IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2020/COM/lab/00049

B E T W E E N

KIM RAHMING

Claimant

AND

BMG INSURANCE AGENTS & BROKERS LIMITED

Defendant

Before: Assistant Registrar Jonathan Deal

Appearances: Mrs. Tanya Wright for the Claimant
Mr. V. Moreno Hamilton for the Defendant

Hearing date(s): 3 April 2025, 4 April 2025

JUDGMENT

ASSISTANT REGISTRAR DEAL

[1.] This is the taking of an account of the commissions on premiums due and owing under the contract of employment dated 18 November 2015 between the Claimant, Kim Rahming, and the Defendant, BMG Insurance Agents & Brokers Limited, pursuant to a Consent Order made on 21 June 2021 (the "Consent Order").

Background

[2.] The Claimant is an insurance industry professional who prior, to her employment with the Defendant in 2015, had worked in the insurance industry for over 25 years and had accumulated experience in various aspects of the industry, including sales, administration and operations.

[3.] The Defendant is a Bahamian company which carries on business in the insurance industry as insurance agents and brokers. The Defendant is part of the Brickell Management Group (for consistency with the Consent Order, the "BMG Group"). It services the insurance needs of the BMG Group as well as external customers. Part of its business includes writing insurance policies.

[4.] The Defendant employed the Claimant as an Account Executive, effective 23 November 2015, by way of a written offer of employment dated 18 November 2015 (the "2015 Offer"). The 2015 Offer, which was signed by the Claimant to indicate her acceptance of it, contained the following material terms:

> "We hereby offer you the subject position with effect November 23rd, 2015 at a base salary of $28,000.00, with an incentive of 5% for the first year on new premiums and 3% for renewals. For business within the BMG Group the incentive would be 3% for the first year on premiums and 1% for renewals of new Group business booked. You will not be entitled to any commissions on existing BMG business."

[5.] In February 2016, the then Managing Director of the Defendant, Keith Major Sr., informed the Claimant that the "commission element" of her pay package had purportedly been "eliminated". This was memorialised in an email to the Claimant dated 19 February 2016 (the "2016 Email"). The 2016 Email stated in material part:

> "Further to our conversation, I have been directed to inform you that the commission element of your pay package has been eliminated. Our model, I'm told, does not allow for commissions to be paid. It is the intention however to create an incentive based on the growth of business. This will soon be developed. In regards your queries on commissions due based on business already secured both your new business and renewing the company business, this you must take up with the President, Paul Major. Also the agreement you have in place to bring in business in order to increase your base pay should also be a part of that discussion.
> We have been reminded that the profitability of the operation from day one remains the goal. I do apologize for this change and trust we can move forward from this."

[6.] The Defendant claims that it introduced a new incentive for staff and agents in 2017. The terms of this alleged incentive are said to have been set out in a generic policy memorandum headed "BMGIA Policy on Incentive for Personal General Business" from Keith Major Sr. dated 25 September 2017 (the "2017 Policy Memorandum"). The material terms were:

"To enhance increased production more stable renewals and good client relations and to reward for continued efforts, we are introducing the following policy for BMGIA staff and agents only.

- Effective June 1st, 2017
- 5% Commission will be paid on all New Business brought into BMGIA in General Insurance (House, Car, Etc.) This will be paid on personal businesses.
- 3% Commission will be paid on Renewal Business.
- Commissions will only be paid once financed premiums are paid in full.
- All Commission payouts will be reviewed, authorized and signed off on by CEO
- No Commission will be paid on BMG Business, however you are eligible to receive commissions on business written on BMG employees.
- Commissions will be paid by the 15th of the following month.
- This policy is subject to change depending on the business environment."

[7.] The Claimant continued to work for the Defendant until she was terminated on 24 September 2020 due to several alleged "infractions" which the Defendant discovered during a review conducted when the Claimant was placed on five days' suspension. It is unnecessary for the purposes of this decision to dwell on those "infractions" in any detail, or to enter into a consideration of what actions other than termination the Defendant took against the Claimant.

[8.] When it terminated the Claimant, the Defendant acknowledged that it owed the Claimant the sum of $9,571.10. That sum represented severance pay, two weeks' pay in lieu of notice, accrued vacation, and "total hours owed" according to the Defendant's calculations. The Claimant's salary had increased twice over the course of her employment from $1,166.67 bi-weekly at her first pay period to $1,398.73 bi-weekly at the time of her termination. The Defendant did not acknowledge owing any accrued commissions to the Claimant.

[9.] The Claimant perceived her termination to be unfair and unlawful and, as a result, commenced these proceedings by a specially indorsed Writ of Summons filed on 26 October 2020 and amended on 26 November 2020. The Claimant advanced various employment law claims which need not be elaborated at this stage as they are not in issue and also sought "...an accounting for the 5% commission on premiums for new business and 3% on renewals also 3% on premiums for new business and 1% for renewals for business within the BMG Group".

[10.] The Claimant's original Writ of Summons and amended Writ of Summons were allegedly served on the Defendant at its registered office on 27 November 2020. No appearance or defence was immediately filed so a Summons for Leave to enter Judgment in Default of Defence was issued on 30 December 2020 at the instance of the Claimant. The Defendant entered an unconditional appearance on 14 January 2021, and, on 23 March 2021, applied for an extension of time to file a defence. No extension of time to file a defence was ever granted.

[11.] On 21 June 2021, at the hearing fixed for the Summons for Leave to enter Judgment in Default of Defence, the Consent Order was made. The Consent Order recited that it was made after the Deputy Registrar read the Claimant's Statement of Claim and was informed that the Defendant had settled the Claimant's claim for notice and severance pay and salary withheld. The Consent Order contained the following orders:

"IT IS HEREBY ORDERED BY CONSENT THAT:

1. The Defendant do pay to the Plaintiff the sum of $30,000.00 for Unfair Dismissal.
2. That the following account be taken by The Registrar that is to say; an accounting of the commissions on premiums due and owing under the contract of employment dated 18th November A.D., 2015 between the Plaintiff and the Defendant with reference to the term of the contract which reads as follows: '5% commission on premiums for new business and 3% on renewals also 1% for renewals for business within the BMG Group.
3. That the Defendant shall pay to the Plaintiff legal fees and costs to date in the sum of $15,000.00.

AND IT IS FURTHER ORDERED THAT the Plaintiff and Defendant do within 14 days lodge with the Registrar an account of information in their possession relative to all premiums paid to the Defendant for new business and business within the BMG Group from 18th November A.D., 2015 until 20th September 2020 along with all necessary vouchers and verifying affidavit and within the like period serve a copy of the said account and verifying affidavit on the Plaintiff and Defendant respectively with liberty to each party to serve notice of objections to the said account.

AND IT IS FURTHER ORDERED THAT the Defendant do pay to the Plaintiff the amount which the Registrar may certify to be due to the Plaintiff on the taking of such account together with interest thereon to be assessed at such rate and for such period as the Court shall think just and costs to be taxed if not agreed."

