IN THE FIJI COURT OF APPEAL

Civil Appeal No. 97 of 1985

Between:

BRIJ BHUSHAN LAL — Appellant

- and -

LIFE INSURANCE CORPORATION OF INDIA — Respondent

Mr. S.M. Koya for the Appellant
Mr. J.R. Reddy and Mr. H.M. Patel for the Respondent

Date of Hearing: 22nd July, 1986
Delivery of Judgment: 31st October, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the judgment of Kermode J. in a case in which the appellant, as plaintiff in the court below, sought to recover the sum of $126,110 being commission alleged to be due to him as an insurance agent.

It is common ground that at all material times the appellant was a duly licensed insurance agent pursuant to the Insurance Act (Cap. 217), and from the 10th May 1978 to the 30th July 1986 (apart from a short break in 1983) was employed by the Respondent Company as an insurance agent under a contract of agency, pursuant to which the rates of commission due to the appellant on the completion of the policy were specified.

The appellant's Statement of Claim was issued on the 17th August 1984. It alleged that during the appellant's term of service with the respondent, he presented 1,821 individual proposals for insurance on which valid policies were subsequently issued by the respondent, and that despite demands, the respondent had refused to pay gross commission due to the appellant on the policies amounting to $95,100. The sum claimed, with interest, was $76,079 after allowing for basic and PAYE tax and other charges.

The Statement of Claim also contained this pleading:

> "THAT the defendant has also failed to pay any commission:
>
> (a) in respect of a number of other proposals obtained from numerous clients and lodged by the plaintiff in the manner aforesaid during and beyond the said period;
>
> (b) in respect of other Insurance Policies issued during and beyond the said period as a direct consequence of the plaintiff's work under the said Contract of Agency.
>
> The plaintiff says he reserves his right to claim for his commission referred to under this paragraph at a later date."

It appears that no details of the "other proposals" were ever furnished, and that aspect of the claim was never pursued.

The Statement of Claim was sadly lacking in detail as subsequently events showed.

The Respondent Company's statement of amended Defence and Counterclaim can be summarised as follows:

"1. That during the term of the appellant's contract with the Company, 2,866 proposals were received, 1,845 of which resulted in the issue of policies in respect of which commission became payable to the appellant.

2. That all commission due and payable to the appellant in respect of 1,845 policies, from premiums received under them, had been paid to the appellant.

3. According to the respondent's records the total nett commission payable, and in fact paid, to the appellant was $261,541, made up as follows:

SUMMARY OF PREMIUM ADJUSTED AND COMMISSION PAYABLE

		Gross Commission Payable
First yearly premium where commission is payable @ 45%	579,648.22	260,841.69
First yearly premium where commission is payable @ 20%	5,230.80	1,046.16
TOTAL	584,879.02	261,887.85
Subsequent yearly premium where commission is payable @ 5%	1,018,125.85	50,906.29
Subsequent years' premium where commission is payable @ 3%	9,725.55	291.77
TOTAL	1,027,851.40	51,198.06
GRAND TOTAL	1,612,730.42	313,085.91

Add:

Special Production Bonus	19,937.50
Total	333,023.41

Less:

Amount actually deducted towards taxes and F.N.P.F.	71,482.14
Net amount payable	261,541.27
Amount actually paid	261,918.41
Excess paid	377.14

According to the respondent, the appellant had been overpaid $377.

4. That from the sum of $261,541 the respondent had deducted $135,430 being monthly level advances made to the appellant. (The position was that the determination of an agent's commission could take some months to complete as the calculations were done by the Respondent's Head Office in India. To compensate for this delay, advances were made to agents of a sum approximately equal to an agent's earned commission for a month). The respondent alleged that a further deduction of $612 was due to it in respect of monthly level advances.

5. The respondent claimed that during the term of the appellant's contract, other lump sum advances had been made, in addition to the monthly level advances, to meet income tax or other liabilities, and pleaded this statement of the account.

