COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2019/CLE/GEN/00387

BETWEEN

ROWENA BETHEL

Plaintiff

AND

THE NATIONAL INSURANCE BOARD

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mr. Frederick Smith K.C. appearing with Ms. Kandice Maycock and Ms. Keath Smith for the Plaintiff**

Mrs. Krystal Rolle K.C. appearing with Ms. Kendrea Demeritte for the Defendant

Judgment Date: **28th April, 2023**

JUDGMENT

1. By a Re-Amended Writ of Summons filed 2nd December 2021, the Plaintiff sought:-
   i. Damages for breach of contract or alternatively misrepresentation
   ii. Further and only if the claim for damages for breach of contract or alternatively misrepresentation fails, then an order that the Defendant disgorge to the Plaintiff $155,900.64 or such of the sum as the court may find on a restitutionary principle.
   iii. Interest
   iv. Costs

2. Her claim arose out of a contract dated 31st July 2013 and made between herself and the Defendant whereby she was engaged as Director and Chief Executive of the Defendant for a three year period.

3. By this contract, she claims that the Defendant had agreed inter alia to provide her with reinstatement in the Defendant's pension scheme provided that she reimbursed them with the refunded payments she had been given at the end of her former tenure with the Defendant.

4. The Plaintiff filed her Statement of Facts on the 24th September 2021. In it she maintained that the issues for determination are:

   i. Did the Defendant ("NIB") represent to the Plaintiff ("Ms. Bethel") that she was eligible for the Scheme prior to the parties entering into the Contract?

   ii. If NIB represented to Ms. Bethel that she was eligible for the Scheme, was this a determinative consideration in her decision to take up employment at NIB?

   iii. Did the terms of the Contract, in particular Clause 15, contractually oblige NIB to deliver to Ms. Bethel her participation in NIB's occupational pension scheme?

   iv. By terms of the Contract, in particular Clause 15 and/or any implied term, did NIB warrant that the Scheme would be available to MS. Bethel?

   v. Notwithstanding Clause 1.10 of the rules of the Scheme's rules, were there steps that NB could have taken to permit Ms. Bethel's participation in the Scheme, including amendment of the scheme's rules or changes to Ms. Bethel's employee status?

   vi. To the extent that NIB agreed that Contract with Ms. Bethel based on the mistaken belief that Ms. Bethel was entitled to participate in the Scheme under the Scheme's rules, does NIB's mistake permit NIB to escape its obligation in the Scheme? If not, is Ms. Bethel entitled to damages to compensate her for the loss associated with not being a member of the Scheme?

   vii. Is the effect of Clause 23 of the Contract that NIB is entitled to deduct the 15% Gratuity only from lump-sum pension payments under the Contract to Ms. Bethel or from all pension payments under the Contract to Ms. Bethel?

5. The Defendant by its Statement of Facts and Issues maintain that the issues for the court's determination are:-

   i. Whether the Defendant, its servants and/or agents, prior to the Plaintiff entering into the Contract, represented to her, whether orally or in writing, that she was eligible for participation in the Pension Plan.

   ii. If so, whether the Plaintiff entered into the Contract in reliance upon such representations made to her by the Defendant, its servants and or agents?

   iii. If so, whether the Plaintiff suffered loss and damage by reason of such misrepresentation?

iv. If so, what is the quantum of such loss?

6. The Plaintiff at trial relied on her written and oral evidence. The Defendant relied on the written and oral evidence of Reverend James Moultrie and Heather Maynard.

7. The Plaintiff states the following as facts agreed:-
   i. NIB engaged Ms. Bethel as its Director and Chief Executive for a fixed term of three years under the terms of a contract dated 31st July, 2013 ("**the Contract**").
   ii. NIB has an occupational pension scheme for its employees ("**the Scheme**")
   iii. The contract included the following clause at Clause 15:
   "You are eligible for participation in the Board's occupational pension plan ("the Plan") [i.e. the Scheme]. Subject (as agreed) to full re-imbursement of all sums paid out of the plan in respect of prior separation from the Board including contributions which would have been payable by you from 2012 to date of contract. All prior years' service (with the Board or with the Bahamas Government) will be taken into account and regarded as continuous service for the purpose of determining final pension entitlement."
   iv. Both parties agree that the Contract included the following Clause at Clause 24:
   "In the event any conflict arises between that provisions of this contract and any other document issued by the Board providing for terms and conditions applicable to employees of the Board, the provisions of this contract shall prevail."
   v. Throughout Ms. Bethel's employment, NIB deducted $713.44 from Ms. Bethel's monthly salary by way of contributions to the Scheme.
   vi. In March and April 2015, Ms. Bethel was purportedly formally enrolled by NIB in the Pension Scheme which was managed by CFAL and provided with a pension account by CFAL.
   vii. Ms. Bethel suffers from severe rheumatoid arthritis, having been diagnosed with this condition before starting work for NIB. Ms. Bethel contends that her knowledge of this condition, and her need to plan financially for the future because of it, was a key reason for her accepting employment with NIB, as it allowed her access to the Scheme in order to meet anticipated medical care costs for the condition. Furthermore, Ms. Bethel contends that she made the importance to her of participation in the Scheme clear to NIB prior to entering into the Contract.
   viii. Due partly to her deteriorating health and partly to a breakdown in her relationship with key individuals at NIB, Ms. Bethel elected not to seek a further term of office. Therefore, by mutual agreement, NIB did not renew Ms. Bethel's term as Director and Chief Executive of NIB.
   ix. Both parties agree that the Contract contained the following clause at Clause 23:
   "You will be entitled to receive a 15% gratuity upon the successful completion of this contract. Any amounts paid by way of gratuity under this clause will be deducted from any lump-sum payment made pursuant to the pension plan."
   x. Ms. Bethel contends that Clause 23 entitles NIB to deduct the 15% "gratuity payment" ("**the Gratuity**") only from the *lump-sum* pension payments under the