[12.] On 22 October, 2021, the Deputy Registrar made an Order on Directions further to the Consent Order extending the time for compliance with the procedural directions contained in the Consent Order, providing directions with respect to the filing and service of witness statements and bundles, and setting down the hearing for the taking of an account (described as an "Assessment of the Plaintiff's commissions").

[13.] Differences between the parties as to the evidence to be introduced at the account hearing, and matters arising out of attempts to resolve those differences, hindered the progress of the proceedings. Those differences arose because the Defendant sought to have the issue of the terms pursuant to which commissions are to be paid be considered as a preliminary issue or in the account hearing (also called an "assessment" by the parties).

[14.] On 31 January, 2022, the Defendant filed a Summons (the "Variation/Set Aside Summons") seeking:

(i) an Order setting aside or varying the Consent Order on the ground of common or unilateral mistake, misrepresentation, or fraud;

(ii) an Order varying the Consent Order to read that an account be taken by the Registrar of the commissions (if any) on premiums due and owing to the Claimant by the Defendant; and/or

(iii) an Order that the issue as to the terms under which the Claimant is to be paid commissions (if any) be determined as a preliminary issue.

[15.] The Variation/Set Aside Summons came on for hearing before the Deputy Registrar on 10 March 2022 and 4 May 2022. On 4 May 2022, the Deputy Registrar made an Order (the "4 May 2022 Order") which remains unperfected but has never been appealed. The Deputy Registrar recorded in their notes that:

> "The issue re terms of payment of commissions during this assessment regarding this particular issue of commissions owing to the Plaintiff factoring in any changes or variation to the same that is during the assessment of damages [sic] so as to allow the Court to have a full understanding of the history and amounts owing to the Plaintiff that is due to her in commissions this is based on the fact that the real issue at hand is what is Mrs. Kim Rahming owed in commissions."

[16.] The Deputy Registrar was asked by Counsel for the Claimant in a letter dated 2 August 2022 to withdraw the 4 May 2022 Order but the Deputy Registrar did not do so.

[17.] On 14 June 2024, the Claimant filed a "Notice of Application (For an appointment for an assessment of damages)" to have a case management conference. At a case management hearing, the issue of the 4 May 2022 Order was raised, among other issues.

[18.] On 9 December 2024, the Court interpreted the 4 May 2022 Order, holding that the Deputy Registrar had made the issue of the Claimant's contractual terms with respect to commissions a part of the account hearing, and gave case management directions.

[19.] On 3 April 2025, the first day set for the account hearing, it was pointed out by the Court of its own motion that the Defendant had failed to file an affidavit of verification verifying the premium data it provided in its filed "Bundle of Account of Information Relative to Premiums Paid". The Claimant had filed her affidavit on 4 November 2021. The proceedings were therefore adjourned to enable that step to be completed by the Defendant.

[20.] On 4 April 2025, the second day set for the account hearing, the Defendant filed an Affidavit of Verification made by Darren Bastian verifying the list of premiums in its Bundle of Account Information. The Court proceeded to hear witness testimony and reserved its decision on the amount of commissions, if any, to be paid by the Defendant to the Claimant pursuant to her contract of employment.

Evidence

[21.] The Claimant testified in support of her case as to the commissions due to her. The Claimant was subjected to cross-examination under oath. She relied primarily on her witness statements, filed on 30 December 2020, 13 April 2021, 25 January 2022 and 24 February 2025, and the documents contained in Bundles of Documents filed on 30 December 2020 and 24 February 2025.

[22.] Darren Bastian and Keith Major Sr. testified in support of the Defendant's case as to the commissions due to the Claimant. They were subjected to cross-examination under oath or affirmation. The Defendant relied primarily on their witness statements, which were filed on 11 March 2022 and 3 March 2022 respectively. The Defendant filed a witness statement made by Paul Major, but he was not called to testify at the account hearing.

The Claimant's evidence

[23.] In her witness statement filed on 30 December 2020, the Claimant stated that, prior to being employed by the Defendant, she worked in the insurance industry for twenty-five years and had experience in all aspects of the industry including sales, administration, accounting and operations. She held the title of Account Executive with the Defendant, which was a supervisory position.

[24.] The Claimant averred that, when she was hired, the Defendant was a small "fledgling insurance company" which had only commenced operations in June 2015. She was recruited by the Defendant due to her knowledge and experience in the insurance industry and her selling skills. She was required to obtain a license from the Insurance Commission as a part of her employment. She was the sole full time staff member from when she started in 2015 until early 2017.

[25.] The Claimant described herself as being "instrumental" in "key formation strategies" for the Defendant. She gave evidence that her job requirements included:

> "(a) analyzing the company deposits and premium collection
>
> (b) balancing and processing premiums with written policies
>
> (c) submitting weekly/monthly reports of a financial nature
>
> (d) training and supervising temporary staff
>
> (e) attend Executive Committee (ExCom) meetings to provide updates on pending matters from previous meetings and answer questions arising from reports [...]"

[26.] The Claimant received favourable appraisals from Keith Major on 15 November 2016, 4 December 2017 and 3 January 2018, copies of which were included in her Bundle of Documents filed on 30 December 2020. The appraisal of 15 November 2016 described her as having "...wholeheartedly taken on the responsibility of building the Insurance Department through sales in the general area and establishing administrative procedures...".

[27.] The Claimant said that she only received one commission payment and had not been paid commission for four out of her five years of employment. She said that she had requested an accounting of her commissions for the period of her employment from the Defendant and the Defendant had failed and refused to pay the same. The Claimant referred to letters and emails written to the Defendant by her attorney after her termination requesting an accounting of her commission from the Defendant.

[28.] In her witness statement filed on 13 April 2021, the Claimant addressed the 2017 Policy Memorandum which had been raised by the Defendant after her first witness statement was filed.

[29.] The Claimant stated that she was personally aware of the 2017 Policy Memorandum, as it was introduced by Keith Major Sr. at a staff meeting in September 2017 to incentivize existing and future staff, however she never agreed that it would pertain to her and, to the best of her knowledge, the proposal was never instituted for any other staff member.

[30.] The Claimant denied that her failure to take action to compel the Defendant to pay her commissions when due could be deemed an acceptance of the 2017 Policy Memorandum. She asserted that the Defendant not only failed to pay the commissions for the BMG Group policies but also commissions for new business, and, therefore, the Defendant could not claim in good faith to have operated under the 2017 Policy Memorandum.

[31.] In her witness statement filed on 25 January 2022, the Claimant commented on the Defendant's Bundle of Account Information and supplemented the evidence concerning the history of her employment with the Defendant contained in her witness statements filed earlier.

