plaintiff

A N D D.J. MARTIN

Defendant

Hearing: December 7, 1993

Counsel: Mr. Scott & Miss Ketteridge for Plaintiff
Miss R. Bedford for Defendant

Judgment: - 5 MAY 1994

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application for Summary Judgment. The Plaintiff is a life insurance company. The Defendant is a former life insurance agent. The AMP corporate agency which had passed to a company in which he was a major shareholder terminated on 13th October 1992. There is no dispute as to these facts.

Pursuant to a loan agreement signed by Mr. Martin in May 1988 with the Plaintiff, the AMP seeks to recover from him the principal and interest

outstanding, a total sum of \$831,975.22 plus interest. The loan became repayable within 14 days of the termination of the agency.

Mr. Martin signed first an application to become an AMP representative on 5th May 1988 wherein he forthwith became a probationary agent. Mr. Martin was appointed as a life insurance representative on 19th May 1988 and signed a deed of appointment, and was a representative until 10th June 1991. As an agent the Plaintiff says he accepted the "confirmed representative's agreement" in the terms of appointment which were in force in May 1988. On the same day as he signed the deed, he was handed a 139 page document setting out the "confirmed representative agent's" terms and actual benefits. Subsequently, on 10th June 1991 at Mr. Martin's request, the Plaintiff appointed David Martin Holdings Limited, a corporate agency, as a corporate agent in substitution for the appointment of Mr. Martin personally. On that day his appointment as a representative was terminated.

The affidavit evidence of the Plaintiff identifies two types of agency agreements; a general agent and a confirmed representative's agreement. It is clear from the evidence that Mr. Martin worked as a confirmed representative's agent within an established AMP agency unit answerable to the Manager of that unit. He did not achieve the status of a general agent who deals directly with the AMP and is paid on a commission basis. A confirmed representative agent on joining the AMP is offered financial assistance as an agency development loan. The quantum of loan is based on the agent's previous earnings. The AMP, in estimating its offer to the Defendant, relied on Mr. Martin's accountant's statement of earnings in 1987. There is no requirement for the agent to take up the loan, but in this case Mr. Martin did. On signing the loan agreement on 19th May 1988, he

borrowed the sum of \$699,672.00 and contracted to repay the loan within 14 days of termination/cancellation of cessation of his appointment as a representative of the Plaintiff. Interest is 5% payable quarterly and there is a penalty interest at 17% if the loan is not repaid when demanded.

It is pleaded the Plaintiff agreed in 1991 with Mr. Martin the loan would be repaid by the Defendant and re-advanced to the corporate agency. This advance would then be secured by a debenture over the corporate agency with a guarantee from the Defendant. The Defendant did not repay the loan in 1991 and did not complete the execution of the new loan document whereunder it was intended he would guarantee the repayment by David Martin Holdings Limited. The Plaintiff elected to waive payment of interest on the loan agreement from 19th May 1988 to 13th October 1992 at which date the corporate agency ceased. This date was treated by the Plaintiff as date of termination of the Defendant's appointment and the date upon which demand could be made for repayment of the loan.

The Plaintiff explored carefully the distinction between the loan agreement under which it sued, which is personal to Mr. Martin, and the agent's terms of appointment.

The Plaintiff's argument can be summarised:

- (1) The claim is based on and is dependent solely on the terms of the loan agreement and not the separate agency agreement.
2. The terms of the written loan agreement are simple, unambiguous and are not disputed by Mr. Martin.
3. The AMP has complied with its obligations under the loan agreement itself. It provided Mr. Martin with the funds, charged him no interest and had no security for the loan.

4. From June 1991 the distinction between the loan agreement, which is personal to Mr. Martin, and the agency agreement, become more important. Mr. Martin's agency was taken over by a corporate entity. Even though Mr. Martin alleges that there were misrepresentations at the time he entered into his original confirmed representative's agreement with the AMP, it is not alleged any of these representations were made when the new company agency agreement came into force.

The gist of the Defendant's case relies on cross-claims arising from alleged misrepresentations by the AMP in relation to Mr. Martin's financial prospects under his agency agreement, and his opportunities to market the AMP products to a certain and limited group of people, which group was referred to as a 'niche' market consisting of a group of older and financially successful people.

