COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 115 of 2023

B E T W E E N

THE NATIONAL INSURANCE BOARD

Appellant

AND

ROWENA BETHEL

Respondent

BEFORE: **The Honourable Mr. Justice Evans, JA**
The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mrs. Krystal D. Rolle, KC with Ms. Kendrea Demeritte, Counsel for the Appellant**

Mr. Frederick Smith KC with him Mrs. Kandice Maycock-Swain, Counsel for the Respondent

DATES: **20 November 2023; 29 February 2024**

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Civil appeal – Contractual employee - Eligibility to participate in Pension Plan – Pension benefits – Breach of contract – Breach of an implied term - Misrepresentation – Breach of warranty – Compensatory damages – Common mistake – Severance of a clause from a contract – Importance of proper pleadings

The respondent was the Director and Chief Executive of the appellant. The appellant has a Pension Plan for its full-time and permanent employees. The respondent was a contractual officer. Her contract, however, included a clause which provided that she was eligible to participate in the Pension Plan. This clause was included following negotiations between the respondent and the then Prime Minister and then Minister with responsibility for the National Insurance Board. Her contract also contained a clause that if there is a conflict between the provisions of the contract and any other document issued by the appellant the provisions of the contract shall prevail.

The respondent opted to participate in the Pension Plan and monthly deductions were made from her salary for payment into the plan. At the expiration of the contract, the parties mutually agreed not to renew the contract. The appellant wrote to the respondent to advise that her pension benefit

was being calculated. Two months later the appellant advised the respondent that there were two options she could choose from to receive her pension payments: 1) she could receive a higher monthly pension and no lump sum payment or 2) she could receive a lower monthly pension and a lump sum payment. The respondent opted for the higher pension payment. The following month the appellant advised the respondent that she was not eligible to participate in the Pension Plan as she was a contractual employee. The appellant accepts that the respondent had not been made aware that she would not be entitled to a pension as she was on a fixed term contract.

As a result of the appellant's position, the respondent brought an action in the court below claiming breach of contract, breach of warranty, misrepresentation and restitution. The trial judge found that the respondent was entitled to damages for breach of contract and/or negligent misrepresentation. The respondent was also awarded interest at the statutory rate as well as costs. The appellant now appeals that decision.

Held: appeal dismissed on grounds 1 – 19 and 21; allowed on ground 20. Costs of this appeal and in the court below are the respondents, certified fit for two counsel, to be taxed if not agreed.

Common mistakes do not lead to invalidity of a contract unless the mistake is fundamental to the identity of the contract. As a general rule, the court will not remake a contract and, to strike out one term and leave the rest in operation is remaking the contract. If it were possible to sever a single clause for reason of common mistake, that would totally subvert the rule that a mistake has to be fundamental to the subject matter of the contract. The criteria required to establish common mistake was absent, there could be no vitiation of the contract on this basis.

The court below found that: it was an implied term of the contract that the appellant had agreed to arrange for the respondent to participate in the Pension Plan. That implied term was capable of clear expression and did not contradict any express terms of the contract. A breach of this implied term resulted in a breach of the contract. There is no reason to set aside the decision of the learned judge.

The respondent relied on contractual misrepresentation. In addition to her findings relative to the respondent's contract, the judge below found as a fact that the appellant was liable based on the evidence of the respondent with respect to the representations made to her by the Government Officials. An appellate court is slow to disturb findings of fact unless they are plainly wrong. On the evidence, this Court cannot say that those findings were plainly wrong.

It is common ground that an award of damages for breach of contract and misrepresentation is compensatory in nature. The learned judge did not err by granting the respondent compensation for breach of contract as the respondent was entitled to damages for the breach.

Bahamasair Holdings Ltd. v Messier Dowty Inc. [2018] UKPC 25 considered
Bell v Lever Brothers [1932] AC 161 mentioned
*BP Refinery (Westernport) Pty Ltd v President Councilors and Ratepayers of the Shire of Hastings (*1977) 52 ALJR 20 considered
Clemenza Ltd and anor v The Attorney General of The Bahamas & anor. SCCivApp. No. 28 of 2022 considered

Great Peace Shipping Ltd v Tsavliris (International) Ltd [2002] EWCA Civ 1407 considered
Kent County Council v Kingsway Investments (Kent) Ltd; Kent County Council v Kenworthy [1970] 1 All ER 70 mentioned
Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2015] UKSC 72 considered
Nazir Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 considered
Tillman v Egon Zehnder Ltd [2019] UKSC 32 mentioned
Wilfred P Elrington v Progresso Heights Limited [2024] CCJ 4 (AJ) BZ considered

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JUDGMENT

Judgment delivered by the Honourable Madam Justice Charles, JA:

Introduction

1. The appellant ("NIB") is a statutory body charged with administering the national insurance social security programme in The Bahamas. The respondent ("Ms. Bethel") is a Counsel and Attorney of the Supreme Court of The Bahamas.

2. By contract of employment dated 31 July 2013, NIB engaged Ms. Bethel as its Director and Chief Executive for a fixed term of three years ("the Contract"). NIB has an occupational pension plan ("the Pension Plan") for its full-time and permanent employees. The Pension Plan excludes contractual employees. However, Ms. Bethel's Contract included a clause (Clause 15) that she is eligible to participate in the Pension Plan. During the term of her employment, she participated in the Pension Plan and NIB deducted a monthly sum from her salary by way of contributions to the Plan.

3. On 2 July 2016, Ms. Bethel's Contract came to an end, and she demitted office. Thereafter, NIB determined that she was not eligible to participate in the Pension Plan by reason of her fixed term of employment and advised her of such. NIB accepts that Ms. Bethel had not previously been made aware at any time that, because of the fact that she was on a fixed term contract, she would not be entitled to a pension.

4. Ms. Bethel brought a claim against NIB for breach of contract, breach of warranty, misrepresentation and restitution.

5. NIB agreed that the monthly deductions of $713.44 for three years are owing to Ms. Bethel but denied her claim for breach of contract, breach of warranty and misrepresentation.

6. In the court below, Stewart J ("the learned judge") found in Ms. Bethel's favour and awarded her damages for breach of the implied term of the contract and misrepresentation being the sum of $8,206.58 monthly from the date that Ms. Bethel's contract ended.

7. NIB has now appealed the decision of the learned judge on a multiplicity of grounds which challenge the learned judge's findings and seek to identify numerous alleged errors of law and fact made by the learned judge.

