IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-6546

BETWEEN	ONEPATH (NZ) LIMITED Plaintiff
AND	BACS INVESTMENTS AND INSURANCE LIMITED First Defendant
AND	BOB WHYE KONG MOO Second Defendant
AND	ANNE KHEUK HAH HO Third Defendant

Hearing: 31 March 2011

Appearances: H A Hooker for Plaintiff
A V Ram for First and Second Defendants

Judgment: 23 August 2011 at 4:30 AM

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

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*This judgment was delivered by me on **23 August 2011** at **4:30pm***
in accordance with Rule 11.5 of the High Court Rules

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Registrar

Solicitors:
Turner Hopkins (A Hooker/D Mitchell) P O Box 33 237 Takapuna, Auckland for Plaintiff
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[1] This proceeding concerns a claim by the plaintiff insurer for reimbursement of $300,762.08 paid to the first defendant broker by way of commissions. The claim is made in accordance with the terms of a business agreement between the parties. The second defendant is sued as guarantor of the obligations of the first defendant under the agreement.

[2] The defendants are resisting the plaintiff's claim for repayment on various grounds, but primarily they say that a number of factual disputes make this matter unsuitable for determination by summary judgment.

Preliminary matters

[3] At the start of the hearing, counsel for the plaintiff advised that it had changed its name, and sought an order changing the name of the plaintiff to its current name. I made an order accordingly, changing the name of the plaintiff from ING Life (NZ) Ltd to Onepath (NZ) Ltd.

[4] Shortly before the hearing, the plaintiff filed and served a further short affidavit by its credit manager, Mr Nicholson. Counsel for the defendants objected to it being admitted. I made an order allowing it to be read, on the grounds that it was producing a document (a prior guarantee given by the second defendant, Mr Moo) that was relevant to the second defendant's contention that he did not agree to guarantee the obligation to repay commission, and the document had only recently come into the possession of the plaintiff.

The business relationship

[5] The plaintiff carries on business as an insurer. The second defendant and his wife (who was initially the third defendant but the claim against her has been discontinued) are the directors of the first defendant.

[6] On 10 September 2008 the plaintiff entered into a business agreement with the first defendant, under which the plaintiff appointed the first defendant as an "adviser" or agent for the sale of its life insurance policies. The agreement included a requirement that the principals or directors of the first defendant guarantee commission debts payable under the agreement:

> ING Life requires the principals, directors and/or partners of your business to collectively and individually guarantee any commission debts, default penalties and interest payable under the terms of this Business Agreement as detailed below.
>
> The Guarantors who have completed this Business Agreement as Guarantors both jointly and severally, unconditionally and irrevocably:
>
> (a) Guarantee by way of continuing obligation to ING Life, as primary obligator, and not merely as surety, the due performance of all of your obligations under this Business Agreement; and
>
> (b) Indemnifying ING Life against any loss or damage which ING Life may suffer as a result of your breach of any obligations under this Business Agreement.

[7] Mr Moo and his wife signed the business agreement on behalf of the first defendant and as guarantors.

[8] From 24 September 2008 until 15 June 2010 the plaintiff paid commissions to the first defendant in respect of life policies taken out by persons introduced by the defendants. The level of business generated by the defendants was high enough to earn him bonuses from as early as January 2009, and for him to be appointed to the plaintiff's "Club Gold" which entitled him to additional benefits.

[9] The commission arrangements were detailed in clause 7 of the business agreement. In brief, the first defendant was to be credited with the commissions upon the issue of each new policy, or any alteration to a policy, and renewal commissions would be credited following the anniversary of issue of a policy, provided all premiums were paid up to date. The clause provided for possible commission clawbacks in the event that the policyholder did not maintain premium payments, or the policy did not remain in force for at least two years (in other words, commission was paid on the assumption that the plaintiff would get a certain amount

of premium income from the policy but with the clawback applying in the event that that was not the case).

[10] The clause also provided for the establishment of a commission holding account to which commissions were credited and from which the first defendant could withdraw any credit balance. The possibility of clawback and potential for that to result in a debit balance was recognised by a requirement for payment of that debit balance (referred to as "commission debt") if the account remained in debit for more than 30 days.