[32.] With respect to the Defendant's Bundle of Account Information, the Claimant said that client codes VCCO, AVEG, BRICM, AAHD, PLAYS, CCCH, VCMCL, EASTSU, CARMHL, BELLCC, AVENTP and BERNPL were policies written for companies and entities considered to be within the BMG Group. The Claimant had personally written the proposal and applications for those companies and entities.

[33.] The Claimant asserted that she "single-handedly" wrote most of the policies for the Defendant and entered them into the Defendant's system until her termination. The Claimant said that the Defendant managed all the insurance needs for the BMG Group, which required multiple and varying types of insurance policies to cover the interior and exterior of many commercial buildings, close to one hundred vehicles, and the construction projects underway for the group.

[34.] The Claimant criticized the Defendant's commission reports for the years 2016 to 2020 contained in its Bundle of Account Information because, on her analysis, they failed to show how the amounts arrived at were calculated, failed to apply the formula for commission in the 2015 Offer, made deductions for negative endorsements and cancellations, and reflected deductions made by the Defendant for certain policies on the basis that they were cancelled when they were in fact not renewed. The Claimant exhibited a marked up version of the Defendant's list of premiums received. In her marked up list of premiums received, the Claimant:

(i) marked in green the policies she considered to be within the BMG Group which were not included in the Defendant's calculations;

(ii) marked in yellow new business for which she was responsible but which were not included in the Defendant's calculations; and

(iii) marked in pink policies pertaining to BSGC. She said in her evidence that, to her knowledge, the BSGC policies were not cancelled but merely not renewed and so should not have been classified as cancelled and deducted by the Defendant.

[35.] With respect to the history of her employment with the Defendant, the Claimant said that she had been a targeted hire. The Claimant said that when she agreed to work with the Defendant, she accepted a much lower salary because of the promise and expectation of a share in commissions on premiums from the entities within the BMG Group. The premiums generated by the BMG Group were "obviously large" with "tremendous potential for growth". Commissions were the only way the Claimant could see she would be compensated commensurate with her qualifications and experience.

[36.] The Claimant said that shortly after she started to work for the Defendant, the Defendant purported to unilaterally terminate the commission element of her contract which was the basis for her accepting the job at the low salary offered. The Claimant stated that she never agreed to forego the commission incentive negotiated in her contract and, despite the Defendant apologizing for the change, she continued to agitate for her contractual commissions but was repeatedly required to wait for the payments due to her. The Claimant attributed the withdrawal of commissions to the Defendant becoming bitter about the sums of money she would be earning under her contract.

[37.] The Claimant averred that she continued to request commissions after she received the 2016 Email. She stated that she was mindful of the fact the Defendant was a new company, with few staff, and was overwhelmed by the insurance demands of the BMG Group. She said that she was also focused on selling policies and thought it would eventually be sorted out. She pointed out the Defendant was inconsistent with the payment of commissions on its own evidence and, in the one instance they did pay, "the record was inaccurate and they failed to give an account of how the calculations were made". She asserted that the Defendant always knew it did not have her consent.

[38.] The Claimant acknowledged receiving a partial payment of $7,692.13 for commissions in what she said was 2017. She said that she took the commission payment as confirmation that the Defendant's threat to terminate the commission element of her contract was not followed through. She said that she was not given a breakdown for the payment despite her having requested one. She said that she knew the payment could not have included her full commissions and, each time she brought it up with the Defendant, she was told that the Defendant was looking into it. Due to the volume of work and her responsibilities, she focused on work expecting the Defendant to eventually resolve the issue.

[39.] The Claimant asserted that the Defendant had attempted to "dishonestly or fraudulently" classify payments from Bahamas First under an annual agency profit sharing initiative as commission payments they were obligated to make to her. The Claimant described a payment of $3,000 made to her on 19 February 2019 and a payment of $7,000 made to her on 1 May 2020 as her share of an annual profit sharing scheme from Bahamas First. The Claimant commented on the unlikelihood of commission payments on premiums coming to round figures and noted how the Defendant did not provide an accounting of how the figures were arrived at.

[40.] The Claimant expressly denied that she was given any benefit, inducement or consideration by the Defendant for her to forego her entitlement to commissions under the 2015 Offer.

[41.] In her witness statement made on 21 February 2025, the Claimant referred to an "Insurance Matrix" in her Bundle of Documents filed on 24 February 2025 which she said showed the existing business she met on the Defendant's books when she was hired. She asserted that, when clients in the BMG Group brought in subsequent business after she was hired, such as new construction projects or new assets which required insurance, that was treated as new business which was not existing BMG Group business at the time of her contract.

[42.] Under cross-examination, the Claimant agreed that she had an understanding of the insurance industry, including how premiums work and how commissions are paid, because she had worked in the insurance industry for twenty-six years and had been employed at Bahamas Cooperative League, Star General Insurance and the Defendant. The Claimant accepted that commission is normally paid on business that is brought in because it is incentive driven and that it should be based on money that is actually collected.

[43.] When cross-examined by Counsel for the Defendant about the 2015 Offer, the Claimant denied that the terms of her employment were changed, but acknowledged in the course of cross-examination that her salary had increased, that she never received an incentive of 5% commission for the first year on new premiums, had never received 3% commission for renewals, had never received 3% commission for the first year on premiums within the BMG Group and had never received 1% commission for renewals on new business within the BMG Group. Despite those concessions, she denied that she never received commissions according to the 2015 Offer, because she had never gotten a commission report from the Defendant.

[44.] When cross-examined by Counsel for the Defendant about the 2016 Email, the Claimant accepted that it was sent about three months into her employment with the Defendant. At one point, the Claimant denied that Paul Major told her that the commission element of her contract was being removed, but later clarified that she meant "that was not the total conversation". The Claimant also asserted that the 2016 Email did not depict the full conversation between her and Keith Major Sr. and that it "was not the end of it". The Claimant accepted that she continued to work with the Defendant after receiving the 2016 Email.

[45.] When cross-examined about the 2017 Policy Memorandum, the Claimant was asked to read the various terms of the policy memorandum and she agreed that the terms were reasonable. However, she denied that it was ever agreed that the 2017 Policy Memorandum would apply to her.

[46.] The Claimant was cross-examined about the documentary evidence she had of her raising the issue of commissions with the Defendant during her employment. She was referred to letters raising the issue in her Bundle of Documents filed on 30 December 2020 and acknowledged that those letters were all sent after she was terminated. She asserted that there were emails she would have sent Keith Major Sr. before her termination in her work email which she no longer had access to. When it was put to her that she had made up that there were other emails, she stated that she sent an email and she had had several conversations in person with Paul Major and Keith Major Sr.

[47.] The Claimant was asked in cross-examination to identify the signatures on the Cheque Requisition Form dated in 2018 exhibited to Darren Bastian's witness statement. The Claimant identified the signatures as being those of Shavette Russell, office administrator, and Keith Major Sr. She identified the payment as being the payment she had referred to in her own witness statement as a commission payment and accepted that the payment was made in 2018, after the 2017 Policy Memorandum was introduced. However, she denied that payment was based on the 2017 Policy Memorandum. She reiterated that she never received a breakdown of the payment from the Defendant.