Year	Opening Balance	Amount Advanced	Total	Amount Recovered	Balance
1981	–	10,000	10,000	840	9,160
1982	9,160	9,895	19,055	6,408	12,647
1983	12,647	12,336	24,983	9,734	15,249
1984	15,249	–	15,249	4,950	10,299

(Up to 3/9/84)

In the result, the respondent denied that there was anything owing to the appellant and counter-claimed for the sum of $11,288 made up as follows:

$ 377	-	excess commission paid.
$ 612	-	under deduction of monthly level advances.
$10,299	-	other advances not recovered.

In his reply to the Respondent's Defence, the appellant appeared to abandon his original grounds of claim and alleged that he was owed the sum of $126,110 made up as follows (using and adopting the respondent's own figures):

Total Gross Commission	$313,085.91
Add Bonus	$ 19,937.50
	$333,023.41
Less amount actually deducted towards taxes and P.N.P.F.	$ 71,482.14
Nett amount payable to the defendant	$261,541.27
Less deduction made by the defendant on monthly advances made by the plaintiff	$135,540.78
Due by the defendant to the plaintiff or not properly explained by the defendant	$126,110.49. "

It appears that on that basis of claim the appellant was alleging that he received nothing from the respondent except monthly advances over the whole period of his agency.

As for his reply to the Counterclaim, he pleaded that all sums claimed had been repaid, or alternatively there was sufficient owing to him by way of commission to meet the Counterclaim.

The action first came before Kermode J. on the 22nd April 1985 when Counsel indicated that they wanted time to consider the appointment of two Referees, one to be nominated by each party, to determine the issues between them. By the end of the day, Counsel had reached agreement and Kermode J. made this Consent Order:

> "IT IS ORDERED under Order 36 of the Supreme Court Rules 1968, that MR. RAM VILASH of Suva, Chartered Accountant (nominated by the Plaintiff) and MR NALIN PATEL of Suva, Chartered Accountant (nominated by the Defendant) be and are hereby appointed as Special Referees to determine the issues or other matters set forth in the Schedule annexed hereto and IT IS ORDERED AND DIRECTED Firstly that the Special Referees do have all the powers conferred upon them under Order 36 of the said Rules Secondly that the Special Referees do file a written report in this Honourable Court of their findings, on or before 31st May, 1985, and such report do include agreed findings in respect of each issue and matters not agreed upon between them Thirdly that the Special Referees do inspect such letters, documents and papers in the custody of the Plaintiff and the Defendant or any other person, firm or Corporation as may seem necessary in determining the issues Fourthly the Special Referees do seek explanation or information (whether in writing or orally) from the Plaintiff and the Defendant or any other person, firm or Corporation as may seem necessary in determining the issues Fifthly that each party be responsible for remuneration of the Special Referee nominated by him and that such remuneration, when paid, be treated as disbursement when costs are taxed in this action after its final determination Sixthly the Chief Registrar do comply with Order 36(2) of the said Rules as soon as possible Seventhly liberty is reserved to all parties and the Special Referees to apply generally for further directions on any matter pertaining to the issues Eighthly that each party do have liberty to apply generally in this action Ninthly this action be adjourned to 4th June, 1985 at 9.00 a.m. (in Chambers) for mention for further directions if required and that 12th and 13th June 1985 be, and are hereby reserved for Hearing."

This is the Schedule referred to in the Order:

"1. Has the Plaintiff been paid or been given credit on account of commission due to him (at the agreed and applicable rate) in respect of policies effected on proposals submitted by the plaintiff:

Firstly for those months between 10th day of May 1978 and the 28th day of February 1984 and Secondly for those months between 1st day of March 1984 and 31st day of July 1984, for which months the Plaintiff alleges that he did not receive full payment or credit (if at all) and particulars whereof are given by him in Paragraphs 7(a), (b) and (c) of the Statement of Claim.

If the Plaintiff has not been so paid or credited then:

(i) For which policy and for what month has this not been done?

(ii) Total amount due in respect thereof.