Contract to Ms. Bethel. NIB contends that Clause 23 entitles it to deduct the Gratuity from all pension payments under the employment contract to Ms. Bethel.

xi. On 13th July, 2016, NIB wrote to Ms. Bethel confirming that her employment with NIB had ceased. This letter stated the following:

"As stated in your contract of employment, the Gratuity of 15% for the satisfactory completion of your contract will be deducted from your pension benefit once finalized."

xii. This letter also stated that Ms. Bethel's pension benefit was being calculated, but otherwise made no further mention of Ms. Bethel's entitlement or lack thereof.

xiii. On 20th September, 2016, NIB wrote to Ms. Bethel again offering her two options of receiving her pension benefit, either to take around $8,206.58 in regular monthly payments or to take a $282,912.87 lump sum payment, and thereafter receive a reduced monthly payment in the region of $6,616.45.

xiv. On 28th September, 2016, Ms. Bethel chose the first option of $8,206.58 in regular monthly payments in a document entitled "Employee's Pension Plan Schedule of Options". Ms. Bethel communicated the selection of such option to NIB.

xv. Ms. Bethel wrote to NIB on 22nd October, 2016 to inform it that she had not received any pension payments.

xvi. NIB wrote to Ms. Bethel on 26th October, 2016 stating that Ms. Bethel was not in fact entitled to any payments out of the Scheme. NIB stated that Ms. Bethel was on a fixed term contract and the Scheme's rules only made the Scheme available to employees not on a fixed-term contract.

xvii. NIB accepts that Ms. Bethel had not been previously been made aware at any time that because of the provision of the Scheme a pension would not be paid to Ms. Bethel, but denies Ms. Bethel is entitled to any compensation for not being made a member of the Scheme.

xviii. The letter of 26th October, 2016 also indicated that the situation was being referred to NIB's pension committed, with two measures being actively considered to allow Ms. Bethel her pension entitlement.

xix. At all material times, NIB had the means, as it did with other Directors, to remedy any perceived inability for Ms. Bethel to participate in the pension Scheme by either amending the Scheme and or making other provisions from NIB for the payment of same financial benefits to Ms. Bethel as she would have received from the Scheme had her contractual enrollment in the Scheme been honored.

xx. Ms. Bethel met with Brensil Rolle, the Minister with portfolio responsibility for NIB on two occasions during 2017. Ms. Bethel was told at the second meeting that Mr. Rolle had spoken to Father James Moultrie, the chairman of NIB at the time Ms. Bethel was engaged as Director and CEO, who was then Chairman of the Public Service Commission, who had assured Mr. Rolle that Ms. Bethel was entitled to a pension from NIB and that he had given the appropriate instructions to achieve that outcome.

xxi. Ms. Bethel has never received any pension payments. NIB is understood to accept as a matter of principle that Ms. Bethel is entitled at least to the return of the contributions made from her monthly salary to the Scheme, but has never returned or attempted to return that money to her.

xxii. Eckler (the Pension Scheme managers) calculated Ms. Bethel's pension entitlement as of 1st August 2016, i.e. following the end of her contract with NIB.

xxiii. The calculation of Ms. Bethel's pension entitlement factored in the sum of $130,216.80 due to Ms. Bethel in respect other financial entitlements due her from the Government] which the Government had agreed to pay to NIB towards Ms. Bethel's pension.

xxiv. Thus, Ms. Bethel has been deprived of and lost the benefit of:

(i) Her pension; and

(ii) The said $130,216.80 and,

(iii) The said $713.44 deducted by NIB from Ms. Bethel's monthly salary by way of contributions to the Scheme for 3 years.

xxv. NIB has had the benefit of all of her funds and her monthly pension entitlements and kept Ms. Bethel out of all of her entitlements.

xxvi. Ms. Bethel has and continues to suffer loss and damage in respect of financially providing for her health which has continued to deteriorate.

