

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
2008/CLE/GEN/FP00246

BETWEEN

LANELLE M. PHILLIPS
Plaintiff

AND

H. G. CHRISTIE LTD.
Defendant

BEFORE The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES:

Mr David C. Thompson for the plaintiff
Mr J. Kwasi Thompson for the defendant

HEARING DATES:

2014: 20 January; 15 May; 16 May; 15 July; 16 October
2015: 23 January

Gray Evans, J.

1. This is a claim by the plaintiff for moneys due and owing to her by the defendant for real estate commissions, management override commissions, and management pay.
2. The plaintiff is a Real Estate Broker. The defendant is a Real Estate company operating within the Commonwealth of The Bahamas. The plaintiff was employed with the defendant from June 2000 until 21 February 2007 when she resigned. The plaintiff initially served as the defendant's District Manager for Grand Bahama at its office in Freeport, Grand Bahama, and was later promoted to Regional Sales Manager, the post she held at the date of her resignation.
3. The plaintiff commenced this action by a specially indorsed writ of summons on 28 October 2008 in which she claims the sum of \$59,133.67 together with interest and costs.
4. In its defence and counterclaim filed 8 December 2009 the defendant denies the plaintiff's claim and avers that all moneys due to the plaintiff had been paid including real estate sales commissions and management override commission. The defendant also counterclaims for the sum of B\$4,526.66, being fifty percent of medical insurance premiums paid on the plaintiff's behalf, that the defendant alleges the plaintiff has failed to refund.
5. In her reply and defence to counterclaim filed 12 May 2010 the plaintiff maintains her claim against the defendant for payment of commissions and pay and denies that she owes the defendant any moneys as stated in the counterclaim.
6. The evidence at the trial came from the plaintiff and John Christie, the Vice-President and managing director of the defendant company.
7. The plaintiff says that at the time she resigned from the defendant's employ she was owed real estate commissions on contract sales, sales manager's overrides on all sales through the Freeport office, as well as management pay for the period 1 January 2007 to 21 February 2007. She said that although the defendant had paid her some of the funds which were due and owing to her at the date of her resignation, the defendant had failed and refused to pay her the sum of \$59,133.67, made up as follows:

Real estate sales commissions	\$33,708.49
Management pay for the months of January/February 2007	\$3,375.00
Management override commissions	\$21,450.18
Unpaid commission due from 2006	<u>\$600.00</u>
	<u>\$59,133.67</u>

8. In support of her claim for the above-mentioned sum of \$33,708.49 for real estate commissions, the plaintiff relies on her documentary evidence at items 1 through 8 of exhibit 46 in the bundle of documents. However, by my calculation those items, shown hereunder, total \$25,608.49 and not \$33,708.49.

Exhibit 46 Items #	DESCRIPTION	AMOUNT EARNED	AMOUNT RECEIVED	AMOUNT DUE AND OWING
1	GS02492	\$5,250.00	\$3,210.74	\$2,039.26
2	GB02210	\$2,250.00	\$1,900.50	\$349.50
3	GB1675	\$39,500.00	\$31,500.00	\$8,000.00
4	GB02273	\$5,625.00	\$3,285.27	\$2,339.73
5	GB02352	\$4,000.00	\$3,100.00	\$900.00

6	4473	\$5,250.00	\$ 00.00	\$5,250.00
7	GB1246	\$2,150.00	\$1,720.00	\$430.00
8	GS02276	<u>\$ 6,300.00</u>	<u>\$ 00.00</u>	<u>\$ 6,300.00</u>
		<u>\$70,325.00</u>	<u>\$44,716.51</u>	<u>\$25,608.49</u>

9. The defendant's evidence, which counsel for the plaintiff accepted as correct, is that no commission is payable to the plaintiff with respect to item 8aforesaid, that is, transactionGS02276, as that transaction was never completed. The plaintiff, therefore, abandoned her claim for \$6,300.00 with respect thereto.

10. In her witness statement, the plaintiff says that her management overrides on sales (\$41,728.04) and rentals (\$4,054.57) for 2006 totaled \$45,782.61 and that of that sum she was paid \$21,600.00, therefore, the sum of \$21,450.18 remains due and owing to her with respect thereto.

11. In support of that claim, the plaintiff relies on her documentary evidence at items 9 through 26 of exhibit 46 in the aforesaid bundle of documents. By my calculation those items, total \$43,050.18. However, when the sum of \$21,600.00 is credited thereto, the balance due is in fact \$21,450.18.