[48.] In the course of questioning by Counsel for the Defendant, the Claimant acknowledged that she owed the Defendant for personal insurance policies. She said that the figure of $10,360.28 put to her by Counsel for the Defendant could be the amount that she owed the Defendant for them. However, she stopped short of admitting quantum as she said she could not recall the exact amount but the amount suggested could be right. The Claimant disagreed with a suggestion put to her by Counsel for the Defendant that, after accounting for the premiums owing on the personal insurance policies, she was owed only $9,406.19 in commissions by the Defendant.

[49.] Under re-examination by her counsel, the Claimant said that she continued to work for the Defendant after the 2016 Email because she had a family and responsibilities and needed her job. She also stated (at pages 51 to 52 of the transcript of the 4 April 2025 hearing) that she continued to work because in the conversations she had with Paul Major and Keith Major Sr. neither of them told her she was not going to get compensated in accordance with her initial contract. Each of them referred her to the other. She therefore assumed she would eventually get paid her commissions or compensation in lieu of the commissions that were promised.

[50.] The Claimant asserted in re-examination that the salary increases she received from the Defendant in 2016 and 2018 were not related to the withdrawal of the "commission element" or her pay package but were instead general salary increases. She also revisited her concession in cross-examination that the 2017 Policy Memorandum was reasonable. She asserted that it was not reasonable with respect to her particular employment because she took the job with the Defendant initially based on the commissions she would receive.

Darren Bastian's evidence

[51.] Darren Bastian is the President of the Defendant. He assumed the role in December 2019.

[52.] In his witness statement, Mr. Bastian stated that the 2016 Withdrawal Email and the 2017 Policy Memorandum suggested to him that there was an understanding that the terms on payment of commission under the 2015 Offer Letter were changed to those contained in the 2017 Policy Memorandum.

[53.] Mr. Bastian exhibited the Cheque Requisition Form and stub for the commission payment of $7,692.13 made to the Claimant to his witness statement. He noted that the form stated that the new business premiums the Claimant personally wrote totaled $72,558.61 and that the $7,692.13 paid was the sum of (i) 5% of $72,558.61 and (ii) incentives paid on a company not related to the BMG Group in the amount of $4,064.20. No commissions were paid on the BMG Group or affiliated group business and no renewal incentives were paid.

[54.] Mr. Bastian expressed the view that the payment of $7,692.13 "reflected" or was based on the terms outlined in the 2017 Policy Memorandum which were previously accepted by the Claimant. Mr. Bastian suggested that the 2017 Policy Memorandum must have been a "new agreement", because there was no payment on renewals. Mr. Bastian opined that if the 2017 Policy Memorandum was not "new and accepted", then commissions on renewals should have been paid on previous years prior to the 2017 Policy Memorandum.

[55.] Mr. Bastian exhibited a commission report for the period 2016 to 2020 to his witness statement. The initial commission report asserted that the Claimant was owed $9,406.19. A revised report was also exhibited. The revised report stated that the total amount of commissions due to the Claimant from the Defendant taking into account negative endorsements and cancellations, the payment of $7,692.13 to the Claimant (said to represent 2017 commissions), further payments of $3,000 (said to represent 2018 commissions) and $7,000 (said to represent 2019 commissions), and deducting the sum of $10,360.28 (being premiums allegedly owed by the Claimant to the Defendant) was $7,000.41.

[56.] In his witness statement, Mr. Bastian explained the reports exhibited to the witness statement. He said that:

(i) industry standard pays commissions on business that has been paid in full. However, because of the length of time that was covered when calculating commissions, the Defendant in its calculations worked on the premise that all premiums were paid in full, which was not the case. All new business the Claimant reported generated commissions of 5% and renewals commissions of 3%.

(ii) endorsements were included with new business sales but negative endorsements and cancellations were deducted.

(iii) commissions on lapsed insurance policies which the Claimant did not repay as she was obliged to were not considered.

(iv) the premiums of $10,360.28 owed to it by the Claimant on the Defendant's case was deducted from the commissions due to the Claimant.

(v) the adjustment from the initial report to the revised report was because commissions for 2016 should not have been included as commissions were not payable until 2017 (and, though not explicitly mentioned by Mr. Bastian, the total gross commissions for 2017 and 2018 were also adjusted).

[57.] During cross-examination, Mr. Bastian was taken through a number of companies the Claimant suggested were in the BMG Group and asked to confirm whether they were or were not in the BMG Group. He was also asked to supplement the companies listed by Counsel for the Claimant in her questioning with any in the BMG Group which were not mentioned by Counsel for the Claimant. Mr. Bastian was also taken to the client codes in the Defendant's list of premiums but he said he was not very familiar with them and could not explain them.

[58.] Mr. Bastian was unable to answer what period either component of the commission payment of $7,692.13 made in 2018 related to because he was not employed by the Defendant at the time, nor could he explain to what policies the payment related to because he did not have the records. He accepted that, without a breakdown of the period or the policies it would be difficult for a person to accept the accuracy of the payment.

[59.] In cross-examination, Mr. Bastian accepted that the Defendant received an annual profit sharing payment from Bahamas First General Insurance Company. He confirmed that the

Defendant still received such payments up to the date of the account hearing. However, he said that such payments were not always shared with staff members.

[60.] Mr. Bastian said that the list of premiums received in the Defendant's Bundle of Account Information related to all customer service representatives and not just the Claimant. The lists contained in the Bundle of Account Information after the commission reports related only to the Claimant. The commission reports were prepared applying the terms of the 2017 Policy Memorandum. "Gross commission amounts" were the commissions the Defendant received on the premiums. Mr. Bastian said that commissions would "never" be paid to agents on premiums, but accepted that the 2015 Offer provided for the Claimant to receive commissions on premiums.

Keith Major's evidence

[61.] Keith Major Sr. is the Chief Executive Officer of the Defendant who previously held positions of Manager and Consultant to the BMG Group. He was replaced by Mr. Bastian as the Defendant's agency head.

[62.] In his witness statement, Mr. Major stated that he was authorized by BMG's board of directors to pursue establishing an insurance agency in or about 2015. BMG initially had its entire portfolio with Insurance Management, but diversified. Most of the Defendant's business was generated from related companies in the BMG Group. Mr. Major eventually negotiated contracts with Bahamas First, Nagico, Security and General, BAF, Colina, "a Bermudian insurance company" and Family Guardian.

[63.] Mr. Major said that, when the Defendant employed the Claimant, the Defendant had already set up some administrative procedures. The Defendant hired the Claimant, but it was not easy to secure the Defendant's agency license because the Insurance Commission required staff to have the ACCI designation. Nonetheless, the Insurance Commission allowed the Defendant to work on the promise of having staff pursue courses to attain the ACCI designation.

