

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**Common Law & Equity Division
2017/CLE/gen/00885**

IN THE MATTER OF the Public Hospitals Authority Act, 1998, Statute Laws of The Commonwealth of The Bahamas

AND IN THE MATTER OF a Contract dated the 1st March 2016 made between The Public Hospitals Authority and J & N Improvement Services

B E T W E E N

**JN IMPROVEMENT LIMITED
T/A J & N HOME IMPROVEMENT**

Claimant

AND

THE PUBLIC HOSPITALS AUTHORITY

Defendant

Before: The Honourable Madam Senior Justice Deborah E. Fraser

**Appearances: Mr. Donovan Gibson for the Claimant
Ms. Melissa Wright and Ms. Sandra Moncur for the Defendant**

Hearing Date: 11 and 12 July 2023

Breach of Contract – Fundamental Breach - Termination of Contract - Section 9(2)(a) of the Schedule of the Public Hospitals Authority Act – Interpretation of Legislation – Authority to act on behalf of the Public Hospitals Authority

JUDGMENT

FRASER, SNR. J:

[1.] This is the trial of an action commenced by JN Improvement Limited t/a J & N Home Improvement (“**the Claimant**”) alleging breach of contract against the Public Hospitals Authority (“**the Defendant**”) for unlawfully terminating a contract dated 01 March 2016 between the Claimant and the Defendant (“**the Contract**”).

Background

- [2.] The Claimant is a company incorporated under the laws of the Commonwealth of The Bahamas carrying on the business of commercial custodial services.
- [3.] The Defendant is a body corporate established under the Public Hospitals Authority Act, Chapter 234 (“**the Act**”) responsible for the management of the hospitals known as the Princess Margaret Hospital (“**PMH**”), the Rand Memorial Hospital and the Sandilands Rehabilitation Centre.
- [4.] By the Contract, the Defendant engaged the services of the Claimant to provide custodial services for PMH. The Contract was set to expire on 28 February 2017.
- [5.] On 28 February 2017, the Board of Directors of the Defendant allegedly advised the Claimant to continue the custodial services on a month to month basis until further advised by the Board.
- [6.] By letter dated 20 June 2017 from Mr. Herbert Brown, the Managing Director of the Defendant (“**Mr. Brown**”), to the Claimant, the Defendant purportedly terminated the Contract with effect 20 July 2017.
- [7.] Subsequently, by letter dated 22 June 2017 from the Claimant’s attorneys to the Defendant, the Defendant was advised that Mr. Brown had no authority to terminate the Contract by virtue of section 9(2)(a) of the Schedule of the Act.
- [8.] The formal termination date was extended from 20 July 2017 to 28 July 2017 by formal letter dated 25 July 2017 from Mr. Brown to the Claimant.
- [9.] By letter dated 27 July 2017 from Mr. Brown to the Claimant, Mr. Brown informed the Claimant that security would not permit the Claimant or its agents access to PMH (for cleaning services) after the termination date.
- [10.] Around 11:00pm on 28 July 2017, it is alleged that the Claimant’s agents were ousted from the Accident and Emergency Department of PMH by housekeeping staff of PMH.
- [11.] The Claimant allegedly secured some of its materials and locked them in a storage room which was allotted to the Claimant by the Defendant. To date, it is alleged that the materials have not been returned to the Claimant.

[12.] By Originating Summons filed on 04 August 2017, the Claimant brought this action against the Defendant alleging breach of contract based on the aforementioned allegations. The Claimant requests the following relief:

“1 A declaration that the Managing Director of the Defendant, namely Mr. Herbert Brown, did not have the authority under the Public Hospital Authority Act to terminate the contract between the [Claimant] and the Defendant and the purported termination amount to a breach of contract;

2 An order that the Court interpret or construe the meaning of Section 9(2)(a) of the [Schedule of the] Public Hospitals Authority Act;

3 Damages for the aforementioned breach of contract;

4 Further or other relief; [and]

5 Costs”

[13.] The Originating Summons action was converted to a Writ Action by Order dated 27 November 2018 and filed on 18 January 2019. A Statement of Claim was subsequently filed by the Claimant on 10 December 2018, further detailing the particulars of its claim against the Defendant.

[14.] On 21 May 2019, the Defendant filed a Defence denying all allegations made by the Claimant.

Issues

[15.] The Claimant has provided its Statement of Facts and Issues. I do not see any corresponding Statement of Facts and Issues from the Defendant. Based on my understanding of the pleadings and the evidence, I frame the issues as follows:

(a) Whether, upon the true interpretation of section 9(2)(a) of the Schedule of the Public Hospitals Authority Act, Chapter 234, Mr. Herbert Brown had the authority to terminate the Contract?

(b) Whether, by Mr. Herbert Brown purporting to terminate the Contract, the Defendant breached the terms of the Contract, thus entitling the Claimant to damages?

