COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCiv App No. 115 of 2014

B E T W E E N

CLARICE BUTLER
VALERIE STUBBS
DARREN SMITH
(as representatives of the "Seasoned Advertising Sales Consultants" of the Bahamas Telecommunications Company Ltd)

Appellants

AND

BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Respondent

BEFORE:	**The Honourable Dame Anita Allen, P** **The Honourable Mr. Justice Isaacs, JA** **The Honourable Ms. Justice Crane-Scott, JA**
APPEARANCES:	**Mr. Carl Bethel, Q.C., with Mr. Michael Foulks, Counsel for the Appellants** **Mr. Raynard Rigby with Mrs. Magan Taylor, Counsel for the Respondent**
DATES:	**22 September 2015; 25 October 2016**

Civil Appeal- Breach of Contract-Employment -Contract for Service-Contract of Service- whether the 2003 contracts were contracts of service or contracts for service

The appellants worked as Sales Agents for the respondent under an annual contract; the terms of which rarely changed from year to year. In 2002 the respondent notified the appellants that it was their intention to hire, in the upcoming year, an additional complement of Sales Agents. The appellants allege that there was an agreement- contested by the respondent- to surrender 17% of their existing advertising accounts to the new agents. The new agents purportedly complained of this arrangement. By way of memorandum all agents were subsequently advised that the advertisement revenue would split 55% to returning agents, 45% to new agents. New contracts of employment indicating the 55/45 split were issued by the respondent in May 2003 and subsequently signed by the appellants. Post the signing of the contract the appellants filed a Writ of Summons in the Supreme Court alleging that the 55/45 split and corresponding re-assignment of accounts was a breach of contract.

Held: appeal dismissed, costs to the respondent to be taxed if not agreed

per Isaacs, JA

There is no gainsaying that the respondent was the owner of the contracts; or that it could assign same to the Sales Agents as it deemed fit for the maximum revenue potential for the company. However, by the latter two sentences of clause 15 of the contract, the respondent was limited in the manner of the assignment. First, the amount of accounts assigned was dependent on two factors, namely, a Sales Agent's ability as shown through his past performance and his expected performance. Second, the respondent could re-assign accounts only in the final months of the canvass period. In both scenarios, the overriding concern of the respondent was the maximizing of revenue potential. The question arises, therefore, were the two preconditions existing at the time the respondent purported to re-assign the accounts? The short answer is no.

In respect to the first factor, there was no evidence provided that the Sales Agents fell below what was expected of them during the year 2002. Further, the decision taken by the respondent to re-apportion the accounts had nothing to do with ensuring "the maximum revenue potential is achieved" and everything to do with addressing the complaints of the new sales agents and ensuring as even a split of the accounts between the veteran sales agents and the new sales agents as possible. Clearly, these were not considerations found in clause 15 to ground a re-assignment of the accounts.

However, the problem for the appellants is that the 2002 contract ran its course by February 2003. When the veteran agents received their accounts in February 2003, it was under the continued terms of the 2002 contract; but with the implied inclusion of the 17% retention condition as a new term. It was expected by the Vets that this new term would be incorporated into the 2003 contract. However, the 19 March 2003 Memo would have disabused them of that notion as it laid out the revised split of the accounts. Thereafter, when they were presented with the 2003 contracts, they signed them with the knowledge the 17% no longer applied and the 54/45 split obtained for the 2003 contract period.

The evidence of the veteran agents who gave evidence before the Judge reveals they all signed with the knowledge that the accounts were to be assigned 55/45; and that when they signed they were not forced to do so. As such I am satisfied that there was no breach of contract as alleged by the appellants because the event, viz, the 19 March 2003 Memo, that they say constituted the breach, preceded their voluntary entry into the 2003 contract.

Carmichael v National Power plc [1999] ICR 1226 mentioned
Messier-Dowty Inc v Bahamasair Holdings Ltd. No. 407 of 2014 mentioned
Minister for Agriculture and Food v John Barry, et al [2009] 1 IR 215 considered
Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 mentioned
Smith v Bahamas Hotel Catering and Allied Workers Union 19871 BHS J. 95 followed
Stevenson Jordan and Harrison Ltd. v. McDonald [1952] 1 T.L.R. 101considered
Tyne & Clyde Warehouses Ltd v Hamerton [1978] ICR 661 considered

The Airport Authority v. Western Air Limited [2014] 2 BHS J. No. 36 mentioned
Watt v Thomas [1947] 1 All ER 582 mentioned
Withers v Flackwell Heath Football Supporters' Club [1981] IRLR 307 mentioned
Young and Woods Ltd v West [1980] IRLR 201considered

J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellants have taken issue with the judgment of Madam Justice Claire Hepburn (the Judge) given on the 2 May 2014. They have appealed to this Court to have the judgment set aside and to have judgment entered for them with damages to be assessed by the Court; and interest thereon. Having heard the submissions of Counsel and considered the authorities they provided along with the relevant documents comprising the record, I am satisfied this appeal must be dismissed.

History

2. Before delving into the several grounds, I deem it necessary to set out a background to the dispute together with the key findings of the court below which should assist in understanding the issues raised on the appeal.