[64.] Mr. Major confirmed that the Claimant was made an offer of a salary plus commissions, as evidenced in the 2015 Offer. Mr. Major stated that the terms relating to commission were noted in writing by Paul Major to have been withdrawn. Mr. Major also recalled communicating with the Claimant on the issue of her contractual offer and the removal of her commission incentive. He exhibited the 2015 Offer and the 2016 Withdrawal Email to his witness statement.

[65.] Mr. Major highlighted that the Claimant's bi-weekly pay was increased on 30 November 2016 to $1,283.33 and on 3 January 2018 to $1,398.73.

[66.] Mr. Major stated that, in 2017, a bonus/commission incentive was arranged which allowed for the Claimant to receive commissions only on business unassociated with BMG Group business. This meant that the Claimant received commission on personal business that she brought in and not businesses that were associated with the BMG Group.

[67.] Mr. Major stated that the Claimant received and accepted commission cheques which were approved by the Defendant's CFO. He exhibited a copy of the 2017 Policy Memorandum and what he said were "a few of the cheques that Kim received and cashed for commission", being the Defendant's cheque no.00195 dated "2/15/2019" in the amount of $3,000 (memo: "Profit &

override commissions for 2018") and the Defendant's cheque no. 00256 dated "5/1/2010" in the amount of $7,000 (memo: "Commission").

[68.] During cross-examination, Mr. Major gave evidence that the office of Chief Executive Officer and President of the Defendant were "one in the same" during his tenure as Chief Executive Officer. He reported to Paul Major, who was the president of the BMG Group.

[69.] Mr. Major confirmed that, during his time as Chief Executive Officer, the Defendant received "annual profit sharing payments" from Bahamas First. The payment was shared with staff members. It was distributed among staff in accordance with no real formula.

[70.] In cross-examination, Mr. Major stated that he was directed to communicate the removal of the commission element from the Claimant's contract to the Claimant by Paul Major, who was in turn directed by the principals of the BMG Group.

[71.] Mr. Major could not recall whether there were any communications about what, if anything, the Claimant would be given in exchange for removing her commissions. Mr. Major said that the Defendant did some things to make up for removing the Claimant's commissions. When asked what was done, he stated that the Defendant paid for her to go on a four-day annual business trip three times between 2015 and 2017.

[72.] Like Mr. Bastian, Mr. Major could not explain the period for which the commission payment of $7,692.13 made in 2018 was calculated and could not explain the "client coding" in the Defendant's list of premiums contained in its Bundle of Account Information.

[73.] Under re-examination by Counsel for the Defendant, Mr. Major explained that he did not call Bahamas First's payments "profit sharing" because the payments were annual "underwriting profit" remitted by Bahamas First. He sent those payments to Paul Major, who directed that they be shared with staff.

Issues

[74.] Having considered the parties' submissions, the Court must, in its view, determine the following five issues:

(i) Did the Claimant consent to or accept the variation of her contractual terms relating to commission?

(ii) What is the amount of commissions payable to the Claimant pursuant to the applicable contractual terms?

(iii) Should the sum of $10,360.28 be deducted from the amount of commissions payable to the Claimant?

(iv) What rate of interest should be awarded on the amount of commissions due and over what period?

(v) What order as to costs should be made?

Discussion and analysis

Issue 1: Did the Claimant consent to or accept the variation of her contractual terms relating to commission?

[75.] On the issue of whether the Claimant consented to or accepted the attempted variation of her contractual terms relating to commission, Counsel for the Claimant submitted that the Defendant bore the full burden of proof both on an alleged acceptance and failure to protest which was not discharged. Counsel submitted. citing **Secretary of State v James Cox** [2022] EWHC 680 (QB) and **Attorney General v Phiri** [2014] ZMSC 128, that the alleged variation of the Claimant's contract of employment was not accepted nor could it be deemed accepted by her.

[76.] Counsel for the Claimant submitted that no weight should be given to the evidence of the alleged variation of the Claimant's contract terms. Counsel described the Defendant's case as a "ninth hour assertion" which was only raised after the Defendant undertook the exercise of calculating the premiums due to the Claimant and determined that it was too much money to pay. Counsel submitted that the issue was being raised in bad faith as the Defendant was aware that the "proposals" were a "moving goal post" and were never actually implemented.

[77.] Counsel for the Claimant highlighted *inter alia* that:

(i) Mr. Bastian was not employed with the Defendant at the time of the 2016 Email or the 2017 Policy Memorandum and therefore could not speak to the conduct of the Claimant at those material times.

(ii) neither of the Defendant's witnesses positively stated in their evidence that the Claimant accepted the unilateral withdrawal of her entitlement to commissions under the 2015 Offer.

(iii) neither of the Defendant's witnesses denied that the Claimant protested the withdrawal of the "commission element" of her pay package. (Counsel also submitted the 2016 Email expressly referred to the Claimant's protest insofar as it stated she had to take up her queries and her agreement to bring in business to increase her base pay with Paul Major.)

(iv) neither of the Defendant's witnesses showed that the 2017 Policy Memorandum, which was not addressed to the Claimant or any other staff member and was not physically signed, was communicated to the Claimant as proposed new terms or was ever implemented.

(v) neither of the Defendant's witnesses refuted the Claimant's evidence that the payments in the amount $3,000 and $7,000 were payments under Bahamas First's profit sharing program. The cheque in the amount of $3,000 written in 2020 had the clear notation "profit and override commissions".

(vi) neither of the Defendant's witnesses could explain for what period the commissions were calculated with respect to the commission payment of $7,692.31 made in

2018. Also, on the Claimant's evidence, no commissions were paid to her at all after 2018.

[78.] Counsel for the Defendant submitted that the issue for the Court to determine is whether the Claimant ought to be paid commission under the terms of the 2015 Offer or the 2017 Policy Memorandum. Counsel's submissions presented the Court with a dichotomy. Thus, in Counsel for the Defendant's submissions, he applied the 2017 Policy Memorandum to the commissions that would be due for the year 2016 before the effective date of the 2017 Policy Memorandum.

[79.] Counsel for the Defendant submitted that, by not protesting or objecting to the three payments made by the Defendant which, on the Defendant's case, were based on the varied terms of her contract, the Plaintiff effectively accepted the variations. The Plaintiff continued to work for the Defendant for several years without any evidence of protest after an immediately effective change to her employment commission terms only two or three months after she was hired.

[80.] Counsel for the Defendant highlighted *inter alia* that:

(i) the Claimant admitted she continued to work with the Defendant after the 2016 Email and after speaking with Keith and Paul Major and that she received salary increases.

(ii) the Claimant denied receiving a 5% commission for the first year on new premiums, a 3% commission for renewals, a 3% commission for the first year on premiums within the BMG Group and a 1% commission for renewals on new business within the BMG Group.

(iii) the Claimant admitted that the terms of the 2017 Policy Memorandum were reasonable.

