Case Number:	Civil Case 4 of 2015
Date Delivered:	30 Nov 2016
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Mathew John Anyara Emukule
Citation:	Bid Insurance Brokers Limited v British United Provident Fund [2016] eKLR
Advocates:	Mr. Sehmi for the Plaintiff. Miss Malik for the Defendant.
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application is dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC NO. 4 OF 2015

(FORMERLY NAKURU CIVIL CASE NO. 292 OF 2010)

BID INSURANCE BROKERS LIMITED……PLAINTIFF

VERSUS

BRITISH UNITED PROVIDENT FUND.....……....DEFENDANT

JUDGMENT

The Parties

1. The Plaintiff herein is a company limited by shares and as its name implies it is engaged in business as an insurance broker. It has no doubt a board of management which lays its broad policies for business from year to year, and an executive management which runs its day to day operations.

The Defendant

2. Is called the British United Provident Fund Association (and is commonly referred to as BUPA), and the Plaintiff says that the Defendant carries on the business of medical insurance.

The Pleadings

The Plaint

3. By a Plaint dated 15th April, 2002 and filed on the same date, the Plaintiff claims that by a verbal agreement entered into between the Plaintiff and the Defendant in or about February 1992, the Plaintiff agreed to be an insurance broker for the Defendant in consideration of payment of a commission of 10% of the value of the business placed. Though the duration of the agreement is not stated in the Plaint, the Plaintiff's counsel in his submissions makes the bold statement that the agreement was entered into on a long term basis.

4. The Plaintiff claims that it was an express, or alternatively an implied condition of the agreement that it would only be determined by either party, for good reason, and by giving notice which would be reasonable in all the circumstances prevailing at the time of such determination and considering the total value and status of the business transacted between the Plaintiff and the Defendant.

5. The Plaintiff claim is for alleged wrongful termination of the agreement by the Defendant and consequently for loss and damage amounting to £ 209,121.76, said to be equivalent to five years of commissions at a projected rate of 20% per annum.

The Defence

6. The Defendant denies the Plaintiff's claim. In its Defence dated 26th August, 2002, and filed on 27th August, 2003 the Defendant admits that there was a verbal agreement between the Plaintiff and the Defendant. The Defendant however denies that it was either an express or implied term of the verbal agreement that it could only be terminated by either party for good reason and by giving notice which would be reasonable in the circumstances prevailing at the time of such termination and considering the total value and status of the said business transacted between the Plaintiff and the Defendant.

7. The Defendant contends in its Defence that it gave the Plaintiff a thirty (30) days' notice of termination, and denies that the termination was on the basis or grounds of bankruptcy. The defendant also denies in its Defence that the Plaintiff suffered loss or damage as a result of the termination and specifically denies the alleged loss amounting to £ 209,121.76, and put the Plaintiff to strict proof of the claim of loss.

The Submissions

8. In addition to the basic pleading of Plaint and Defence, counsel for the Plaintiff and Defendant also filed written submission and authorities in support of their cases. The Plaintiff's counsel's submission dated 30th May, 2016, were filed on 31st may, 2016. The Defendant's counsel's submissions dated 9th August, 2016 were filed on 10th August, 2016 together with a List of Authorities of the same date, and filed together with the submissions.

Analysis and Determination

9. I have considered the pleadings aforesaid the evidence, and the submissions by respective counsel to determine the respective claims. I will need to determine the following issues –

(a) whether it was an express term of the verbal agreement between the Plaintiff and the Defendant that the **verbal agreement** could only be terminated by either party (i) for good reason and (ii) by giving notice which would be reasonable in the circumstances prevailing at the time of such termination and considering total value and status of the said business transacted between the Plaintiff and the Defendant;

(b) If the answer to (a) were in the negative, whether there was an implied term of the verbal agreement between the Plaintiff and the Defendant that it would only be terminated by either party (i) for good reason, and (ii) by giving a notice which would be reasonable in the circumstances prevailing at the time of such termination and considering the total value and status of the said business transacted between the Plaintiff and the Defendant;

(c) whether the Defendant gave the Plaintiff thirty days of termination in any event;

(d) whether the agreement was terminated on alleged bankruptcy"

(e) whether the Defendant was justified in terminating the agreement in any event"

(f) whether the Plaintiff has proved, and is therefore entitled to loss and damage as claimed.