[11] The full terms of clause 7 are:

> **7. COMMISSION PAYMENTS**
>
> ING Life will undertake to credit commissions to your commission account immediately upon issue of each new policy or on the completion of each commissionable policy alteration. Renewal commissions will be credited to your commission account immediately following the anniversary of the policy provided all premiums are paid to date. You will have the choice of daily or weekly commission runs; whichever suits your business best.
>
> ING Life is happy to offer you a commission holding account facility where you may transfer any percentage of your commission account (as long as it is in credit), at any time, to be withdrawn on your instructions. This is useful for accruing withholding tax, to offset possible future commission clawbacks or to act as a savings vehicle for you for a particular purpose. Interest will be payable on any credit balance in this holding account at the 30 day rate. ING Life will deduct Resident Withholding Tax from this account as directed by the IRD.
>
> The amount payable to you in each commission run will be the total of all commissions credited since the last commission run less the total of all commission debited since the last commission run less any commission you have instructed us to credit to your commission holding account plus any commission you have instructed us to withdraw from your commission holding account.
>
> ING Life will undertake to provide you with commission statements that accurately reflect your commission account and are easy to read and to understand. ING Life will endeavour to obtain your feedback on the layout and information contained within the commission statements. ING Life will also provide you the ability to split your commissions with other nominated parties of your choice.
>
> Should your commission account fall into a debit position and remain that way for more than 30 days, ING Life will require you to make an immediate payment equivalent to the value of the commission debt.

> Should the commission debt not be repaid within a time frame acceptable to ING Life (determined at ING Life's sole discretion), you will be changed interest on the debt at the current FBT rate. ING Life will also adopt whatever processes it deems necessary to recover the debt and also the recovery of the costs of this process, including legal fees from you.

[12] In the first half of 2010, premium payments for policies introduced by the defendants started falling into arrears. When this occurred, the plaintiff wrote to the policyholder asking for payment to be brought up to date, but if that did not occur within a reasonable period (three to four months, on the evidence before the Court), it then cancelled the policy.

[13] On 21 June 2010, the plaintiff cancelled the policy for Sun Yong Gary Tan as a consequence of which, on 23 June 2010, a first commission clawback was debited against the commission holding account. The defendants were advised of this and asked to make up the debit. On 6 July 2010, the plaintiff wrote to the defendants to remind them of the terms of the business agreement, and calling for repayment of the debit balance at that time, prior to 23 July 2010. The letter referred to the fact that there were several other policies in arrears which were likely to increase the sum owed substantially.

[14] The commission clawback on 23 June 2010 proved to be the first of many. The next clawback was on 7 July 2010 (in respect of policies issued to Thomas Kakng Sum that were cancelled on 5 July 2010), followed by a number of clawbacks starting on 10 August 2010 and running through to 3 September 2010 (being the last date for the recovery sought in this proceeding), as well as another two before the end of the year.

[15] There is no dispute over the fact that the underlying policies were cancelled within the clawback period, although the defendants have challenged the cause of some of the cancellations and the quantum of the clawback.

Procedural history/grounds for opposition

[16] The plaintiff issued this proceeding against the first defendant (as the principal under the business agreement) and the second and third defendants as its

directors and guarantors of the first defendant's obligations under the business agreement. The contemporaneous application for summary judgment was supported by an affidavit by the plaintiff's credit manager (Mr Nicholson), in which he gave evidence of the business agreement, including the commission arrangements and guarantees, and produced a copy of the plaintiff's ledger for the first defendant showing the history of crediting of commissions, payment out and clawbacks, resulting in the sum claimed as a commission debt as at 3 September 2010 of $300,762.08.

[17] The defendants filed a notice of opposition, challenging the amount claimed, contending that the third defendant entered into her guarantee under the undue influence of the second defendant (and that knowledge of that should be imputed to the plaintiff), and that the plaintiff's conduct in requiring the second defendant to procure the third defendant's signature without proper explanation or independent advice amounted to oppressive conduct. The notice of opposition was supported by brief affidavits of both the second and third defendants, focused on the circumstances of execution of the guarantees (particularly by the third defendant), and the alleged lack of detail as to the composition of the commission debts.