3. The Directory Publications Department (the DPD) was established in 1979 as a means for the Bahamas Telecommunications Company (Batelco) to assume responsibility for the production of The Bahamas Telephone Directory (BTD).

4. The DPD was organised into a number of departments, e.g., Customer Services, Graphics and Quality Control. The Customer Services department was responsible for inter alia, the work of Sales Agents, Sales Commissions and customer complaints.

5. The appellants worked as Sales Agents for the respondent. Their duties included the solicitation of advertising contracts from business houses in The Bahamas, and it seems South Florida for inclusion in the respondent's annual BTD's. The appellants believed that at all material times they were contractual agents or rather independent contractors of the respondent. Indeed they were all in place with the respondent at the end of 2002 and accordingly, will be referred to as "the Vets".

6. The employment of the Vets was governed by an annual contract which incorporated the “Conditions of Service for Sales Agent” and by reference, the “Policies and Procedures Manual” of the DPD. The contract terms rarely changed from year to year and was essentially the same for all of the Sales Agents. At the material time, a contract entered into in 2002 was in effect and governed the relationship between the appellants and the respondent notwithstanding the contract period had expired.

7. Under the terms of the contract, the contractual year commenced on 1 February of each year. The contractual year is divided into two parts: the canvass period, that is, from 1 February to 30 September, and the non-canvass period, that is from 1 October to 31 January. There was a period called “open season” which begins 1 September or as determined by Management; and ended as per Management’s determination. During this period, Sales Agents were allowed to work any new account.

8. During the canvass period in each year, the appellants were assigned client accounts. These were contracts entered into by each customer of the respondent, most particularly business accounts. The appellants’ duty was to solicit enhanced listings in the BTD and the Yellow Pages (from newly issued accounts) or the renewal of enhanced listings from existing accounts, and where possible to increase the amount of the account through the sale of increased enhancements (coloured ink, graphic designs, larger page space, etc).

9. By way of remuneration, in respect of renewals the appellants were paid a commission of 15% of the revenue generated by any existing accounts which were renewed, and in respect of newly created accounts or increased sales to existing clients, a commission of 27.5% of the new or increased revenue thereby generated. Thus, the more assiduously an agent applied himself to his accounts the possibility for greater gains materialised. It could be said therefore that by the sweat of their brow they reaped the harvest.

10. Generally, each appellant received at the beginning of each contractual year all the accounts that he or she had worked and/or enhanced the year before. This was in keeping with the terms of paragraph 13 of the contract; and evident from the evidence of Mr. Garomme Hanna, former Director of the respondent’s Publication Department, at pages 5 and 6 of the transcript for 10 September 2013 where the following appears:

> **“Q. Right. So if the contracts were assigned to them at the beginning of the canvass period, they would the vast**

majority of those would have been preexisting contracts from the previous year, recurring contracts?

A. It is typical, yes, that many of the contracts that they are assigned would have been accounts that they probably worked before the previous year.

Q. And that was the practice that you know you expected that they would be given the work they were given the year before, is that not so, ordinarily?

A. In most cases they were assigned work that they would have worked the previous year and that was basically for different reasons.

Q. One would have been their familiarity with the customers and theirproven ability to get the customer to buy directory ads?

A. That's correct."

11. It was the appellants' case in the court below that in November 2002, the respondent determined that it would hire in the upcoming contractual year an additional complement of Sales Agents (the Newbies). Indeed by letter dated 26 November 2002 and addressed to Ms. Felicity Johnson, Secretary to the Board and Director of Legal Affairs of the respondent, Mr. Arlington Miller, an Industrial Consultant and Negotiator, complained on behalf of the appellants that during a meeting on 18 November 2002 they were advised that the respondent had doubled the complement of Sales Agents; and he requested a meeting.

12. It seems that there were a number of meetings held between the Sales Agents and Management to discuss, among other matters, split of the accounts. One such meeting took place on 14 January 2003 between certain of the Vets: Ms. Clarice Butler and Messrs. Frederick Scott and Darren Smith along with Mr. Miller and members of the respondent's Management: Messrs. Michael Symonette, Tellis Symonette and Claude Hanna along with Ms. Johnson. The appellants alleged that there was an agreement – contested by the respondent - to surrender a portion of their existing revenue, to wit, 17% of the BTD advertisement accounts which had been worked by them the previous year, for the respondent to re-assign to the Newbies. This, the appellants said, was based upon what was the accepted practice in the past whenever new Sales Agents were taken on.

13. The appellants believed that this proposal was accepted by the respondent because the respondent issued the revenue accounts to the appellants for the new contractual year, that is, in February 2003, minus the 17%.

14. The Memorandum of Tellis Symonette dated 13 April 2004 addressed to Ms. Johnson, while seeking to disavow any agreement being made with the Vets regarding the amount of revenue that would be kept for the Newbies, stated inter alia:

> **"However, during the initial distribution exercise, approximately Seventeen percent (17%) of the total revenue was taken from the existing sales agents and distributed to new sales agents. The new sales agents complained about this arrangement and as a result, we were directed to reallocate revenue to ensure that all agents received an equal share."**

15. According to the appellants, as a result of complaints from the Newbies, the respondent took the unilateral decision to re-allocate the accounts and demanded the return of all the issued accounts. By a Memo from Claude Hanna, Senior Manager/Directory Publications dated 20 February 2003, he reminded Mr. Gladstone Adderley, Advertising Consultant, Directory Publications, of advice previously given to him on 14 February 2003 that **"the Company had taken the decision to split its current directory revenue [as] evenly as possible among its entire Sales Agents staff"**.