10. I will take these issues in turn. Before however taking these issues, it is necessary to understand the nature of contract. According to Black's Law Dictionary, 8th Edition –

"The term "contract" has been used indifferently to refer to three different things –

(i) the series of operative acts by the parties resulting in new legal relations;

(ii) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;

(iii) the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called "obligation" William R. Anson – Principles of the Law of Contract"

11. These attributes may be found in **"oral contract"**, also called **"parole contract"**, or **"simple contract"**, which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced.

"The basic principle is often called the parole evidence rule, and according to this rule evidence is not admissible to contract or qualify a complete contract. This rule is usually stated as a rule of evidence, but it probably best regarded as a rule of substantive law. The question is not really whether evidence can be admitted which might vary the written document, but whether if the evidence is admitted, it will have the legal effect of varying the document." Per P.S. Atiyah – an Introduction to the Law of Contract 3rd Edition 1981.

12. If that be the position in respect of written contract, could there be an **express term** of a verbal agreement between parties, or in this case, between the Plaintiff and the Defendant that it could be terminated by certain party for good reason and by giving notice which would be reasonable in the circumstances prevailing a the time of the said termination and considering the total value and status of the business transacted between the Plaintiff and Defendant" With respect, I do not think so. **Firstly** as a matter syntax, an **"express term of a verbal agreement"** does not exist. **"Express"** in this context, means **"specifically identified to the exclusion of anything else"**.

13. According to Chitty on Contracts Vol. I (General Principles), 2009 Edition paragraph 13-001, page 773,

"…express terms are those which are actually recorded in a written contract or openly expressed at the time the contract is made."

14. In the absence of a written contract between the Plaintiff and the Defendant, the court cannot find that either the Plaintiff or the Defendant **"openly expressed"** at the time the verbal agreement was entered into, that it could only be terminated by either party for either good reason by giving notice which would be reasonable in the circumstances prevailing at the time of such termination and considering the total value and status of the business transacted. I consequently find and hold that in the absence of any evidence of such express term, there was no such express term.

15. The next question is whether there can be **an implied term** in a verbal agreement, and in this case between the Plaintiff and the Defendant that the verbal agreement could only be terminated by other party for good reason by giving a notice which would be reasonable in the circumstances prevailing at the time of such termination and considering the total value and status of the business transacted

between the parties"

16. Again Chitty on Contracts (supra), comes handy.

"The implication of a term is a matter for the court and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances."

17. The **"intention of the parties"** like the spirit of the Constitution or Statute, must be found within the words of the Constitution or Statute. **Chitty on Contracts**, paragraph 13004 says –

"In many cases, however, one or the other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature, may be made in two situations –

First where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both however depend on the presumed intention of the parties."

18. It is difficult to find that there was an implied term that the verbal agreement could be terminated only for good reason, and giving notice. If this were so, the Plaintiff might have hesitated to itself terminate the agreement with immediate effect, without notice, and without giving any reason. In its letter dated 18th August, 1998 (found at page 5 of the Plaintiff's First Bundle of Documents – Exhibit PI), the Plaintiff's one Dilesh Bid (PW1), wrote to the Defendant as follows –

"I write to confirm with immediate effect and as per my internal arrangement with Rajan Jani of Jani Consultancy Services Limited, we would like to transfer the agency of Bupa International from Bid Insurance Broker to Jami Consultancy Limited."

and added –

THE CORRESPONDENCE FOR THE CLIENTS OF BID INSURANCE BROKERS LIMITED, WHICH ARE BEING TRANSFERRED TO JANI CONSULTANCY SERVICES LIMITED AS FOLLOWS –

"Jani Consultancy Services Limited (Bid Insurance Brokers Limited, P. O. box 40127, NAIROBI KENYA

Please confirm in writing that you adhered and complied with this arrangement."

19. It is clear from the above correspondence that the Plaintiff wished to transfer its insurance agency business with the Defendant to a different identity called Jani Consultancy Services Limited (Jani). It may have escaped the Plaintiffs attention, but it terminated the business relationship between the Plaintiff and the Defendant. It may also have escaped the Plaintiff's attention, that no good reason was given (apart from [the Plaintiff] internal arrangement). PW1 admitted in evidence that Jani Consultancy Services Limited was a different entity from the Plaintiff, and that upon transfer of the agency business Jani would earn the commission to whom he was happy to hand over his agency business. The fax of

23rd September, 1998 from the Defendant to Jani, (Page 8 of the Plaintiff's First Bundle of Documents – Exhibit P1), it states -

"as originally requested the business originally introduced by Dilesh Bid has been transferred to your Agency and Jami Consultancy will now be paid commission on the income of those groups."