Factual background

8. In January 1985, NIB established a Pension Plan making provision for a pension for certain of its employees after retirement from service. Clause 1.10 of the Pension Plan provides that eligible employee or employee means:

> **"1.10 …any person employed on a regular, full-time, permanent basis by the Board, excluding individuals employed on a fixed term contract."**

9. Prior to Ms. Bethel's engagement as NIB's Director and Chief Executive, she had several meetings with the then Honourable Prime Minister, Mr. Perry Christie and the then Minister responsible for National Insurance, Mr. Shane Gibson (together and for convenience, "the Government Officials"). As she suffers from severe rheumatoid arthritis, a job that provides for pension benefits appealed to her and she discussed it with the Government Officials. They assured her that a pension would be made available to her. She drafted her own contract using a precedent which Minister Gibson provided to her. It replicated the Pension Plan of her predecessor, Mr. Algernon Cargill. Mr. Lennox McCartney who preceded Mr. Cargill also had a similar pension provision in his contract of employment. The Pension Plan was an inducement to her given her health issues. The Contract underwent a cycle of vetting, also by members of the Board of NIB, before it was executed.

10. The dispute in this matter revolves around Clause 15 which provides that Ms. Bethel is eligible for participation in the Pension Plan. Clause 15 expressly states:

> **"Occupational Pension Plan**
> **15. <u>You are eligible for participation in the Board's occupational pension plan (the Plan)</u>. 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' of service (with the Board or with The Bahamas Government) will be taken into account and regarded as continuous service for the purposes of determining final pension entitlement." [Emphasis added]**

11. Clause 23 provides for termination gratuity. It states:

> **"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."**

12. Clause 24 provided for the supremacy of the terms of the Contract over any other document issued by the Board. It provides:

> **"In the event any conflict arises between the 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." [Emphasis added]**

13. During the currency of Ms. Bethel's employment, NIB deducted the monthly sum of $713.44 from her salary as her contributions to the Pension Plan.

14. On 2 July 2016, Ms. Bethel's tenure came to an end and, by mutual agreement, NIB did not renew her Contract.

15. On or about 13 July 2016, NIB wrote to Ms. Bethel confirming that her employment with NIB had ceased and her pension benefit was being calculated. The letter also stated that the sum of $77,051.52 would be paid in respect of the gratuity (which was paid on 2 August 2016). The letter continued:

> **"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." [Emphasis added]**

16. On 20 September 2016, NIB again wrote to Ms. Bethel. The letter set out two options as to how she would receive her pension benefit. Those options were:

i. To take $8,206.58 or thereabouts by way of regular monthly payments; or

ii. To take a $282,912.87 lump sum payment and thereafter to receive a reduced monthly payment of about $6,565.27.

17. On 28 September 2016, Ms. Bethel executed a document entitled "Employee's Pension Plan Schedule of Options". She opted not to receive a lump sum payment but rather a higher monthly payment. In other words, she chose Option (i).

18. By 22 October 2016, Ms. Bethel had not received any pension payments. She wrote to NIB expressing dissatisfaction about that fact.

19. On 26 October 2016, NIB wrote to Ms. Bethel stating that she was not eligible to participate in the Pension Plan because she was a contractual employee. NIB accepts that Ms. Bethel had not previously been made aware at any time that, because of the fact that she was on a fixed term contract, she would not be entitled to a pension.

20. It is common ground that Ms. Bethel was not eligible to participate in the Pension Plan which is intended for permanent employees.

Judgment in the court below

21. In a well-reasoned judgment, the learned judge found that Ms. Bethel is entitled to damages for breach of contract and/or negligent misrepresentation in the monthly sum of $8,206.58 from the date of the termination of her contract and payable as determined under the Pension Plan. Ms. Bethel was also awarded interest at the statutory rate as well as costs in the action certified fit for two counsel. In coming to this conclusion, the learned judge identified the main issues to be determined namely: (i) breach of contract; (ii) misrepresentation and (iii) contractual warranty.

22. After hearing oral evidence and extensive submissions from both sides, on the issue of breach of contract, the learned judge acknowledged that both parties have accepted that based on the terms governing the operation of the Pension Plan, employees on a fixed term contract are not eligible to participate in the Pension Plan. At paragraphs 65 and 66, she stated:

> **"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…**
>
> **66. <u>I find that it was reasonable and equitable to accept that the Defendant by agreeing the expressed (sic) terms of the contract agreed to perform what was necessary to ensure that the Plaintiff would be able to participate in the Pension Scheme.</u> In fact, Clause 15 set (sic) out the conditions which the Plaintiff had to fulfil in order for her to participate. This was an implied term which meets the requirements set out in Mark and Spencer." [Emphasis added]**

23. At paragraph 68, the learned judge continued:

> **"68. I also accept that the implied term was capable of clear expression and did not contradict any express term of the contract. <u>Accordingly, I find that there was an implied term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme.</u> This did not happen." [Emphasis added]**

24. At paragraph 69, she accepted that there was a breach of the implied term and consequently a breach of the contract.

25. The learned judge then proceeded to address the issue of whether the breach as a result of the admitted mutual mistake was non-actionable and, at paragraph 71, she accepted that the mistake did not render the performance of the contract impossible. She stated:

> **"71. …. Further, <u>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.</u>" [Emphasis added]**

26. On the issue of negligent misrepresentation, the learned judge stated at paragraph 83 that:

> **"83.. <u>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</u>. The Plaintiff relied on this representation as an inducement to enter in the contract. She did not receive the benefit." [Emphasis added]**

27. She subsequently found, at paragraph 84, that there was negligent misrepresentation by NIB because it was the only person/entity to determine whether Ms. Bethel could participate or not in the Pension Plan and its failure to ascertain from its own records Ms. Bethel's accurate position led her to believe that she could participate. Further, the learned judge did not accept that the responsibility fell on Ms. Bethel because she drafted Clause 15. According to the learned judge, Ms. Bethel would not have been privy to the terms of the Pension Plan. Accordingly, Ms. Bethel is entitled to damages as an alternative claim to her claim for breach of contract.

28. With respect to contractual warranty, the learned judge focused on it at paragraphs 88 to 89 of the Judgment. She stated:

> **"88. The warranty in this case being relied on is an implied one, which is valid if 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."**

29. Then, at paragraph 92, the learned judge found that Ms. Bethel is entitled to monthly payments of $8,206.58 which she opted for.

The grounds of appeal

30. In its Notice of Appeal Motion filed on 9 June 2023, NIB sought to impugn the Judgment on twenty one (21) grounds which may be subsumed under these broad heads namely:

(1) Grounds 1 to 4 - Claim for breach of contract;

(2) Grounds 5 to 9 - Claim for breach of an implied term;

(3) Grounds 10 to 16 - Claim for misrepresentation;

(4) Grounds 17 to 18 - Claim for breach of warranty and;

(5) Grounds 19 to 20 - Award of compensatory damages.

(6) Ground 21 – Overarching ground.