[18] The plaintiff responded to the evidence in opposition with a second affidavit of Mr Nicholson, explaining the ledger and providing a breakdown of commissions earned by reference to policies and policy-holders, and referring to standard industry practice as to the clawback arrangements in the business agreement. It also filed a reply affidavit from the plaintiff's regional sales manager (Mr Reveley) who negotiated the business agreement with the second defendant, giving evidence as to the circumstances surrounding execution of the agreement, his understanding of the second defendant's experience in the financial and insurance industry, and an industry practice of requiring personal guarantees of directors to business agreements entered into with companies.

[19] At about the same time, the plaintiff elected to discontinue its proceeding against the third defendant.

[20] The application for summary judgment had its first call on 15 December 2010. The plaintiff withdrew its application for summary judgment against the third defendant. The defendants informed the Court that they wished to amend their opposition and were changing their counsel. A timetable was set for filing an amended notice of opposition and further affidavits, with the plaintiff having a right to reply.

[21] The defendant subsequently filed an amended notice of opposition with substantially expanded grounds. The amended notice of opposition was supported by a second affidavit of the second defendant, and affidavits by three former policy-holders whose policies had been cancelled.

[22] The defendant continued to challenge evidence of quantum, but now put in issue also an alleged absence of demand, the validity of the guarantee (whether the second defendant's guarantee was given to cover the commission debts and was otherwise binding in the absence of independent legal advice) an amended ground of oppression (this time relating to the second defendant) and allegations of negligence, failure to mitigate loss, and interference with the first defendant's business (by causing an investigation into the policies and freezing the first defendant's commission account) allegedly giving rise to counterclaims or set-off.

[23] In light of the number of alleged grounds, and difficulty relating counsel's written submissions to them, counsel for the defendants was asked at the commencement of the hearing to identify the particular grounds for defence that were being advanced. He stated the grounds that the defendants were advancing were:

(a) The plaintiff had not established the quantum of its claim (the amount was either uncertain or was incorrect, and had not been formally demanded).

(b) The second defendant was not bound by the guarantee because he had not clearly guaranteed the first defendant's obligation to repay the

debt on the commission account, and because he did not seek independent legal advice.

(c) If the business agreement makes the second defendant a principal debtor, the business agreement (and hence the obligation to repay the commission account) is oppressive and should be re-opened because the plaintiff pressured the second defendant to sign the agreement without seeking legal advice.

(d) The defendants are entitled to a set-off against commission debts for contributory negligence on the plaintiff's part by entering into the business agreement with knowledge that the second defendant had a prior conviction for insurance fraud.

(e) The defendants have a counterclaim and set-off against the plaintiff arising out of the manner of its investigation into the policies, which led to the policy-holders cancelling the policies, thereby giving rise to the commission debts.

Principles for summary judgment

[24] Before returning to consider each of the grounds advanced for the defendants, it is appropriate to refer to the principles that the Court applies in determining applications for summary judgment. The principles are well established, starting with the classic case of *Pemberton v Chappell*.[1] For the purposes of the present application, the central principles are set out succinctly in the following passage from the decision of the Court of Appeal in *Krukziener v Hanover Finance Ltd*.[2]

> The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell*.[3] The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart*.[4] The Court will not

1 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
2 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187 at [26]; [2010] NZAR 307.
3 *Pemberton v Chappell* (CA) at 3.
4 *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).

> normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan*.[5]

[25] Although the overall onus lies on the plaintiff to show that there is no real question to be tried, in light of the relatively clear and straightforward nature of the plaintiff's claim, the critical questions in this case are whether the defendants have provided some evidential foundation for the defences they have raised,[6] and whether the defendants' statements are too inherently improbable, lacking in credibility or so inconsistent with other positive evidence, that the Court may conclude that there is no arguable defence.[7]

Quantum

[26] The amount that the plaintiff seeks ($300,762.08) is the debit balance on the commission account as at 3 September 2010.

[27] In his first affidavit, Mr Nicholson produces a copy of the ledger for that account (printed on 6 September 2010) showing this balance. He also produces a copy of the business agreement, and its attached commission schedule, which sets out the basis on which clawback is calculated in the event of a policy discontinuance within 24 months. Mr Nicholson states in his evidence that the clawbacks shown in the ledger were calculated in accordance with the reducing scale set out in that schedule.