2.(i) WHETHER, from amongst the policies in the Plaintiff's Lists A, B, & C, filed herein under Paragraph 78 of the Statement of Claim, there are any policies in respect of which the appropriate premium has not been received by the Defendant for the months mentioned in the lists:

(a) up to 28th February 1984.

(b) up to 31st July 1984.

(ii) If there are such policies, then for which policy and for what month the premium has not been paid to the Defendant.

3. WHAT was the total amount paid by the Defendant to the Plaintiff between 10th May 1978 and 17th August 1984:

(a) as monthly level advances.

(b) as lump sum advances.

4. WHAT was the total amount deducted by the Defendant from the Plaintiff's commission account between 10th May 1978 and 3rd September 1984 in respect of:

   (a) monthly level advances.

   (b) lump sum advances.

5. WHICH of the policies listed in the Plaintiff's Particulars of Claim and issued between 10th May 1978 and 31st July 1984 have been cancelled by the Defendant.

   In respect of the policies cancelled:

   (a) the number of the policy cancelled

   (b) the date of cancellation

   (c) amount of premium paid up to the date of cancellation

   (d) the date and amount when the premium was refunded. "

Although not included in the Order, Counsel were agreed that the following issues were to be left for determination by Kermode J.:

"(1) Whether the policies which have been cancelled by the Defendant have been lawfully cancelled.

If not:

What (if any) is the amount of commission payable by the Defendant to the Plaintiff in respect thereof.

(2) Who should pay the cost of:

(a) the Referees

(b) this Action

(3) To make such Order or Orders relating to the report of the Referees.

(4) Liberty is reserved to each party generally. "

We take (3) above to mean that on the completion of the Referees' report, Kermode J. was to make such Orders to implement its content as the circumstances justified.

On the 31st May 1985 the Referees presented an interim report. It is unnecessary to consider it in any detail as its content was included in their final report, but some mention must be made of it, if only to indicate how the Referees were approaching their task, a consideration which is relevant to certain submissions made by Mr. Koya on the appeal. (In his original Statement of Claim, the appellant had specified the number of policies out of the total number written, on proposals presented by him, on which the Respondent had failed to pay commission at 45%, 15% or 5%. Detailed schedules had been prepared by the Appellant to support his claim for commission at the three different rates, and these were referred to in the Lower Court, and by the Referees, as "Plaintiff's Lists A, B and C").

In the interim report the Referees said that 1,112 of the 1,631 policies in the "Plaintiff's List A" had been checked in detail and the work was continuing; Plaintiff's List B contained repetitions of policy numbers which had taken considerable time to check; monthly level and lump sum advances to the Appellant had been checked and showed that the Appellant had received $113,920 as monthly advances and $32,231 as lump sum advances; the Respondent's deductions from the Appellant's commission account to cover the advances had also been checked and showed that $1,017 had been over-deducted; cancelled policies, of which there were ten, had also been checked. The interim report concluded by asking for an extension of time within which to complete a final report.

On the 9th August the Referees presented their final report by which time they had spent almost four months engaged in the task of checking the appellant's claim. The five page report was accompanied by a 27 page appendix which sets out details of the Referees' findings and calculations.

The following is a summary of the Referees' findings in terms of the Schedule annexed to the Order of Appointment:

Paragraph 1 of the Schedule

The Referees concluded that the appellant had been paid or credited with all commissions due on his Lists A, B & C with the exception of commissions, totalling $93.53. Part of the appellant's claim was rejected on the basis that some of the policies in the lists were not issued as a result of proposals presented by the appellant.

Paragraph 2

Commissions totalling $154.55 had not been paid to the appellant, while on other policies he had been overpaid $138 due to a wrong rate of commission being applied.

Paragraphs 3 and 4

The Referees found that there had been an over-deduction of $1,017.79 by the respondent in respect of monthly level advances; and that the appellant was still indebted to the respondent for $10,299 in respect of lump sum advances.

Paragraph 5

> The Referees concluded that ten policies had been cancelled by the respondent, and that it had over recovered $693.73 from the appellant, in respect of commission already paid in respect of those policies.