Evidence

The Claimant's Evidence

Mrs. Nicole Richardson

[16.] On 30 September 2019, the Claimant filed the witness statement of Mrs. Nicole Richardson (“**the Richardson WS**”), which stood as Mrs. Nicole Richardson’s (“**Mrs. Richardson**”) Evidence in Chief at trial. According to the Richardson WS, around 2014/2015, the Claimant was short listed as one of the candidates for cleaning PMH. Prior to being awarded the contract, Mr. Mark Demeritte (“**Mr. Demeritte**”), an agent of the Defendant, led an inspection of the Claimant’s premises. He was said to be extremely critical towards the Claimant’s staff and equipment to the point where even Dr. Anthonie Ward (another agent of the Defendant who was present during the inspection) stated that his behavior was excessive. Mr. Demeritte wrote a scathing report stating that the Claimant’s machines did not work and that the General Manager did not know how to operate machines. The Claimant’s lawyers had to intervene. The Claimant was subsequently awarded the contract, but Mr. Mark Demeritte’s behavior did not change.

[17.] The Claimant received complaints about the quality of its service from the eighth day on the job. The Richardson WS also states that the Claimant received a letter of claims against it. Mrs. Forbes states that, despite there being a total of four cleaning companies on the premises, PMH staff insisted it was the Claimant’s performance that was at issue. The Claimant’s staff and owners were fearful of Mr. Demeritte and any accusations he would make during the tenure of the Contract. The Richardson WS further states that Mr. Demeritte personally insulted the owners of the Claimant on two separate occasions. According to the Richardson WS, Mr. Demeritte’s behavior put a significant strain on the relationship between the Claimant and staff of PMH.

[18.] The Richardson WS also states that, despite claims by agents of PMH that numerous meetings were being held with the Claimant relating to deficits in its staff’s performance, no such meetings were held. If there were any concerns, they were addressed immediately. The Richardson WS further states that the Claimant never ran out of supplies, or received infractions from PMH or the Defendant.

[19.] The Richardson WS also states that in January of 2017, Mrs. Richardson wrote to the Chairman of the Board, Mr. Frank Smith, addressing several concerns that the Claimant had and detailed their experience. Upon termination of the Contract, the Claimant wrote to the then Minister of Health (on an unspecified date) requesting he address concerns about the manner of termination of the Contract. She states that she was in constant communication with the Minister of Health regarding this matter.

[20.] In addition, according to the Richardson WS, on 28 July 2017, around midnight, the Claimant was advised by a senior maid of PMH that PMH's housekeeping department was taking over and that the Claimant's services were no longer required. The Richardson WS also states that agents of the Claimant were escorted off the premises by security personnel at PMH. The Claimant was not permitted to gather its belongings. Only senior maids of PMH were present during the Claimant's removal from the premises. Mrs. Richardson also admits that she is still in possession of keys belonging to PMH and that PMH still has equipment belonging to the Claimant.

Ms. Shirleymae Forbes

[21.] On 01 October 2019, the Claimant filed the witness statement of Shirleymae Forbes ("the Forbes WS") which stood as Ms. Shirleymae Forbes' ("Ms. Forbes") Evidence in Chief at trial. According to the Forbes WS, she was employed by the Claimant as a Manager from February 2016 to July 2017. During the tenure of the Contract, Ms. Forbes was responsible for ensuring that all areas assigned to the Claimant at PMH were kept clean to the Defendants' standards. She reported to the Operations Manager, Mr. Will Saunders directly. When Mr. Saunders saw the need for all concerned to meet, he would call a meeting with the owners or Ms. Forbes - then she heard directly from Mr. or Mrs. Richardson - the owners of the Claimant - as to the way forward.

[22.] Mr. Fenton Williams (an Operations Manager employed by PMH - "Mr. Williams") would do walkabouts every morning after agents of the Claimant cleaned assigned areas. During the first month at PMH, Ms. Forbes recalls the team having their first and only inspection with Mr. Williams and other agents of PMH. She states that there were issues with PMH staff (eg: moving supplies belonging to the Claimant). The Forbes WS also provides that the Claimant had to handle many floods at PMH and

PMH was never equipped to handle such incidents. The Claimant was called on with very little to no help from PMH staff.

[23.] The Forbes WS further provides that on 25 August 2016, while shifts were changing, Mr. Mark Demeritte, called Ms. Forbes to show her an indelible stain on the corridor stairs as well as a broom owned by the Claimant that was left in the area. Ms. Forbes states that he was loud and rude during this time and there was an audience. Ms. Forbes reported the incident to the relevant authorities and a meeting was subsequently held.

The Defendant's Evidence

Dr. Anthone Ward

[24.] On 24 September 2019, the Defendant filed the Witness Statement of Dr. Anthone Ward (“**the Ward WS**”) which stood as Dr. Anthone Ward’s (“**Dr. Ward**”) Evidence in Chief at trial. According to the Ward WS, Dr. Ward is the Director of Shared Services at the Defendant and has served in that capacity since March 2009. As Director of Shared Services, he is a member of the Tender Evaluation Committee, which analyzes bids received by various vendors.

[25.] According to the Ward WS, it has been the practice that once a contract has expired, the Director of Shared Services office is responsible for notifying the company holding the contract that their services will be on a month to month basis, while a new tendering process is underway. All contracts for the provision of services are for a period of one year and must be tendered on an annual basis. Dr. Ward further states that, upon expiration of a contract, it is the Managing Director who oversees the month to month and subsequent tendering of a new contract, not the Board of Directors of the Defendant.