[28] In his second affidavit (his first reply affidavit) Mr Nicholson expands upon the information in the ledger by providing a further schedule identifying the commissions paid by reference to policy numbers (recorded against the various entries for commission payment or clawback in the ledger) and the names of the respective policy-holders. He also identifies five bonus payments, the last of which was made on 27 January 2010.

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5 *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC).
6 *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] 3 NZLR 54.
7 *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12.

[29] The defendants raise two matters in support of their argument that there is uncertainty as to the amount due. The first is that the first time the debit balance was raised with them (on 6 July 2010) the plaintiff referred to a debt of $27,994.83. When a demand letter was sent a month later (3 August 2010), the debt was stated to be $67,322.97, and in email correspondence on 19 August 2010, Mr Nicholson referred to the debt having increased to $246,698.40. The defendants say that they have never had a clear statement of the amount due and how it has arisen.

[30] I am unable to accept that there is any merit in this argument. It is clear from the ledger that the debt was fluctuating and increased throughout the period. The sums mentioned by the defendants reflect the balance at the time of the various communications, and the sum which the plaintiff is seeking is clearly the amount that was due according to the ledger as at 3 September 2010. Further, even if the defendants might have had some difficulty reconciling the ledger with the business that they had introduced, I consider that those concerns were answered by the further schedule provided in Mr Nicholson's (first) reply affidavit.

[31] Similarly, there is no merit to the defendants' related contention that the amount claimed is incorrect. The evidence from the plaintiff is clear that the debt has increased since 3 September 2010, but the plaintiff has elected to seek only the sum due as at that date, and has foregone claim to interest (no doubt taking into account prospects of recovery).

[32] Lastly under this point, the defendants contend that the sum makes no allowance for bonuses that the plaintiff said would be payable in April and July 2010. I accept that the plaintiff did advise the defendants of these bonuses, but it is clear that the bonuses were calculated by reference to policies written, and that at the same time as the advice of bonuses was given, the plaintiff was investigating those policies (which would appear to explain the failure to pay as indicated) and that by the time the claim was issued it was apparent that the level of clawback was so high as to invalidate the bonus entitlement.

[33] The second general contention by the defendants under this heading is that the plaintiff has not demanded the debt from the first defendant, nor issued a personal demand to the second defendant.

[34] I accept the submission of counsel for the plaintiff that there is no contractual requirement to make demand before issue of proceedings (the proceeding itself constitutes a demand) but in any event there is evidence of a demand on the defendants in correspondence on 6 July 2010, 3 August 2010 and 20 August 2010. Counsel for the defendants sought to rely on the fact that the first two items of this correspondence were addressed to the first defendant, and the third was email correspondence to the first defendant's email address. I see nothing in this. It is clear from other correspondence that the second defendant accepted a liability for the debt. He was putting forward proposals to sell his house, and in one of them (16 August 2010) provided a statement of assets and liabilities listing the known debt to the plaintiff at that point as the liability under "Other guarantees: ING Life lapses".

Is the second defendant's guarantee binding on him?

[35] The defendants contend that it is not clear whether the guarantee contained in clause 10 of the agreement was to be binding on the second defendant. When pressed to expand on the basis for this ground (in light of the apparently unequivocal wording, and a query from counsel for the plaintiff whether this included an argument of lack of consideration seemingly raised in the written synopsis), counsel for the defendants initially said that the second defendant had not agreed to give a personal guarantee but subsequently modified that by saying that he had not agreed to guarantee the obligation to repay the debts arising from the clawback of commissions. He also contended that the guarantee is not binding on the second defendant because he did not receive independent legal advice (I will return to that after dealing with the first point).

[36] For the first point, the defendants rely on the evidence of the second defendant in his second affidavit that Mr Reveley told him that the personal guarantee had no legal consequence (it meant nothing) and that he would not be liable for the first defendant's debts. Counsel submitted that this evidence was sufficient to call into question whether the language of the guarantee was sufficient to bind the second defendant. He argued that the guarantee would not be enforceable unless it was clear from the words used (considered objectively) that there was an

intention on the part of the alleged guarantor to provide the guarantee,[8] and there had to be clarity as to what was being guaranteed (taking into account the evidence as a whole).[9] He also relied on the principle that if there was ambiguity as to the language used, recourse could be had to the negotiations between the parties.[10]

[37] The starting point has to be the words of the business agreement and the guarantee. I find no ambiguity in them. The words are straightforward and clear. The directors collectively and individually guaranteed the obligations of the company (as primary obligators) and commission debts are identified specifically. The second defendant acknowledges that he signed the agreement and guarantee. Prima facie it is binding on him according to its terms.