Discussion

Grounds 1 to 4 - Claim for breach of contract

31. Ms. Bethel's claim for breach of contract is premised on the allegation that NIB breached Clause 15 of the Contract by failing to provide her with the pension benefits to which she is entitled. In her Re-Amended Statement of Claim, Ms. Bethel pleaded that:

> **"24. In the circumstances pleaded above, the fact that the Plaintiff is not in fact eligible for the Scheme means that the Defendant has breached the following terms of the Contract:**
>
> > **24.1 The implied term pleaded above that the Defendant will facilitate the Claimant's (sic) membership of the Scheme; and**
> >
> > **24.2 Further or in the alternative, the warranty at Clause 15 of the Contract that the Plaintiff was eligible for the Scheme."**

32. NIB, in its Amended Defence, pleaded the following:

> **"7. Further, as regards Paragraph 5.2 of the Plaintiff's Statement of Claim, the Defendant will aver that Clause 1.10 of the Pension Plan provides, "ELIGIBLE EMPLOYEE OR EMPLOYEE" "Shall mean any person employed on a regular, full-time, permanent basis by the Board, excluding individuals employed on fixed term contract.**
>
> **8. As regards Paragraph 5.2 of the Plaintiff's Statement of Claim, the Defendant repeats Paragraph 3 hereof and denies that the Plaintiff, having been employed on the Fixed Term Employment Contract as aforesaid, was entitled to participate in the pension scheme.**

> **9. The Defendant will aver that both the Plaintiff and the Defendant at the time of execution of the Fixed Term Employment Contract and the inclusion of Clause 15 thereof, mistakenly assumed that the Plaintiff was eligible to participate in the Pension Plan.**
>
> **10. By reason of matters aforesaid, the Defendant will aver that Clause 15 of the Fixed Term Employment Contract is severable from the remainder thereof and that the said provision is Null and Void Ab Initio."**
> **[Emphasis added]**

33. In her Reply, Ms. Bethel pleaded at paragraph 9 (1) that:

> **"9. …**
>
> **(1) Save that the Plaintiff cannot plead to the Defendant's state of mind, the Plaintiff admits that the parties entered into the Contract on the mistaken basis that the Plaintiff would be able to participate in the Scheme."**

34. In summary, Grounds 1 to 4 raise the general issue of the legal effect of Clause 15 of the Contract in light of the parties' mutual mistaken assumption regarding Ms. Bethel's eligibility to participate in the Pension Plan.

35. Mrs. Rolle KC, appearing as Counsel for NIB, argues that the learned judge erred by failing to give due consideration to the issue as to the legal effect of Clause 15 in light of the parties' mutual acceptance of its impossibility of performance and the parties' mutually accepted position of their mistake at the time of contracting as to the relevant state of affairs relative to Ms. Bethel's eligibility. She argues further that the learned judge similarly failed to consider and to hold that Clause 15 in the circumstances was null and void and severable from the Contract.

36. Mr. Smith KC, appearing as Counsel for Ms. Bethel, contends that it is misleading for NIB to assert that the parties had a mutual acceptance of the impossibility of performance of Clause 15 when the evidence showed otherwise.

37. I agree with Counsel for Ms. Bethel that at no time prior to this dispute did the parties ever agree that Clause 15 was incapable of performance or impossible to perform. In fact, as

Counsel for Ms. Bethel argued, and which I accept, the parties mutually understood and accepted the following:

> 1) a conflict existed between the first sentence of Clause 15 and the provisions in the Pension Plan; a fact that NIB drew to Ms. Bethel's attention after the Contract had been executed and was being performed by Ms. Bethel;
>
> 2) by Clause 15, NIB intended that Ms. Bethel should have a pension as was mutually understood and agreed, once she satisfied the obligations imposed on her as specified in Clause 15; and
>
> 3) By Clause 24, NIB would resolve the conflict between the language in the two instruments in Ms. Bethel's favour. This is demonstrated by the fact that NIB continued to make monthly deductions for pension from Ms. Bethel's salary and had her complete pension related documents even after discovery of the conflict. Further, NIB invited Ms. Bethel to apply for the pension once her contract ended and its actions in processing that application proved that NIB was committed to paying the pension and honouring its obligations under Clause 15.

38. To categorically assert that Clause 15 was "*impossible"* to perform or "*incapable*" of performance is erroneous. Although it may be true, as Ms. Bethel argues, that (contrary to the warranty at Clause 15 of the Contract) she was not eligible to join the Pension Plan, NIB always acknowledged that it had available options to resolve the issue including:

> 1) enforcing Clause 24 of the Contract which expressly provides that in the event of any conflict between the Contract and any other document, the provisions in the Contract shall prevail;
>
> 2) amending the Pension Plan; and
>
> 3) providing the same benefit package that is the same as the Pension Plan directly from NIB's fund as they had done for Mr. McCartney, a former Director.

39. NIB asserts that there is no evidence for the learned judge to find that the above options were available to resolve the dispute. Respectfully, this argument is tenuous. In light of the learned judge's findings specifically at paragraphs 66 and 74 of the Judgment, she must have accepted Ms. Bethel's evidence (Record of Appeal, Volume 2 at pp. 723 -725, page 758, lines 16 to page 761, line 22) as well as the internal memorandum from the Financial Controller to the then Chairman (Record of Appeal, Volume 1, Tab. 8 at p. 296), a letter dated 26 October 2016 from the then chairman to Ms. Bethel (Record of Appeal, Volume 1, Tab. 8 at p. 348), the cross examination of Father Moultrie (Record of Appeal, Volume 2, pages 723-724) and her own findings (Record of Appeal, Volume 2 at page 592) that there were available options open to NIB to resolve the issue. She was also entitled (which she did) to reject even the unchallenged evidence of Mrs. Maynard, Deputy Director and Legal Officer of NIB if she found it implausible and inconsistent with the other evidence before her. She stated:

> **"66. I find that it was reasonable and equitable to accept that the Defendant by agreeing the expressed (sic) 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 fulfil in order for her to participate…**
>
> **…**
>
> **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." [Emphasis added]**

40. With respect to the legal effect of Clause 15, NIB further submits that, consequent upon both parties' mutually agreed common misunderstanding of the state of affairs and mutually agreed common mistake as to Ms. Bethel's eligibility, when the learned judge expressed, at paragraph 71, that **"the mistake did not render the performance of the contract impossible",** she was wrong because she failed to consider and determine whether Clause 15 itself as distinct from the Contract as a whole was null and void *ab initio* and whether

Clause 15 was severable from the Contract. NIB criticizes the learned judge for making a determination on whether the Contract as a whole was impossible of performance which NIB maintains was not their pleaded case: see paragraph 10 of NIB's Amended Defence.