16. Handwritten notes – author unknown - which appear to reflect the minutes of a meeting held on 25 February 2003 also disclose both Tellis Symonette and Claude Hanna were aware of the 17% retention. The following appears:

> **"CH** (Claude Hanna) **Initially I informed Agents it would be 17% <u>but I cautioned them that after tweaking & adjustments these percentages may not be final.</u> Comfortable level of commission."** (Emphasis added)

17. Thereafter, by a Memorandum dated 19 March 2003 from Mr. Claude Hanna to Sales Agents (old and new) they were told the following:

> **"Please be advised that the BaTelCo have** (sic) **taken the decision to redistribute its Directory Sales Revenue in respect to New Providence and accounts related to New Providence.**
>
> **Revenue will be distributed on the following basis:-**

Returning Agents (old) 55%

Directory Publication (office) 45%

Revenue retain (sic) **by Directory Publication will be distributed in a manner to be determined by BaTelCo.**

Be further advised that revenues/accounts relating to the Family Islands and South Florida will also be retain (sic) **by BaTelCo to be distributed in a manner to be determined by BaTelCo."**

18. The appellants allege that this 45%-55% split of existing revenue was imposed by the respondent, with the Newbies receiving 45% of the existing revenue which would normally have been assigned to the appellants as a matter of course.

19. The appellants use the figure of $556,537:60 mentioned by Mr. Garomme Hanna in his evidence as the commission which could have been earned by the Newbies had the 45% been worked. This represented 45% of $300,710,250.00. Mr. Hanna did admit that under the new dispensation, the appellants earned less in 2003 than they did in 2002. He was not able to state how much each Sales Agent's commissions decreased but he accepted that there was a decrease. This action of taking the 45% is alleged by the appellants to have been in breach of contract. They contend further, that it was a deprivation of goodwill or an interest in property.

20. The appellants had at some point engaged Counsel to represent their interests, who by letter dated the 9th April, 2003, wrote the then General Manager of the respondent to protest against the actions of the respondent.

21. The respondent, having called-in the already issued accounts, which were in the physical possession of the appellants, then submitted a new written contract for the year in May, 2003, and required that every agent including the appellants sign the same. The appellants, acting pursuant to legal advice they had received, signed the 2003 contracts. Thereafter they worked the accounts they had been allotted. It was this action of signing the 2003 contracts that was later alleged by the respondent to have raised an estoppel, or to amount to waiver by the respondent; and by the Judge, to have signified the **"agreement"** of the appellants to the events which occurred.

22. Subsequent to signing the contracts, the appellants did take out an action against the respondent via a generally endorsed Writ of Summons. The statement of claim included the following:

"3. The Contractual relationship between the Plaintiffs and the Defendant is regulated by a contract in writing renewable annually, which contract is usually renewed in the same or similar terms as the previous contract.

4. Where, in the past, due to administrative delays of negotiations the said contract has not been renewed in a timely manner, the terms of the pre-existing contact have served to govern the relations between the Plaintiffs and the Defendant until such time as the renewed contract was executed.

5. By Clause 15 of the Contract it is provided that: "The Accounts are considered the property of the Company which reserves the right to assign, withdraw or re-assign them as required for the maximum benefit of the company."

6. Clause 15 of the Contract, however further provides that: "The amount assigned to the Sales Agent will be related to the Sales Agent's ability and past or expected performance.

7. In or about the month of November 2002 the Plaintiffs learned that the Defendant intended to contract with additional "new" Sales Agent for the ensuing year in addition to the Plaintiffs and to, hereby increase the number of its sales force.

8. Preparatory to the engagement of the new Sales Agent referred to above it was agreed between the Plaintiffs and the Defendant that seventeen percentum (17%) of the existing revenue of each of the Plaintiffs would be made available to the Defendant for re-distribution to the new Sales Agents. This was agreed to by the plaintiffs to assist in the facilitation of the new hiring policy and was in line with previous practice by the Defendant.

9. On or about the 14th February, 2003 the Plaintiffs were mandated to turn in their contracts to the Defendant's office and were informed that they would be permitted to retain "an identified" but unspecified, "amount of revenue."

10. On or about the 19th March, 2003 in the midst of the new contractual year, the Defendant summarily informed

the Plaintiffs that the revenue related to the Island of New providence would be distributed in the following manner "Returning agents (old) 55% and "Directory Publication (office) 45%. The Revenue retained by the Office was to be distributed as determined by the Defendant, as was all revenue from the Family Islands and South Florida.

11. The across-the-board deprivation of revenue was imposed by the Defendant without the consent of the Plaintiffs, and without regard to the provisions of Clause 15 of the Contract.

12. The effect of the Memorandum of the 19th March 2003 was to summarily deprive the Plaintiffs of more than fifty percentum (50%) of their previous annual income, without compensation or due or adequate notice, and contrary to the amicable agreement referred to in paragraph 8 hereof.