Counsel for the Plaintiff says that there is an allegation the AMP has misrepresented to Mr. Martin that he could maintain the level of his 1987 pre-crash commission earnings. The AMP says there is no evidence to support such a claim and no such representations were made. In essence, Mr. Martin claims that as a result of representation as to the 'niche' market he should sell in, and the continuation of commission rates, he was effectively guaranteed commission earnings of \$350,000.00 per annum for the next five years at his 1987 level.

The Defendant filed a lengthy Statement of Defence in response to the Plaintiff's request for particulars. The defences set out therein were much more extensive than those contained in the notice of opposition but the Plaintiff's Counsel was prepared to deal with the matters referred to. Mr. Martin, in his Statement of Defence, essentially admits the allegations in the

Statement of Claim, including the existence of the loan agreement, but denies the moneys are repayable. He pleads in respect of the agency agreement that there are misrepresentations, breaches of a collateral contract, breaches of a contractual duty which arise through the agent and principal relationship, breaches of the Fair Trading Act 1986 and negligence.

The Plaintiff attempts to categorise all the claims as counterclaims and not defences, but the Defendant claims damages which, if successful, would reduce substantially any obligation he has to repay the loan.

The Plaintiff said the submissions made would focus primarily on the misrepresentation allegations, relying on Buxton v. Buches Time Share [1991] 2 NZLR, 641 and page 647. The Plaintiff took objection to the pleading of a collateral contract (paragraphs 26 - 29 of the Statement of Defence) as it had not been previously raised in the notice of opposition. It was, as Counsel said, a legal issue; there was no further evidence required. I accept the objection but indicated, as Counsel were prepared to cover the point, it would be advantageous to make submissions to allow the Court to make a finding, bearing in mind that the Court had no obligation so to do, but to ensure that its exclusion did not constitute a ground for appeal.

'Niche' Market & Income Level Representations

The Defendant's claim in damages arises from an alleged breach of a collateral contract, that is, he claims that the Plaintiff required the Defendant to market his services in a particular 'niche' market. There is no evidence to support this allegation and this allegation is in conflict with one of the objects of the written agency contract which permit him to sell any of the AMP stock products to any area of the market. Counsel for the Plaintiff relied on A.M. Bisley Co. Ltd., v. Thompson [1982] 2 NZLR, 696 at 702.

Further, there are allegations that the AMP identified the wrong 'niche' market in which the Defendant should operate and failed to identify a new market in which the Defendant could operate. If the allegation is that the AMP required Mr. Martin or his agency to sell into that market, then in order for Mr. Martin to argue the AMP breached this collateral contract, he must allege the AMP prevented him from doing so. But his Counsel argues that the AMP did not prevent him from selling in any market. To the contrary, Mr. Martin's complaint is the AMP should not have required him to sell into a 'niche' market as it was not a profitable market. This, the Plaintiff says, must be looked at as an allegation of negligent advice.

The Plaintiff's case is there is no evidence that he was required to sell as alleged; he elected to sell, his agency was an agency formalised by a contract and he had access to all the forms of policy marketed by the AMP. The Defendant's Counsel submitted that the collateral contract was evidenced by the parties' intentions at the time the loan contract was signed. She suggested the loan agreement was not simply a loan agreement but in reality related to the primary relationship of principal and agent.

It took Mr. Martin ten months to examine the AMP proposition before joining AMP. The one type of policy that was not available to him to sell, he obtained permission to place that insurance elsewhere. Mr. Martin continuously says that he relied on what the AMP said and changed his position but he does not identify specifically what was said to him. He deposes that he had worked within a certain market for some years, he wanted to continue do so and Mr. Stubing confirmed this market as a market he could concentrate on. The Court is not fully aware, but it is likely in the changed commercial climate, the market could have changed. He still

made a reasonable income in the years he worked; over \$100,000.00 per annum and was one of the AMP top ten salesmen. In his own expert's report given by Mr. Murphy in 1992, Mr. Murphy did not criticise the AMP. He also noted the downturn in Mr. Martin's business did not occur until 1991. There is no suggestion he is more successful in another occupation away from the AMP. Mr. Stubing on behalf of the AMP rejects all his allegations. It is recognised his income could fall when he joined the AMP and on a careful analysis of the evidence, it is impossible to find contemporary documents, independent statements or clear depositions that support the allegations made by Mr. Martin, nor can I find evidence to support an argument that the AMP breached a collateral contract; in fact I find there is no collateral contract.