41. Additionally, NIB asserts that, in determining the issue of common mistake, the learned judge determined that the third criteria as laid down in the case of **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407 (**"the non-existence of the state of affairs must not be attributable to the fault of either party")** was not met by virtue of her finding that **"I do not accept that the non-existence of the state of affairs contemplated could not be attributed to the fault of the Defendant."** NIB argues that this was an error because, for the third **Great Peace** criteria to be operative, Ms. Bethel would have had to make such an assertion, produce evidence in support and then the learned judge would have had to find that NIB caused Ms. Bethel's ineligibility. NIB contends that since there was no pleaded assertion, evidence, argument or finding that NIB had caused Ms. Bethel's ineligibility any determination that the third **Great Peace** criteria was operative and/or NIB had caused Ms. Bethel's ineligibility was wrong in fact and in law. NIB also criticizes the learned judge for not making a determination on the second **Great Peace** criteria namely there must not be a warranty by either party that such state of affairs exists. In any event, says NIB, there was no warranty as to Ms. Bethel's eligibility from them (NIB).

42. In the court below, the learned judge comprehensively addressed the issue that Clause 15 of the Contract was void for mistake at paragraphs 70-77. At paragraph 71, she accepted that the mistake did not render the performance of the contract impossible. In addition, she did not accept that the non-existence of the state of affairs contemplated could not be attributed to the fault of NIB. She continued:

> **"71. …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 (NIB) did not comply with one of its obligations."**

43. Following, the learned judge stated:

> **"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, <u>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</u>**

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." [Emphasis added]

44. In my view, NIB is unable to demonstrate to us how the learned judge's application of the third **Great Peace** criteria was wrong in law. Indeed, as Counsel for Ms. Bethel postulates, the learned judge's application of the third **Great Peace** criteria was both conventional and correct. Specifically, NIB contends that the learned judge overlooked the possibility of severing Clause 15 from the Contract when she could have treated that clause as void and the rest of the Contract valid. Counsel for Ms. Bethel properly argues that no such option was available to the learned judge since common mistake (where the mistake is shared by both parties, is fundamental and directly affects the basic definition of what the parties are contracting for) will render the **whole** contract void and **not a single clause.**

45. It is trite law that common mistakes do not lead to invalidity of a contract unless the mistake is fundamental to the identity of the contract. Put another way, if the mistake is not fundamental to the contract, the contract will not be void: **Bell v Lever Brothers** [1932] AC 161 at pp 218 and 236).

46. As a general rule, the court will not remake a contract and, to strike out one term and leave the rest in operation is remaking the contract. So it is not surprising that there can only be severance of a contract in exceptional circumstances: per Lord Reid in **Kent County Council v Kingsway Investments (Kent) Ltd; Kent County Council v Kenworthy** [1970] 1 All ER 70 at 75. NIB has shown no exceptional circumstances. In addition, if it were possible to sever a single clause for reason of common mistake, that would totally subvert the rule that a mistake has to be fundamental to the subject matter of the contract. In other words, it would change the rule to being that the mistake had to be fundamental to only a particular clause of the contract.

47. Furthermore, since common mistake renders a contract void and a contract cannot be partially void, severing Clause 15 from the remainder of the Contract would totally transform the whole doctrine to permit individual clauses to be vulnerable to common mistake. Unsurprisingly, NIB has not provided a single authority to substantiate their assertion that once a contract has been completely performed by both parties except as to one clause, that one clause which provides for compensation could be severed from the remainder of the contract.

48. The argument by NIB that the learned judge could have availed herself of the principle of severance is tenuous. The principle of severance exists for cases of illegality, not common mistake: **Tillman v Egon Zehnder Ltd** [2019] UKSC 32, [2019] 3 W.L.R. 245. Furthermore, it was never a contention of Ms. Bethel that the doctrine of severance, when properly understood, applies to her case.

49. Additionally, NIB contends that the learned judge was wrong to find that Ms. Bethel's inability to join the Pension Plan was **"attributable to the fault of the Defendant".** NIB is

unable to produce any authority to substantiate the submission it made at paragraph 38 of its Written Submission that:

> **"38. This third Great Peace criteria contemplates a scenario where one of the parties has in fact caused or created the non-existence of the relevant state of affairs and then seeks to rely on its non-existence."**

50. Counsel for Ms. Bethel argues that this bare assertion is plainly wrong however, in that it is possible for a party to be at fault for a contractual provision providing for a state of affairs that does not exist without the party having prevented the state of affairs existing itself. In support, he relies on the well-known treatise **Chitty on Contracts**, 35th Ed. para 9-039 which essentially states that where one party is in a better position than the other to know the truth such that they are at fault for not finding out the true position, the contract will not be void for mistake. I agree.

51. I also agree with Counsel for Ms. Bethel that, even if the learned judge was wrong to find that the third **Great Peace** criteria was absent, the second **("there must be no warranty by either party that that state of affairs exists")**, fourth **("the non-existence of the state of affairs must render performance of the contract impossible")** and fifth **("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"** criteria are also absent. Therefore, there could be no vitiation of the Contract for common mistake.

52. Further, NIB submits that there is a clear and obvious distinction between "*causing"* the non-existence of the state of affairs and having *"knowledge"* of it and it was palpable that the learned judge considered the latter when she stated **"I accept that it was their plan. They would or should have been cognizant of the terms contained therein":** paragraph 71. NIB further argues that what NIB knew or ought to have known would have been germane to the negligence claim (assuming that it was advanced on that basis) and not to the third **Great Peace** criteria of what NIB actually caused. Consequently, the learned judge erred in her application of the third **Great Peace** criteria by conflating the issue of whether NIB caused Ms. Bethel's ineligibility with the discrete issue of whether NIB had knowledge of Ms. Bethel's ineligibility.

53. As I see it, it is NIB that has conflated the state of Ms. Bethel's knowledge at the time that the Contract was entered into with the state of her knowledge during these proceedings. It is trite law that the knowledge of both parties at the time a contract is entered into can be taken into account in the construction of a contract but the knowledge acquired by parties after is not a relevant

consideration: see **Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another** [2015] UKSC 72:

> **"27. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication…". [Emphasis added]**

54. Plainly, the learned judge concerned herself with the intention of the parties at the time the Contract was entered into, specifically at paragraph 65 of the Judgment where she said:

> "**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…".**

55. As Counsel for Ms. Bethel correctly alluded to, the fact that, during the course of the proceedings, Ms. Bethel accepted that the terms of the Pension Plan did not permit her enrolment was properly not considered as relevant by the learned judge to the construction of the Contract. To use such a fact in the construction of the Contract would have been wrong in law and defies common sense since the bargain struck by parties at a given point in time cannot be interpreted in the light of knowledge that they did not have at that time. Put simply, one must look at what was in the mind at the time that the Contract was entered into.

56. In the circumstances, these grounds lack merit and must fail.

Grounds 5 to 9 - Claim for breach of an implied term

57. Ms. Bethel pleaded that there was a term implied in the Contract that NIB will **"facilitate the Claimant's (sic) membership of the Scheme":** paragraph 24.1 of the Re-Amended Statement of Claim.