13. Further and in addition, the effect of the Memorandum of the 19th March, 2003 was to summarily deprive the Plaintiffs of the Goodwill built by each of the Plaintiffs in the contracts which generate the revenues of which the Plaintiffs were summarily deprived, without compensation or due or adequate notice, and contrary to the amicable agreement referred to in paragraph 8n hereof.

14. In consequence of the summary action of the Defendant, the Plaintiffs and each of them were, further, deprived of the chance to earn the said revenue over the ensuring contractual period.

15. The Memorandum of the 19th March 2003 and subsequent action of the Defendant in pursuance thereof were a breach of contract.

16. The Defendant have failed and/or refuse to compensate the Plaintiffs for the summary and wrongful action of the Defendant and for the aforesaid breach of Contract.

17. Further or in the alternative, the actions of the Defendant were in breach of Article 27 of The Bahamas constitution in that the Defendant deprived the Plaintiffs and each of them or property, namely revenue and goodwill, without compensation.

18. In consequence of the matters aforesaid the Plaintiffs and each of them have suffered loss and damages, special damages and economic loss."

23. During the trial, reams of documents were placed before the Judge which included witness statements, submissions and authorities. A number of persons gave evidence among which were the appellants and Ms. Johnson. At the end of the trial, the Judge via her Ruling set out the reasons for her Order dismissing the appellants' claims. In paragraphs 36, 37, 41 and 42 of her ruling she stated:

> **"36.The plaintiffs had and have no property interest in the advertising contracts. Therefore, the Plaintiffs' claim for a declaration that the BTC violated Article 27(1) of The Bahamas Constitution in summarily depriving the Plaintiffs as a group of more than one-half of revenue is therefore refused.**
>
> **37. There was no suggestion by the Plaintiff that once they had executed a contract with BTC to sell Directory Advertisement BTC could not thereafter reassign the customer accounts. In fact they plead at paragraph 5 of the statement of claim that "The Accounts are considered the property of [BTC] which reserves the right to assign, withdraw or re-assign them as required for the maximum benefit of [BTC]. (Clause 15 of the contract.) Their allegation was that the reassignment of the account in 2003 was imposed by the defendants "without the consent of the Plaintiffs" and "without compensation or due or adequate notice, contrary to the amicable agreement" that 17% of the existing revenue of the plaintiffs would be made available to BTC for redistribution to the new Sales Agents. The plaintiffs' evidence does not support that allegation. It is their evidence that there were quite a number of meetings with BTC executives (the minutes of which are included in the bundles) and correspondence between Clarice Butler, Arlington Miller, the Plaintiffs representative and BTC executives to discuss the matter and in the end, the plaintiffs signed the contracts between themselves respectively and BTC which embodied the 55/45 split and they did so without being forced to. The plaintiffs' witnesses all admitted under cross examination that they were not forced to sign the 17 April 2003 contract, that at the time of signing they were aware that the contract provided for a 55/45 split of the accounts and that they continued to work**

under that contract and receive commissions based on the 55/45 split. Valarie Stubbs testified in cross examination, "Nobody forces me to do anything" when asked by Mr. Rigby if Claude Hanna forced her to sign the contract. Claudette Butler also testified that she knew exactly what she was doing when she signed the 17 April 2003 contract, but they had a lawyer who was handling the situation. Darren Smith, too, admitted that he knew of the 55/45 split when he signed the agreement.

41. Similarly, once BTC included the 55/45 split as a term of the 17 April 2003 contracts, the plaintiffs were free to elect not to continue selling advertisements for BTC on the terms set out in the 17 April 2003 contract. What they were not free to do was to insist on retaining their employment on their own terms, or on terms other than those lawfully inserted in the contract by BTC.

Findings

42. I make the following findings based on the evidence and a consideration of the written and oral submissions on behalf of the plaintiffs and the defendant and the case law to which counsel referred.

(a)The plaintiffs did not and do not have any property interest in BTC's Telephone Directory advertisement accounts or contracts and the revenue generated from the sale of such advertisements.

(b)The redistribution of BTC's Telephone Directory advertisement accounts or contracts and the revenue generated from the sale of such advertisements on the basis of 55% of the plaintiffs and 45% to the new Sales Agents ("the said redistribution") did not breach the respective contracts between the plaintiffs and BTC.

(c)The plaintiffs agreed to the said redistributions and evidenced their agreement by executing the respective contracts dated 17 April 2003.

(d) In the result, the plaintiff claims set out in paragraph 11 through 16 and 18 inclusive of the statement of claim have not been made out and are rejected."