The second defence is claimed to be a breach of fiduciary duty. This was not pursued but turned on a breach of the actual agency contract and was based on the failure of Mr. Martin to sustain his earnings; this did not relate to the loan of the AMP funds.

Fair Trading Act 1986

The Plaintiff says this is clearly the counterclaim in relation to the agency contract and not a defence to the repayment of the loan. There are no separate factual allegations and the suggestion the Defendant's claim relies on s.13 of the Fair Trading Act 1986 is not applicable as there is no supply of goods or services.

Counsel for the Defendant also sought to raise a defence relying on s.9 of the Fair Trading Act. She then considered in depth whether the AMP had put before the Court all the material that it is suggested was necessary to obtain Summary Judgment. I cannot accept a submission without affidavit

evidence that Mr. Martin obtained the general agency terms from one of the Managers at the AMP. This information is unbeknown to the Court. The only information the Court has is that Mr. Martin had a copy of these terms, he is not a party to these terms and he had accepted other terms by which he is bound. What she was attempting to do was to persuade the Court that Mr. Martin could have been a general agent with more powers with better terms and conditions. Mr. Martin, however, signed the documents and acted as a representative agent with the knowledge of what the general agent's position was, and I find this argument untenable.

Negligence

The Plaintiff says any claim against it for negligence must be a counterclaim not a defence. The claim for negligence is based on the alleged misrepresentations. Counsel analysed s.6(1) of the Contractual Remedies Act 1979 and said that the Defendant cannot claim damages for negligence but the representations are to be treated as terms of the contract with an entitlement to damages. See Savill v. NZI Finance Limited [1993] 1 NZLR, 135 at 144. If there was a counterclaim it could only be brought in contract, not in tort. With that view I concur.

The Defendant's case, although making many allegations, turns upon the major issue as to whether there is evidence that shows there were alleged misrepresentations which induced him to enter into the agency and the loan agreements.

Counsel for the Plaintiff therefore based his major submissions on the Court's attitude to misrepresentation allegations in Summary Judgment cases. The Court of Appeal has said that it is not bound uncritically to accept what a Defendant says and has, on occasions, rejected such

allegations after analysis of the evidence of supporting documentation if they are inherently improbable and lacking in commercial reality. See Bilby Dymock Corporation v. Patel (1987) 1 PRNZ, 84 and O'Leary v. Sygrove CA.385/92 dated 17th June 1993. Counsel referred to various cases that had been before the Court relating to insurance agents' termination of their arrangements and their obligations to repay loans to the insurance company. See Tower Corporation v. Truhubivich CP.6/92 (Wellington Registry) dated 27th July 1992 and CA.228/92 dated 23rd October 1993, where again an application was sought for recovery of a personal loan from an insurance agent. The Defendant alleged misrepresentation when entering into the agency agreement but the Courts held the loan was personal, the agency was with the company and the only rights in respect of the alleged misrepresentation could be exercised by the company; there was no set-off available as the two claims were not inter-dependent. Similarly in Prudential Assurance v. Hunt CP.324/92 (Wellington Registry) dated 1st August 1992 and Prudential Assurance v. Andrews CP.1991/91 (Wellington Registry) dated 9th October 1991, the Court allowed Summary Judgment for recovery of the agents' loans. The Plaintiff submitted that in these cases, as herein, the Courts had taken a realistic approach to alleged misrepresentations whilst observing the Summary Judgment rules. The Plaintiff carefully distinguished the decision of Smythe v. NZI CA.243/92 dated 23rd March 1993, a case in which, despite the written discharge of mortgage, the Plaintiff still sought to recover pre-paid or overpaid commissions; not the loan which the Defendant had repaid.

In terms of s.s. 6 and 7 of the Contractual Remedies Act 1979 Counsel said there must be misrepresentation and inducement. In respect of the inducement it is not enough that a representation, even if there was one which is denied, caused Mr. Martin to act in a particular way. He must also

show the AMP intended him so to do and used language that would induce him so to do. See Savill v. NZI Finance Limited [1990] 3 NZLR 135. Counsel quoted as an example a situation where even if the AMP told Mr. Martin he was likely to do well, the Court would still be entitled to find no reasonable person in the Defendant's position, with knowledge and experience, would act on the strength of the representation because an agent would fundamentally need to satisfy himself how he was likely to fair in the market into which he was aiming to sell.