20. The letter of 9th October, 1998 from the Defendant to the Plaintiff P. 10 Exhibit P1), reinstating the Plaintiff's agency is a further confirmation the agency had been transferred to Jani (that is effectively terminating the agency) and commissions had in fact been paid to Jani.

21. There are also several aspects of the Plaintiffs' witnesses and in particular PW1 which do not add up **Firstly**, he transferred his business to Jani Consultancy Services Limited with **"immediate effect"**, but creates an express/implied term for the Defendant, that the Defendant would only terminate the verbal agreement upon five years notice. Surely what is good for the **"gander"** must be good for the **"goose"**. **Secondly**, there was no evidence of either goodwill or of extensive effort to expand the Defendant's business in Kenya, and then be happy to hand over the expanded business to **"Jani"** for undisclosed **"goodwill"**.

22. The evidence of DW1 confirmed that the Plaintiff did not give any good reason for terminating the agency nor did not give notice. It is correct that the Defendant did not call Mary Phillips with whom the Plaintiff had dealt, but DW1 confirmed what Mary Phillips would have confirmed from the same correspondence referred to by DW1. In any event there was no evidence that the Plaintiff had summoned Mary Phillips and that she had declined to come and testify.

23. It seems to me as a matter of contract law, that having itself terminated the verbal agreement on 18th August, 1998 without any giving notice whatsoever or providing any reason, there is no basis in law for the claim by the Plaintiff of an implied term of the verbal agreement that it could be terminated only upon giving notice or providing reasons. Any such implied term would have applied to the both parties. The only reasonable conclusion from the conduct of the Plaintiff even though the agreement was later reinstated, is that there was no such express or implied term that the verbal agreement would be terminated for good reason and on notice.

24. On the other hand the Defendant gave the Plaintiff thirty (30) days terminating the agency relationship, per letter dated 23rd November, 1998.

25. In determining what constitutes reasonable notice, the court in **ALPHA LETTING LIMITED vs. NEPTUNE RESEARCH & DEVELOPMENT LIMITED [2003] EWCA** – Vol. 1 704 said –

"31. One very important consideration will be the degree of formality in the relationship. A completely formal agreement would probably have its own provision for termination, so no problem about assessing a reasonable period for termination will arise. But the more relaxed relationship the less likely will be that the law would imply a lengthy notice period."

26. In my opinion therefore the period of thirty days' notice was in the circumstances prevailing and nature of the agreement, reasonable notice.

27. The claim by the Plaintiff in the evidence of PW1 that the agency was terminated on the grounds of **"bankruptcy"** is not borne out by the evidence. The letter dated 11th December, 1998 from Chris Crowe to the Plaintiff Mr. Crowe categorically stated to PW1 that –

“Finally we have the case in which it is alleged you fraudulently obtained more than Kshs. 250 million from Bullion Bank. Regardless of the outcome of the alleged activity we reserve the right at our sole discretion, to terminate a relationship with an insurance broker who is alleged to have done something wrong which potentially could bring us into disrepute.”

28. The Defendant may have been hedging the risk of tainting its own reputation in dealing with the Plaintiff should the allegations stick, and so took the action to terminate the agency. No reason of bankruptcy was adduced. An organization in the Defendant’s situation had good reason to hedge against any risk to its reputation, and it would serve no useful purpose in this Judgment to tabulate all the allegations regarding the unacceptable practices by the Plaintiff’s Director (PW1).

29. It suffices to say in contract law, in the absence of any express provision to the contrary, reasonable notice is all that is required to terminate a contract. This was a verbal contract. The plaintiff had terminated it **“with immediate effect”**. The contract had again been verbally reinstated and taken away from Jani Consultancy Services Limited, and no effort was made to reduce the terms into writing or provide a specific period of notice for termination. What is reasonable is a question of fact, and in this case the loose relationship between the Plaintiff and the Defendant point to a period of thirty days as being reasonable. There was no reason to give reasons, though reasons emerged in evidence as stated above.

30. Having found that the thirty days’ notice was reasonable, it is strictly not necessary to consider whether the Plaintiff suffered loss and damage as a result of that termination of the agency, I consider it here because the Plaintiff made a specific claim of the loss of £stg. 209,121.76. The entire basis for this claim was the evidence of PW2, Vijay Kumar Shah who claimed to be an expert in business analysis and projected a consistent growth of 20% over a period of five years of the Plaintiff’s agency business with the Defendant. The basis was the growth of the agency from the year 1992 @£Stg. 10,687.70 commission to £Stg.234,181.00 in the year 1998. Notwithstanding these figures, there was evidence by both PW2 and PW3 that there was minimal growth in 1996/1997. PW3 had worked for the Plaintiff for 5 months when he came up with the projections, he laid no comparable evidence from any other insurance brokerage house where there would be such five year growth. In the absence of such evidence, the purported growth has really no basis, and can at the best be regarded as purely speculative.