(iv) the Claimant admitted that the letters sent by her attorney questioning her commission and the terms on which commissions were to be paid were only sent after her termination.

(v) the Claimant could not point to any email, text or written communication sent during her employment which showed she protested the payment of her commission in accordance with the 2017 Policy Memorandum.

(vi) the Claimant admitted that the only commission cheque she received (on her case) was paid to her in 2018 after the promulgation of the 2017 Policy Memorandum.

(vii) the commission payment of $7,692.13 was consistent with the 2017 Policy Memorandum and the 2017 Policy Memorandum being a "new" agreement because no commission was paid on BMG group business or renewals.

[81.] Counsel for the Defendant submitted, citing **Roberts v Mr. Photo Ltd** [2016] 2 BHS J. No. 167 and **Abrahall v Nottingham City Council** [2018] EWCA Civ 796, that it is settled law that conduct can amount to acceptance of contractual variations and that silence and conduct in accepting payments under a varied agreement can amount to acceptance of such variations. Counsel submitted that the Plaintiff's acceptance of payment made under the varied terms, without protest, amounts to acceptance of the variations and therefore, in "assessing damages", the Court should determine the amount of commission based on the varied terms.

[82.] In her written reply to Counsel for the Defendant's submissions, Counsel for the Claimant submitted, *inter alia*, that the Defendant had conceded in its submissions that the 2015 Offer remained in effect up to the Claimant's acceptance of the commission payment of $7,692.13 in 2018 and that the Defendant failed to discharge the burden of proof "both as to alleged acceptance [of the variation of her contract] and failure to protest".

[83.] Variations of contract may be express or implied. Where an employer purports unilaterally to change the terms of an employee's contract, the employee may be taken to have accepted or affirmed the variation if their conduct justifies such an inference being made, as occurred in **Roberts v Mr. Photo Ltd** [2016] 2 BHS J. No. 167. Whether an employee has accepted or affirmed a variation by their conduct is a question of fact to be decided taking into account all the circumstances. The inference is easier to draw if the variation relates to a matter which has immediate practical application. If the employee seeks to enforce the original terms of their contract, the burden lies on the employer to show that there was an effective variation.

[84.] Both counsel referred, directly or indirectly, to the decision of the English Court of Appeal in **Abrahall v Nottingham City Council** [2018] IRLR 628. In that case, the English Court of Appeal reviewed the leading English authorities which have considered whether an employee has become disentitled to enforce the terms of their contract of employment after a purported variation, including **Rigby v Ferodo Ltd** [1987] IRLR 516, **Jones v Associated Tunneling Co Ltd** [1981] IRLR 477, **Solectron Scotland Ltd v Roper** [2004] IRLR 4 and **Khatri v Cooperative Centrale Raffeisen-BoerenleenBank BA** [2010] IRLR 715. After reviewing those authorities, Underhill LJ made the following remarks at paragraphs [85] to [89]:

> "85. However, to take the position that to continue to work following a contractual pay-cut could never constitute acceptance would be contrary to the dicta of both Browne-Wilkinson J in Jones and Elias J in Solectron, in an area where the specialist expertise of the EAT must be accorded particular respect; and I do not believe that it would be right in principle. A contractual offer can of course be accepted by conduct, and that must include the offer of a variation. Under a contract of employment the parties are in a complex relationship in which they are both required to perform their mutual obligations on a continuous basis, and those obligations are frequently modified by their conduct towards each other. I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not – in principle – be reasonably understood as indicating acceptance of the change. As for Khatri, the general language of para 46 of Jacob LJ's judgment must be read in the context of his overall reasoning. He did not rely on the simple proposition that silence can never indicate consent: rather, he went on to give particular reasons why it was not proper in the circumstances of that case to infer the employee's acceptance of the new terms which the employers sought to impose – namely that those terms had not yet bitten, and also that the employers had expressly sought the employee's acceptance in writing but he had not given it.

86 However, to say that in some circumstances continuing to work following a contractual pay cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case. Neither Browne-Wilkinson J in the Jones case nor Elias J in the Solectron case went further than saying that continuing to work following a contractual pay cut might constitute acceptance: the language used was 'may well be taken to have ... agreed' and 'it may be possible to infer'. The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. I briefly identify them as follows.

87 First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in the Solectron case used the phrase 'only referable to'. That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.

88 Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing. This is clear from Rigby v Ferodo Ltd [1988] ICR 29: see para 74 above.

89 Thirdly, Elias J's use in para 30 of his judgment in Solectron of the phrase 'after a period of time' raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis. In Khatri Jacob LJ discomforted counsel for the employers by making that very point: see para 47 of his judgment. But, again, that passage needs to be read in the context of the fact that in that case the variation had not yet bitten, and I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay cut means that the question has to be answered once and for all at the point of implementation."

[85.] Drawing guidance from **Abrahall**, the question to be answered by the Court in this case is whether the Claimant's conduct in (i) continuing to work for several years after receiving the 2016 Email and (ii) accepting one or more commission payments from the Defendant after the 2017 Policy Memorandum was introduced, viewed objectively, unequivocally indicated an intention by the Claimant to accept the variations to her contract of employment introduced by the Defendant. The mere fact that the Claimant continued to work for a substantial amount of time after the 2016 Email and after the 2017 Policy Memorandum does not necessarily mean that there was an acceptance of the variations. It depends upon the circumstances. There was, for example, no acceptance of the withdrawal of a "check-off" facility in **Secretary of State v James Cox** [2022] EWHC 680 (QB) despite total silence from the affected employees for five years because there was protest at the collective level (a conclusion upheld on appeal in [2023] EWCA Civ 551).

[86.] The Claimant, as the party asserting the affirmative, bore the burden of proving that she protested the variations of her contract which the Defendant sought to impose upon her. Having considered her evidence as a whole and having had the opportunity to observe her give evidence, the Court found the Claimant to be a credible and reliable witness on this issue, although it could not necessarily be said that her evidence on other issues was wholly free of blemishes. The absence of contemporaneous written evidence from the Claimant was a factor to be taken into consideration, however, on balance, the Court believed the Claimant's testimony that she did not passively accept the withdrawal of her valuable commission entitlement in 2016 and that she continued to request her full commissions even after receiving the $7,692.13 commission payment. The Claimant's evidence about her actions was not controverted or challenged by any defence witness. Mr. Bastian lacked any personal knowledge of the events in question and Keith Major Sr. gave brief evidence which was high level in nature.

[87.] On the evidence before it, the Court makes the following findings of fact relevant to the issue now under consideration:

(i) in or around February 2016, Paul Major directed Keith Major Sr. to inform the Claimant that the "commission element" of her pay package had been eliminated. Paul Major had been directed by the principals of the BMG Group to do so. The reason for the elimination was concerns about profitability and not any malice on the part of the Defendant.