The result of the Referees' report was that the appellant was entitled to recover $1,959.60 on his claim and the respondent $10,437 on its counter claim. (The question whether the respondent should also recover, as an advance, a sum of $1,630 paid for a return air ticket to India for the appellant, has never been resolved either by the Referees or the Court).

It is to be noted that there was no disagreement between the Referees on any issue.

On the 14th August, five days after the Referees' report had been submitted to the Court, the appellant moved for an Order that the whole of the report be rejected on the grounds that the Referees had failed to act in accordance with Order 36 of the Supreme Court Rules; had failed to comply with the Order of Appointment made by Kermode J.; and had acted in breach of the rules of natural justice in that they had not called upon the appellant, or any witnesses he may have had, to give evidence on, or explain, issues relevant to the enquiry. An Order was sought that all issues be fixed and determined by the Court.

In support of the Motion for total rejection of the Referees' report, the appellant filed a 19 page affidavit. It is a rambling and repetitious document and attacks the Referees' findings on all counts. It alleges that they failed to proceed in accordance with Rule 4 of Order 36 and the Order of Kermode J. appointing them; that they breached the

audi alteram partem Rule in failing to give the appellant an opportunity to be heard; that their findings were unsupportable in every respect, having been arrived at by a "one sided" perusal of records. It even challenged the authorship of some of the appendices to the report, claiming that these were prepared by the officers of the respondent and accepted without question by the Referees. It was also alleged that the respondent, through its officers, had acted dishonestly.

Mr. V.R. Galcar, a Chartered Accountant and Deputy Manager of the Respondent, filed an Affidavit in reply. He denied that any of the Company's officers had had any part in preparing the appendices to the report, denied any dishonest conduct and dealt in some detail with specific complaints made by the Appellant in his Affidavit.

On 19th August, the Motion for rejection of the report came before Kermode J. and appears to have proceeded in fits and starts on 20th, 21st and 29th August on which date Kermode J. reserved his decision. During the course of argument, the appellant was given the opportunity to check the Referees' finding that 105 of the policies included in his Lists A, B and C were not in fact his policies (referred to in the appendices as "Not His"); and their conclusion that ten policies had been cancelled by the respondent. In the result, Mr. Koya informed the Court that his client could not challenged the Referees' "Not His" list merely by looking at the policies, for reasons that will be referred to later, and abandoned his challenge to the cancelled policies, which, apart from costs, was the only matter which had been left for determination by the Court.

Before dealing with the present Grounds of Appeal, it is appropriate to set out the Terms of Order 36. (R.S.C. 1965).

This Order (as amended by Fiji Supreme Court subsidiary legislation (Cap 13)) provides:

"Rule 2

(1) In any cause or matter the Court may refer to the Chief Registrar, or to a Special Referee (being a person nominated by the Court) for inquiry and report any question or issue of fact or mixed law and fact, arising therein, and, unless the Court otherwise orders, further consideration of the cause or matter shall stand adjourned until the receipt of the report.

(2) Before a Special Referee enters upon the reference, the Chief Registrar shall supply him with:

(a) a certified copy of the order of reference;

(b) a copy of the pleadings; and

(c) a copy of such other documents as may be directed by the Court.

(3) The Court may make such Order as it thinks fit to provide for the remuneration of a Special Referee and may give such directions as may be necessary for the collection thereof from the parties and for the payment thereof to the Special Referee.

Rule 3

(1) The report made by the Chief Registrar or Special Referee, in pursuance of a reference under Rule 2, shall be made to the Court and notice thereof served on the parties to the reference.

(2) The Chief Registrar or Special Referee may, in his report, submit any question arising therein for the decision of the Court or make a special statement of facts from which the Court may draw such inferences as it thinks fit.

(3) On the receipt of the Chief Registrar or Special Referee's report, the Court may:

(a) adopt the report in whole or in part;

(b) vary the report;

(c) require an explanation from him;

(d) remit the whole or any part of the question or issue originally referred to him for further consideration by him or any other Chief Registrar or Special Referee;

(e) decide the question or issue originally referred to him on the evidence taken before him, either with or without additional evidence.