58. At paragraph 26 of its Amended Defence, NIB repeats paragraphs 3, 7, 8, 9 and 10 of their Defence. Those paragraphs raise two allegations namely (i) NIB denies that Ms. Bethel is entitled to a pension and to participate in the Pension Plan by reason of her three-year contractual employment and (ii) common mistake by both parties that Ms. Bethel was eligible to participate in the Pension Plan.

59. At paragraph 6 of Ms. Bethel's Reply, she pleaded the following:

> **"6. …**
>
> **(1) … The plaintiff's case (as stated above at paragraph 4(2) of this Reply) is that the Contract did create an obligation on the Defendant to facilitate participation in the Scheme …."**

60. On the law governing implied terms in a contract, the learned judge relied on the House of Lords case of **Marks and Spencer** and, more particularly, Lord Neuberger's endorsement of the test as expressed by Lord Simon in the Privy Council case of **BP Refinery (Westernport) Pty Ltd v President Councilors and Ratepayers of the Shire of Hastings** (1977) 52 ALJR 20 at 26:

> **"[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." [Emphasis added]**

61. In terms of implying a term into a contract, the legal principles are settled. In the Privy Council case of **Nazir Ali v Petroleum Company of Trinidad and Tobago** [2017] UKPC 2, Lord Hughes summarized it in this manner:

> **"7. …. It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept**

> **of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."**

62. NIB submits that the dispute concerns the learned judge's application of those principles specifically at conditions (1) and (2) of **Marks and Spencer**.

63. Fundamentally, the learned judge found that:

1) There was an implied term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme: paragraph 68 of the Judgment;

2) The implied term was capable of clear expression and did not contradict any express term of the contract: paragraph 68 of the Judgment; and

3) There was a breach by NIB of such implied term and consequently, a breach of the contract: paragraph 69.

64. Grounds 5 to 9 challenge these findings.

65. Ground 5 claims as follows:

> **"5. The Learned Judge having canvassed the authorities on when the Courts would imply a term into a contract then proceeded to find "that there was an implied term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme" and thereby erred in law firstly <u>by finding that the law would imply this term in circumstances where the mutual and repeated stated position of the parties was that Clause 15 was incapable of performance by reason of the mutually admitted ineligibility of the Respondent</u>." [Emphasis added]**

66. In my judgment, this ground has no merit since it conflates the state of Ms. Bethel's knowledge at the time of the Contract was entered into with the state of her knowledge during these proceedings. No useful purpose will be served by re-iterating what was already canvassed and determined: see paragraphs 34, 43 and 47-50 above.

67. Grounds 6 to 8 of the Notice of Appeal are as follows:

> **"6. … the Learned Judge erred in law by finding "that there was an implied term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme" (1) in circumstances where the Respondent had adduced no evidence at all that the Appellant was capable in fact or in law to arrange the Respondent's participation in the Pension Plan; (2) in circumstances where the evidence before the Court included legal advice to the Appellant that it could not arrange the Respondent's participation in the Pension Plan along with the Appellant's acceptance of this legal advice and (3) in circumstances where the Respondent had not suggested to the Appellant's witness on cross examination that the Appellant was capable of arranging the Respondent's participation in the Pension Plan and/or that the advice which the Appellant had received as to its inability to do so was wrong.**
>
> **7. …the Learned Judge in finding that "the implied term was capable of clear expression and did not contradict any express term of the contract" erred in law by failing to consider or to give proper (consideration) to the issue of whether the asserted implied term was inconsistent with the parties' mutually accepted position on the Respondent's ineligibility and the resultant impossibility of performance of the pension provision.**
>
> **8. …the Learned Judge erred in law in finding that the Appellant had breached such implied term as the Respondent's pleading did not plead as a fact that the Appellant was able to arrange the Respondent's participation in the Pension Plan and contained no particulars of the Appellant's asserted breach of the implied term such that the Learned Judge's finding of breach was made in the absence of any pleaded particulars as to the manner of such breach."**

68. Shortly put, NIB has failed to provide any basis to support its contention that these issues are relevant to the learned judge's findings in paragraph 68 that:

> **"68. … the implied term was capable of clear expression and did not contradict any express term of the contract… there was an implied term that the Defendant by Clause 15 had agreed to arrange for the Plaintiff to participate in the Pension Scheme…"**

69. Consequently, these grounds are lacking in merit.

70. Ground 9 provides as follows:

> **"9. … assuming without accepting that the obligation to arrange the Respondent's participation in the Pension Plan was a properly implied term, if and in so far as the Learned Judge made a finding of breach of the implied term when she stated, "This did not happen", such a finding is also an error of law since in so finding the Learned Judge must have accepted as a fact that the Appellant could in fact arrange for the Respondent's participation in the Pension Plan and had failed to do so and such finding would be plainly wrong as being unsupported by any evidence and inconsistent with the evidence which was that the Appellant could not facilitate the Respondent's participation in the Pension Plan."**

71. Ground 9 is untenable since NIB is unable to point out to any part of the learned judge's application of **Marks v Spencer** that it contends is wrong in law.

72. NIB also argues that the Court would never hold that a party is in breach of a contract where the performance of the relevant contractual term is impossible and/or beyond their control. Put differently, NIB argues that a party who contracts to give something he is or may be unable to deliver, is simply let off the hook because he is unable to deliver it. As Counsel for Ms. Bethel puts it **"if this were true it would completely destroy the purpose of the law of contract."** I agree.

73. Counsel for Ms. Bethel properly emphasized that NIB has dedicated considerable time to the issue of implied term on an inherently weak proposition that a party cannot validly contract

to do something that, unbeknown to itself at the time, it will be unable to do: paragraphs 51-86 and 91-97 of their written Submissions.

74. Grounds 5 to 9 lack merit and must fail.

75. In my judgment, there is no reason to set aside the decision of the learned judge. As she alluded to at paragraph 69 of her judgment there was a breach of the implied term and consequently a breach of contract. Ms. Bethel is therefore entitled to damages in the monthly sum of $8,206.58 from the date of the termination of the Contract and payable as determined under the Pension Scheme.

76. Having reached this conclusion, it is unnecessary to consider the alternative claim of misrepresentation. However, for the sake of completeness as well as the industry of counsel, I shall address it.