[26.] The Ward WS also provide that in 2015, the Claimant was awarded the cleaning services contract for the period from 01 December 2015 to November 30 2016 at a cost of \$1,068,000.00. Under the terms of the Contract, the Claimant was to provide cleaning services for select areas of PMH. About two months into the Contract, there were complaints by PMH staff about the quality of services rendered by the Claimant.

[27.] The Ward WS further provides that after receiving numerous complaints, he along with representatives of the Defendant Ms. Nicole Richardson and Mr. Mark

Demeritte visited several out-patient clinic areas, in particular, the Accident and Emergency Department. During his walk-about, Dr. Ward received verbal complaints from various PMH staff that the Claimant was not performing its job. Due to poor performance, upon the expiration of the Contract and after three months of their month to month contract, the Managing Director of the Defendant formally advised the Claimant of the termination of their month to month services.

Mr. Fenton Williams

[28.] On 14 February 2020, the Defendant filed the Witness Statement of Fenton Williams (“**the Williams WS**”), which stood as Mr. Fenton Williams’ (“**Mr. Williams**”) Evidence in Chief at the trial. According to the Williams WS, Mr. Williams was employed at PMH for 10 years and presently holds the position of Senior Housekeeper Operations Manager of Housekeeping Services. It states that he held this position during the Claimant’s tenure at PMH.

[29.] The Williams WS further provides that Mr. Williams’ duties include the oversight and supervision of housekeeping services of PMH. Mr. Williams stated that he noticed grave issues with the Claimant’s cleaning services as their agents were not trained on how to deal with cleaning in a fast paced institution such as PMH. During the first evaluation period in April of 2016, the Claimant was not performing well resulting in several in-house training sessions (by PMH staff) to assist with their performance.

[30.] The issues persisted in addition to the fact that there were rapid turnovers with staff of the Claimant. The Williams WS further provides that the Claimant was not able to keep up with scheduling and supplies. They appeared to struggle consistently to maintain any type of standard. Mr. Williams wrote to Mr. Mark Demeritte on several occasions after walkabouts to inform him of the non-compliance and under-performance of the Claimant. The Williams WS further stated that there were numerous complaints from several departments of PMH regarding the Claimants’ performance and the Claimant was informed of the internal complaints and at each instance agents/representatives of the Claimant were called in for meetings where they promised to improve the quality of the services rendered.

[31.] Lastly, Mr. Williams states that several meetings were held with the Claimant and the Hospital Administrator to which Mr. Williams was also a party to. During

meetings, it was communicated that the services rendered by the Claimant were not up to standard. The Claimants' owners in those meetings would always admit that they were falling short in their performance, and would seek to improve. According to the Williams WS, the dismal performance persisted for the duration of the Contract.

Ms. Dorsinayer Thompson

[32.] On 24 September 2019, the Defendant filed the witness statement of Dorsinayer Thompson (“**the Thompson WS**”) which stood as Ms. Dorsinayer Thompson’s (“**Ms. Thompson**”) Evidence in Chief at trial. According to the Thompson WS, Ms. Thompson has been employed with PMH since 1992 and presently holds the position of Manager 1 Quality and Patient Safety. During the tenure of the Contract, Ms. Thompson held the position of Administrative Officer with responsibility for the Housekeeping Department. Her duties included the daily administrative management for the housekeeping department and infection prevention and control.

[33.] The Thompson WS further provides that, shortly after the commencement of the Claimant’s services, there were grave concerns with its performance. Issues included: (i) rapid turnover of staff; (ii) incomplete work in areas cleaned by the Claimant; and (iii) equipment challenges.

[34.] The Claimant acknowledged during walkabouts that their performance was lacking. The internal complaints persisted and this went on for the entire year of the Contract. Ms. Thompson states that she wrote to the Claimant about its poor cleaning service and performance. Ongoing training sessions were also held by PMH staff with the Claimant to assist its staff on how the proper cleaning techniques should be carried out.

[35.] The Thompson WS further states that several meetings were held with the Claimant which included agents of the Claimant, the Chief Housekeeper and Ms. Thompson. There were also meetings held with agents of the Claimant and the Hospital Administrator to which Ms. Thompson was a party to. During these meetings, the Claimant was always informed that its performance was not up to standard. The infractions greatly impacted the potential for infection in PMH as inappropriate cleaning procedures are conducive to cross contamination.

Ms. Mary Lightbourne Walker

[36.] On 24 September 2019, the Defendant filed the witness statement of Mary Lightbourne Walker (“**the Walker WS**”) which stood as Mary Lightbourne Walker’s (“**Mrs. Lightbourne Walker**”) Evidence in Chief at trial. According to the Walker WS, Mrs. Lightbourne Walker holds the position of Hospital Administrator at Sandilands Rehabilitation Centre, but at the material time, she was the Hospital Administrator at PMH (from May 2014 to September 2018). She was responsible for the management and oversight of the facility including all clinical ancillary and allied health professional services. Ms. Lightbourne Walker states that she encountered the Claimant during her habitual early morning and late-night oversight walks throughout PMH.

[37.] According to the Walker WS, she has background training in health facilities environment of care, infection control and housekeeping services. She would advise PMH’s management team of the Claimant’s deficiencies observed during her rounds.

[38.] Despite being provided with the Contract and the methodology for cleaning, the Claimant’s performance, according to the Walker WS, was subpar. The housekeeping management team provided training to the Claimant’s employees, but this resulted in marginal improvement. She also states that the Claimant’s staff was using diluted chemicals to clean, which lessened the effect of the chemicals to kill germs.

