

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 12 OF 2011

BETWEEN

STATE INSURANCE CORPORATION

Employer

and

SUNDRY WORKERS

(ANTIGUA TRADES & LABOUR UNION)

Employees

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Samuel R. Aymer

Member

Appearances:

**Mr. Charlesworth O. D. Brown –
Attorney-at-Law for the Employer**

**Mr. Cosbert Cumberbatch –
Attorney-at-Law for the Employees**

**February 20, 2013
October 17, 2013**

JUDGMENT

PILGRIM, P

Introduction:

- [1] State Insurance Corporation (“the Corporation”) is a statutory entity which is tasked primarily with the responsibility to insure the assets of the Government of Antigua & Barbuda and certain statutory boards. It also undertakes and carries on all classes of insurance business. It has established an office situate at Redcliffe Street in the city of St. John’s in Antigua.
- [2] The Antigua Trades & Labour Union is a registered Trade Union. I shall after refer to it as **“the Trade Union”**. It has represented the interests of the Employees at the Corporation for several years.

Legal Proceedings

- [3] A Reference dated and filed on June 10, 2011 indicated that the nature of the dispute between the two (2) parties centred around negotiations.
- [4] The Corporation through its then Attorney-at-Law Mr. Charlesworth Brown filed an Amended Reference on August 17, 2011 of even date. This document stated that the matter in dispute between the two (2) parties dealt with the terms of a new Collective Agreement to be negotiated in order to supersede the subsisting Agreement.
- [5] An Employer's Memorandum dated August 17, 2011 was filed on the same date. Attached to this document is a copy of a Memorandum of Agreement between the Corporation and the Trade Union for the period July 1, 2007 to June 30, 2010. In accordance with Article 32 of that Agreement, it continued upon expiration thereof until it was cancelled or amended by a subsequent agreement.(I shall refer to it as **"the existing agreement".**)
- [6] The Employee's Memorandum dated August 17, 2011 was filed on October 21, 2011.

The Order of November 13, 2012

- [7] This Court made an Order dated November 13, 2012 with regard to two aspects of the existing agreement. For the period July 1, 2010 to June 30, 2013 the following Order was made:

"(a) Article 5:

Pay increases for the Employees shall be:

- 4% for the first year
- 3.5% for the second year
- 3.5% for the third year

(b) Article 21 (1)

Vacation leave shall be calculated in accordance with the following table:

- The first to the third year - 15 working days per year
- The fourth to sixth year - 18 working days per year"

- The seventh to tenth year – 25 working days per year
- Over ten years – 27 working days per year

The first issue

What is the proper interpretation to be given to Article 28 of the existing written contract or Agreement in the formulation of a new contract or Collective Agreement?

The second issue

What is the proper interpretation to be given to Article 21 (2) (b) of the existing written contract or Agreement or in the formulation of a new contract or collective Agreement?

- [8] Both parties have been unable to agree as to the meaning to be ascribed to Articles 21 (2) (b) and 28 of the existing agreement as they seek to conclude a new set of proposals. They have requested this Court to make a decision relative to the determination of the two issues.
- [9] Article 21 (2) (b) seeks to decide the aggregate number of days per annum beyond two (2) days which an employee of the Corporation may be granted due to illness without the submission of a medical certificate.
- [10] Article 28 relates to retiring benefits and makes reference to the Pensions Act Cap. 311 of the Laws of Antigua & Barbuda.

Legal submissions

- [11] Legal written submissions were dated and filed on April 25, 2013 by Mr. Cosbert Cumberbatch, Attorney-at-Law for the Employees. Those for the Employer were dated and filed by Mr. Brown on May 10, 2013.

Some basic legal principles

- [12] **Sir Kim Lewison**, one of Her Majesty's Justices of the High Court in the United Kingdom in the textbook entitled ***"The Interpretation of***

Contracts”, London, Sweet & Maxwell, 2007 states inter alia at page 119 as follows:

“The proper construction of a written contract is a question of law. However, the ascertainment of the meaning of a particular word is a question of fact.”