[38] I have considered whether the second defendant's assertion that the guarantee had no legal consequence can provide some basis for a defence. If proved, it could do so. However, given that it contradicts the clear wording of the clause, and this evidence is strenuously denied by Mr Reveley, I need to consider whether the assertion is credible. I find that it is not, and that the statement is inherently improbable, for the following reasons:

(a) I accept the undisputed evidence of Mr Reveley that it is standard practice in the industry for personal guarantees to be obtained from directors of companies to protect the insurer in respect of any clawback of commissions.

(b) The second defendant can be taken to have knowledge of this industry practice from his prior employment as an account manager with Colonial Mutual, and his engagement by Sovereign Assurance in October 2001 and by Fidelity Life Assurance in November 2007, on like terms to his engagement by the plaintiff (an agreement between the insurer and the first defendant, guaranteed by the second defendant).

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8 *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111.
9 *McCarthy v Derbyshire* HC Auckland CIV-2005-404-3105, 6 December 2005.
10 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; [2010] 2 NZLR 444.

(c) The defendants have not advanced any cogent reason for Mr Reveley to have made such a statement and Mr Reveley has denied, emphatically, making it. There was no credible reason for Mr Reveley to have made this statement.

(d) The second defendant acknowledges that Mr Reveley gave him the business agreement to take away and read, and that he took it to his home and discussed it with his wife. In light of his background experience, it is simply not credible that he did not read and understand the guarantee and, in light of its clear terms, require some qualification to it if he genuinely believed that Mr Reveley had told him it was not binding on him.

(e) If the assertion was true, I would have expected that to have been advanced as a ground for opposition at the outset (his first counsel has considerable experience in this kind of claim).

[39] Counsel for the defendants advanced what can only be described as a curious argument, that the Court should infer from the second defendant's alleged disclosure of his prior fraud conviction, and that Mr Reveley is alleged to have told him "not to worry", that the parties did not intend the guarantee to extend to any debt arising from fraudulent conduct on the second defendant's part. For the purpose of this application, I will accept that the second defendant made some disclosure to this effect to Mr Reveley (he has not denied it), but it cannot possibly affect the objective construction of the guarantee. I also note that the plaintiff is not alleging fraud by the second defendant as a ground for its claim.

[40] Although I understood from the oral re-statement of grounds at the start of the hearing that counsel for the defendants was not pursuing an argument in his written synopsis that the guarantee lacked consideration, I will add, for completeness, that there is adequate consideration for the guarantee in the plaintiff's entry into the business agreement with the first defendant.

[41] As a second challenge to the binding nature of the guarantee, counsel for the defendants submitted that it did not bind the second defendant as he did not receive independent legal advice. Counsel referred to evidence from the second defendant to

the effect that had he known that he was personally bound to repay any commission debt, he would not have signed the agreement.

[42] The plaintiff acknowledges that Mr Reveley did not recommend to the second defendant that he obtain legal advice, but submitted that there was no legal requirement on the plaintiff to do so.[11] He also relied on Mr Reveley's evidence that he knew of the second defendant's extensive experience as an insurance adviser and prior employment as an account manager for Colonial (in other words, that he was not new to the industry) and saw no need to recommend that he took advice (as he might have done if he was dealing with an inexperienced person). It is significant that the three policy-holders who have provided affidavits for the defendants all speak of their reliance on the second defendant's experience.

[43] In my view, the point is determined by the finding in *Shivas v BNZ*[12] that a commercial party (in that case a bank) seeking a guarantee has no duty in tort to the intending guarantor to explain the guarantee, warn the guarantor, or recommend to the guarantor that he obtain separate advice:

> The present question is whether it is necessary or desirable to add to the bases upon which a guarantor may, according to the circumstances, challenge the guarantee by casting upon the bank a positive duty to explain, warn or to recommend separate advice. In my respectful view a guarantor's position is adequately covered in law already. If the guarantor cannot succeed on one or other of the recognises causes of action in my view the pendulum would be swinging too far if one were to permit an action for the tort of negligence on the premise not of advice negligently given but on the basis of a failure to explain, warn or recommend separate advice.