8. The Defendant states the following as agreed facts:-

i. The Defendant provides a contributory pension plan ("The Pension Plan") for its employees.

ii. Clause 1.10 of the Pension Plan provides that eligible employee means "***any person employed on a regular, full-time, permanent basis by the Board, excluding individuals on a fixed term contract.***"

iii. By a contract in writing dated 31st July, 2013 between the Plaintiff and the Defendant, the Plaintiff was employed by the Defendant in the capacity of Director and Chief Executive Officer (CEO) on a full-time basis for a fixed term of Three (3) years commencing on 3rd July, 2013 ("The Contract").

iv. Clause 15 of the Contract provided that the Plaintiff was eligible for participation in the Pension Plan.

v. During the term on the Plaintiff's employment under the Contract the Defendant deducted the sum of $713.44 per month form the Plaintiff's salary purportedly as her contributions to the Pension Plan.

vi. On the 2nd, July, 2016 the Plaintiff's employment under the Contract came to an end.

vii. The Defendant thereafter determined that the Plaintiff was not eligible for participation in the Pension Plan by reason of her fixed term of employment and advised the Plaintiff as such.

viii. The Plaintiff by her Statement of Claim accepts that she is not eligible for participation in the Pension Plan.

ix. The Plaintiff by her Statement of Claim has brought an action against the Defendant for (1) Breach of Contract, (2) Breach of Warranty (3) Misrepresentation and (4) Restitution.

x. The Defendant has agreed that the said monthly deductions of $713.44 are due back to the Plaintiff and has agreed to repay the same.

xi. The Defendant has denied the Plaintiff's claims for (1) Breach of Contract, (2) Breach of Warranty and (3) Misrepresentation.

9. The Plaintiff relied on Clause 15 of the Contract which she asserts was unambiguous. Clause 15 states:-

> **"You are eligible for participation in the Board's occupational pension plan (the Plan). Subject (as agreed) to full re-imbursement of all sums paid out of the plan in respect of prior separation from the Board including contributions which would have been payable by you from 2012 to date of contract. All prior years' service (with the Board or with The Bahamas Government) will be taken into account and regarded as continuous service for the purpose of determining final pension entitlement"**

10. This entitlement the Plaintiff submits was subject to the condition that she reimburse the Scheme for previous contributions refunded in the amount of $130,216.80 which condition she met.

PLAINTIFF'S SUBMISSIONS

11. The Plaintiff claimed that clause 15 was a clear, factual warranty that she was entitled to participate in the pension scheme. If she was not entitled to participate then the Defendant was liable to her for the incorrect warranty. The Plaintiff submitted that where one party has given a warranty about a given fact, the contract cannot be varied for mistake about that fact; **Great Peace Shipping Ltd. V Tsavlirirs Salvage (International) Ltd. (The Greater Peace) [2002] EWCA 1407.** Whether or not she was in fact eligible to join the pension scheme was irrelevant to her cause of action.

12. The Plaintiff relied on Lord Hoffman's dicta in **Investors Compensation Scheme Ltd. v West Brownwick Building Society (1998) 1WLR 896** where Lord Hoffman held:

> **"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.**
>
> **(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.**
>
> **(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in the respect, only legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore.**
>
> **(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely**

enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax;

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naveiera S.A. v Salen Rederierna A.B. [1985] A.C. 191, 201:

> **"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""**

13. The Plaintiff contended that the Defendant's assertion that Clause 15 was void for mistake was wrong in law as a warranty about a given fact could not be void for mistake. Where one party was in a better position than the other to know the truth, such that they were at fault for not finding out the true position, the contract would not be void for mistake.

14. The subject matter of the mistake needed to be absolutely fundamental to the contract such that the test would be to ask the parties what they were contracting for. The mistake would have needed to be absolutely fundamental to the contract and which mistake would have made it impossible for the contract to be performed. The Plaintiff submits that the entitlement to participate in the scheme, while of critical importance was not the fundamental essence of the contract, but a component of her remuneration.

15. The representation made to the Plaintiff by the Defendant was a determinative inducement to her accepting the role, particularly because of her chronic medical condition which proved to be expensive to care and control. The Defendant fell below the standard reasonably expected of it when representing that she should join the pension scheme thus the misrepresentation was negligent.

16. The Plaintiff contended that the Board retained funds which belonged to her. The first was a monthly payment of $713.44 which was deducted each month by the Defendant from her salary as contributions to the scheme for a period of three years. The total claimed was $25,683.84. The second was $130,216.80 which was owed to her by the Office of the Prime Minister and was paid to the Defendant to bridge her entitlement to the scheme and re-instate her pension; unjustly enriching the Defendant as it had failed to pay the money to her nor provide her with a pension benefit. The Plaintiff fulfilled her obligations under the contract in full.

17. In the alternative, the Plaintiff submitted that she was entitled to restitution in the amount of $155,900.64 at minimum which represents the $25,683.84 and the $130,216.80.

18. The Plaintiff also relies on **Craven-Ellis v Canons Ltd (1936) 2KB403** where services had been rendered by Craven-Ellis under a contract which had turned out to be void. The court concluded that as he had rendered services he must be paid a reasonable sum for his work. The starting point must be the terms the parties agreed which included the pension benefits.