- [13] The learned author also submits at page 120 that *“Since the proper construction of a written contract is a question of law, the Court is not bound by concessions about its meaning made by counsel in the course of argument.”* In addition, Sir Kim Lewison also states at page 120 that *“the Court is not restricted to an interpretation which has been advanced by counsel. Since the question of construction is one of law, it is at large.”*

The facts

- [14] Article 28 of the existing agreement under the heading **“RETIREMENT BENEFITS”** states as follows:

“1.The normal age of retirement for employees covered by this Agreement shall be sixty (60) years. For the compensation of retiring benefits the provisions of the Pension’s Act Cap. 311 as amended and adapted shall apply to all employees who have contributed at least thirty-three and one third years of service.”

- [15] The Employees Memorandum states as follows:

“Notwithstanding any other pensions to which the Employees are entitled they are also entitled to their contributory pension pursuant to the State Insurance Corporation Act Cap. 413 for a pension outside of that provided for in Cap. 311. The Employees reject any suggestion that they are entitled to one or the other but not to both pensions.”

Submissions of the Employees

- [16] Mr. Cumberbatch, Attorney-at-Law for the Employees state in summary that those Employees who are not employed with the Corporation should continue to benefit pursuant to Cap. 311 if they have worked for 33 1/3

years. According to learned Counsel the result is that if the Corporation's plan and the Article 28 provision are both applicable, a number of Employees will both benefit under the two provisions.

- [17] Learned Counsel submits at paragraph 22 of his written submissions as follows:

"In essence Cap. 311 provides for a non-contributory pension whereas the State Insurance Plan provides for a contributory pension. While the Employees recognize that certain pension reforms have taken place it is their position that the number of employees who at any one time would work for 33 1/3 years would be such as not to impose any undue financial burden on the Corporation and that there is nothing wrong in morality, principle or good sense in permitting those employees who worked for 33 1/3 years to have the benefit of both pensions. In fact, and in law (they) are entitled to it."

- [18] No legal or other authorities were cited by Counsel in support of his submissions.

Submissions of the Employer

- [19] Mr. Brown submits that to apply the plain meaning rule to Article 28 would result in a finding that no Employee would receive a pension until he has worked for 33 1/3 years.
- [20] Learned Counsel also submits that the Employees are entitled to one pension pursuant to the Employer's Pension Plan which came into operation on September 18, 2006.
- [21] No authorities whatsoever were cited by Counsel in support of his submissions.

The law

The interpretation of a contract

[22] The law which concerns the proper interpretation of contracts has been summarised in five (5) principles by Lord Hoffmann in **Investors Compensation Scheme v West Bromwich Building Society [1998] 1 ALL E.R. 98 (HL) [1998] 1 W. L. R. 896**. At pages 114 to 115 of the All England Report, Lord Hoffmann stated inter alia as follows:

"The principles may be summarised as follows.

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

*The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words in syntax (see **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] 3 All ER 352, [1997] 2 WLR 945.*

- (5) *The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios** [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:*

‘... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.’

- [23] These general principles were summarised by Lord Bingham of Cornhill in **BCCI v Ali** [2001] ICR 337, [2001] UKHL 8. At page 337 of the first Report Lord Bingham stated *inter alia* as follows:

“To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the contract of the agreement, the parties’ relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties’ intention the Court does not of course inquire into the parties subjective states of mind but makes an objective judgment based on the materials already identified.”

- [24] Lord Hoffmann in the **BCCI** case at page 351 of that report stated *inter alia* as follows:

*"The background is however very important. I should in passing say that when, in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, 913, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents". I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage."*

[25] Sir Kim Lewison in the above cited textbook at page 22 stated inter alia as follows:

"Lord Hoffmann's reformulation by reference to the reasonable outsider, rather than by reference to the parties themselves, emphasises the objective nature of the task. Indeed, the phrase 'the intention of the parties' does not appear at all in the five principles he laid down. This is a reflection of the philosophical basis of interpretation in English law; namely that it is an objective exercise.