(4) When the report of the Chief Registrar or Special Referee has been made, an application to vary the report or remit the whole or any part of the question or issue originally referred, may be made, on the hearing by the Court, of the further consideration of the cause or matter, after giving not less than four days' notice thereof, and any other application, with respect to the report, may be made on that hearing without notice.

(5) Where, on a reference under Rule 2, the Court orders that the further consideration of the cause or matter in question shall not stand adjourned until the receipt of the Chief Registrar's or Special Referee's report, the Order may contain directions with respect to the proceedings on the receipt of the report, and the foregoing provisions of this rule shall have effect subject to any such directions.

Rule 4

(1) Subject to any directions contained in the Order referring any business to the Chief Registrar or Special Referee:

(a) the Official Referee shall, for the purpose of dealing with any matter (including any interlocutory application therein) or any other business referred to him, have the same jurisdiction, powers and duties (including the power of committal and discretion as to costs) as a Judge,

exercisable or, as the case may be, to be performed, as nearly as circumstances admit in the like cases, in the like manner and subject to the like limitations, and

(b) Proceedings before the Chief Registrar or Special Referee shall, as nearly as circumstances admit, be conducted in the like manner as the like proceedings before a Judge.

(2) No steps or proceedings shall be taken to enforce any Order made or direction given by the Chief Registrar or Special Referee in the exercise of any of the powers referred to in Rule 4(1)(a) until such Order or direction has been confirmed by a Judge.

(3) The Chief Registrar or Special Referee may hold any proceeding before him at any place which appears to him to be convenient and may adjourn the proceedings from place to place as he thinks fit. "

By his decision of the 4th October 1985, Kermode J. refused the Appellant's Motion for an Order rejecting the Referees' report and gave Judgment on the Claim and Counterclaim in accordance with its terms. He ordered that each party was to be responsible for the fees of the Referee the party had nominated, such fee to be treated as a disbursement.

We turn now to the Grounds of Appeal and the first reads:

"That the Learned Trial Judge failed to take into account or appreciate that the Special Referees did not avail themselves of the means necessary to arrive at a true answer to the issues as contained in the Schedule to the Order of the Court dated 22nd April 1985; that the Special Referees failed to comply with Order 36 of the Supreme Court Rules 1968."

It is claimed under this ground that the Referees failed to conduct their enquiry in accordance with Rule 4 of Order 36 which imposes on a Referee the same jurisdiction powers and duties as a Judge, and the obligation, as nearly as circumstances admit, to conduct the proceedings as they would be conducted before a Judge. Mr. Koya submitted that as a result of such failure the Referees did not act in a truly judicial manner, and in the main, accepted the Respondent's figures without attempting to ascertain whether those figures were correct. He submitted that the Referees had not actually adjudicated on the issues "but rather carried out what may loosely described as an 'accounting exercise'". It was because this was an 'accounting exercise' that each party appointed an experienced Chartered Accountant to ensure that the audit, and that is what it amounted to, was properly and fairly carried out. To suggest that the Referees simply accepted the Respondent's figures without question, is undiluted humbug and an insult to the Referees. They were almost four months at their task and it is not correct that there was no approach whatsoever to the appellant for information. There can be no doubt that the Appellant's Referee, Mr. Vilash, pursued the appellant's interests with diligence. In June 1985 he wrote to the Court seeking to extend the scope of the enquiry but was apparently directed to comply with the Court's Order of the 22nd April.

As Kermode J. said, the Referees were given extremely wide discretionary powers by the parties themselves. In Mr. Koya's memorandum to the Court, on which the Order of the 22nd April was based, is this statement: "The Plaintiff and the Defendant agree that the following are the issues to be decided by the Referees in the above action". Then follows what became the Schedule to the Order. It was at Kermode J.'s suggestion that the Referees were granted the powers contained in Order 36, Rule 4. In our opinion this was not the ordinary

reference to Referees envisaged by Order 36 but has elements of a reference to arbitration.