12. The defendant does not refute the plaintiff's entitlement to management overrides. However, Mr Christie's evidence is that the plaintiff was only entitled to the sum of \$31,110.67 for management overrides and that she had been paid the sum of \$21,600.00. Hence, he says, she is owed a balance of only \$9,510.67, made up as follows:

D.J.	\$8,826.16
K.L.	\$ 4,478.77
C.W-W	\$ 4,046.54
L.S.	\$ 485.00
C.P.	\$ 1,490.00
B.W.	\$ 1,050.00
A.L.	\$ 6,715.75
L.B.C.	\$ 997.00
L.P.	<u>\$ 3,021.45</u>
	\$31,110.67
Less	<u>-\$21,600.00</u>
Balance due	<u>\$ 9,510.67</u>

13. Although he appears to have arrived at a different total, \$10,508.61,counsel for the plaintiff in his closing submissions accepted the defendant's evidence in regard to the plaintiff's management overrides entitlement.

14. It is clear that the plaintiff's calculation contains an addition error. By my calculation the sum of \$9,510.67 is correct.

15. The plaintiff said she was not paid her manager's pay at \$450.00 per week for the period 1 January 2007to21 February 2007 in the sum of \$3,375.00. That evidence was not denied or refuted by the defendant.

16. As for the claim for \$600.00 referral fee, counsel for the plaintiff, in his closing submissions, conceded that that claim was not supported by the evidence and was, therefore, abandoned.

17. In the end, as I understood counsel for the plaintiff's submissions, and, allowing for the aforesaid addition error of the management overrides, the plaintiff's claim is amended to reflect

a claim for \$32,194.16 instead of \$59,133.67 as stated in the writ of summons. The said sum of \$32,194.16 is made up as follows:

a. Real estate commissions	\$19,308.49
b. Management overrides	\$9,510.67
c. Management pay	\$ 3,375.00

18. The plaintiff having conceded the defendant's figures in relation to the management overrides and the defendant not having denied or refuted the plaintiff's claim with respect to management pay, I find that the plaintiff is entitled to judgment for those sums being \$9,510.67 and \$3,375.00 respectively.

19. The sum of \$19,308.49 being real estate commissions for which the plaintiff maintains her claim is made up by items 1 through 7 of exhibit 46 aforesaid.

20. Mr Christie admits that the defendant withheld funds from the funds due and owing to the plaintiff with respect to real estate commissions earned by her.

21. However, Mr Christie, in his witness statement filed 15 January 2014, says that those funds were lawfully retained by the defendant in accordance with its policy, included in its Manual or Employee Handbook which forms a part of the employment contract. According to Mr Christie, that policy allows an employee who leaves the company to be paid for transactions under contract that later go into completion and for which the defendant had been paid on condition that 20% of the amount due the former employee is retained by the defendant to defray the expenses incurred in processing the matter which was worked on by the former employee.

22. Mr Christie's evidence in that regard is that the defendant retained the sum of \$10,467.07 made up by items 2, 3, 4, 5 and 7 of exhibit 46.

23. In relation to the plaintiff's claim at item 1 of the plaintiff's claim, Mr Christie's evidence is that the commission has already been paid to the plaintiff. The plaintiff alleges that the commission earned was \$5,250.00, made up as follows:

"ITEM 1	
Property:	GS02492 – Gardens at Discovery Bay Lot 26
Selling price:	\$525,000.00
Total Commission:	\$31,500.00
Listing commission:	\$ 5,250.00
Total due L Phillips:	\$ 5,250.00"

24. That evidence has not been refuted by the defendant.

25. In an email from Elizabeth Higgs, the defendant's Administration Manager, to the plaintiff, dated 12 March 2008, in which a number of payments were listed, amongst them is a payment of \$3,210.74 with respect to GS02492 made on 14 November 2007. The plaintiff admits to having received that sum. No evidence was produced to show that any further payment was made to the plaintiff with respect to GS02492.

26. I, therefore, accept the plaintiff's evidence and find that the defendant continues to hold the sum of \$2,039.26 from the commission earned by the plaintiff with respect to transaction GS02492.

27. Although Mr Christie admits to the defendant having retained a portion of the commission with respect to item 4, he disagrees that it was \$2,340.00 as alleged by the plaintiff. His evidence is that the amount of commission received by the defendant was \$4,072.84 and

not \$5,625.00, as alleged by the plaintiff; that of that sum, \$3,285.27 has been paid to and receipt acknowledged by the plaintiff, and, therefore, only the sum of \$787.57 was retained under the aforesaid 20% retention policy.

28. In that regard, in a letter dated 28 August 2007, counsel for the defendant wrote to counsel for the plaintiff, inter alia, as follows:

"(d) GB0 2273 – Our client confirms that the commission is \$4,072.84 less 20% due to H.G. Christie, amount to be disbursed \$3,285.27."