[44] The absence of a recommendation to obtain legal advice cannot, of itself, be a basis to invalidate a guarantee between two arms-length commercial parties. Further, the factors I have referred to in paragraph [38] above point strongly away from any basis for imposing such a duty.

[45] This takes me on to the next ground, oppressive conduct, which also relies on lack of independent legal advice.

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11 *Shivas v Bank of New Zealand* [1990] 2 NZLR 327 at 368.

12 Ibid.

Is the business agreement an oppressive contract?

[46] The circumstances in which a credit contract can be opened on the grounds of oppressive conduct are to be found in ss 118-126 of the Credit Contracts and Consumer Finance Act 2003. A helpful summary of grounds on which a contract can be re-opened can be found in paragraphs 22.10.1-22.10.9 of *Commercial Law in New Zealand*.[13] Counsel for the defendants advanced this ground essentially on the plaintiff's failure to send the second defendant away for legal advice, but also on an allegedly underlying ulterior motive.

[47] Counsel for the defendants again advanced the defendants' contention that the second defendant had disclosed a prior conviction for fraud as support for the defendants' case that failure to send the second defendant away for independent legal advice was oppressive conduct. His argument was that the conviction rendered him vulnerable when seeking employment, and the disclosure to Mr Reveley gave rise to an imbalance of bargaining power in respect of the plaintiff's requirement for a personal guarantee. In those circumstances, he argued that it was oppressive for Mr Reveley to require the guarantee without sending him away for legal advice.

[48] I have already said that, for the purpose of this application I will accept that the second defendant made known to the plaintiff that he had had some difficulties in the past. I am not persuaded, however, that he told Mr Reveley exactly what those difficulties were. He says in his second affidavit that he brought up in his meetings with Mr Reveley that he "had some troubles in the past in this matter", and that Mr Reveley knew of the conviction (for obtaining by deception). More importantly, there is no evidence to support the second defendant's contention that this was affecting his employment. To the contrary, the evidence shows that the defendants were engaged as an agent by Fidelity Life in November 2007 (seven months after the conviction, for which 200 hours of community work was ordered) and it was clearly not a disentitling matter for Mr Reveley some 11 months later.

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13 Justice Susan Glazebrook (ed) *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis, 2011).

[49] Ultimately, however, the question must be judged in all the circumstances of the case.[14] Even if the second defendant felt slightly vulnerable at the time, I do not accept that it could be oppressive for Mr Reveley to have called for the execution of the guarantee as a term for entering into the agreement with the first defendant, given the industry practice and the second defendant's background experience (as shown by his willingness to give the prior guarantee to Fidelity Life). However, the telling factor, in my view, is that he was given the agreement and guarantees to take away, and had ample opportunity to take advice on them. As counsel for the plaintiff put it to me, this is not the case of a strong party pressuring a commercially illiterate person.

[50] I have also taken into account whether the defendants' assertions as to what Mr Reveley said about the effect of the guarantee, if established, could amount to bad faith on the plaintiff's behalf. There is room for scepticism about this evidence, coming from a party with a fraud conviction. Notwithstanding that reservation, and for the same reasons that I have rejected these assertions as providing support for other grounds of defence, I reject them as evidence of bad faith, and potentially oppressive conduct. The most that the defendants can make of the evidence, in my view, is that the defendant was told that he need not worry about his "past difficulties". That falls well short of bad faith. There is no reason to believe that Mr Reveley had any ulterior motive for expressing that view. It is more in keeping with an indication that he was willing to allow the second defendant to start with a clean slate. It cannot assist him in resisting the obligation arising out of the very clear language of the guarantees.

[51] The defendants have also produced evidence from three clients which, on its face, could be seen to support an argument of bad faith. However, for reasons that I will address shortly, I place no weight on that evidence.