[39.] The Walker WS also provides that PMH’s management attempted to reach out to the Claimant through repeated educational and orientation sessions, provided training and had meetings with the Claimant’s agents regarding performance, compliance and scheduling. The Claimant was given an opportunity to remedy shortcomings. Sometimes, there was compliance and other times, there were not. The deficiencies persisted. As a result, Mrs. Lightbourne Walker escalated the matter to the Managing Director of the Defendant, Mr. Herbert Brown on 24 June 2016, 13 October 2016 and 24 October 2016.

Mr. Mark Demeritte

[40.] On 24 September 2019, the Defendant filed the witness statement of Mark Demeritte (“**the Demeritte WS**”), however the Defendant elected not to call this witness – with no objection from the Claimant. Furthermore, his evidence was not

tested on cross-examination, nor was he called to confirm that he stands by the evidence contained in his witness statement. Accordingly, his witness statement was not admitted into evidence. Therefore, I have not considered it.

Findings of Fact

[41.] My findings of fact will be based on the testimony of the witnesses and other evidence before me. Accordingly, I will now go through the testimony of each witness.

Ms. Shirlymae Forbes (“Ms. Forbes”)

[42.] Ms. Forbes’ testimony was rather brief. I do note, however, that she immediately contradicted her own testimony during cross examination. At page 5 lines 8 to 22 of the 11 July 2023 Court Transcript, it reads:

“Q Were there any delinquencies at any time with the staff or the scrubbing schedule that were given to Mr. Williams?

A Not that I can recall.

Q You are sure about that

A Only if I had some problem in an area scrubbing near the theatre and we couldn’t get to do it that particular night...”

Q And how many times would you say that these delinquencies occurred - - that this happened to your knowledge?

A Not a lot”

[43.] She also testified that PMH staff provided educational sessions on proper cleaning, but no meetings were ever held with her and Mr. Saunders to discuss issues. She also admitted that a time frame was provided to correct delinquencies. Ms. Forbes also refuted claims that the Claimant could not handle the workload or that there was no improvement in the quality of service rendered by the Claimant

[44.] I found Ms. Forbes to be a believable witness. Aside from the contradiction of her own evidence, she remained consistent with the remainder of her evidence.

Nicole Naomi Richardson (“Mrs. Richardson”)

[45.] Mrs. Richardson confirmed that she is one of the co-owners of the Claimant Company. She also confirms receiving complaints about the work rendered by the Claimant along with a letter from PMH staff with several accusations against the Claimant. She also testified that she asked if anyone witnessed her staff doing any of the alleged acts. For example, she said no one could confirm who saw agents of the Claimant dilute chemicals.

[46.] Interestingly, Mrs. Richardson stated that she only received one formal letter from Mr. Demeritte and that no other written correspondence from any other hospital administrator was ever received. She also denies being written to on several occasions from the Defendant about the Claimant’s performance. She testified that, as far as she is aware, only one formal letter about the Claimant’s performance was issued and it came from Mr. Demeritte.

[47.] Mrs. Richardson also testified that there were few meetings regarding the Claimant’s performance. She testified “*it was not more than five*” (page 15 lines 12 and 13 of the 11 July 2023 Court Transcript).

[48.] I found Mrs. Richardson’s evidence mostly reliable. Though she testified that only one formal letter was ever received, there are several pieces of correspondence in the bundle of documents that were sent from both Mr. Demeritte and other personnel from PMH and the Defendant regarding the Claimant’s services. I find it curious that Mrs. Richardson did not recall such correspondence directly sent to the Claimant. I also find it difficult to accept that there were few sit-down meetings relating to the Claimant’s performance.

[49.] In any event, I will rely on Mrs. Richardson’s testimony to the extent that it aligns with corroborating evidence.

Mrs. Mary Lightbourne Walker (“Mrs. Lightbroune Walker”)

[50.] Mrs. Lightbourne Walker testified that training sessions were provided to the Claimant’s staff in an effort to improve their performance. This was specifically referenced at page 31 lines 1 to 10 of the 11 July 2023 Court Transcript, which provides:

“Q Okay. Now let me ask you, as it relates to training, was there any particular training for the staff at J & N in reference to how to clean those medical clinics, those specialty clinics?

A We at the PHA provided training, specialty training with respect to infection control and all of the other safety aspects of working within a health care facility

Q With J & N?

A Yes sir.”

[51.] She also testified that she observed agents of the Claimant diluting chemicals during one of her walkabouts at PMH. She watched the entire process and preparation. Mrs. Lightbourne Walker also stated that she reported it to the person in charge of housekeeping services for PMH. She further testified that she knew it was staff of the Claimant based on the colors of their uniform (page 36 lines 27 to 30 of 11 July 2023 Court Transcript). Mrs. Lightbourne Walker also confirms that there was a formal meeting regarding Mr. Demeritte’s purported behavior towards the Claimant’s staff and that owners of the Claimant were parties to that meeting (page 40 lines 22 to 27 of 11 July 2023 Court Transcript). She also recalled that there were two meetings with the Claimant (page 41 lines 19 to 21 of the 11 July 2023 Court Transcript).