The Appeal

24. The grounds on which the appellants rely are that, inter alia:

> **"The Learned Trial Judge erred and misdirected herself in Law: -**
>
> **1. in finding that the specific provisions of the Contract in writing between the Appellants, severally, and the Respondent, which governed the assignment and re-assignment of the Telephone Advertising Accounts or contracts to individual Sales Agents, bound the Appellants only, and not the Respondent;**
>
> **2. in erroneously treating the contracts between the Parties as being contracts for service or employment, and not as contracts for services.**
>
> **3. in finding that the Appellants had no interest whatsoever in the revenue generated by their sole efforts from the (renewal of existing Account) sales, and increases in sales of any of the said Advertising Accounts or contracts (except to be paid at the contractual rates for any work which happened to be assigned);**
>
> **4. in finding that after the acts of breach of contract alleged to have occurred between February, and April, 2003, the Appellants had, by signing a new annual contract in April of that year, thereby, severally "agreed" to the re-distribution or re-assignment of Accounts; and/or that there had been an implied waiver of their claim for damages for breach of contract, previously communicated to the Respondent, and pressed by counsel for the Appellants thereafter;**
>
> **5. in erroneously finding, at paragraph 37 of the Judgment, that:**
>
> **"There was no suggestion by the plaintiffs that once they had executed a contract with BTC... BTC could not thereafter reassign the customer accounts";**
>
> **6. in erroneously finding, at paragraph 41 of the Judgment, that the Respondent had "included the 55/45 split as a term of the 17th April 2003 contracts".**

7. in failing to consider the inequality of bargaining power as between the Parties, and whether or not the Appellants were subjected to "economic duress" or other unconscionable conduct and, in particular, the admission by Ms. Johnson, a key witness for the Respondent, and an Executive Vice President of the Respondent, that the Appellants were told, in respect of the 2003 contract to "take it or leave it";

8. in failing to consider that the unilateral actions of the Respondent breached a contractual and legitimate expectation, and right, of the Appellants to expect and to receive fair dealings from the Respondent under the respective annual contracts.

9. In failing to consider adequately or at all the evidence from all Parties showing the long established and customary practices associated with the written contract, which customary practices or implied terms of the contract were violated by the Respondent."

25. The appellants ask this Court to interfere with findings made by the Judge. As the respondent correctly submitted in opposition to any such interference, an appellate court would not normally overturn a finding of fact made by a judge in the court below. However, that reticence aside, if it is shown that the judge erred by making findings of fact not supported by the evidence or failed to take proper advantage of having seen and heard the witnesses, then the appellate court is to treat the issues as at large and free to make its own findings of facts.

26. The Respondents highlight the judgment of the Court of Appeal in **The Airport Authority v. Western Air Limited** [2014] 2 BHS J. No. 36 where at paragraph 10 this Court referred to the decision of Lord Thankerton in **Watt v Thomas** [1947] 1 All ER 582 which spoke to when an appellate court would interfere with a finding of fact by a judge in the lower court. He said, inter alia:

> **"(i) 'Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion."**

27. It is evident therefore that while an appellate court should be slow to interfere with a lower court's finding of fact, it is not precluded from doing so; and may do so if the circumstances warrant it. See also **Messier-Dowty Inc v Bahamasair Holdings Ltd.** No. 407 of 2014. Thus, I do not fetter my examination of the Judge's findings to determine if she has erred.

28. I think the best way to resolve the issues raised on this appeal is to determine the nature of the appellants' employment, namely whether they are employees of the respondent or independent contractors" or put another way was the contract between the respondent and each of the appellants a contract of service or a contract for services. Hepburn, J concluded the contract was one of service and that the appellants were employees. So I will begin with ground 2.

Ground 2

29. The contract, which seems to be a *pro forma* document for the signature of the parties, appears, (but for some inconsequential changes, e.g., the time for expiry of the contract being reduced from three years to one) to have remained in its pristine state from at least 1994 up to 2003. As mentioned earlier, it incorporated the "Conditions of Service for Sales Agent" and by reference, the "Policies and Procedures Manual" of the DPD. A read of the contract discloses comprehensive terms of employment governing the Sales Agents' employment with the respondent.

30. I will refer to three of the clauses in the **"Conditions of Service for Sales Agent"** portion of the contract which I consider of some moment to this appeal. Thereafter I will examine the combined effect of these clauses as they relate to this appeal.

31. Clause 2 of the contract, under the rubric "Further Engagement", provides that:

> **"One month prior to the completion of the term of this agreement, the Sales Agent will give notice in writing to the Company that the Sales Agent is desirous of continuing the Agency, and the Company shall thereupon in its absolute discretion decide whether it will offer the Sales Agent a further appointment. If the Company offers employment, the re-engagement will be on such terms and conditions as are mutually agreed."**

32. Clause 15 of the contract under the rubric, "Assignment of Accounts", states:

> **"The accounts are considered to be the property of the Company which reserves the right to assign, withdraw or re-assign them as required for the maximum benefit of**

the Company. The amount assigned to the Sales Agent will be related to the Sales Agent's ability and past or expected performance. During the final months of the canvass period the Company will re-assign accounts if it deems necessary to ensure the maximum revenue potential is achieved."

33. Clause 3 of the contract under the rubric, "Evaluation" provides:

> **"The Corporation shall conduct an annual assessment of Sales Agent at the end of each canvass period to assess the Agent's performance. A copy of such evaluation shall be provided to each agent."**

34. The appellants submit that while Clause 15 of the Contract specifies that **"the accounts are ...the property of the Corporation/Company.."**, the same Clause then provides contractual limitations upon the respondent's right to deal with those accounts in two significant respects:

> (i) The amount assigned to the Sales Agent will be related to the Sales Agent's ability and past or expected performance; and
>
> (ii) During the final months of the canvass period the Company will re-assign accounts if it deems necessary to ensure the maximum revenue potential is achieved.