Counsel also analysed the relationship between the agency and the loan agreement. It is clear that all the allegations of misrepresentation concerned factors which go to the Defendant's ability to sell insurance policies and generate a high level of income. He analysed the particulars alleged, none of which have any relationship to the loan agreement. He noted they were not supported by evidence except for Mr. Martin's affidavit in paragraphs 12 and 13 where he deposes he believed he had the idea he would be able to repay the loan from the sale of his insurance register if he maintained the level of his historical sales during the next five years. He does not identify who represented this would occur, nor does he depose that any AMP representative ever represented this would occur. Counsel says this seems inconsistent with Mr. Stubing's evidence that he warned Mr. Martin he had to be careful with the money because it would eventually need to be repaid. Counsel also said that other representations as the Defendant alleged were not sufficiently inter-dependent on or called into question or impeached the loan; at best therefore the Defendant can only have a counterclaim.

Counsel also analysed the said misrepresentations and said they were untenable and often unsupported by evidence. They fell into four broad categories (a) lack of promised advice, support and administration; (b) that

there would be no change in the terms and conditions relating to the calculation of commissions; (c) the 'niche' market serviced by Mr. Martin would be compatible with the AMP's operation and therefore generate sufficient income to maintain his 1987 income level; and (d) at the end of the five year term he would have a sum sufficient from the sale of his agency to repay the \$699,672.00 he borrowed.

The Plaintiff says that the Defendant had never raised these allegations prior to his consultation with solicitors in 1993 after the agency had terminated. It was not mentioned at the time of the change to a corporate agency. After termination of that agency and the request for repayment in February 1993, he sent a statement of assets and liabilities to the AMP recognising the loan as a debit and showing he had no real assets at that time. The allegations of misrepresentation were raised first in April 1993. He names only Mr. Stubing in his evidence and relies on Mr. Murphy's report which he had sought, which showed that the present position he held in selling AMP life insurance was not conducive to him attaining the financial levels he was looking for.

Mr. Martin makes the allegation about representations as to support but there was never any complaint to the AMP. He says he received good advice from the AMP. He seems to rely on and refers to the terms of a general agency agreement but does not identify how he came to hold the agreement which is not a contract between him and the Plaintiff, but he knew of the difference between the agreements. He did not take part in the AMP in-house training seminars on occasions and although he complains about the reduction in commission rates, it is clearly provided for in the contract into which he entered. He makes no allegation that the AMP represented it would not change. He was advised changes could occur and

the representative's agreement and benefits are incorporated in the deed he signed. He has established no right to any of the general agency terms.

Whilst I accept the complaints about the length of terms, the Plaintiff's submission is that there was plenty of opportunity for Mr. Martin not to join the AMP if he found them unacceptable before he uplifted the funds. These facts concerning the terms of the contract and the right of the company to change the commission rates was held pivotal in the Prudential cases (supra) and not a ground for refusing Summary Judgment. He had the right to terminate on three months notice if he did not like the new commission rates.

The Defendant also makes complaint about the lack of opportunity to sell his life register. There is no evidence that he has either sought to sell it or asked AMP to buy it. He would not fall within the terms of the contract where the Plaintiff would have to buy the register, and its value is only \$59,344.00. Mr. Martin was not obliged to take the loan. He took it; he used the money. He had long negotiations with the AMP and he was warned by Mr. Stubing that he would have to repay the money. Accordingly the Plaintiff says it is entitled to judgment. If anything that is claimed by Mr. Martin can sustain a claim, it can only sustain a claim under the agency agreement which the company operated and which at best would be a counterclaim. Mr. Martin has had the benefit of it being treated as if the agency was operated by a company and not had to pay interest on the loan for five years.

There have been some intermediary matters between the parties as the Plaintiff sought further particulars from the Defendant. The Defendant considered he had given sufficient particulars but filed a Statement of

Defence to outline the defences. I have adopted the analysis made by the Plaintiff of the Statement of Claim, and the Defendant took no opposition to the manner of this way of dealing with the issues raised.