(ii) Keith Major Sr. informed the Claimant as he was directed to do and memorialized the conversation in the 2016 Email. The Claimant had queries and raised the fact that she had an agreement in place to supplement her base pay and was told to speak to Paul Major. When the 2016 Email was sent, no commissions had been paid by the Defendant to the Claimant in accordance with the 2015 Offer.

(iii) after receiving the 2016 Email, the Claimant continued in the employment of the Defendant. She did not bring a claim for breach of contract, file a trade dispute or lodge a formal complaint or grievance. She had obligations and needed her job. However, she agitated internally for her commissions to be paid and had several conversations with Paul Major and Keith Major Sr. about it.

(iv) neither Paul Major nor Keith Major Sr. categorically told the Claimant in her conversations with them that she was not going to be paid in accordance with her contract or given suitable compensation in lieu. The Claimant was also mindful that the Defendant was a busy new company, with a small staff complement, and she thought that the issue would eventually be sorted out.

(v) at a staff meeting held in 2017, Keith Major Sr. introduced the 2017 Policy Memorandum as an incentive for staff and agents. The 2017 Policy Memorandum was not specifically directed to the Claimant and was not presented to the her for agreement. Up to the time of this staff meeting at which the 2017 Policy Memorandum was introduced, no commissions had been paid to the Claimant.

(vi) although the 2017 Policy Memorandum purported to be effective from 1st June 2017 and stated that commissions would be paid by the 15th of each following month, no commission payments were made by the Defendant to the Claimant until a commission payment of $7,692.13 was made to the Claimant on or around 19 June 2018.

(vii) the commission payment of $7,692.13 was not expressly stated in any of the documentation the Claimant received to be made pursuant to the 2017 Policy Memorandum and the Claimant did not receive a breakdown of the payment to inform her how it was calculated. The Claimant believed it could not have been her full commissions and raised the issue with the Defendant more than once but her queries were not substantively addressed.

(viii) the commission payment of $7,692.13 was the only commission payment that the Claimant received up to the time of her termination. The payment of $3,000 made on 19 February 2019 and the payment of $7,000 made on 1 May 2020 were not commission payments but the Claimant's part of an annual profit sharing scheme from Bahamas First which was shared among staff in the discretion of management.

(ix) the Claimant received no inducement, benefit or other consideration to give up her entitlement to commissions under the 2015 Offer. The salary increases that the Claimant received were general salary increases. The Claimant was hired at a salary of $28,000 which was well below the minimum set by the Defendant for her post, and at the time of her termination, the Claimant's salary did not significantly exceed that minimum.

[88.] Taking the circumstances as a whole, the Court does not consider that the Claimant's conduct unequivocally indicated an acceptance of the withdrawal of her commissions and the substitution of the commission scheme under the 2017 Policy Memorandum. The Claimant did not placidly accept the withdrawal of her entitlement to commissions in 2016 and, after receiving the 2016 Email, continued to agitate internally and to request her commissions but management never conclusively resolved the situation one way or the other. When the Plaintiff received the one commission payment of the number that she was by then due, she never received a breakdown of it. The Defendant never consistently and openly adhered to the 2017 Policy Memorandum and never, at any time, scrupulously observed its obligations regarding commissions.

[89.] The Court finds in the particular circumstances of this case that the Claimant did not consent to or accept the variation of her contractual terms relating to commission. The Claimant's commissions are accordingly to be calculated by reference to her original contract terms.

Issue 2: What is the amount of commissions payable to the Claimant pursuant to her applicable contractual terms?

[90.] The Court has found that the Claimant is entitled to be paid commissions in accordance with the terms of the 2015 Offer. In this connection, there appears to have been a slip in the drafting of the Consent Order. Paragraph 1 of the Consent Order did not accurately quote the relevant contractual term in the 2015 Offer and was not consistent with the Claimant's Statement of Claim. Paragraph 1 of the Consent Order referred to "5% commission on premiums for new business and 3% on renewals also 1% for renewals for business within the BMG Group" instead of "5% commission on premiums for new business and 3% on renewals also 3% on premiums for new business and 1% for renewals for business within the BMG Group".

[91.] Counsel for the Claimant provided an Excel version of the Defendant's list of premiums and Excel spreadsheets breaking down the Claimant's calculation of the commissions due to her. Counsel for the Claimant applied the formula contained in paragraph 1 of the Consent Order and submitted that the total commissions due to the Claimant on new business and renewals for non-BMG Group business is $74,736.07 and the total commissions on new business and renewals for business other than BMG Group business is $12,159.09, with the result that the total commission due to the Claimant is $86,895.16.

[92.] Counsel for the Defendant did not provide a calculation of the commissions that are due on the formula contained in paragraph 1 of the Consent Order or the 2015 Offer. Counsel for the Defendant adopted the initial commission report exhibited to Darren Bastian's witness statement, which applied the 2017 Policy Memorandum. Counsel for the Defendant did not provide a detailed breakdown of the calculation. The relevant transactions which were inputs into the calculation were also not highlighted on the list of premiums provided. Counsel for the Defendant contended that the total commission due to the Claimant before any deductions is $40,313.

[93.] The disparity between the Claimant's calculation of the commissions due on non-BMG Group business versus the Defendant's calculation of the commission due under the 2017 Policy Memorandum suggests that some of the non-BMG Group business which the Defendant included in its calculations may not have been included in the Claimant's calculations, as the rates of commission on non-BMG Group business did not change between the 2015 Offer and the 2017 Policy Memorandum. However, this was not addressed by the Claimant in her reply submissions. Counsel for the Claimant rejected the Defendant's calculations in their entirety.

[94.] Having reviewed the list of premiums received in Excel format, the Claimant's closing submissions and the calculations which accompanied the Claimant's closing submissions, the Court accepts that commissions are to be calculated on the "Premium Paid" amounts in the list of premiums, that positive endorsements should be treated as new premiums, and that no commission should be calculated on "fee" entries. However, the rate of commission payable on new BMG Group business under the 2015 Offer is 3%, not 5%, and cancellations and negative endorsements reduce the premiums the insurer receives and therefore ought to be taken into account in calculating agent commission.

[95.] Based on the list of premiums provided, employing Counsel for the Claimant's identification of the relevant transactions on which commissions are to be calculated, the Court calculates the following commissions payable by the Defendant to the Claimant:

(i) BMG Group new business – $1,037,137.78 x 0.03 =$31,114.13

(ii) BMG Group renewals – $2,169,295.49 x 0.01 = $21,692.95

(iii) non-BMG Group new business – $175,014.80 x 0.05 = $8,750.74

(iv) non-BMG Group renewals – $108,378.72 x 0.03 = $3,251.36

[This calculation has incorporated cancellations and negative endorsements.]

[96.] Deducting the payment of $7,692.13 which the Claimant received in 2018, the Court finds that the total amount of commission on premiums due from the Defendant to the Claimant under the contract of employment dated 18 November 2015 between the Claimant and the Defendant is $57,117.05.