29. In response to that letter, the plaintiff in a letter dated 5 September 2007 to her attorney, wrote:

"This amount is inaccurate. The house sold for \$250,000 net at 6% commission for a total of \$15,000.00 less 25% to Coldwell Banker James Sarles Realty. This was NOT a referral to his company. We had a co-exclusive – whichever company did not get the sale received 25% off the top of the commission amount. This can be verified by James Sarles as he is in possession of the agreement. The accurate breakdown is as follows: \$15,000.00 less 25% (\$3,750) = \$11,250.00 less 50% to me as selling and listing agent = \$5,625."

30. That information was also provided by the plaintiff in an email dated 17 March 2008, addressed to Beth Albury and copied to John Christie, in which she wrote:

"GS0 2273 – wrong amount - \$3,285.27 received – Please see calculations below:

ITEM 4

Property:	GS02273 – No. 134 Lucayan Beach House
Selling price:	\$250,000.00
Total Commission:	\$15,000.00 less 25% to JS - \$11,250/2 = \$5,625
Sales & Listing:	\$ 5,625
Total due L Phillips:	\$ 5,625
Received from HGC	\$ 0
Owed:	\$5,625.00 less 20% (which we are not agreeing to) = \$4,500.00, which is a difference of \$1,214.73."

31. That evidence has not been controverted by the defendant. I, therefore, accept the plaintiff's evidence in that regard and find that she is entitled to a real estate commission of \$5,625.00 in respect to contract GS02273, of which sum she has been paid the sum of \$3,285.27; that the balance of \$2,339.73 and not \$787.57 has been retained by the defendant.

32. In relation to item 6 of exhibit 46, namely transaction #4473, the defendant's evidence is that the deposit was not received, nor the contract there for signed, until March 2007, after the plaintiff had resigned, so she is not entitled to any part thereof.

33. Moreover, the defendant contends that William (Peter) Christie and not the plaintiff was the agent on that transaction. Indeed, Mr Christie's name is so shown on the transaction report amongst the defendant's documentary evidence.

34. However, the plaintiff maintains that she was the agent and says that it was a sale which she co-brokered with Colin Lightbourne, who would have held the deposit prior to her resignation, although she does not dispute that the defendant may not have received it until afterwards. In that regard, the plaintiff drew attention to the note on #4473 which indicates the "under contract date" as 12 February 2007.

35. Mr Christie's evidence on re-examination was that the "entry date of 5 March 2007" meant that that was the date the defendant received the deposit. According to Mr Christie, in the real estate business a property is not considered "under contract", or even "sale pending", until a deposit is made; that "until there is a deposit, there is no transaction."

36. In my view, that statement confirms the plaintiff's evidence. The transaction report provided by the defendant clearly shows the "under contract date" as 12 February 2007. If, as Mr Christie says, a property is never considered "under contract" until a deposit is made, it would appear that the deposit was received from the purchaser on or before 12 February 2007, prior to the plaintiff's resignation, albeit by a co-broker.

37. I, therefore, accept the plaintiff's evidence that transaction #4473 was a transaction with which she co-brokered with Mr Lightbourne and that the deposit there for was received and held by Mr Lightbourne, prior to her resignation. I note here that Mr Lightbourne is the person from whom the defendant eventually received the deposit and the purchaser

38. I find that the plaintiff is entitled to the sum of \$5,250.00 being 50% of the real estate commission (\$10,500.00) payable in respect to transaction #4473.

39. As indicated, the defendant contends that except for transaction #4473, the funds retained by the defendant from the commissions payable to the plaintiff, were retained pursuant to the defendant's 20% retention policy as set out in the "Payments on unsettled business" section of its manual/employee handbook as follows:

"Payments on Unsettled business

An Associate leaving H G Christie Ltd will be paid on any transactions under contract that go into completion and for which H G Christie Ltd gets paid. No bonuses on rebates or referrals will be paid on commissions disbursed after the date of the associates' termination. Twenty percent (20%) of the amount due the associate upon completion of those sales that have not settled will be retained by the company from the remaining commissions to help defray the expenses incurred in processing the associates business."

40. Much was made during cross examination of the plaintiff about the extent to which she was aware of the provisions of the handbook. However, there is no evidence that the plaintiff was aware of that provision prior to her resignation.

41. The plaintiff contends that the defendant's 20% retention policy was implemented after she commenced her employment with the defendant; that it was never a part of her contract of employment and she never agreed to it after the manual was published in January 2006; that, in fact, she only became aware of the policy after her resignation. I believe her.