35. The respondent contends that as the property of the accounts lay with the respondent it was free to deal with them as it wished particularly in light of the phrase, **"which reserves the right to assign, withdraw or re-assign them"**.

36. There is no gainsaying that the respondent was the owner of the contracts; or that it could assign same to the Sales Agents as it deemed fit for the maximum revenue potential for the company. However, by the latter two sentences of clause 15 of the contract, the respondent was limited in the manner of the assignment. First, the amount of accounts assigned was dependent on two factors, namely, a Sales Agent's ability as shown through his past performance and his expected performance. Second, the respondent could re-assign accounts only in the final months of the canvass period. In both scenarios, the overriding concern of the respondent was the maximizing of revenue potential. The question arises, therefore, were the two preconditions existing at the time the respondent purported to re-assign the accounts? The short answer is no.

37. In respect to the first factor, there was no evidence provided that the Sales Agents fell below what was expected of them during the year 2002. The evidence disclosed through Mr. Garomme Hanna was that assignment of contracts to existing agents was generally done reflexively each year, that is, the respondent assigned the same contracts to the same agents each year. All things being equal therefore, a returning Sales Agent could expect to be assigned the same accounts each year.

38. Of course, this was dependent on the results of the assessment conducted by the respondent pursuant to Clause 3 of the contract. A copy of a Memo dated 9 December 2002 from Claude Hanna to Tellis Symonette purports to be a year end assessment of the thirteen Vets for the 2003 Directory Canvass performed by Mr. Hanna for the year 2002 showed all of the Vets gave satisfactory service in terms of productivity; and of the two who received adverse reports, none related to their performance in maintaining the revenue stream of the contracts. In the premises, therefore, all things being equal, the appellants could have expected to receive the same contracts they held before, and perhaps then some.

39. As it was, prior to the execution of the 2003 contract, they did indeed receive the accounts previously worked less the 17% they allege they agreed with the respondent should be retained by the respondent for assignment among the Newbies. The evidence discloses that the respondent was bombarded by complaints made by the Newbies that the 17% split was inadequate; and it was those complaints combined with directions (presumably from above, i.e., upper Management) which precipitated the recall of the contracts already issued for 2003.

40. The decision taken by the respondent to re-apportion the accounts had nothing to do with ensuring **"the maximum revenue potential is achieved"** and everything to do with addressing the complaints of the Newbies and ensuring as even a split of the accounts between the Vets and the Newbies as possible. Clearly, these were not considerations found in clause 15 to ground a re-assignment of the accounts.

41. In respect of the second factor, re-assignment of accounts during the final months of the canvass period, it could not seriously be advanced that the phrase **"final months of the canvass period"** included the month of February of each year. It could, perhaps include July to September, even conceivably, the months of May and June. In my view it could not encompass the first quarter of the year.

42. However, the problem for the appellants is that the 2002 contract ran its course by February 2003 although it was mutually accepted that paragraph 4 of the appellants' statement of claim in the court below accurately represented the state of affairs if a new contract was not negotiated timeously. It said:

> **"4. Where, in the past, due to administrative delays of negotiations the said contract has not been renewed in a timely manner, the terms of the pre- existing contract have served to govern the relations between the Plaintiffs and the Defendant until such time as the renewed contract was executed."**

43. So when the Vets received their accounts in February 2003, it was under the continued terms of the 2002 contract; but with the implied inclusion of the 17% retention condition as a new term. It was expected by the Vets that this new term would be incorporated into the 2003 contract. However, the 19 March 2003 Memo would have disabused them of that notion as it laid out the revised split of the accounts. Thereafter, when they were presented with the 2003 contracts, they signed them with the knowledge that the 17% no longer applied and the 54/45 split obtained for the 2003 contract period.

44. The evidence of the Vets who gave evidence before the Judge reveals they all signed in the knowledge the accounts were to be assigned 55/45; and that when they signed they were not forced to do so.

45. Thus, the complaint made by the appellants at paragraph 15 of their statement of claim filed on 15 March 2004: **"The memorandum of the 19th of March 2003 and subsequent action of the Defendant in pursuance thereof were a breach of contract"** is unsustainable because the memorandum related to an anticipatory event, that is the entering into of the 2003 contract. The recall of the accounts was preparatory to their assignment under the new contract.

46. In **Tyne & Clyde Warehouses Ltd v Hamerton** [1978] ICR 661 the Employment Appeal Board (EAB) considered the position of a sales representative who was regarded by the employer as self- employed. The headnote discloses the following:

> **"The applicant was engaged as a sale representative by the employers. He was told that he was self-employed; he paid Schedule D income tax and self-employed insurance stamps and he was paid commission rather than a salary. He was instructed when and where he would work each week and was expected to comply with the instructions on sales techniques contained in the employers' staff manual. The applicant was dismissed and he applied to an industrial tribunal for compensation for unfair dismissal. On a preliminary issue the tribunal rejected the employers' submission that the applicant was a self-employed agent**

and held that he was employed under a contract of service and that they had jurisdiction to hear the complaint.