Grounds 10 to 16 – Claim for misrepresentation

77. At paragraph 27 to 29 of her Re-Amended Statement of Claim, Ms. Bethel alleges the following:

> **"27. The Plaintiff relied on the following representations in entering into the Contract (as the Defendant knew and/or intended):**
>
> **27.1 The representations about the remuneration the Plaintiff would receive referred to at paragraph 4 above; and**
>
> **27.2 Further or alternatively, clause 15 of the Contract, when provided to the Plaintiff in draft for her execution, amounted to a representation that the Plaintiff was eligible for the Scheme.**
>
> **28. The representations were false, and the Defendant was negligent as to their truth or falsity, given that the Defendant could with reasonable endeavours have discovered that the Plaintiff was not eligible for the Scheme.**
>
> **29. The Plaintiff's non-eligibility for the Scheme has caused the Plaintiff to suffer losses of $8,206.58 per month and the Plaintiff will**

continue to suffer those losses every month for the rest of her life…." [Emphasis added]

78. To this, NIB pleaded the following:

> **"27. As regards, the Plaintiff's claim for Misrepresentation as contained in Paragraphs 27, 27.1, 27.2, 28 and 29 of the Re-Amended Statement of Claim, the Defendant repeats Paragraphs 1 and 4 thereof."**

79. In summary, paragraphs 1 to 4 of its Re-Amended Defence state that NIB denies that Ms. Bethel is entitled to participate in its Pension Plan because she was employed on a fixed term contract. NIB also put Ms. Bethel to strict proof of her assertions. These are the pleadings which NIB had to meet.

80. First, NIB relies on an Opening Statement by Counsel for Ms. Bethel where he said:

> **"MR. SMITH: The third cause of action, my lady, is a misrepresentation. We say that there was a misrepresentation <u>before</u> she entered into the contract that she was eligible to be part of the scheme…."**

81. It cannot be disputed that Counsel for Ms. Bethel made this statement in his Opening Statement. However, submissions are not pleadings. Ms. Bethel's pleaded case is what NIB had to meet; not what Counsel opines in his Opening Submissions.

82. Second, NIB claims that the learned judge's finding that NIB had discussed the importance of the Pension Plan with Ms. Bethel is wrong in fact and in law because such finding is wholly inconsistent and irreconcilable with the evidence adduced at the trial. NIB submits that Ms. Bethel herself testified that all discussions relative to the importance of the Pension Plan were with the Government Officials prior to any discussion with NIB. Further, that one of their witnesses, Father Moultrie, the then Chairman of NIB, confirmed that the Board, during its interview with Ms. Bethel, never discussed the Pension Plan with her and Father Moultrie's evidence was not challenged during his cross-examination.

83. During extensive cross-examination of Ms. Bethel, she stated the following: See pages 714 to 720 and more specifically page 715 (lines 4-21) and page 720 (lines 3-4) of the Transcript of Proceedings dated 28 March 2022, Volume 2:

At page 715 (lines 4-12 and lines 19-21):

> **"The second meeting at which Father Moultrie was present, it was also Mr. Bernard Evans who was the Deputy Chair. He was in the (sic) that meeting as well. I (sic) the meeting that they called interview. <u>During that meeting, I raised the question notwithstanding what may be said otherwise, I raised the question again, because it was critical to me. I have a chronic medical condition. It was critical to me. I had raised it, and both indicated to me that I had nothing to worry about…. I raised the question of pension, and I was assured by both that I didn't have to be concerned about it. The pension was fine.</u>" [Emphasis added]**

At page 720 (lines 3-4):

> **"…They gave me assurances that I did not have to worry. The pension was fine…."**

84. In addition, at page 727 (lines 29-31) and page 728 (lines 1-9), she stated:

> **"My interactions with Father Moultrie, particularly at the sidelines in UN meeting in February 2017, he told me that I was, and he was surprised that they are still objecting to paying."**

85. Documentary evidence confirms that, following a meeting between Ms. Bethel and Father Moultrie and his Deputy on 27 and 28 May 2013, NIB met on 30 May 2013 and passed a Resolution appointing Ms. Bethel as its Director. The issue of pension was raised and both Father Moultrie and Mr. Evans assured her that she need not worry.

86. At paragraphs 6 and 7 of his Witness Statement, Father Moultrie emphatically stated that, at no time during the interview, did he and/or Mr. Evans say to Ms. Bethel that she was eligible to participate in NIB's Pension Plan. He reiterated that the issue of pension never arose.

87. During cross-examination, Father Moultrie was repeatedly challenged as to his poor recollection of events. On occasions, he stated that he did not recollect: see page 781(lines 21 -25); page 821 (lines 13-27); page 822, (lines 28-31); page 823 (lines 6 -30); page 825 (lines 15-24); page 826 (lines 15-27); page 831 (lines 13-19) while on other occasions, he simply denied that the issue of pensions was discussed with him or he knows anything about it: see, for example, page 783 (lines 29-31).

88. Under further cross-examination, Father Moultrie acknowledged that he was copied on communication for the finalization of the Contract and that the final version, which he

reviewed, was sent to him for execution. He then authorized Mr. Evans to sign the Contract which was done on 31 July 2013, nearly a month after Ms. Bethel assumed her duties as Director of NIB. Father Moultrie also confirmed that Ms. Bethel's remuneration and benefits were discussed and negotiated with the Minister and the Board was not part of the discussion relative to her benefits. At page 839 (lines 15-23) of the Transcript of Proceedings dated 31 March 2022, when questioned by Counsel for Ms. Bethel, Father Moultrie stated:

> **"Q: Sorry, what did you just say?**
>
> **A: We were not in the discussions about her benefits. Whatever she was entitled to, salaries and anything else that went along with it, we were not involved in it.**
>
> **Q: You would simply adopt whatever the Minister directed?**
>
> **A: Yes sir. I have the confidence in the Minister to do that."**

89. Evidence was also presented to show that section 40 of the National Insurance Act provides that a Director cannot be hired or fired, nor given any **pension** without the approval of the Minister who at the time was Minister Shane Gibson. This was highlighted by the learned judge in the Judgment. She stated:

> **"75. I also accept that the National Insurance Act mandates that the Defendant (NIB) 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." [Emphasis added]**

90. Counsel for Ms. Bethel correctly posited that Ground 10 of the Notice of Appeal ignores the learned judge's findings at paragraph 82 of the Judgment where she stated:

> **"82. …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…"**

91. Grounds 11 to 16 of the Notice of Appeal raise the issue of whether the learned judge was wrong in law to find that NIB was liable for the acts or omissions of the Government Officials since the clear and unequivocal evidence of Ms. Bethel, on cross-examination, was that the representations were made to her by the Government Officials. In other words, NIB alleges that it is not liable for misrepresentations which were made by the Government Officials because they are officers of the Crown and therefore, under section 4(3) of the Crown Proceedings Act 1963, it is the Attorney General who is liable for torts which are committed by a Minister while carrying out or purporting to carry out these functions. Succinctly put, Ms. Bethel did not plead a tort of negligent misrepresentation but contractual misrepresentation.