19. During trial, the Plaintiff gave viva voce evidence. Her evidence was that she and Father James Moultrie had a clear conversation during which he stated that she was entitled to participate in the pension scheme. She stated that he had been surprised that the Defendant was still objecting to paying her the money.

20. She also stated that she had a conversation with then Prime Minister, the Honourable Mr. Perry Christie and then Minister for National Insurance, Mr. Shane Gibson whom she had informed that she would not accept the role as Director and Chief Executive of the Defendant, unless it was guaranteed that she would be able to participate in the pension scheme.

21. In her reply to the Defendant's submissions, she submits that the Plaintiff can be entitled to receive damages for the breach of a contractual promise even though she was not entitled to participate in a pension, particularly where the promise is made in exchange for valuable consideration.

22. The Plaintiff reiterated her reliance upon **Great Peace Shipping** which held that where a party has given a warranty about a given fact the contract cannot be void for a mistake about that fact. Further the contract will not be void for mistake where one party was in a better position than the other to know the truth and as such the Defendant was at fault for not finding out the true position.

23. The Defendant's reliance on **Associated Japanese Bank (International) Ltd v Credit du Nord SA** does not assist their case. This shows that the element of common mistake were not made out in this action. The elements of common mistake as set out therein were:-

> **"the doctrine of common mistake was concerned with "the impact of unexpected and wholly exceptional circumstances on apparent contracts," and the required elements of a common mistake were as follows:**
>
> **(1) The mistake must be substantially shared by both parties and must relate to facts as they existed at the date of the contract. The parties must have had reasonable grounds for their mistaken belief.**
>
> **(2) The mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist.**
>
> **(3) If the contract itself provides for the allocation of risk or the consequences of such a mistake, the contract must be applied to the exclusion of any applicable doctrine".**

24. The circumstances of the promise by the Defendant were not wholly exceptional circumstances. Further the Defendant did not have reasonable grounds for their mistaken belief and most importantly the subject matter of the contract was not rendered

radically different as a result of the Plaintiff's ineligibility to participate in the pension scheme. The Plaintiff continued to provide her services under this contract and fulfilled her obligations. The Defendant paid her remuneration except for the pension benefit.

25. Further, **Triple Seven SN Annor v Arzman Air Services Ltd. [2018] EWHC 1348** supports the Plaintiff's case as the court held that the contract was not void for mistake.

26. The Plaintiff's oral evidence confirmed that negotiations for her contract were not only with the Prime Minister and or Minister Shane Gibson but also with the Board and references were made to various portions of the transcripts.

27. The Plaintiff further submits in reply that only the Defendant had knowledge as to the actual terms of the Pension Scheme and the Plaintiff could not have been expected to have the same knowledge. A duty of care ought to be imposed on the Defendant as a result of this fact.

28. The Defendant was prohibited by the National Insurance Act from hiring a Director without the approval of the Minister responsible who in turn receives his authority from Cabinet.

29. The Plaintiff also relies on the definition of a warranty as set out in **Chitty on Contracts** which provided:-

> **"In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not to an entitlement to terminate further performance of the contract.51 The use of the word "warranty" in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract,52 the breach of which by one party does not entitle the other to terminate further performance of the contract".**

DEFENDANTS SUBMISSIONS

30. By its Defence filed 24th May 2019, the Defendant denied that the Plaintiff was entitled to be a part of its pension scheme and that both parties had mistakenly believed that the Plaintiff was able to.

31. The Defendant objected to various paragraphs in the Plaintiff's original witness statement on the grounds of impermissible arguments and submissions, hearsay and double hearsay. The Plaintiff's response to the objections did not demonstrate or support the admissibility of the subject evidence and/or paragraphs. The Defendant respectfully invited the Court to rule that these paragraphs were inadmissible and to strike them from the Plaintiff's Original Witness Statement.

32. It was accepted that the Plaintiff was not eligible to participate in the Defendant's pension scheme and such mutual agreement on the Plaintiff's ineligibility demonstrated the unsustainability of the core premise of the Plaintiff's case against the Defendant for compensation and the unsustainability of the Plaintiff's claims for (i) Breach of Contract, (ii) Breach of the Implied Term, (iii) Breach of Warranty and (iv) Misrepresentation.

33. The Defendant submitted that the Plaintiff could not receive damages for something she never had and could not lose. Whatever happened in the case of a past director was wholly irrelevant to the Plaintiff's pleaded case. Damages for breach of contract, breach of warranty and misrepresentation were compensatory in nature in order to compensate a claimant for something which was lost. The Plaintiff only lost the purported deductions. By conceding that she had no entitlement she conceded that she had no right to any compensatory damages.