Furthermore, in terms of the Order, there was no absolute liability on the Referees to inspect all letters, documents or papers in the custody of the parties, or to seek explanation or information from them, but only such documents or information "as may be necessary in determining the issues". We are considering the actions of two very experienced Chartered Accountants, each appointed to represent the interests of one or other of the parties, and it would require very strong evidence before we could accept that they somehow failed in their duty, or were in some way deceived by the respondent, which prima facie must be regarded as a reputable Corporation.

It is also relevant on this Ground of Appeal, and that concerning an alleged breach of the audi alteram partem Rule, that no complaint was made as to the Referees' mode of operation following the issue of the interim report despite leave reserved in the Order. We therefore reject the first Ground of Appeal.

The second Ground of Appeal reads:

> "The Learned Trial Judge erred in not taking into account that the Special Referees failed to comply with the terms of the said Order of the Court and in particular he erred in not taking into account the following errors and omissions made by the Special Referees:

(i) They did not comply with the said Order of Court directing the Special Referees to "inspect such letters, documents and papers in the custody of the plaintiff and defendants or any other person, firm or Corporation as may seem necessary in determining the issues.

(ii) The Special Referees did not comply with that part of the said Order of Court which directed them to 'seek explanation or information (whether in writing or orally) from the plaintiff and the defendant or any other firm or Corporation as may seem necessary in determining the issues'. They did not at any time during their investigations seek explanation or information from the plaintiff."

What we have said on ground one applies equally to this ground of appeal which we also reject, and there is nothing more we can usefully add.

Grounds Three reads:

"That the Learned Trial Judge did not take into account that the Special Referees, in their investigations, acted in breach of natural justice in that they did not call upon the Plaintiff or any of his witnesses to be examined or ask for any explanation or material relevant to any of the issues set forth in the said Order of the Court (except for their request to the Plaintiff to produce for inspection a number of commission bills forwarded by the Defendant to the Plaintiff relevant to the years 1978 to the month of December, 1984."

We say at the outset that we are not satisfied that the Referees' contact with the Appellant, during the course of the enquiry, was as limited as this ground of appeal suggests. For example, in an associated Appeal (No. 18 of 1986) which concerned Mr. Vilash's action against the appellant for recovery of his fee for acting as Referee, is the uncontradicted statement in Mr. Vilash's Affidavit that his fee did not include "time spent on several discussions during the

period with the Defendant". Furthermore, it is reasonable to assume that before Mr. Vilash sought to extend the scope of enquiry in June 1985, he was in communication with the party who was instrumental in having him appointed.

As Mr. Reddy quite correctly said, the requirement of natural justice must be governed by the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with, and so forth. In this case, each party had a representative conducting the enquiry which was basically a matter of accounting. They had before them the Appellant's Lists, A, B and C, referred to by Kermode J. as "bulky documents", which contained particulars of the appellant's claim, the Statement of Claim, the Defence and Counterclaim and the appellant's reply to them, and the appellant's commission bills which had been sent to him by the respondent over the years. Furthermore, it is clear from Mr. Vilash's June 1985 letter to the Court, that each of the policies on the Appellant's Lists, A, B and C, were inspected and the premium and commission on each policy checked against the Appellant's own Lists A, B and C and the commission bills. They verified the due date of the premium, the date it was received and the commission thereon. Kermode J. described their efforts as thorough and competent, and we can only agree. We detect no breach of natural justice given the nature of the enquiry. Indeed, as Kermode J. commented, it was really unnecessary for the Referees to have gone to all the trouble they did, having regard for the appellant's reply to the respondent's Defence. In it he appeared to accept that the nett commission payable to him was $261,541 (as the respondent alleged) and that proper deductions had been made totalling $135,430. The sole question seemed to be - Did he receive payment of the balance of $126,110?