[52.] She also testified that at least one of the two owners were present at both meetings (page 42 lines 1 to 3 of the 11 July 2023 Court Transcript). Mrs. Lightbourne Walker testified that she addressed the owners of the Claimant regarding issues with performance (page 43 lines 19 to 29 of 11 July 2023 Court Transcript).

[53.] She also confirmed that the usual practice was to document minutes of meetings, but that the Defendant did have a cyber-attack (page 44 lines 9 to 10 of 11 July 2023 Court Transcript). She further testified that the Claimant was given ample opportunity to correct issues. When she realized issues remained unchanged, she then brought the matter to Mr. Brown’s attention for further action. She also testified that, when the Claimant made a complaint about PMH staff, an internal investigation ensued (page 49 lines 2 to 13 of 11 July 2023 Court Transcript). She confirmed that the Claimant did receive some praise, but that the complaints outweighed this (page 56 lines 14 to 16 of 11 July 2023 Court Transcript).

[54.] I found Mrs. Lightbourne Walker to be a coherent, consistent and trustworthy witness. She seemed truthful in her responses and confirmed that some of the information she was aware of emanated not from her, but from staff. She handled cross-examination well and did not falter in her position, nor did she stray from her witness statement. Accordingly, I accept her evidence and will rely on it accordingly.

Dr. Anthone Ward (“Dr. Ward”)

[55.] During Dr. Ward’s testimony, he testified that the management of day to day activities of vendors awarded contracts was within the remit of the Managing Director and not the Board. He testified that, this is his understanding, based on his years working for the Defendant (page 64 lines 7 to 24 of 11 July 2024 Court Transcript). He also testified that it is the Managing Director who would communicate to vendors whether or not they were successful in their bid and whether or not any contract has been terminated (page 65 lines 22 to 32 of the 11 July 2023 Court Transcript). Dr. Ward further stated that the tendering of contracts was done by the Managing Director of the Defendant and the actual approval was by the Board (page 68 lines 1 to 4 of 11 July 2023 Court Transcript).

[56.] In addition, Dr. Ward testified that verbal complaints were communicated to Mrs. Richardson. She was present on walkabouts when complaints were made (page 71 lines 22 to 31 of 11 July 2023 Court Transcript). Dr. Ward also made mention that there was a cyber-attack on the Defendant’s email system (page 81 lines 4 to 5 of the 11 July 2023 Court Transcript). Lastly, Dr. Ward testified that the Board gave the Managing Director the responsibility to oversee the day to day operations of all contracts and that he is aware that the Managing Director is permitted to end contracts and that this is done all the time (page 82 lines 20 to 32 of 11 July 2023 Court Transcript).

[57.] Dr. Ward appeared to be a reliable and consistent witness. He did not resile from the evidence contained in his witness statement and appeared truthful. His evidence will be given appreciable weight in my later discussion.

Mr. Fenton Williams (“Mr. Williams”)

[58.] Mr. Williams confirmed that, from the very beginning of the Contract, there were situations that needed to be corrected. He testified that the Claimant used cleaning procedures that were ineffective (page 4 lines 10 to 21 of 12 July 2023 Court

Transcript). He also stated that there were issues with scheduling. He further testified that efforts were made by PMH staff to show the Claimant methods on how to clean properly.

[59.] Mr. Williams also stated that the Claimant did not have proper machinery or equipment to render services required for cleaning (page 15 lines 12 to 20 and page 16 lines 9 to 18 of 12 July 2023 Court Transcript). He also confirmed that complaints about the Claimant's performance emanated from supervisors and managers at PMH (page 21 lines 11 to 18 of 12 July Court Transcript). Mr. Williams further testified that the Claimant's performance never came to the required standard to do the job (page 25 lines 1 to 8 of 12 July 2023 Court Transcript). He also confirmed that the owners of the Claimant were not present at all meetings. He said that the operation manager and their supervisor had meetings (page 25 line 32 and page 26 lines 1 to 5 of the 12 July 2023 Court Transcript). In addition, Mr. Williams also stated that PMH attempted to demonstrate proper cleaning techniques for the Claimant's benefit (page 30 lines 11 to 14 of the Court Transcript).

[60.] Mr. Williams was also a believable witness. His testimony remained consistent with his witness statement. I will, therefore, treat his evidence with the appropriate weight.

Ms. Dorsiner Thompson ("Ms. Thompson")

[61.] Ms. Thompson stated that there were issues with the Claimant's performance and that the issues were communicated to the Claimant. She also testified that there were many meetings with the Claimant (page 39 lines 11 to 15 of 12 July 2023 Court Transcript). She also said that the Claimant did not deny the issues and that it would seek to improve them. She further testified that minutes of meetings are typically shared by email, but that she is not responsible for such dissemination. Ms. Thompson also said that she did monthly walkabouts with the owners of the Claimant and PMH's housekeeping team. She also testified that no concerns of the Claimant were brought to her attention. She further said that there was a rapid turnover in the Claimants staff compliment which made them incapable of doing the work required (page 50 lines 20 to 32). She also testified that the Claimants equipment was not functional.