34. Clause 15 was void ab initio as the circumstances surroundings its inclusion in the Contract did not satisfy the principles established for the doctrine of common mistake. The Plaintiff's claim for breach of the implied term should also fail because of the mutual mistake as to the Plaintiff's ineligibility. The Defendant relied on various authorities in support of this submission, namely **Sheikh Brothers Ltd. v Arnold J. Ochsner [1957]; Griffith v Brymer [19TLR 434, Clarke v Lindsay (1903) 88LT1998, Cooper v Phibbs (1867) LR2HL149 and Zuchetto v Republic [2014] 5LRC.**

35. In **Zuchetto v Republic** the Court of Appeal held that the following elements had to be present for a common mistake to avoid a contract:-
    i. There had to be a common assumption as to the existence of a state of affairs;
    ii. There had to be no warranty by either party that the state of affairs existed;
    iii. The non-existence of the state of affairs could not be attributable to the fault of either party;
    iv. The non-existence of the state of affairs had to render the performance of the contract impossible;
    v. The state of affairs could be the existence, or a vital attribute, of the consideration to be provided or circumstances which had to subsist if performance of the contractual adventure was to be possible.

36. The Defendant submitted that there was no implied term of fact as pleaded by the Defendant.

37. The Defendant relies on **Triple Seven MSN Anor v Azman Air Services [2018] EWHC 1348** which referred to **Great Peace Shipping Ltd. Tsavilris Salvage (International) Ltd [2018] EWHC 1348** to establish that the essential elements for determining that the contract was void for common mistake were present. Lord Phillips MR stated that a contract will be void for common mistakes at common law if the following elements were present:-
    (1) There must be a common assumption as to the existence of a state of affairs.
    (2) There must be no warranty by either party that state of affair exists.
    (3) The non-existence of the state of affairs must not be attributable to the fault of either party.

(4) **The non-existence of the assumed state of affairs must render the performance of the contract impossible (or according to paragraph 82 of the judgment must render performance of the essence of the obligation impossible).**

(5) **The state of affairs may be the existence or a vital attribute of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.**

38. The Defendant also submitted that Triple Seven referred to the finding of Justice Steyn in **Associated Japanese Bank (International) Ltd. v Credit Du Nord SA.**

39. The Defendant further submitted that the court will not imply a term into a contract which is not capable of being achieved but if the court held that such a term was implied, the Plaintiff must prove that it was breached by the Defendant. In order to prove this, the Plaintiff must show that the term was capable of being performed by the Defendant.

40. It was never suggested to Mrs. Maynard that the Defendant could in fact facilitate the Plaintiff's eligibility and therefore the rule in **Browne v Dunn** prohibited the Plaintiff from asserting that the Defendant was able to somehow render the Plaintiff eligible.

41. The Defendant contended that the Plaintiff's misrepresentation claim should fail as the Plaintiff failed to establish each and every essential ingredient for this cause of action. The Plaintiff's evidence was that through her negotiations prior to having a conversation with the Defendant, she was induced to enter into the Contract. Subsequently, Clause 15 was drafted by the Plaintiff herself and remained as drafted and the evidence of Father Moultrie that he never represented to the Plaintiff that she was eligible for a pension during the interview was not challenged on cross examination.

42. No duty of care arose between Father Moultrie and /or Bernard Evans and the Plaintiff which could sustain a claim for negligent misrepresentation as the Plaintiff was an admitted pension expert who did not consider Father Moultrie or Bernard Evans as experts. As the Plaintiff drafted Clause 15 it was incumbent upon her to exercise reasonable diligence to look at the Pension Plan.

43. Father Moultrie's contention that he never represented that she was eligible for a pension plan at her interview was never challenged on cross-examination. His evidence that she was appointed by the Defendant's Board at the Minister's direction was corroborated by the Board's Minutes. Additionally, Clause 15 was a condition and not a warranty. The remedy for breach of a condition was a rescission of contract which the Plaintiff had not claimed and which was not pleaded.

44. The Defendant contended that a claim for restitution premised on unjust enrichment could not succeed unless the Defendant had benefitted or had in fact been enriched. Notwithstanding the Defendant's intention to return the sums deducted from the Plaintiff's salary which were purported to be contributions to the pension plan, the Plaintiff made no claim to the funds and had no intention to retain them.

45. The Plaintiff has not benefitted or been enriched by the sum paid by the Office of the Prime Minister to the Defendant. She failed to prove that it was paid as her compensation for having worked at the OPM.

46. During the trial, Father Moultrie could not confirm speaking with the Plaintiff outside of her interview for the position with the Defendant, although it could have been possible. During her interview, the issue of a pension was not discussed as such, it was never said to her that she was eligible for participation in the Defendant's pension scheme. He appointed the Plaintiff as the CEO and Director of the Defendant on the instruction of the then Prime Minister.

DECISION

HEARSAY

47. The Defendant submitted that various statements in the Plaintiff's witness statement be struck out as inadmissible hearsay or submission.

48. Hearsay evidence is not admissible in evidence unless it falls within the exceptions statutorily allowed in the Evidence Act, Chapter 65 of the Statute Laws of the Commonwealth of the Bahamas.

49. Section 39 of the Evidence Act states:-

(1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.