42. Although Mr Christie, in his witness statement, said that the employee handbook formed part of the employment contract, under cross examination he said that the intent of the manual was not to change the terms of the contract of employment of the defendant's employees.

43. Indeed, the manual itself clearly states that it was not intended to be a contract or to include any contract terms. See page 2 paragraph 2 thereof.

44. On another occasion, Mr Christie said that he had "something in writing" from the defendant's other employees to say that they accepted the aforesaid policy, but he had nothing to that effect from the plaintiff.

45. I accept the submission of counsel for the plaintiff that the defendant's 20% retention policy was not a part of the plaintiff's employment contract with the defendant and, therefore, the

defendant was not entitled to retain any part of the plaintiff's commissions pursuant thereto, since, as counsel points out, the policy cannot be made retroactive to affect the plaintiff, without her agreement.

46. In the result, I find that the plaintiff is entitled to the sum of \$19,308.49 being funds withheld by the defendant from the real estate commissions earned by the plaintiff while employed with the defendant with respect to transactions which closed after her resignation, as follows:

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1	GS02492	\$5,250.00	\$3,210.74	\$2,039.26
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5	GB02352	\$4,000.00	\$3,100.00	\$900.00
6	4473	\$5,250.00	\$ 00.00	\$5,250.00
7	GB1246	<u>\$ 2,150.00</u>	<u>\$ 1,720.00</u>	<u>\$ 430.00</u>
		<u>\$70,325.00</u>	<u>\$44,716.51</u>	<u>\$19,308.49</u>

47. Judgment will therefore be entered in favour of the plaintiff for the sum of \$32,194.16 made up as follows, together with interest and costs, to be taxed if not agreed:

a. Real estate commissions	\$19,308.49
b. Management overrides	\$ 9,510.67
c. Management pay	<u>\$ 3,375.00</u>
	<u>\$32,194.16</u>

THE COUNTERCLAIM

48. The defendant counterclaims against the plaintiff for B\$4,526.66, being "fifty percent of medical insurance premiums paid on the plaintiff's behalf that the plaintiff has failed to refund."

49. The defendant does not plead how its claim arises. It does not say that the parties had an agreement for the defendant to pay 100% of the medical insurance premium and for the plaintiff to reimburse 50% thereof to the defendant; and that the plaintiff breached such agreement.

50. However, in his witness statement, Mr Christie avers that:

- a. It was an agreed term of the plaintiff's contract that the Company would pay half of the health insurance benefit and she would pay half;
- b. The plaintiff paid her portion for the years 2002 and 2003. The company paid the full amount for the years 2004, 2005 and 2006 on condition that the plaintiff would reimburse the Company. The Company is therefore entitled to deduct the amount of \$4,359.66 from any funds held on behalf of the plaintiff.

51. (I note here that there is a difference of \$167.00 between the amount claimed in the counterclaim and the amount stated by Mr Christie as being owed and there is no evidence accounting for the difference).

52. In support of its claim for a refund of insurance premiums the defendant relies firstly on an email from the plaintiff to Mr John Christie, dated 20 August 2002, on the subject: "New Employee Contract", in which the plaintiff proposed, inter alia, as part of her contract with the defendant that one-half of her health insurance would be covered by the defendant; and

secondly, on an undated letter from Colina Imperial to the defendant in which one Darren F. Obregon, Billings Administrator, forwarded a schedule of premiums billed and paid for the plaintiff for the period 1 October 2002 to 28 February 2007 in the sum of \$11,784.96. (See exhibits 3 and 31 of the defendant's bundle of documents).

53. Although there is no evidence that the defendant responded in writing to the plaintiff's proposal with regard to the health insurance coverage, there are a number of handwritten notations on the aforesaid copy of the email, which Mr Christie identified as his. Beside the aforesaid proposal for half of the plaintiff's health insurance to be covered by the defendant are the letters "ok". The defendant contends, and I understand that to mean, that the plaintiff's proposal in that regard was agreed.

54. Under cross examination the plaintiff admitted that she and the defendant had negotiated that the defendant would be responsible for one half of the payment for her health insurance. She also said that there was a time when the defendant took one-half of the premiums out of her management overrides, although she says that she believed that the defendant started paying 100% of the premium in late 2004, as they were no longer deducted from her overrides.

55. On re-examination the plaintiff said that she never paid any premiums to Colina Imperial for her medical insurance; that she was never billed by the defendant there for; that she never received any letters from the defendant advising her that she owed the sum or a request that the same be paid before she retired.