Counsel for the Defendant acknowledged that Mr. Martin's evidence related to the representations made by the Plaintiff and could not refute the submission of the Plaintiff's Counsel that the evidence relating to the representations was lacking in precision in Mr. Martin's affidavit evidence. She said, however, that with the preparation of the Statement of Defence they could be clearly identified. In her submissions she pointed out her client's income when working for the AMP had dropped by two-thirds, and the Court was not aware of the reasons the AMP asked for Mr. Martin's resignation and then repayment of the loan. She traversed in depth the affidavit evidence and pointed out that Mr. Martin was a successful agent. AMP knew his business practices and the 'niche' market in which he dealt. She pointed out that their discussions had taken place over a long period before Mr. Martin made his commitment to the AMP and she says her client's evidence shows what his expectations were of the AMP agency. She placed emphasis on the terms and conditions of a general agent although there is no evidence that Mr. Martin was offered a general agency except the fact that he held a set of the terms and conditions. The Court is not informed in evidence from whom these were obtained. She pointed out that when Mr. Martin signed the application for the AMP Membership on 5th May 1988, the document did not differentiate between a general agent and a representative agent. Nevertheless, Mr. Martin then signed the confirmed representative's agreement and received the terms and conditions on 19th May which appointed him as a representative agent. She says that his percent commission in his market was less than dealing in a market relating to younger members of the population, and during his time as an agent the

company changed the rules both for buying life insurance registers and the commission structure. She says the AMP has not produced before the Court the buyer of last resort rules which were in existence prior to 1989, i.e. at the time when Mr. Martin became an agent. There is a general complaint made that the 1989 buyer of last resort rules increased the restrictive covenant from one to three years. She considered in depth Mr. Martin's reference to the buy/sell contracts and suggested the policies were legally wrong. There was no evidence supporting the submissions in regard to this matter and it is not the Court's function in respect of Summary Judgment to recover a debt based on a loan agreement, to be giving in depth consideration to a life insurance policy which Mr. Martin had the option to sell to his clients or not.

The documents that Mr. Martin became a party to on 19th May 1988 gave the Plaintiff the right to recover loan moneys advanced. These issues were not called into question when Mr. Martin subsequently relinquished his agency in favour of a company which he had set up. Mr. Martin's Counsel said that in this evidence and on the affidavit evidence put before the Court by the AMP representatives, raised sufficient matters to support an arguable defence under the Contractual Remedies Act 1979. In view of the contract originally signed and of the actions of the parties in 1991, I do not find there are sufficient grounds identified to support a tenable defence.

Counsel for the Defendant submitted that I could find a tenable defence within the principal and agent relationship as it is implied the principal owes certain duties to the agent the breach of which is actionable. She suggested that the collateral contract obliged the AMP to provide the support services and correct identification of a 'niche' market and the AMP has breached the express term of the contracts by the failure to do as is

promised. The evidence supporting this is not as specific as Counsel for the Defendant would like to imply in relation to the matters that have been breached. She suggested that the AMP should act fairly with Mr. Martin and it failed to meet those obligations. I find such a suggestion untenable in the light of the evidence before the Court of the opportunity for Mr. Martin to investigate the position he was placing himself in as a life insurance agent, the contractual documents he signed and the re-affirmation of those obligations by the change in the agency in 1991.

Relying the number of alleged factual disputes, the Defendant said there was sufficient material and concessions made in the evidence by the AMP to justify the dismissal of the Summary Judgment. I am not so satisfied. I do not believe that Mr. Martin is entitled to any set-off. I am unable to ascertain that there is an existence of a collateral contract by which both parties are bound and I find that the signing of the documents created the relationship under which Mr. Martin operated his agency and received the benefits therefrom.

Accordingly I am satisfied that the Plaintiff is entitled to Summary Judgment. The terms of the original deed are not attacked, the terms of the loan agreement are not attacked and I do not believe the Defendant has raised an arguable or tenable defence. As to a set-off or counterclaim, I do not believe the allegations support the set-off as claimed and, at best, if such a claim exists it would have to be brought pursuant to the agency agreement by the company as a counterclaim.

Accordingly there will be judgment for the Plaintiff in terms of the Statement of Claim. There is an adjustment of quantum of interest which is acknowledged by the Plaintiff and the interest is to be calculated in

accordance with the memorandum to be filed and which is to be served on the Defendant. If there is any dispute about the quantum of interest, the Defendant is to give notice to the Court within three days of service of the memorandum outlining the interest claimed. The Plaintiff has succeeded and there will be costs in its favour of \$3,000 plus disbursements as fixed by the Registrar.


MASTER ANNE GAMBRILL

Solicitors:

Chapman Tripp & Co., Wellington for Plaintiff
Holmden Horrocks, Auckland, for Defendant