(2) Hearsay evidence may be admitted —

(b) ... where the knowledge, intention, motive, state of feeling, state of mind or state of body of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive, state of feeling, state of mind or state of body;

50. I accept that this subsection allows hearsay evidence to be admitted if the intention and knowledge of either of the parties was a fact in issue. As the court must determine what the intention and the knowledge of the parties were with regard to the Plaintiff's eligibility to participate in the pension scheme, any hearsay statement which speaks to that is admissible.

51. Upon a review of the objections made by the Defendant to various portions of the Plaintiff's witness statement I find as follows:-

i. Paragraph 42 – Admissible
ii. Second sentence of paragraph 47 – Inadmissible
iii. Last sentence of paragraph 52 – Inadmissible as it is a submission
iv. Paragraph 84 – The last sentence is inadmissible, the balance is admissible.
v. Paragraph 90 – Inadmissible as it is a submission.
vi. Paragraph 94 – The last sentence is inadmissible as hearsay which is not allowed within the exceptions.
vii. Paragraph 101 – The first sentence is inadmissible. The second sentence which speaks to what Fr. Moultrie said although hearsay is admissible as he is a

witness to the proceedings and able to be cross-examined on the same. The last sentence is inadmissible.

Those sentences ruled inadmissible are struck from the witness statement of the Plaintiff.

REFUND

52. The Defendant accepted that the Plaintiff is entitled to the refund of the funds paid to it by the Office of the Prime Minister to bridge her pension contributions which should have been paid had the Plaintiff continued in her employment with the Defendant.

53. This amount would only be returnable to the Plaintiff if I find that the contract was void-ab-initio and that the funds be restored to the Plaintiff.

54. The issues will be addressed individually. These are claims for breach of contract, misrepresentation and contractual warranty.

55. The crucial facts have been agreed as set out earlier in this judgment.

BREACH OF CONTRACT

56. The Plaintiff's case against the Defendant is primarily for a breach of her employment contract, specifically Clause 15 which states: -

> **"You are eligible for participation in the Board's occupational pension plan (the Plan). Subject (as agreed) to full re-imbursement of all sums paid out of the plan in respect of prior separation from the Board including contributions which would have been payable by you from 2012 to date of contract. All prior years' service (with the Board or with The Bahamas Government) will be taken into account and regarded as continuous service for the purpose of determining final pension entitlement."**

57. Clause 23 of the Contract is also an issue, which states: -

> **"You will be entitled to receive a 15% gratuity upon the successful completion of this contract. Any amounts paid by way of gratuity under this clause will be deducted from any lump-sum payment made pursuant to the pension plan."**

58. The Plaintiff contends that her acceptance of the employment offer was subject to her pension entitlement. She asserts that she made this clear to the then Prime Minister, Mr. Perry Christie and then Minister responsible for National Insurance, Mr. Shane Gibson.

59. The Merriam Webster dictionary defines "condition" as:

> **"a premise upon which the fulfillment of an agreement depends, a provision making the effect of a legal instrument contingent upon an uncertain event, something essential to the appearance or occurrence of something else"**

60. The Defendant contends that Clause 15 should be held to be void-ab-initio due to the Plaintiff's ineligibility to participate in the pension scheme. Its witnesses, who were members of its Board, as appointed by the aforementioned Minister, deny that they agreed to the payment of a pension for the Plaintiff. Unfortunately, neither of the parties were able to rely on the evidence of the former Prime Minister or Minister whom the Plaintiff claims she made the initial negotiations with.

61. Clause 15 was included in the final contract which was approved and executed by the Defendant. The Plaintiff performed as Director and Chief Executive of the Defendant on the basis of the executed contract. Moreover, the Board by resolution made during a meeting held on 4th June 2013, agreed to appoint the Plaintiff in those capacities. By executing this contract both the Defendant and Plaintiff accepted the terms of the contract.

62. Both parties have accepted that based on the terms governing the operation of the Pension Scheme, employees on a fixed term contract are not eligible to participate in the Scheme

.

63. The court must then decide what is the effect of Clause 15 and whether implied in this Clause was a term that the Defendant was agreeing to arrange for the Plaintiff to participate in the Pension Scheme upon certain conditions regarding payment of the funds to bridge the pension contributions necessary to ensure that the Plaintiff had uninterrupted service, and if this term did exist whether it was breached resulting in a breach of the contract.

64. The law governing implied terms in a contract is succinctly set out in **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd 2015] UKSC 72 ("Marks and Spencer")** which I adopt. The case involved a tenant claiming that, under the terms of a lease, certain funds were impliedly owed to him upon termination of the lease. Lord Neuberger stated :-

> **"[15] As Lady Hale pointed out in Geys v Société Générale, London Branch [2012] UKSC 63, [2013] 1 All ER 1061, [2013] 1 AC 523(at para [55]), there are two types of contractual implied terms. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.**
>
> **[16] There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In The Moorcock (1889) 14 PD 64 at 68, [1886–90] All ER Rep 530, Bowen LJ observed that in all the cases where a term had been implied, 'it will be found that ... the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties**

must have intended that at all events it should have'. In Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592, [1918–19] All ER Rep 143, Scrutton LJ said that '[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract'. He added that a term would only be implied if 'it is such a term that it can confidently be said that if at the time the contract was being negotiated' the parties had been asked what would happen in a certain event, they would both have replied ' "Of course, so and so will happen; we did not trouble to say that; it is too clear"'. And in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 All ER 113, [1939] 2 KB 206, MacKinnon LJ observed that, '[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'. Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied 'if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!" '.