[62.] Based on the foregoing, I make the following findings of fact: (i) the Claimant's performance of the Contract was lack luster, despite numerous attempts by both the Claimant and staff of PMH to remedy the issues by means of meetings and training of the Claimant's staff by staff of PMH; (ii) the issues with the Claimant's performance improved marginally, but overall still did not meet the standard required under the Contract; (iii) the issues with the Claimant's performance began from nearly the inception of the Contract and persisted for its entire tenure; (iv) there were numerous meetings held with agents of the Claimant regarding issues with the Claimant's services; (v) there were at least two (2) meetings that the owner(s) of the Claimant attended relating to the Contract and the quality of the Claimant's services; (vi) the Claimant did not have sufficient man power or proper working equipment to perform their duties as required under the Contract; (vii) the Claimant was made aware of issues through numerous written correspondence and verbally; (viii) the Claimant's owners and/or its agents participated in monthly walkabouts and were informed of ongoing issues with the Claimant's performance; (ix) the Claimant was afforded opportunities to remedy the ongoing issues with its services; and (x) the reason for the Claimant's termination was its inability to perform its obligations under the terms of the Contract.

Law, Discussion and Analysis

[63.] For the avoidance of doubt, I have reviewed and considered the written submissions of counsel. I will now move to my discussion of the issues.

Issue 1: Whether, upon the true interpretation of section 9(2)(a) of the Schedule of the Public Hospitals Authority Act, Chapter 234, Mr. Herbert Brown had the authority to terminate the Contract?

[64.] In order to properly interpret statute, one must first look at the express wording of the legislation itself. In relation to the management and governing body of the Defendant, **section 7 of the Act** provides:

“7. (1) There shall be a Board of Directors of the Authority.

(2) The Board shall be the governing body of the Authority and shall perform the functions and exercise the powers of the Authority.

(3) **The Schedule has effect with respect to the constitution and procedure of the Board.**

(4) The Minister may by Order amend the Schedule.

[Emphasis added]”

[65.] **Section 9(1) and (2)(a) of the Schedule under the Act** provide:

“9. (1) There shall be a Managing Director of the Authority who shall be appointed by the Board with the prior approval in writing of the Minister.

(2) **The Managing Director shall be the Chief Executive of the Authority and shall be responsible to the Board for —**

(a) the day to day administration of the affairs of the Authority...

[Emphasis added]”

[66.] **Section 36(1) of the Interpretation and General Clauses Act, Chapter 2** provides:

“36. (1) Where any written law confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are **reasonably necessary to enable the person to do or enforce the doing of the act or thing.**

[Emphasis added]”

[67.] Based on the express terms of the legislation, in my view, it is clear that the Managing Director of the Defendant has the power and duty to manage the daily activities of the Defendant and by association the hospitals that fall within its remit. The Managing Director essentially oversees the overall operation of the three hospitals. His responsibilities and powers must, therefore, include but are not limited to, hiring and firing staff, contractors and/or vendors, managing and assisting in the preparation of budgets, assist in review of and marketing of tenders for vendors to work at the requisite hospitals, overseeing and supervising all management teams of the various hospitals and addressing any other management level decisions/matters of the Defendant. I believe the power to hire or fire is a reasonably necessary power that the Managing Director has in order to properly manage the daily affairs of the Defendant and hospitals that fall within its scope.

[68.] Though the legislation is silent on the power of the Managing Director to hire and fire, it can be gleaned from the very wording of the legislation. It is the managing director charged with the duty to handle and manage the day to day activities of the Defendant. Though section 9(2)(a) of the Schedule of the Act seems quite wide, I do not believe that the power to hire or fire falls outside of the managing director's scope of powers. Powers of oversight must include oversight and management of staffing and vendors at the relevant hospitals. I based this also on the testimony of Dr. Ward. His testimony made it patently clear that it was the managing director who dealt with termination of vendor contracts. In the premises, I rule that the managing director is empowered to, inter alia, hire and fire vendors who were hired by the Defendant. Accordingly, he was empowered to terminate the new contract as between the Claimant and the Defendant.

[69.] Even if one were not to accept the above interpretation, a Board of Directors' power to delegate certain powers to a designated person is not a novel concept. In the House of Lords decision of **Tesco Supermarkets Ltd v Natrass** -[1972] AC 153 Lord Reid made the following pronouncements:

“Normally the Board of Directors, the Managing Director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. **But the Board of Directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company.** It may not always be easy to draw the line but there are cases in which the line must be drawn.

[Emphasis added]”

[70.] Though the above excerpt relates to a Board of Directors and the Managing Director of a company, I believe such pronouncements are equally applicable to a Board of Directors and the Managing Director of a body corporate.

[71.] Based on the foregoing and the evidence before me, I believe that the Board of Directors delegated and empowered the managing director to manage employees and

contract workers which includes hiring, re-engagement and/or termination. Dr. Ward made it clear that it was a regular practice of the managing director to terminate contracts. The Board of Directors must have been aware of this 'regular practice'. As the evidence indicates that this was a regular practice, it must be accepted that the Board of Directors imbued the managing director with the power to do so.

Issue 2: Whether, by Mr. Herbert Brown purporting to terminate the Contract, the Defendant breached the terms of the Contract, thus entitling the Claimant to damages?