92. More importantly, NIB did not plead this issue but made submissions on it during closing arguments. The learned judge considered the issue and made findings. In **Clemenza Ltd and anor v The Attorney General of The Bahamas & anor.** SCCivApp. No. 28 of 2022 (delivered on 6 February 2024), this Court, differently constituted, addressed the issue of pleadings and stated:

> **"64. It is trite law that parties are bound by their pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court (being) taken by surprise. The pleadings must be precise and disclose a cause or causes of action. In Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018, this Court, differently constituted, held that the starting point must always be the pleadings. At paragraphs 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:**
>
> > **'29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**

30. <u>The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim</u>.

31. <u>In our judgment this is not proper and manifestly unfair to the appellant</u>.

32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.

33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board.

…

37. This is not an arid pleading point.

38. In Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:

> **'It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.'**

> **39. <u>The starting point must always be the pleadings</u>. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:**
>
> > **'In Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed at 792-793:**
> >
> > > **'<u>Pleadings are still required to mark out the parameters of the case that is being advanced by each party</u>. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.'**
>
> **65. At paragraph 40 of the Judgment, Sir Michael went on to state:**
>
> > **'It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings cause no prejudice, or where for some reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.'" [Emphasis added]**

93. The importance of proper pleadings was recently emphasised by the Caribbean Court of Justice in the case of **Wilfred P Elrington v Progresso Heights Limited** [2024] CCJ 4 (AJ) BZ: see paragraphs 28 and 47 to 51. At paragraph 47, Anderson J, in a concurring judgment, had this to say:

> **"47. As I have had cause to say on another occasion (Nicholson v Nicholson [2024] CCJ 1 (AJ) BZ) <u>pleadings</u>**

> **<u>are the alpha and omega of litigation in our legal system. They are the guardrails which guide the commencement, progression, and disposition of the case. The rules governing pleadings are therefore not optional. They are pivotal. They are mandatory.</u> They are to be complied with by the parties lest chaos overtakes the process of adjudication and lest the unruly horse of litigation be allowed to roam free." [Emphasis added]**

94. In the present case, NIB cannot rely on this issue that the Attorney General ought to be sued for the actions of the Government Officials since it was not pleaded. The purpose of pleadings is to circumscribe the issues in the case. Accordingly, this issue is unsustainable.

95. Grounds 12 to 16 of the Notice of Appeal sought to appeal factual findings made by the learned judge. It is accepted that, as an appellate court, we should not intervene in upsetting a trial judge's conclusions of primary facts unless we are satisfied that the judge was **"plainly wrong"**: **Bahamasair Holdings Ltd. v Messier Dowty Inc.** [2018] UKPC 25. At paragraph 36, the Board reiterated the basic principles in this area which was summarized thus:

> **"36. …**
>
> **1. … '[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …' - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.**
>
> **2. …..**
>
> **3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument**

in favour of restraint is reduced - para 8 of Central Bank of Ecuador."

96. Our Court of Appeal, differently constituted, in **Ousman Bojang v Attorney General of The Bahamas & Ors** SCCivApp. No. 139 of 2022 endorsed the basic principles which were enunciated in **Bahamasair Holdings.** In delivering the judgment of the Court, Sir Michael Barnett, P. said:

> **"29. It is settled law that a judge's factual findings can only be overturned on appeal if they are plainly wrong or the judge's decision is one that no reasonable judge could have reached or is rationally insupportable. This point has repeatedly been made by this Court. A recent example is that of Minister Responsible for Crown Land v Findeisen SCCivApp No 79 of 2022. As recently as this year this was pointed out by the English Court of Appeal in Deutsche Bank AG v Sebastian Holdings Inc [2023] EWCA Civ 191 where the court considered and applied the decisions of the English court in Volpi v Volpi [2022] EWCA Civ 464 and Walter Lily & Co v Clin [2021] EWCA Civ 136.**
>
> **30. The court pointed at paragraph 54 of the Deutsche Bank Case:**
>
> > **'54 These considerations apply with particular force when an appeal involves a challenge to the judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the judge has made so serious an error that her assessment must be set aside.'**
>
> **31. Earlier, in Volpi v Volpi (which was applied in Deutsche Bank) the court regarded the following as settled law:**

‘(i) An appeal court should not interfere with the trial judge’s conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb “plainly” does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge’s conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been [sic] better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”

97. Later, at paragraph 36, Sir Michael continued:

“34. The point was made by Nugee LJ in Griffiths V TUI (UK) Ltd [2021] EWCA Civ 1442 where at paragraph 81 he said:

> **'81. As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons.'**
>
> **See also MBR Acres v Markou [2022] EWHC 2072 QB at paragraphs 87 to 90."**

98. In Ground 14, in my view, NIB has conflated the law of negligent misrepresentation with that of misstatement that is actionable in the tort of negligence which does not require that a duty of care be owed. However, Ms. Bethel has always relied on contractual misrepresentation.

99. Relative to Ground 15 of the Notice of Appeal, it is my firm view that the chronology of the drafting of Clause 15 is irrelevant in circumstances where the learned judge found that NIB represented to Ms. Bethel that she was eligible for participation in the Pension Plan at the time the Contract was entered into and that the Contract itself constituted such a representation: see paragraph 82 of the Judgment.

100. In summary, I cannot fault the learned judge for finding that: (i) both parties were under the mistaken belief at the time of the creation of the contract that Ms. Bethel would be entitled to participate but it was subsequently discovered that the Pension Plan was not available to her because she was a fixed term employee; and (ii) there was negligent misrepresentation by NIB as it was the only person/entity to determine whether Ms. Bethel could participate or not and by its failure to ascertain from its own records the true position and they led her to believe that she could.

101. For all these reasons, Grounds 10-16 of the Notice of Appeal are dismissed.

Grounds 17 to 18 – Claim for Breach of warranty

102. Grounds 17 and 18 concern the issue of breach of warranty. While both parties made attractive and equally persuasive submissions on the issue, it is unnecessary for me to decide it since it does not affect the outcome of this appeal. That said, I agree with the learned judge

that Clause 15 of the Contract contained a clear warranty that Ms. Bethel was entitled to participate in the Pension Plan and that warranty was false: see, for example, paragraphs 66 and 74 of the Judgment.

Grounds 19-20: Award of compensatory damages

103. In Ground 19 of the Notice of Appeal, NIB complains that the learned judge erred when she awarded compensatory damages to Ms. Bethel in circumstances where Ms. Bethel herself accepted that she was never eligible to participate in the Pension Plan and was thereby never eligible to receive pension benefits.

104. At paragraph 90 of the Judgment, the learned judge stated:

> **"90. The measure of damages available to the Plaintiff would be <u>to compensate her for her loss suffered from the breach of the implied term of the contract or alternatively for the negligent misrepresentation</u> and to put her in the position she would have been in if the breach had not occurred." [Emphasis added]**

105. It is common ground that an award of damages for breach of contract and misrepresentation is compensatory in nature. In other words, an award of damages is made to compensate a claimant for that which he/she has loss by reason of the breach or misrepresentation.