[52] In summary, there is an insufficient evidential basis for any assertion of bad faith on the part of the plaintiff to give rise to a defence based on oppression. It is again significant that this ground was not advanced initially, even though oppression was alleged in respect of the first defendant.

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[14] *Jenkins v NZI Finance Ltd* (1991) 3 NZBLC 102,198 at 102,204-205 (CA).

Claim to set-off for contributory negligence by the plaintiff

[53] Counsel for the defendants submitted that, in light of the disclosure of his conviction for fraud, the plaintiff was under a legal duty to undertake a thorough check on the second defendant, and effectively contributed to its own loss by reason of its failure to do so.[15]

[54] The Court can apportion damages in actions in tort, under the Contributory Negligence Act 1947. There are differences of view, however, as to whether and to what extent contributory negligence is available in contract actions.[16]

[55] Counsel for the defendants' reliance on *Day v Mead* and *Mouat v Clark Boyce* in the present case is misplaced. In *Day v Mead*, Somers J took the view that the Act was not available to a defendant in an action brought against him for breach of contract.[17] In *Mouat v Clark Boyce*, Cooke P considered that the Act could apply but only where negligence is an essential ingredient of the plaintiff's cause of action[18] (the other members of the Court accepted that the claim was for tort and did not need to consider whether a contributory negligence defence was available in contract alone).[19] The learned authors of *Law of Contract in New Zealand*[20] dismiss the possibility of a defence where the allegation is in essence one of failing to prevent the other party from committing a breach of strict contractual duty:

> Conversely, where a contracting party merely failed to prevent the other party from committing a breach of a strict contractual duty, then even on the basis that there was also a breach of a parallel obligation in tort coterminous with the duty in contract the plaintiff was able to recover in full, because the very imposition of strict liability would be inconsistent with an apportionment of the loss.[21]

[56] The claim in the present case is under clause 7 of the business agreement, which imposes a strict obligation on the first defendant to ensure that his commission

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15 Relying on *Day v Mead* [1987] 2 NZLR 443 (CA) and *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) for the proposition that the court must consider a plaintiff's share of responsibility for loss when assessing compensation for breach of contract.

16 Burrows, Finn & Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at 21.2.5.

17 *Day v Mead* at 457 and cases cited there.

18 *Mouat v Clark Boyce* at 564-565.

19 *Mouat v Clark Boyce* at 571 and 575.

20 Burrows, Finn &Todd *Law of Contract in New Zealand* at 720.

21 *Barclays Bank Plc v Fairclough Building Ltd* [1995] QB 214 (CA).

account did not fall into a debit position and to remain that way for more than 30 days. The defendants' liability to remedy the breach does not depend on any alleged failure of the plaintiff to take reasonable care. The imposition of any such duty is inconsistent with the strict terms of the contract.

Interference with policy-holders

[57] The defendants' last ground of defence is that the plaintiff caused the clawback of commission by unlawful acts in the form of harassment of policy-holders and by freezing the first defendant's commission account. Counsel argued that telephone enquiries made of Thomas Sum in April 2010 and visits by the plaintiff's private investigators to Mr Sum, and to Sim Yong Gary Tan and his wife Kook Fong Wong, in July 2010 were part of a concerted effort by the plaintiff to find reasons to terminate the policies in the two year period that clawback was possible. He submitted that the point could not be resolved fairly without an examination at trial of the plaintiff's executives, to find out what triggered the investigations and whether that contributed to the cancellation of policies and the clawback of premiums.

[58] I do not accept that the defendants' have an arguable defence on this ground, for two reasons. The first is that there is no evidence of any unlawful act by the plaintiff or its private investigators. Secondly, even if it could be argued that evidence of a late night visit, insistent questioning and threats of prosecution could amount to an unlawful act, it is clear that these acts are post-dated and therefore could not have caused the cancellation (the policies had already been cancelled). I will deal with each in turn.

[59] The evidence from the plaintiff is that it started its enquiries of Mr Sum in April 2010 because of arrears in payment of premiums and concerns as to whether Mr Sum had taken out the policies genuinely. There is no reason to question the motives of the plaintiff in trying to establish facts with Mr Sum in April 2010. It had a legitimate interest in establishing the true facts, and it is understandable that it would want to do so. It is apparent from the affidavits given by the policy-holders and the statements they gave to the investigators (and they say that they answered

these questions to the best of their abilities) that the second defendant had paid premiums on their behalf, raising questions as to whether the policies were genuine.