On the employers' appeal: —

Held **, dismissing the appeal, that having regard to the definition of "employee" in section 11 (1) of the Contracts of Employment Act 1972, which had not been altered by the Employment Protection Act 1975, the question whether or not a person was an employee still depended on whether there was a contract of service; that despite the fact that the applicant considered himself to be self-employed, the reality of the relationships to be inferred from the parties' conduct was that the applicant was employed under a contract of service and that, accordingly, the tribunal had reached the correct conclusion and had jurisdiction to hear the complaint."**

47. In **Stevenson Jordan and Harrison Ltd. v. McDonald** [1952] 1 T.L.R. 101, Denning LJ said at p. 111:

> **"One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."**

48. In **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612, the English Employment Appeal Tribunal ("EAT") by a majority (2 to 1) dismissed the appeal of an employer against a decision of the Employment Tribunal that two women employed by the appellant to sew pockets and flap on trousers supplied by the employer but working from home were employed under contracts of service. The Appeal Tribunal stated with approval the dicta of Stephenson LJ in ***Young and Woods Ltd v West*** [1980] IRLR 201: **"Whether there is a contract of service or a contract for services is a matter of law."** It went on to say: **"*West's* [1980] IRLR 201 case also established that in determining the status of the contract on the facts of a particular case, all the indicia have to be considered with perhaps the fundamental test being whether the applicant was in business on his or her own account."**

49. The majority of the EAT cited the dicta of Bristow J in **Withers v Flackwell Heath Football Supporters' Club** [1981] IRLR 307, to the effect that it could not be said that the respondents were on their own business rather than on the business of the party for whom the work was being done. The EAT's decision was upheld on appeal by the Court of Appeal.

50. In the Court of Appeal, Stevenson, LJ recognised the possibility of well-founded expectations of continuing home work being **"hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more"**. See also **Carmichael v National Power plc** [1999] ICR 1226.

51. In **Minister for Agriculture and Food v John Barry, et al** [2009] 1 IR 215, the court identified a feature of a contract of service. The following appears at paragraph 8:

> **"8. That the requirement of mutuality of obligation had to be satisfied if a contract of service was to exist: there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality was not present, then either there was no contract at all or whatever contract there was must be a contract for services or something else, but not a contract of service."**

52. In light of the feature of mutuality which must exist if a contract of service is to exist, the finding of the Judge that the contract only bound the appellants (if such a finding was indeed made – which is contested by the respondent - and I have determined was not), would be inconsistent with her finding that the contact was a contract of service and not a contract for services. It must be appreciated however that the presence of mutuality is not the only indication that a contract of service exists. The court is required to look at all of the surrounding indicia.

53. There is mutuality disclosed in the contracts at paragraphs 2 and 3 inasmuch as in paragraph 2 the Sales Agents agree to perform diligently their duties and to act according to the instructions and directions of the Corporation.; and in paragraph 3 in consideration of effecting sales for the BTD, the Corporation agrees to pay the Sales Agents the commissions and other remunerations set out in the Conditions of Service. (See the 2001 and 2003 contracts).

54. Nevertheless, the complaint that the Judge should not have found that the appellants were employed by the respondent on a contract of service cannot be sustained because all of the indicia, for example, the fulsome terms governing the

appellants' employment with the respondent under the contract and the level of control exerted over the appellants' work by the respondent, suggested that they were so employed. Thus, this ground is dismissed.

Ground 1

55. I have been unable to locate in the record where the Judge determined that the terms of the contract bound the appellants only and not the respondent too. In any event, the appellants accepted that the property in the accounts belonged to the respondent and that the respondent could assign, re-assign or withdraw the accounts as they determined. See paragraph 5 of the Statement of Claim. Further, even if the Judge was wrong to have decided as she is alleged to have done, it would not affect the outcome of this appeal. Hence, I find no merit in this ground; and it is dismissed.

Ground 3

56. This ground is unsustainable due to my conclusion on ground 2 that the appellants were employed under a contract of service. I do not, therefore, accept that by the finding of the Judge at paragraph 42(a) of her decision she has fallen into error or that she has misdirected herself in law. This ground too, fails.

Ground 4

57. The appellants submit that they had a right to affirm the contract and sue for damages for the breach thereof. They say that they never affirmed the breach of contract; and pursued legal steps after signing the 2003 contract. Further, the 2003 contract contains no words of affirmation, ratification, waiver or release of any claim arising from the breach of contract. They rely on an extract from Chitty On Contracts as support for their position.

58. The respondent submits that the Judge correctly relied on the Bahamian case of **Smith v Bahamas Hotel Catering and Allied Workers Union** 19871 BHS J. 95 in which Osadebay, JA stated that the employees suing were put to an election to accept the new term introduced by Union or seek other employment. Applying the case of Smith the Learned Judge rightly concluded at paragraph 41that:

> **"Similarly, once BTC included the 55/45 split as a term of the 17 April 2003 contracts, the plaintiffs were free to elect not to continue selling advertisements for BTC on the terms set out in the 17 April 2003 contract. What they were not free to do was to insist on retaining their employment on their own terms, or on terms other than those lawfully inserted in the contract by BTC"**.