This is not a new approach. Even in the more traditional formulations of the purpose of interpretation judges have been careful to stress that when they speak of the intention of the parties, they are ascertaining their presumed intention objectively.

Thus in **Reardon Smith Line Ltd v Hansen-Tangen**, [1976] 1W.L.R.989 Lord Wilberforce said:

'When one speaks of the intention of the parties to the contract one speaks objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.'

A similar point was made by Lord Reid in **McCutcheon v David MacBrayne Ltd**. [1964]1W.L.R.125, approving the following quotation from **Gloag on Contracts**:

'The judicial task is not to discover the actual intentions of each party it is to decide what each was reasonably entitled to conclude from the attitude of the other.'

- [26] The main reason why an objective approach is utilised in the interpretation of contracts is to promote certainty. In **President of India v Jebsens (UK) Ltd**. [1991] 1 Lloyd's Report 1, at 9 (HL) Lord Goff stated inter alia as follows:

"I must confess however that I am reluctant to speculate on the motives of a party for adopting a clause in any particular form. For once a clause is embodied in a commercial contract, it has simply to be construed in its context, from the objective point of view of reasonable persons in the shoes of the contracting parties. Of course it has to be construed sensibly, and regard has to be had to its practical effect. But the objective interpretation is of paramount importance in commercial affairs; commercial men have frequently to take important decisions with some speed, and it is of great importance that they all know that they can rely on Courts and arbitrators, if any dispute should later arise, to adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts."

- [27] In **Benjamin Developments Ltd v Robt Jones (Pacific) Ltd**. [1994] 3 NZLR 189 (CA) Gallen J stated inter alia as follows at page 206:

"When parties enter into an agreement particularly a complex agreement which is expected to be performed over a period, then

there is a necessity for certainty to determine the nature, extent and operation of that contract. The parties are required to formalise their obligations so far as that is possible so that all may know what each has bound him or herself to perform and may order their affairs accordingly. It should also not be forgotten that other persons not parties to the contract are also entitled and may need to order their affairs in line with what they understand the agreements to be.”

The starting point

- [28] The meaning of the contract must be ascertained from the language the parties have used, considered in the light of the surrounding circumstances and the object of the contract, in so far as that has been agreed or proved.

- see **Sir Kim Lewison** *op cit* at page 34

- [29] The starting point to determine the meaning of a word, a term or a particular provision of a contract must be the words or clause which is located in the contract. In the **Benjamin Developments Ltd** case *op cit*, **Gallen J** stated the position at page 207 *inter alia* as follows:

“In my view where words or a clause or indeed a contract as whole, have a clear objectively ascertainable meaning on the face of the document, then that is the meaning which the parties will be held to have intended and to which they will be bound. If a contract refers to apples, then it will not be open to parties to aver that the real intention was to refer to pears. Such a contention would not only do violence to the language which the parties have clearly adopted, but may be unfair to persons outside the negotiations who have taken the concluded expression of the agreement at its face value”.

An absurd, uncertain or an unreasonable result

- [30] **Gallen J** in the **Benjamin Developments Ltd** case *op cit* immediately after stating the words at paragraph [29] above continued to state *inter alia* as follows:

“On the other hand where a word or a clause or indeed a contract as a whole is ambiguous or the result of a literal construction gives rise objectively to ambiguity or absurdity, then the authorities allow

the true intention to be elucidated by the admission of evidence directed to that end.”

- [31] **Hardie Boys J** in the **Benjamin Developments Ltd** op cit at page 203 used the term “**unreasonable result**” in the following context:

“There is another aspect too. It is not to be assumed that the parties will have intended an unreasonable result. If the plain and ordinary meaning of their words will lead to such a result, the Court is entitled to seek another meaning that will not do so; for it is that other meaning that is the more likely to represent the parties’ intention.”