[60] Even more significantly, however, the evidence of the three policy-holders that they cancelled their policies because they disliked the intrusion of the plaintiff into their lives is patently incorrect. Mr Sum says that he felt threatened in the interview with the investigator, he became scared, and did not want to keep his insurance cover going in case the investigators came back or they took steps to get him into trouble with the Police. Mr Tan and Ms Wong both say that everything was going fine, and they were happy knowing they had their insurance in place, until they were contacted by the private investigator. They then say they were forced to give a statement, were very scared, and that this led to the second defendant being unable to continue to help them, and to them not meeting their premiums. However, this evidence is simply not credible, having regard to documented and uncontestable facts:

(a) Mr Sum's policies were cancelled on 5 July 2010 (two-and-a-half weeks before the private investigator visited Mr Sum on 22 July 2010) by which time the premiums were already four months overdue.

(b) Mr Tam's policy was cancelled on 21 June 2010 (a month before the visit by the private investigator) at which time the premiums were four months overdue.

(c) Payment of premiums on Ms Wong's policies ceased in April 2010, and the policy was lapsed in August 2010.

[61] The statements given by the three policy-holders to the private investigators on 22 July 2010 give rise to a number of questions about the validity of the policies, and the ability of these policy-holders to meet the premiums (with the suggestions being that the second defendant contributed, at least in part, to the payment of the premiums). However, this is not the basis of the plaintiff's claim. It relies purely on the contractual arrangement it had with the first defendant. Nevertheless the

questions relating to the creation of the policies and payment of premiums do help to explain the reluctance of the policy-holders to speak to the private investigators.

[62] These matters also go to refute the defendants' argument that the plaintiff's subsequent step of freezing the commission account affected the first defendant's ability to reinstate the policies or otherwise mitigate his debt to the plaintiff. The evidence is clear that at the time that the commission account was frozen, the first defendant was already hopelessly in debt, with commissions of somewhere between $70,000 and $250,000 having been clawed back, and that sum was continuing to increase.

[63] In summary, the defendants have failed to provide any credible evidential basis for this ground of defence.

Conclusion

[64] The Court will not usually decide issues of credibility. However, in this case the defendants have asserted matters of fact which are either inherently improbable or conflict with documented and indisputable evidence. There is reason to believe the second defendant, a person with a conviction for fraud, has procured and advanced as truth evidence that cannot be correct.

[65] In those circumstances, the Court is entitled to take a robust approach on summary judgment, and reject that evidence. It is also material, when weighing that evidence, that these apparently significant facts were not initially advanced by way of defence. The way in which they arose indicates desperation rather than reliability.

[66] The defendants' conduct immediately after demand was made is also relevant. The second defendant initially wrote seeking details of quantum. The plaintiff responded with further information. There were no further questions. There is reference in correspondence to a meeting on 6 August 2010 in which the second defendant acknowledged personal liability. He then sought to reach agreement on proposals for repayment (and subsequently talked of selling his house). By that time, he had to have known of the visits of the private investigators (the three policy-

holders say that they were good family friends). Nevertheless, when the plaintiff issued this proceeding (when it became apparent that the commission debts had risen to a value which the defendants could not meet), there was no mention in the initial opposition of most of the grounds subsequently advanced.

[67] I am satisfied that the defendants do not have any arguable defence.

Decision

[68] The plaintiff is entitled to summary judgment against the defendant for the sum of $300,762.08 as sought.

[69] Under clause 10 of the business agreement, the defendants are required to indemnify the plaintiff against all damages, liabilities and expenses which the plaintiff in incurs as a direct or indirect result of any breach of the defendants' obligations under the business agreement. The plaintiff is not seeking interest. However, under that clause, the plaintiff is entitled to claim costs reasonably incurred on a solicitor/client basis. Its counsel did not address me on the quantum. I reserve leave for the plaintiff to seek an order if the parties are unable to agree. Any memorandum seeking costs it to be filed and served within 20 working days, with any memorandum in reply to be filed within a further five working days.

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Associate Judge Abbott