Issue 3: Should the sum of $10,360.28 be deducted from the amount of commissions payable to the Claimant?

[97.] Notwithstanding that the Defendant never filed a counterclaim in this matter, the Defendant sought to have brought into account the unpaid premiums owed to it by the Claimant on personal insurance policies taken out by her allegedly totaling $10,360.28. The Claimant did not concede that the sum of $10,360.28 should be deducted from the commission found due to her on the taking of the account and the Defendant did not identify a legal basis for the deduction to be made.

[98.] Pursuant to **Part 41.5** of the **Supreme Court Civil Procedure Rules, 2022**, the Court is required to make all "just allowances" in taking the account without any specific direction to that effect. **Order 43, rule 6** of the **Rules of the Supreme Court** imposed the same requirement upon the Court.

[99.] The commentary at paragraph [11] of **Volume 1 (Accounts)** of **Atkin's Court Forms** under **Practice B: Proceedings for an Account** makes the point that there is a general distinction between an allowance and a counterclaim. The relevant part of the commentary reads:

> "A general distinction may be drawn between an allowance and a counterclaim. Where a party claims a sum of money from the person to whom he is accounting, then if the money is not due as an expense of the transactions comprised in the accounts, payment should more properly be claimed by counterclaim or as a set-off in the action, and not as a 'just allowance' on taking the accounts."

[100.] In **Dickinson (t/a John Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)** [2000] Lexis Citation 2644, proceedings between two brokers who entered into an oral agreement to combine to broker transactions, the plaintiff obtained a direction for an account to be taken in relation to his entitlement to half of the commissions, fees, profits or other benefits on twenty-two transactions. The defendant contended that he was entitled to bring into account sums representing losses incurred on a particular transaction. The judge taking the account refused to entertain the claim. The English Court of Appeal upheld that decision, holding that the defendant had needed to amend his counterclaim. The English Court of appeal rejected an argument that the losses were "just allowances" within **Order 43, rule 6** or **paragraph 1** of **Practice Direction 40A**.

[101.] In the instant case, there was no direction contained in the Consent Order for the Registrar to take into account any outstanding premiums owed by the Claimant to the Defendant on any personal policies. In the Court's view, neither **Order 43, rule 6** of the **Rules of the Supreme Court** nor **Part 41.5** of the **Supreme Court Civil Procedure Rules, 2022** entitled or entitles the Defendant to claim the sum of $10,360.28 from the Claimant in the context of the account hearing as a "just allowance". In the absence of the Claimant's consent to the sum being deducted from the commissions found due to her, the sum allegedly owed by the Claimant to the Defendant for personal insurance policies ought to have been made the subject of a counterclaim by the Defendant and cannot be deducted from the amount found due to the Claimant under the Consent Order in these proceedings.

Issue 4: What rate of interest should be awarded on the amount of commissions that are payable and over what period?

[102.] Counsel for the Claimant sought pre-judgment interest pursuant to **Section 3** of the **Civil Procedure (Award of Interest) Act** at the rate of 8.25% per annum from the date of the Claimant's termination (because all commissions ought to have been paid by then) to "the date of the award". Counsel also sought statutory interest at the rate of 6.25% from "the date of the award" until payment. Counsel relied on **Jefford v Gee** [1970] EWCA Civ 8, **Rod Andrew Bethel v The Commissioner of Police** 2017/CLE/gen/00825 (11 May 2021) and **Harrison Butler v Dolly Swann** SCCivApp No. 61 of 2013.

[103.] The Court has discretion to award pre-judgment interest under **Section 3** of the **Civil Procedure (Award of Interest) Act**. The Court's discretion extends both to the rate and period. The Court accepts that, in this case, pre-judgment interest should be awarded to the Claimant from the date of her termination. However, the Court does not find the suggested rate of interest reasonable. Pre-judgment interest is more commonly awarded in range of 2% to 4% although higher awards are possible when warranted: see, e.g., **Newbold v Commonwealth Building Supplies** [2013] 1 BHS J. No. 94; **Balmoral Development v Cottis law (a firm)** [2017] 1 BHS J. No. 73.

[104.] Exercising the Court's discretion on the specific facts of this case, the Court considers that pre-judgment interest should be awarded on the commission found due to the Claimant of $57,117.05 from the date of the Claimant's termination, 24 September 2020, to the date of this decision at the rate of 3% per annum. The pre-judgment interest rate of 3% per annum is consistent with the authorities and provides reasonable compensation to the Claimant for being kept out of her money which is not unfair to the Defendant. The amount of pre-judgment interest awarded is $9,727.11.

[105.] **Section 2(1)** of the **Civil Procedure (Award of Interest) Act** provides that every judgment debt shall carry interest at such rate as shall be prescribed by rules of court made by the Rules Committee. The rate of interest payable on judgment debts is prescribed as the prime rate plus two per centum per annum by the **Civil Procedure (Rate of Interest) Rules**. Statutory interest runs from the date that there is an ascertained debt: **Gaming Board for The Bahamas v Kayla Ward** SCCiv App No. 120 of 2024.

[106.] In accordance with **Section 2(1)** of the **Civil Procedure (Award of Interest) Act**, interest runs on the judgment debt in this matter at the statutory rate of 6.25% per annum from the date of this decision until the date of payment.

Issue 5: What order as to costs should be made?

[107.] On the issue of costs, there is no basis here for the departure urged by Counsel for the Defendant from the general rule that costs follow the event which is codified in **Part 71.6** of the **Supreme Court Civil Procedure Rules, 2022**. The Consent Order already ordered that the Defendant pay to the Claimant "legal fees and costs to date in the sum of $15,000" and that the Claimant's costs of the proceedings incurred after the date the Consent Order be taxed if not agreed.

[108.] The **Supreme Court Civil Procedure Rules, 2022** apply to these proceedings: **Kim Rahming v BMG Insurance Agents & Brokers Limited** 2020/COM/lab/00049 (30 September 2025). The prescribed costs regime under those rules is not applicable. There is an existing costs order granting the Claimant her costs incurred after the date of the Consent Order subject to judicial assessment. The Claimant's costs incurred after 21 June 2021 are to be subject to detailed assessment if not agreed.

Conclusion

[109.] For the reasons stated above:

(i) The amount of commissions on premiums due from the Defendant to the Claimant under the contract of employment dated 18 November 2015 between the Claimant and the Defendant which the Defendant must pay to the Claimant is $57,117.05.

(ii) Pre-judgment interest is awarded on the commissions found due to the Claimant in the sum of $9,727.11, being interest at the rate of 3% from 24 September 2020 up to the date of this decision.

(iii) Statutory interest runs on the judgment debt at the rate of 6.25% per annum from the date of this decision until the date of payment.

(iv) the Claimant's costs incurred after 21 June 2021 are to be subject to detailed assessment if not agreed.

Dated the 28th day of May, 2026

Jonathan Deal

Assistant Registrar