[72.] The Claimant's counsel argues that Mr. Herbert Brown lacked authority to terminate the Contract and that there is no express clause in the Contract which addresses termination. It is not in dispute that the Contract came to an end as at 28 February 2017. Mr. Herbert Brown subsequently informed the Claimant that it is permitted to continue providing custodial services to PMH on a month to month basis. To my mind, this created a new contract. However, I note that there is no evidence before me which proves that a new written contract was ever prepared or that there were new terms of the contract. The evidence before me (particularly from the testimony of Dr. Ward) is that the contract as between the Claimant and the Defendant became a month to month contract. As there is no evidence regarding any written terms of the new contract, it must be accepted that the material terms of the new contract were memorialized in the original Contract and that the parties operated under such terms after the termination of the original Contract. Accordingly, I shall refer to such terms.

[73.] I do not agree with the Claimant's counsel's submission that there is no express termination clause. The relevant part of the chapeau of the Contract reads as follows:

"This Contract (which shall incorporate the Specific and General Terms and Conditions of the Tender Document) is made this 1st day of March 2016 for a period of one (1) year...

[Emphasis added]"

[74.] Accordingly, the terms of the Contract (and by extension the new contract) incorporate the Specific and General Terms and Conditions of the Tender Document.

[75.] **Clauses 13 and 15(a), (b) (c), (d) and (f) of the General Terms and Conditions** addresses termination. The Clauses state:

“13 Termination: The Public Hospitals Authority reserves the right, to terminate the Contract of the successful Tenderer if, for any reason whatever, a condition or obligation imposed upon the successful Tenderer by the Contract is not met. The successful Tenderer agrees to accept and pay any ensuing costs and charges arising out of the termination or amendment of the said Contract”

15 Penalty Provisions (such as termination or the withholding of funds) may apply:

(a) **If the successful Tenderer fails to supply the service for which an “Acceptance of Tender” has been issued and Contract made, this may constitute evidence of a breach of the terms and conditions of contract;**

(b) In the event of the failure of a successful Tenderer to supply a service and the Public Hospitals Authority has to acquire the service at a higher price than that agreed to in the Tender Document, the successful Tenderer shall be liable to pay the difference between the agreed Contract price and the higher amount actually paid.

(c) **If the successful Tenderer fails to supply the service for which an “Acceptance of Tender” has been issued and Contract made, this may constitute evidence of a breach of the terms and conditions of the contract;**

(d) In the event of the failure of a successful Tenderer to supply a service and the Public Hospitals Authority has to acquire the service at a higher price than that agreed to in the Tender Document, the successful Tenderer shall be liable to pay the difference between the agreed Contract price and the higher amount actually paid;

(e) ...

(f) In addition to the provisions of (a) and (b) above, **the Public Hospitals Authority reserves the right, where there may have been a fundamental breach (which could include, but is not limited to, failure to provide hospital grade supplies, repeated failure to correct notified breaches or short staffing on a regular basis) of the terms and conditions of the Contract, to terminate the Contract** and/or to proceed with legal action against the Tenderer...

[Emphasis added]”

[76.] The term “fundamental breach” was explained in the House of Lords decision of **Suisse Atlantique Société d’Armement Maritime S.A. v NV Rotterdamsche Kolen Centrale (Silvretta) [1966] UKHL J0331-4**. There, Lord Upjohn made the following pronouncements:

“A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of the term may at once and without further reference to the facts and circumstances be regarded as a fundamental breach.”

...and there is no magic in the words ‘fundamental breach’; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. **Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case.**

[Emphasis added]”

[77.] It must be noted that a breach of condition entitles the innocent party to treat the contract as repudiated, thus giving them the right to terminate (*Moss and Bahama Reef Condominium Association CLE/GEN/FP No. 336 of 2001*).

[78.] Based on the testimony of all of the Defendant’s witnesses, it is clear that the new contract was terminated due to the Claimant’s inability to render custodial services up to the Defendant’s standards. Furthermore, the evidence proves that the lack luster performance was based on insufficient staffing, non-functioning or insufficient equipment and the Claimant’s staff’s use of practices that were not acceptable or efficient. Such evidence emanates from the extensive and consistent testimony of every single witness called by the Defendant. It must be noted that proper staffing and proper equipment (which was to be provided by the Claimant itself and not the Defendant or PMH) were material and clear terms under the Contract, and by extension the new contract.

[79.] According to **clauses 2, and 4 of the Specific Terms and Conditions** (which again, form part of the Contract, and by extension the new contract):

“2 Cleaning Supplies: the successful Tenderer shall supply at his own cost all cleaning supplies/products that must be preapproved by PMH management and must meet the Hospital’s approved standards and the specific needs of the Hospital...

4 Equipment. The successful Tenderer shall provide all equipment inclusive of (suction machines, blowers, scrubbing/burning machine) necessary for the efficient execution of all work procedures. Storage will be provided; it is imperative that the abovementioned equipment be stored in the storage space provided...”

[80.] In my view, the lack of personnel and equipment amount to a fundamental breach of the new contract. The express wording of the Contract (and the new contract) made this abundantly clear. For a hospital – premises known to require specialized cleaning - one would need proper and sufficient personnel, equipment and appropriate cleaning agents to ensure the highest standard of cleanliness and safety for patients, visitors and staff of the hospital. Based on the evidence, the Claimant was not able to meet such a standard. Furthermore, the Defendant’s agents made it clear that these were required to do the job the Claimant was hired to do, which the Claimant stated would be addressed and improved. There is also evidence that the Claimant was afforded opportunities to remedy the issues, however, the complaints persisted and there was no material change in the services rendered by the Claimant. Accordingly, the Defendant was lawfully able to terminate the new contract and did so in accordance with the express clauses of the Contract (which must be understood to be the terms of the new contract).