[17] Support for the notion that a term will only be implied if it satisfies the test of business necessity is to be found in a number of observations made in the House of Lords. Notable examples included Lord Pearson (with whom Lord Guest and Lord Diplock agreed) in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, [1973] 1 WLR 601, and Lord Wilberforce, Lord Cross, Lord Salmon and Lord Edmund-Davies in Liverpool City Council v Irwin [1976] 2 All ER 39, 47, 50 and 53, [1977] AC 239, 258, 262 and 266 respectively. More recently, the test of 'necessary to give business efficacy' to the contract in issue was mentioned by Lady Hale in Geys at para [55] and by Lord Carnwath in Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] 2 WLR 1593(at para [112]).

[18] In the Privy Council case of BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20 at 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:

> '[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

[19] In Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 at 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which 'distil[led] the essence of much learning on implied terms' but whose 'simplicity could be almost misleading'. Sir Thomas then explained that it was 'difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue', because 'it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision', or indeed the parties might suspect that 'they are unlikely to agree on what is to happen in a certain ... eventuality' and 'may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur'. Sir Thomas went on to say this (at 482):

> **'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in Reigate, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ...'**
>
> **[20] Sir Thomas's approach in Philips was consistent with his reasoning, as Bingham LJ in the earlier case Atkins International HA v Islamic Republic of Iran Shipping Lines, The APJ Priti [1987] 2 Lloyd's Rep 37 at 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were 'because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter' (emphasis added)."**

65. Accordingly, in order to determine whether there was an implied term in the contract as set out aforesaid, the documents and surrounding circumstances must be reviewed to ascertain the intention of the parties. The test as stated in **Marks and Spencer** is summarized as:-

> **" (1) it ("the implied term") must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."**

66. I find that it was reasonable and equitable to accept that the Defendant by agreeing the expressed terms of the contract agreed to perform what was necessary to ensure that the Plaintiff would be able to participate in the Pension Scheme. In fact, Clause 15 set out the conditions which the Plaintiff had to fulfill in order for her to participate. This was an implied term which meets the requirements set out in Mark and Spencer.

67. In determining whether the implied term was to give business efficacy to the contract, the Plaintiff maintained that the pension scheme was an important part of her remuneration package as it was necessary to assist with her medical condition and hence it was a part of the package negotiated. The question which must be addressed was whether the contract would be fully effective without it. It is clear that the contract would not have been fully effective without the implied term as the Plaintiff would not have received the remuneration agreed. The Plaintiff worked the term of the contract, and the pension contributions were duly deducted from her salary but she did not receive the benefit promised. The contract would not have been completely performed.

68. I also accept that the implied term was capable of clear expression and did not contradict any express term of the contract. Accordingly I find that there was a implied

term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme. This did not happen.

69. I accept therefore that there was a breach of the implied term and consequently a breach of the contract.

70. The court must now decide whether the breach as a result of the admitted mutual mistake is non-actionable.

71. Having reviewed the submissions of the Defendant and the Plaintiff on this issue, I accept that the mistake did not render the performance of the contract impossible. Further, I do not accept that the non-existence of the state of affairs contemplated could not be attributed to the fault of the Defendant. I accept that it was their plan. They would or should have been cognizant of the terms contained therein. The contract was performed albeit the Defendant did not comply with one of its obligations.

72. Despite the submissions that the initial negotiations or the negotiations in general were not conducted by the Defendant and that they did not agree the terms of the contract, I find it unacceptable that an entity as sophisticated or as complex or as highly developed in public financial services and which deals inter alia with protecting and safeguarding funds for the Bahamian public would submit that they signed a contract that they had no part in negotiating or would submit that they did not accept their Minister was negotiating on their behalf.

73. I do not accept this submission at all. The Plaintiff was interviewed by the Board. They reviewed the terms of the contract. They approved the terms of the contract. They had discussed the importance of the pension plan to the Plaintiff and they signed it. It was their contract.

74. Further, I accept that there was an at length discussion with the then Financial Controller who accepted that it was not a question of whether the Plaintiff would get a pension but who would pay for it. The evidence showed that the Pension Scheme could have been amended to accommodate the Plaintiff or the Defendant could pay it themselves. Even though the Defendant raised the **Browne v Dunn** defence, the evidence was agreed and the court is able to make any findings based on evidence before it.

75. I also accept that the National Insurance Act mandates that the Defendant obtain the approval of the Minister responsible before employing a senior executive such as a Director like the Plaintiff. I am satisfied that with the initial approval and negotiations of the contract between the Plaintiff and the then Minister and the then Prime Minister and the subsequent approval by the Board, the Board was ensuring that it was in compliance with the statutory restrictions on hiring of senior executives. They already had the Minister and the Prime Minister's approval and they approved the contract.