56. It appears that the defendant's Administration Manager, Elizabeth Higgs, was also of the view that the defendant paid 100% of the premium for the plaintiff's medical insurance coverage. In an email dated 28 February 2007, to the plaintiff, Ms Higgs wrote:

"Hi Lanelle, I believe insurance was part of your package so nothing is taken from [sic] medical insurance only for any outstanding bills owed by yourself to H.G. Christie, for example, phone or any other personal charges incurred."

57. However, two weeks after Ms Higgs' said letter, in a letter dated 14 March 2007, Tina Thompson, the defendant's General Sales Manager, wrote to the plaintiff, inter alia, as follows:

"In addition, we have outstanding personal expenses on various charge accounts, a new Batelco Bill for 2007 prior to your resignation, and a repayment of 50% of your medical payments that were not paid to the company. All of these funds are due and payable to HG Christie Ltd and a formal calculation with supporting documentation will be provided to you/attorneys for your repayment of the same."

58. There is no evidence that a formal calculation with supporting documentation of the amount which the defendant claims to have been paid with respect to insurance premiums was provided to the plaintiff and although it appears that funds for the telephone bill were deducted from the commissions paid to the plaintiff since her resignation, nothing was deducted with respect to the insurance premiums.

59. Furthermore, although Mr Christie says that the letter from Ms Higgs regarding insurance should not have been written, and although he said he believed the plaintiff paid her portion of the premiums in 2002 and 2003, he had no evidence to that effect; nor could he say whether the defendant ever requested reimbursement from the plaintiff for 50% of the funds paid to the insurance company on her behalf.

60. When asked by counsel for the plaintiff if he recalled saying that the defendant paid 50% of the insurance premiums for 2002 and 2003 Mr Christie responded: "It is my recollection that they did. I heard talk of it, yes."

61. On re-examination, Mr Christie said that he was not personally involved in the payment or receipt of the insurance premiums, but he was able to confirm that the plaintiff paid her portion of the premium for 2002 and 2003 because his manager would know what has been paid and they told him that "she had paid for the first two years". He did not say who was his manager nor did his manager called as a witness.

62. In her defence to counterclaim the plaintiff denies that she owes the defendant the amount claimed.

63. However, her evidence, as I understand it, is that although she and the defendant had an agreement for the defendant to pay 50% of her medical insurance premium, and there was a time when the defendant took one-half of the premiums out of her management overrides, she believed that sometime in late 2004 the defendant started paying 100% of the premium, and no longer deducted moneys from her management override with respect thereto. She

64. Curiously, the evidence is that the plaintiff received no overrides in 2002 and 2003. The plaintiff's evidence is that prior to 2005 there was no override. The defendant's director and treasurer, Peter Drudge, in a letter dated 14 March 2007 addressed To Whom It May Concern, confirmed this when he wrote, inter alia: "HG Christie Limited has absorbed any annual loss, expense and revenue that did not cover the override for Lanelle. This occurred in the override payments of \$1,800.00 paid monthly during the period of 2002, 2003, 2004."

65. Although the defendant claims that the sum of \$4,526.66 or \$4,526.22, according to the counterclaim; or \$4,359.66, according to Mr Christie's witness statement, being one-half of the premiums paid for the period 2004 through February 2007, is due and owing by the plaintiff, the defendant has provided no evidence of any payments being made by the plaintiff to the defendant, either directly or by way of reimbursements from funds due to the plaintiff, for any portion of the insurance premium.

66. Indeed, although in her said letter dated 14 March 2007, Ms Tina Thompson wrote to the plaintiff that she owed the defendant "a repayment of 50% of her medical payments that were not paid to the company"; and notwithstanding Ms Thompson's promise that a formal calculation with supporting documentation would have been provided to the plaintiff and or her attorneys for her repayment of the same, there is no evidence that any such formal calculation with supporting documentation with respect to insurance premiums was provided to the plaintiff.

67. Furthermore, although there is evidence that funds for the telephone bill referred to in Ms Thompson's letter were deducted from the commissions paid to the plaintiff since her resignation, nothing was deducted with respect to the insurance premiums. It seems to me that the defendant, if it was really of the view that it was entitled to be reimbursed for 50% of the insurance premiums paid on behalf of the plaintiff could have also deducted those funds from the funds paid to the plaintiff since her resignation.

68. The fact that the defendant paid 100% of the said premiums for at least three years without seeking reimbursement from the plaintiff for any part thereof is, in my view, strong prima facie evidence that the defendant had either agreed or decided to pay 100% of the same, without reimbursement from the plaintiff.

69. In the circumstances, the counterclaim is dismissed with costs to the plaintiff, to be taxed if not agreed.

DELIVERED this 23rd day of January A.D. 2015

Estelle G. Gray Evans
Justice.