106. In my judgment, the learned judge did not err by compensating Ms. Bethel for breach of contract. All she did was to put Ms. Bethel back in the position she would have been had the Contract been performed from the day she demitted office. If the breach had not occurred, Ms. Bethel would have received her full monthly pension of $8,206.58 from that day.

107. Ground 19 lacks merit.

108. In Ground 20, NIB complains that the learned judge's finding at paragraph 52 of the Judgment that:

> **"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."**

is plainly wrong as being inconsistent and irreconcilable with the evidence which was that the Appellant itself made no claim of entitlement to these funds and would abide by the Court's determination as to whether the said funds should be paid to the Respondent or the Government.

109. In fact, what NIB pleaded is set out below at paragraphs 16 and 31 of its Amended Defence:

> **"16. Further, as regards the said repayment by the Office of the Prime Minister, the Defendant will aver that the sum of $130,216.80 was received from the Office of the Prime Minister on 17th November, 2016, (1) after the Plaintiff's ineligibility for the Pension Plan had already been discovered, (2) after the Plaintiff via her Counsel had already by letters dated 31st October, 2016 submitted a claim to the Defendant, (3) after the Defendant had already retained external Counsel by reason of the submission of such claim via the Plaintiff's Counsel and (4) after the dispute with the Plaintiff on the Pension Plan had already ensued. The Defendant will further aver that by reason of the facts and matters listed at (1) through (4) hereof, it has retained the said sum of $130,216.80 in its Payroll Account pending the determination of said dispute and awaiting advice or directions as to who payment or repayment, as the case may be, should be made.**
>
> **…**
>
> **31. As regards specifically the Plaintiff's claim in Paragraph 31 of her Re-Amended Statement of Claim for the sum of $130,216.80, the Defendant repeats Paragraphs 15, 16 and 17 hereof and the Defendant reiterates that it makes no claim of right, title or interest to the said sum of $130,216.80 nor any part thereof and stands ready, willing and able to repay the same to the Office of the Prime Minister or to pay the same to the Plaintiff pursuant to an Order of the Court and/or as the Court directs."**

110. Further, paragraphs 17, 21, 22 and 23 of the Supplemental Witness Statement of Mrs. Maynard stated as follows:

> **"17. The Board is mindful of the fact that the said sum of $130,216.80 was paid for the specific purpose of "restoring" the Plaintiff's pension account and/or to**

> **"bridge" the Plaintiff's pension entitlements. The Board is also mindful of the fact that the payment was made by the Government, also on the mistaken belief that the Plaintiff was eligible for participation in the Pension Plan. The Board is therefore concerned as to the Government's right to potentially seek the repayment of the said sum of $130,216.80 given the fact that the payment was made under such mistake and the Board's own realization that the Plaintiff is not so eligible.**
>
> **…**
>
> **21. The Board is also concerned about the potential for the Government to seek the repayment of the said sum based on their own mistaken belief as to the Plaintiff's eligibility.**
>
> **22. <u>Having regard to a potential right of the Government to seek the return of the said sum and the claim of entitlement which the Plaintiff now makes to the said sum, the Board stands ready, willing and able to repay the said sum of $130,216.80 to the Office of the Prime Minister OR to pay the said sum to the Plaintiff, pursuant to an Order of the Court and/or as the Court directs</u>.**
>
> **23. The Board respectfully invites the Court to order and/or direct the manner in which the said sum of $130,216.80 is to be paid and the Board shall thereupon make such payment." [Emphasis added]**

111. NIB also made comprehensive submissions on this issue: see: paragraphs 216 to 223 of its Closing Submissions. Specifically, that the Government paid the sum of $130,216.80 on the mistaken belief that Ms. Bethel is eligible to participate in the Pension Plan. The purpose of paying this sum to NIB was "bridging the pension."

112. At paragraph 33 (2) of her Re-Amended Statement of Claim, Ms. Bethel states:

> **"(2) Further, and <u>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,</u> or such other sum as the court may find, on restitutionary principles." [Emphasis added]**

113. The learned judge found that Ms. Bethel is entitled to damages for breach of contract or alternatively, negligent misrepresentation in the monthly sum of $8,206.58 from the date of the termination of her Contract. In other words, Ms. Bethel's claim for damages has not failed. Therefore, the other limb of her claim does not kick in. Otherwise, Ms. Bethel would be unjustly enriched.

114. As it stands, the learned judge's statement that the Appellant:

> **"52. ... 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"**

is inconsistent with NIB's pleaded case, their evidence as well as their submissions and ought to be set aside.

115. At the hearing before us, Counsel for Ms. Bethel concedes that Ms. Bethel is not entitled to the $130,216.80. To quote him, Counsel stated:

> **"Mrs. Bethel should not get the 130,000 back. It was a bridge…."**

116. Ground 20 is allowed.

Ground 21

117. In the Notice of Appeal, there is a further ground; ground 21 which states:

> **"21. Having regard to all of the circumstances of the case, no Judge properly directing herself to the pleadings, the evidence as a whole, the submissions of the parties and the applicable law would found (sic) that there was an implied term that the Appellant would arrange the Respondent's participation in a Pension Plan for which the parties agreed she was not eligible; that the Appellant had made negligent representations to the Respondent and/or was liable for the representations made to the Respondent by the Prime Minister and/or Minister and that the Respondent should receive a pension benefit in circumstances where she admitted that she was not entitled to participate in the Pension Plan."**

118. Counsel for NIB did not specifically canvass this ground before us. That said, it appears to be an overarching ground which has been addressed and determined in this Judgment.

Conclusion

119. For these reasons, I would dismiss the appeal on Grounds 1-19. On Ground 20, I would allow the appeal, set aside the order of the learned judge that Ms. Bethel is entitled to the funds ($130,216.80) paid to the Office of the Prime Minister to bridge her pension.

120. The Order of this Court is as follows:

(i) NIB shall pay to Ms. Bethel 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 Plan.

(ii) NIB is entitled to retain the sum of $130,216.80 paid by the Office of the Prime Minister to bridge Ms. Bethel's pension **as well as** her contributions of $25,683.84 which was deducted from her monthly salary representing her contributions to the Pension Plan.

(iii) NIB shall pay to Ms. Bethel interest at the statutory rate from the date of judgment to the date of payment;

(iv) NIB shall pay to Ms. Bethel the costs of and occasioned on this appeal and in the court below certified fit for two counsel to be taxed if not agreed.

The Honourable Madam Justice Charles, JA

121. I agree.

The Honourable Mr. Justice Evans, JA

122. I also agree.

The Honourable Mr. Justice Turner, JA