- [32] Indeed, **Lord Reid in L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235 at page 251** stated inter alia as follows:

“The fact that a particular construction leads to a very unreasonable result may be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it and if they do intend it the more necessary it is that they shall make that intention abundantly clear.”

The objective background approach

- [33] **Sir Kim Lewison** in the above stated text book states at page 101 *inter alia* as follows:

“In construing any written agreement the Court is entitled to look at evidence of the objective factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction. However, this does not entitle the Court to look at evidence of the parties’ subjective intentions; nor to ascribe to the words of the contract a meaning that they cannot legitimately bear.”

- [34] In the **Investors Compensation** case op cit **Lord Hoffman** said (“in what is now the most cited passage in contractual interpretation” – see **Sir Kim Lewison** at page 101) at page 114 of the All England Report *inter alia* as follows:

"The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but the phrase is anything, an understated description of what the background may include subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

- [35] This modern approach of an examination of the objective factual background meets with the approval of Lord Wilberforce in two leading cases. These are **Prenn v Simmonds [1971] 3 All ER 237 – see pages 239 and 240 and Reardon Smith Line Ltd v Hansen – Tangen [1976] 3 All ER 570 – see pages 574.**

Sir Kim Lewison (op cit) submits however that **"the more fashionable phrase is 'background' following Lord Hoffman's lead"**.

- see page 105

- [36] The relevant background circumstances must consist of facts which are known to both parties.

The legal background

- [37] **Sir Kim Lewison** op cit states at page 128 inter alia as follows:

"The legal background against which the contract was made may influence the construction of the contract.

Parties do not make contracts in a legal vacuum. They always negotiate against the background of the law. It is, therefore, reasonable to suppose that they take into account the general law in reaching their ultimate consensus. And, accordingly, the proper construction of their agreement is properly influenced by the legal background against which it is made."

[38] At pages 130 – 131 **Sir Kim Lewison** op cit also wrote inter alia as follows:

“Where statute law changes, the Court must decide how to apply the words of the contract to the changed circumstances.”

- See **Debenhams Retail Plc v Sun Alliance and London Assurance Co Ltd. [2005] 3 E.G.L.R. 34; [2006] 1 P. & C.R.8 (UK CA)**

[39] In **Lymington Marina Ltd. v Macnamara and others [2007] EWCA Civ 151 at 157 Lady Justice Arden** stated inter alia as follows:

“In my judgment there can be no necessary implication that, where parties come to an agreement, that agreement must be interpreted on the basis of the law as it stood when the agreement was made as if it were in some time warp. It is part of the factual matrix known to both parties that both statute law and the common law develop over time ... If the parties have been content to leave a matter to the general law, they must be taken to have agreed that their agreement should be interpreted in the light of the general law from time to time.”

Expressly incorporated terms

[40] (a) Where parties expressly incorporate terms into a contract; the incorporated terms must be construed as if they had been written out in full in the contract; and accordingly must be construed in the context of the contract which they have been incorporated.

(b) The first question to be determined is what terms the parties have incorporated into their contract. The second question is what the incorporated terms mean in the context of the contract into which they have been incorporated. These two questions are to some extent interlinked.