76. The facts of this case do not satisfy the requirements as established in **Great Peace** in order to find that contract was void for common mistake.

77. I find therefore that the Defendant breached the implied term in the contract and the Plaintiff is entitled to damages flowing from that breach.

MISREPRESENTATION

78. The Plaintiff contends that the Defendant misrepresented the issue of the pension and/or that the Board made a clear, factual warranty that she was entitled to be a part of the Scheme. I accept that a warranty is a term of a contract which gives rise upon a breach of the term to a claim for damages but does not enable the injured party to terminate the contract. Further a warranty can be a term which is collateral to the main purpose of the contract.

79. In **Quality Business Centre Limited v Anthony Munnings and another [2020] 1 BHS J. No. 14**, Charles J stated the following in relation to misrepresentations made for the inducement of a contract.

> **"36 Generally, where a plaintiff argues that a defendant has made a misrepresentation, it is for the plaintiff to prove that the misrepresentation induced him [the plaintiff] to enter into the contract.**

80. The Plaintiff alleges that the Defendant misrepresented to her that she was eligible to participate in the Pension Scheme. She alleged that the misrepresentation was either negligent or innocent, and it would entitle her to benefit from the pension scheme at the completion of her employment contract. It was on this representation that she entered into the contract with the Defendant.

81. In 2016, the Plaintiff was advised that as her contract had ended her pension entitlement was being calculated. The Plaintiff exercised the option to receive regular monthly payments. She was also advised that she would receive a 15% gratuity which would be deducted from her pension benefit once it was finalized. The Plaintiff maintains that the gratuity which she received could not be deducted as she did not opt for a lump sum payment, only a regular monthly payment. Despite this, the Plaintiff relied on this letter as corroborating the representation made to her.

82. Upon a review of all of the evidence I accept that the Defendant through the negotiations, the contract itself and the subsequent discussions and correspondence represented to the Plaintiff that she would be entitled to participate in the Scheme and obtain a pension benefit, which she did not get.

83. Both parties were under the mistaken belief at the time of the creation of the contract that the Plaintiff would be entitled to participate but it was subsequently discovered that the plan was not available to fixed term employees like the Plaintiff. The Plaintiff relied on this representation as an inducement to enter in the contract. She did not receive the benefit.

84. I find therefore that there was a negligent misrepresentation by the Defendant as the Defendant was the only person to determine whether the Plaintiff could participate or not and by its failure to ascertain from its own records the accurate position the Plaintiff was

led to believe that she could. They did not review or check the plan which was their document and signed the contract nevertheless.

85. I do not accept that the responsibility was the Plaintiff's as she had drafted Clause 15. She would not have been privy to the terms of the Scheme which its Financial Controller had stated had been recently amended. I find that the fact of her drafting the Clause supported the importance of the pension to her.

86. Based on this, the Plaintiff has proven on a balance of probability that the Defendant negligently misrepresented to her that she could participate in the Pension Scheme as an inducement to have her enter the contract. They further accepted her monthly pension contributions as further evidence of their belief in their representation.

87. The Plaintiff is entitled to damages as an alternative claim to her claim for the breach of contract.

CONTRACTUAL WARRANTY

88. The warranty in this case being relied on is an implied one, which is valid iff it can be shown that it was given during the negotiations to complete and execute the Contract.

89. As held above, I accept the evidence of the Plaintiff that she and the Defendant discussed her receiving a pension which resulted in her drafting Clause 15 which was accepted by the Defendant and which led her to accept the Defendant's offer to be its Director and Chief Executive and caused her to make the monthly payments of $713.44 for a total of $25,683.84 in reliance on the agreement to provide her with a pension benefit.

90. The measure of damages available to the Plaintiff would be to compensate her for her loss suffered from the breach of the implied term of the contract or alternatively for the negligent misrepresentation and to put her in the position she would have been in if the breach had not occurred.

91. If the breach had not occurred she would have received her pension monthly payments as she opted to.

92. The Plaintiff is entitled to the monthly payments of $8,206.58 as chosen by her in the options offered to her as compensation for the breach by the Defendant as proven.

93. I accept that the wording of the contract is clear and deductions from the gratuity paid could only be made from a lump sum payment. I am not aware if the Scheme gives the Defendant any right to deduct it except as set out in the contract and even so the Plaintiff was not a part of the Scheme for it to bind her.

94. In order to be so entitled, the payments forwarded to the Defendant from the Office of the Prime Minister would remain with the Defendant which I order.

CONCLUSION

95. The Plaintiff is entitled to damages in the monthly sum of $8,206.58 from the date of the termination of her contract and payable as determined under the Pension Scheme.

96. The Plaintiff is entitled to interest at the statutory rate from the date of judgment to the date of payment.

97. The Plaintiff is entitled to her costs of this action certified for two counsel to be taxed if not agreed.

Dated this 28th day of April, 2023

Hon. Justice G. Diane Stewart