[81.] Again, based on the evidence of Dr. Ward, the Board of Directors of the Defendant must have delegated responsibility of day to day operations to Mr. Brown, as Managing Director – including termination of contracts. I highlight paragraphs 6 and 7 of the Ward WS:

“6 It has been the practice that once a contract has expired, the Director of Shared Services’ office is responsible for notifying the company holding the contract that their services will be on a month to month basis, while a new tendering process is

underway. All contracts for the provision of services are for a period of one year and must be tendered on an annual basis.

7 Upon the expiration of a contract, it is the Managing Director who oversees the month to month and subsequent tendering of a new contract, not the Board.

[Emphasis added]”

[82.] Furthermore, Dr. Ward unequivocally states the following in his testimony at page 82 lines 20 to 32 of the 11 July 2021 Court Transcript:

“Q Dr. Ward, to the best of your knowledge, once a contract is approved by the Board, would the contract have to go to [the] Board for the contract to come to an end, or this is something that the Managing Director can then do. It would be in the remit of the Managing Director?”

A The Board gives the Managing Director that remit, that responsibility to oversee the day-to-day operations of all contracts.

Q And to the best of your knowledge, are you aware of other instances where the Managing Director would have approved month-to-month contracts and then brought them to an end when another vendor is selected?

A All the time, yes. On a consistent basis.

[Emphasis added]”

[83.] Even if it were the Board of Directors and not the Managing Director himself empowered to hire and fire, it is patently clear that the Board indorsed the acts of the Managing Director, thus, (if not by delegation) by implied or ostensible authority, accepts, adopts and consents to such actions. Such authority to act was discussed in the case of **Armagas Ltd v Mundogas SA (The Ocean Frost)** [1985] 3 WLR 640 where the following was stated by Stephenson LJ:

“The duties of the servant or agent will bring him into contact with third parties either by proximity or contract, and the duties of the servant or agent will be seen by third parties as the duties of the position into which the master or principal has put him. The master or principal may limit those duties by instructions contractually binding on his servant or agent: the bus driver may be

instructed not to obstruct other buses, the Vice President (Transportation) and Chartering Manager not to conclude long term charterparties. But the master will be liable for damage caused by the driver of the bus in disobeying those instructions or for any contracts made by the Vice President which are within the scope of the ordinary duties of a man in that position. The position of the servant or agent will give him apparent or ostensible authority to do what persons in such a position may be expected to do and will carry with it implied authority to do what is reasonably incidental to, and necessary for, carrying out the duties of his position and doing what he is expressly authorised to do.”

[84.] It is perplexing that the Claimant did not take issue with the Managing Director executing the initial Contract, but now takes issue with his termination of the new one. In the premises, I rule that there was no breach of contract on the part of the Defendant and that it lawfully terminated the new contract.

[85.] Consequently, as the Claimant has not proven its case, it is not entitled to any damages.

[86.] I do, however, note that the Claimants claim that some of their belongings remain in the possession of the Defendant. According to the Defence, the Defendant pleaded that it afforded the Claimant an opportunity to collect its belongings which remained at PMH after termination of the new contract, but no agent of the Claimant ever came to collect the items. I shall, therefore, make an appropriate order for the return of such items.

Miscellaneous

[87.] I note in the Claimant’s pleadings a claim for losses, however, such losses were not particularized. Litigants are bound by their pleadings. In the case of **McHari Institute v The Department of Public Service** – 2012/PUB/jrv/00033, Charles J (as she then was) expounded on the subject. At paragraph 19, the learned judge stated:

“[19] It is well-established that parties are bound by their pleadings. In *Glendon Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited* 2017/CLE/gen/01294, this Court emphasized the importance of pleadings:

“[41] In *Montague Investments Limited v Westminster College Ltd & Another* [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from *Bahamas Ferries Limited* and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital 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 and the court is obligated to look at the witness statements to see what the issues between the parties are.

[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings.”

[88.] It is unclear what losses the Claimant is referring to, beyond the allegations of breach of contract. There is also no evidence to suggest whether or not the Claimants were fully compensated for work rendered prior to the termination of the new contract or if any funds remain extant from the original Contract. Accordingly, I make no ruling on the issue.

Conclusion

[89.] Based on the foregoing, I dismiss the Claimant’s action.

[90.] The Claimant shall provide a list of all of its equipment and materials which remain in the Defendant’s possession within twenty-one (21) days from the date of this judgment.

[91.] The Defendant shall return all equipment and materials belonging to the Claimant within thirty (30) days from the date it receives the aforementioned list from the Claimant.

[92.] The Claimant shall return any and all equipment/items in its possession which belong to the Defendant or any of the facilities which the Defendant has control and management over within thirty (30) days from the date of this ruling.

[93.] The Claimant shall pay the Defendant's costs for this action, to be assessed by this Court, if not agreed.

Dated this 18th day of October 2024

**Deborah E. Fraser
Senior Justice**