- see **Sir Kim Lewison** op cit at page 78

Discussion

- [41] Does a clear contractual intention emerge from a reading of Article 28? Article 28 at first blush appears to be clear when it states as follows:
- "The normal age of retirement for employees covered by this Agreement shall be sixty (60) years."*
- [42] The other section of Article 28 states as follows:
- "For the compensation of retiring benefits the provisions of the Pensions Act Cap 311 as amended and adapted shall apply to all employees who have contributed at least thirty-three and one-third years of service."*
- [43] Do the words of Article 28 which appear at paragraph [42] above in the words of **Gallen J in Benjamin Developments Ltd** (op cit) at page 207 *"have a clear objectively ascertainable meaning on the face of the document..."*
- [44] No provision of Cap 311 was cited by either Counsel to this Court. A strict interpretation of Article 28 is that every employee of the Corporation must work for a period of 33 1/3 years before he is eligible to obtain a pension.
- [45] It would therefore appear that if an employee does not work for 33 1/3 years he is not eligible to obtain a pension. In other words, on the face of Article 28, if an employee works for 32 or 33 years it does not appear that he would be entitled to obtain a pension.
- [46] It certainly cannot be that after an employee has either paid his monthly contributions and/or is otherwise entitled to obtain a pension that he may become ineligible if he does not work for the full 33 1/3 years.
- [47] I therefore hold that the plain and ordinary meaning of the words in Article 28 are ambiguous and do produce an unreasonable result.

- [48] What therefore are the objective background matters into which I must inquire and which are known to both parties?

What is the Department?

- [49] An understanding of the term “**all employees**” in Article 28 must commence with a historical analysis of the Employer.

- [50] State Insurance Corporation was first established on December 23, 1976 in accordance with the State Insurance Act, No. 21 of 1976. (I shall refer to it as “the former Act”). Page 1 of the former Act reads *inter alia* as follows:

*“An Act to authorise **the Government of the State** to conduct the business of insurers.”*

(The emphasis is the Court’s)

- [51] The term “**employee**” was defined in the following manner:
“Employee” means a public officer employed in the service of the Department;

- [52] “**The Department**” means the State Insurance Department established under section 3 of this Act.

- [53] “**Public Officer**” is defined in section 127 (1) of the Antigua & Barbuda Constitution as “a person holding or acting in any public office and includes an officer or member of the Police Force”.

- [54] In accordance with the former Act the Department was “**under the control of the Minister.**” The General Manager and Deputy General Managers were public officers.

- [55] Under the former Act there was a very close link between the Minister and the Corporation. In addition, if there was any financial shortfall to discharge the functions of the Corporation, such was met by the Government.

- [56] So the initial employees of the Corporation were public officers who prior to December 1, 1976 were employed in the public service of the State of Antigua & Barbuda.

The Pensions Act Cap. 311

- [57] The Pensions Act Cap 311 of the laws of Antigua & Barbuda was first passed on April 1, 1948. It was amended on a number of occasions since that date.
- [58] Section 6 of Cap 311 outlines the circumstances in which a pension may be granted. In summary a person is so entitled if (a) he attains the age of 60; (b) he attains the age of 55 and opts to retire at that age or (c) attains the age of 50 and requests to be retired at that age and the Governor General acting on the advice of the Cabinet grants his request.
- [59] In addition, a careful perusal of Cap 311 clearly reveals that circumstances do exist which may allow a public officer who has been employed in a pensionable office for 10 years or more to obtain a pension upon retirement.
- see Part II section 4 of the Regulations to Cap 311.
- [60] A person who holds a pensionable office in Antigua & Barbuda and who has worked for more than 10 but less than 20 years and who retires from the public service on medical evidence to the satisfaction of the Governor General, may also on retirement, be granted a pension as if his pensionable service had been 20 years.
- [61] To limit therefore retirement benefits exclusively to those employees who have served for 33 1/3 years and to the exclusion of other employees fails to capture the wider provisions of Cap 311.
- [62] Moreover, to state that the normal retirement age is 60 and thereafter to refer to retirement benefits in accordance with Cap 311, fails to recognise the other circumstances in which Cap. 311 makes provision for retirement at an earlier age than 60.