The next two Grounds of Appeal read:

> "That the Learned Trial Judge did not take into account, that for the reasons set forth in the preceding paragraphs, the Special Referees had erred and misdirected themselves, and by adopting an erroneous procedure, they produced an inaccurate and misleading report. The said report did not constitute a true finding.
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> That the Learned Trial Judge did not take into account that the report so prepared by the Special Referees did not show that they adjudicated on all relevant facts, that the said report was prepared, (as admitted by the Special Referees on Page 1 of the report) on the basis of the figures furnished by the defendant only, and that they acted in breach of Order 36 of the Supreme Court Rules and the said Order of the Court."

These are simply re-statements of what has gone before and require no further comment.

The next two grounds of appeal refer to alleged errors and omissions in the Referees' report, and the refusal of Kermode J. to allow the appellant to call evidence at the hearing in August following receipt of the Referees' report.

They are in essence, allegations that the Referees' enquiry was "one sided" and unfair, and that the appellant had been denied the right to be heard in Court. On the latter aspect the ground of appeal reads:

> "That the Learned Trial Judge erred in disallowing the Plaintiff from adducing evidence in support of his case having regard to the fact that the Plaintiff was not given an opportunity to be heard or to produce evidence before the Special

> Referees. As a result the Plaintiff was denied the right to establish his case at the trial, by adducing evidence from his witnesses who were Government Officers, Officers from Fiji Electricity Authority and others, to establish that the Defendant did receive premiums from the employers of their relevant clients, who were introduced by the Plaintiff to the Defendant and to whom the Defendant issued the insurance policies. Consequently there has been, over the relevant period, a substantial miscarriage of justice."

In support of that submission Mr. Koya said that the respondent had wished to adduce evidence to establish that he had introduced potential policy holders to the respondent, that they had paid premiums but no commission had been paid on the premiums. It is not clear from the ground of appeal or the submissions upon it, just what was hoped to be established by the evidence the appellant claimed to have available.

We propose to deal with this ground of appeal on the basis that the argument was that at least some of the policies which the Referees found were not the appellant's, in that they had not resulted from proposals presented by the appellant, (described as "Not His" in the report), were indeed his policies. In his affidavit in support of the motion to reject the report, the appellant explained how this might occur. He claimed that in some cases, an unscrupulous fellow insurance agent might prevail on a policy holder to cancel a policy written by another agent and take out a new policy so that the commission was lost to the original agent and transferred to the second agent. This, said the appellant, is contrary to the rules governing insurance agents.

Kermode J. rejected the application to call further evidence "in respect of agreed issues referred to the Referees" but obviously the issue of what might be called "transferred policies" was not in the contemplation of the parties when the issues were agreed upon. It only arose

after the Referees had settled the "Not His" list, and there was no enquiry as to whether any of the policies should have been regarded as "His", because of the activities of some other agent, until the matter came before Kermode J.

We think the appellant is entitled to have this matter resolved but we make it clear that the scope of the further enquiry is narrow.

We will deal with the issue further at the conclusion of this judgment.

The last of the appellant's original Grounds of Appeal deals with the question of costs and reads:

> "That the Learned Trial Judge erred in not making an Order that the Plaintiff was entitled to costs in these proceedings in the usual manner.
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> That the Learned Trial Judge erred in making an Order that the Plaintiff do pay to the Defendant costs and that such costs be taxed on the higher scale, and erred in making a Declaration that the Defendant is entitled to include the actual fees paid by the Defendant to Mr. Nalin Patel, in the Defendant's Bill of Costs, as a disbursement."

The reasons why Kermode J. refused to make an Order for costs in the appellant's favour are very clear from his judgment. He concluded that the appellant had failed completely to establish that the respondent had withheld commissions due "despite repeated requests", which was the real basis for the claim, and indeed the greater part of the sum of $1,959 which the appellant did recover, related to errors in deduction, not unpaid commission. Kermode J. went further and said:

> "The reason for refusing the plaintiff any costs is my belief that at no time could he have honestly believed the defendant was indebted to him in the sum he claimed or any sum approximating it."

We think it relevant on the question of honest belief that no claim was made until the appellant's agency was terminated and then covers the whole seven years of his agency.