59. The Judge's view expressed at paragraph 37 of her judgment, to my mind, accurately reflects the state of play in this case; and is dispositive of the appellants appeal:

> **"The plaintiffs' witnesses all admitted under cross examination that they were not forced to sign the 17 April 2003 contract, that at the time of signing they were aware that the contract provided for a 55/45 split of the accounts and that they continued to work under that contract and receive commissions based on the 55/45 split."**

60. I am satisfied that there was no breach of contract as alleged by the appellants because the event, viz, the 19 March 2003 Memo, they say constituted the breach, preceded their voluntary entry into the 2003 contract.

Ground 5

61. This challenge is qualified inasmuch as the appellants seem to accept the respondent could reassign the accounts; but contend that such reassignment was subject to conditions, e.g., those contained in clause 15 of the contract. Subject to that caveat the finding of the Judge on this issue is not inconsistent with the facts which emerged in the case. Nevertheless, even if I agreed with the appellants it would make no difference to this appeal because there was no evidence led that subsequent to the signing of the 2003 contracts the respondent reassigned the accounts.

Ground 6

62. The appellants take issue with the Judge's finding that the Respondent had **"included the 55/45 split as a term of the 17 April 2003 contracts"**. The Respondent supported the Judge's finding. The appellants contend that the Judge and the respondent are in error as the **"55/45 split"** is nowhere mentioned in the contract.

63. The appellant then points to paragraphs 7 and 10 of the respondent's submission and accuse it of planting itself on both sides of the Parole Evidence rule. At paragraph 7 the Respondent asserts that: **"...the Court must note that the relevant factual background cannot lead to the non-application of the parole evidence rule."** At paragraph 10, the respondent relies on **Alexiou v. Campbell,** that: **"...the court will not have regard to the parties' negotiations so as to interpret their intentions save that a fact was known to the parties..."**.

64. The appellants say that this is an instance of a party seeking to both approbate and reprobate at the same time. By reliance upon that rule of construction the

Respondent is seeking to rely upon the parole evidence rule to somehow disregard the fact that there was a specific discussion between the parties, which resulted in a specific action (the initial deduction of the 17%, without demur by the appellants); which consensus or agreement was thereafter arbitrarily set aside by the respondent, without the consent of the appellants.

65. Further, the appellants point to paragraph 13 of the respondent's submissions and accuse the respondent of reprobation for its reliance upon the parole evidence rule by acknowledging that it might have no application since: "**The Court is further invited to note that the 2003 Agreement (Contract) did not contain an 'entire agreement' clause."** The appellant submits that by this concession, the respondent admits that the parole evidence rule does not apply; since that rule only applies where the written contract is shown to have been intended to be the complete and exclusive record of the contract.

66. It does appear that the Judge accorded different treatment to the parties through her disposal of the issue relating to the terms included and/or excluded from the contract. This may be because of what is contained in paragraph 40 of her judgment where she observed that the appellants signed the 2003 contracts in the knowledge the split was to be 55/45. Paragraph 40 says, inter alia:

> **"The plaintiffs' witnesses all admitted under cross examination that they were not forced to sign the 17 April 2003 contract, that at the time of signing they were aware that the contract provided for a 55/45 split of the accounts and that they continued to work under that contract and receive commissions based on the 55/45 split."**

67. The Judge probably did not accept there was an agreement disclosed of the 17% in light of the note which said, inter alia, **" … <u>after tweaking & adjustments these percentages may not be final …"</u>**. In any event, even if there was an agreement as contended for by the appellants, it could only have been effective in the period between contracts, that is February and March; and prior to the signing of the new contract in April 2003.

Ground 7

68. This ground was not advanced or argued in the court below. It would not be proper for this Court to entertain arguments not considered and ruled upon by the Judge. Hence, I decline to entertain this ground; and it is dismissed.

Grounds 8 and 9

69. Other than the evidence of the Vets that 17% was usually retained by the respondent for the benefit of new agents, a fact disputed by the respondent, there was nothing disclosed by the Vets evidencing such a practice, e.g., past receipts, contracts or memoranda or notes from previous meetings. The Judge was left to determine the issue as one of credibility, viz, who she believed on the matter. There has been nothing disclosed to show the Judge erred to accept the respondent's position over that of the appellants.

70. While the idea of the 55/45 split emanated from the respondent, the appellants signified their agreement with it by voluntarily affixing their signatures to the 2003 contracts. I am satisfied that the dictum of Osadebay, JA in **Smith v Bahamas Hotel Catering and Allied Workers Union** (supra) is dispositive of these two grounds.

Disposition

71. In the main, I can discover no fault in the findings of the Judge. She was correct to hold that the evidence of the appellants did not accord with their pleaded case and failed to support the allegation of a breach of contract. Their several grounds of appeal as addressed above are without merit or substance.

72. In the premises, the appeal is dismissed. The costs of the appeal are the respondent's; to be taxed if not agreed.

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The Honorable Mr. Justice Isaacs, JA

73. I agree.

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The Honorable Dame Anita Allen, P

74. I also agree.

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The Honorable Ms. Justice Crane-Scott, JA