31. In law, a specific claim of £Stg. 209,121.76, is in the nature of special damages, and must therefore specifically be proved. The evidence of growth by PW2 and PW3, is purely speculative, it has no legs to stand on. In the case of **“KENYA BREWERIES LIMITED KIAMBU vs. GENERAL TRANSPORT AGENCY LIMITED [2000]eKLR**, the court said –

“It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in Bonham Carters Hyde Park Hotel Limited [1948] 64TR 177 –

The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, “this is what I have lost, I ask you to give me these damages.” They have to prove it.”

32... The same conclusion was reached in **OUMA vs. NAIROBI CITY COUNCIL [1976]KLR** 297 at 304 –

"I am not obliged to go through the charade of making my own discounts from the expert's figure. I therefore make no award in favor of the Plaintiff for the claimed loss of profits."

33. I find it strange that the Plaintiff instead of proving its case also purports to rely on the principle of **restitution in integrum**. The submission is a fundamental misunderstanding of that principle. The principle literally means **"restoration to the original position"**. The remedy of restitution only applies where the Defendant has been unjustly enriched and would only apply where the contract has been set aside. **"The essence of restitution"** according to **Chitty on Contracts**, is concerned with whether a claimant can recover a benefit from the Defendant, rather than whether the claimant can be compensated for the loss suffered. Restitutionary remedies are therefore distinct from those which are traditionally available in contract or in tort as was recognized by Lord Wright in the case of **FIBROSA SPOLKA AKCYJNA vs. FAIRBAIRN LAWSON COUIBE BARBOUR LIMITED [1943] A.C. 32, 61** –

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are not recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

34. In **FOSKET vs. Mc KROWN [2001] 1AC 102** the House of Lords recognized that restitutionary remedies are available where the Defendant has been unjustly enriched at the expense of the claimant. Unjust enrichment is however the only principle which will trigger a claim for restitutionary remedy. These remedies may also be awarded where the Defendant has obtained a benefit by the commission of a wrong or where the claimant can bring a claim to recover property held by the Defendant in which the claimant has a proprietary interest.

35. Indeed at common law, the law of restitution is subordinate to the law of contract in that if a contractual relationship subsists between the parties, the contractual regime will prevail (see **GUINNESS PLC vs. SAUNDERS [1990] EAC**, 603, 697-8 (Lord Goff). It will then only be possible to resort to restitutionary remedies if the contract has been set aside for some reason so that it is no longer operative.

36. In this case, there is no claim for unjust enrichment by the Plaintiff and the verbal agreement was not set aside, the remedy of **restitution in integrum** does not apply. A party is bound by its pleadings.

37. The law of contract demands that a party must take steps to mitigate its damages. A claimant cannot recover damages for any part of his loss consequent upon the defendant's breach of contract which the claimant could have avoided by taking reasonable steps. In any event the Plaintiff claims that it continued to retain the same clients for general insurance business and therefore did not lose the clients entirely.

38. Besides, the alleged loss is not based on the net profits but speculative net profits the Plaintiff would have earned over a 5 year period. The court cannot in law treat as in force, an agreement which has been terminated as if it were in force for an unexpired period of five years. This is not tenable in law or fact.

Disposition

39. Once the Plaintiff had itself terminated the verbal agreement by transfer of the agency business to

Jani business to Jani Consultancy Limited without giving any reason, it cannot turn round and demand notice and reasons for termination from the Defendant. The Defendant gave thirty (30 days' notice, and it was reasonable notice in all the prevailing circumstances.

40. The Plaintiff failed to prove loss and damage, there were allegations of fraud even if they were not proved, for the Defendant it did not wish to be entangled with the Plaintiff's affairs. There was no basis for the projected 20% growth. In short the Plaintiff failed totally to prove its case on a balance of probability.

41. In the circumstances the Plaintiff's suit dated 15th April, 2002 and filed on the same date is dismissed with costs to the Defendant.

42. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 30th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Nanji holding brief for Mr. Sehmi for Plaintiff

Miss Malik for Defendant

Mr. Silas Kaunda Court Assistant