Costs are in the discretion of the Court and we are not satisfied that Kermode J. acted on wrong principles when he refused an Order. After all, the appellant's claim went from $76,000 to $126,000 and after months of detailed enquiry he recovered $1,959 essentially on a ground of claim not pleaded.

As for the award of costs on the higher scale to the respondent, and the inclusion of Mr. Patel's fee as a disbursement, we see no cause for complaint. The respondent was put to very considerable expense, not in justifying its Counterclaim but in meeting the appellant's claim. In our opinion, the Trial Judge would have been justified in awarding costs against the appellant on his claim.

At the appeal hearing, Mr. Koya sought and was granted leave to argue four additional grounds of appeal although in the result only two were pursued.

The first of the additional grounds reads:

> "The Learned Trial Judge erred in not adverting to the fact that both the Joint Special Referees did not investigate and/or determine the issues in question by a joint sitting or investigation as they were obliged to do by the Order of the Supreme Court made on the 22nd of April 1985.
>
> PARTICULARS
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> (i) Mr. Nalin Patel carried out his investigations in his own office.
>
> (ii) Likewise, Mr. Ram Vilash, the other Joint Special Referee, worked both on his own and at the offices of Messrs. G. Lal & Company."

This ground of appeal is almost wholly dependant on this passage from an affidavit by Mr. V.R. Galkar, Deputy Manager of the Respondent:

> "In any case, Mr. Nalin Patel is one of the partners of G. Lal & Company and he had to engage several of his staff and use office premises for several months in order to complete the preparation of the Referees' report which was ordered by this Honourable Court. Whereas, Mr. Ram Vilash was working on his own and used office premises of G. Lal & Company to do the work. "

We are asked to conclude from that statement that each Referee carried out his own investigation, there being no joint consulation or decision. We reject that. What we regard as the true picture emerges from this passage from another of Mr. Galkar's affidavits:

> "That the Referees spent a total of at least three weeks in the defendant's office examining books, accounts, policies, data sheets, etc. and interviewing employers in order to verify payments of commission in respect of the plaintiff's claim. Furthermore I delivered and/or caused to be delivered to the Referees at the office of G. Lal & Co., <u>where the two Referees were working</u>, all books, accounts, commission bills, records, etc. as and when requested, and did not withhold any information in my possession relevant to the issues in this case. "

The final ground of appeal relates to costs and reads:

> "That the Learned Trial Judge erred in not clarifying in his Order, as to costs, that the Special Referees' fees could be treated as disbursements; that the said Order did not include any sum beyond remuneration and that the amount of such remuneration ought to be reasonable, and, in particular, that the said

> Order, as to costs, did not include the cost of engagement of staff to conduct the investigations, or the hire of office premises by the Special Referees. "

The real complaint here, was that whereas Mr. Vilash's fee for acting as Referee was $7,226 (and Vilash had to sue the appellant to recover that), Mr. Patel's fee, which the appellant was required to pay as a disbursement, was $21,026. The reason for the difference was that Mr. Patel's office premises and a staff were used for the investigation which spread over months. The investigation had to be carried out somewhere and it was only right that the Referees should not have finished up "out of pocket". Having regard for the scope of the enquiry, the overall fees charged were not unreasonable. We reject the final ground of appeal.

We return now to the question of the "Not His" policies. As already indicated, we think the appellant should be given the opportunity to prove, if he can, that all or part of the "Not His" policies are in truth his. We stress that the further enquiry is to be a limited one and not to be regarded as the opportunity to raise other issues.

There will be an Order that the case be referred back to the Supreme Court for the purpose of an enquiry into whether any of the "Not His" policies in Appendices 7, 8, 9 and 9.1., of the Referees' report are policies in respect of which the appellant is entitled to commission. On the completion of such enquiry, leave is reserved to the parties to apply to the Supreme Court for such amendments to the Judgment and Orders for costs entered by Kermode J. as the results of the enquiry may justify.

We reserve the question of costs on this appeal.

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Vice President

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Judge of Appeal

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Judge of Appeal