State Insurance Corporation

- [63] State Insurance Corporation was established on January 1, 1986 in accordance with the State Insurance Corporation Act Cap. 413 of the Laws of Antigua & Barbuda. (I shall refer to it as “the Corporation”).
- [64] The establishment of the Corporation in 1986 was a radical transformation of the former Act in several ways.
- [65] Some of these included (a) the establishment of the Corporation as a body corporate (b) the ability to function as a commercial organisation (c) being able to hire staff whether from the public sector, the private sector or from elsewhere (d) a limit placed on the Minister’s role to “the policy to be followed by the Board”, and (e) near full financial autonomy save and except for the provision of a sum by the Government for paid-up capital.
- [66] As an organisation which functions in a commercial capacity, it must be able to hire its staff and train them to obtain great productivity.
- [67] If in these circumstances the Corporation hires staff who are not public officers why should the provisions of Cap 311 apply to those employees? This appears not to be correct.
- [68] While the provision of Cap. 311 may have been applicable when the former Act was in place it does appear to me that the provisions of Article 28 have not been amended to take account of the objective facts namely (a) the legislation had changed; (b) the nature of the organisation was transformed and (c) the nature of the employees are no longer necessarily public officers.

Section 15 (c) of Cap. 413

[69] Section 15 (2) (c) of Cap. 413 states as follows:

“(2) Without prejudice to subsection (1), the Board may, subject to the approval of the Minister, make rules –

(a) ...

(b) ...

(c) prescribing the salaries, allowances, benefits, pension or superannuation schemes and gratuity for officers and employees of the corporation;”

The Pension Fund of the Corporation

[70] The objective facts are that the Corporation by a Resolution of the Board of Directors dated September 18, 2006 has established a Pension Fund with effect from January 01, 1988. This was done in accordance with Section 15 (2) (c) of Cap. 413.

[71] The purpose of the Pension Plan which according to Article 1.28 means the State Insurance Corporation Pension Plan for Salaried Employees of the Corporation is the provision of pension benefits for employees of the Corporation. (I shall refer to it sometimes as “the Pension Plan”)

[72] The Pension Plan provides at Article 1.25 as follows:-

“Pensionable Past Service” means (subject to the definition of Pensionable Service) the number of full years and completed months prior to 1st January, 1988 of Continuous Employment as an Employee since the date of employment of the said Member.”

[73] At Article 1.23 of the Pension Plan it defines “Pensionable Future Service” as follows:

“Pensionable Future Service” means the number of full years and completed months of Continuous Employment after entry into the Plan during which the Member remains an Employee; during which Regular Contributions are made, if required by Article IV Clause 4.1, and during periods in which the Member continues to accrue Pensionable Service under the Plan.”

[74] "Pensionable Service" is defined at Article 1.26 inter alia as follows:

"Pensionable Service" means the total of Pensionable Past Service and Pensionable Future Service,..."

[75] The Pension Plan provides inter alia for (a) retirement at age 60, (b) earlier retirement, (c) vested status of a deserved pension after working for 10 years, (d) provision for employees who have not worked for 10 years, and (e) a provision for the payment of member contributions and the Corporation contributions.

[76] The Pension Plan was established after taking into consideration the advice of a recognised actuarial organization who was appointed by the Corporation.

[77] It does appear and I do hold that the Corporation's Pension Plan is comprehensive. It was signed on September 18, 2006 and became effective since January 01, 1988. It takes into consideration all full-time salaried employees of the Corporation.

Findings on the first issue

[78] I hold that Article 28 is very badly drafted having regard to the objective facts, the change in the legislation and the establishment of the Corporation's Pension Fund.

[79] I also find that the provisions of Article 28 produces an uncertainty, is ambiguous and produces such an unreasonable result that could not have been intended by either party to these proceedings. In the present form it creates serious challenges and is unreasonable for both sets of Employees of the Corporation.

[80] An unreasonable result occurs where former public sector employees of the Corporation who provide one service and who satisfy the requirements of Cap 311 may become eligible for the payment of a non-contributory pension. Should they have continued to work for the

Corporation and make a contribution to the Pension Fund, this may also entitle them to be paid a contributory pension for the same service. This cannot have been the intention of both parties.

The way forward

[81] Of course neither Counsel cited to me **Section 109 Cap 23 the Antigua & Barbuda Constitution Order 1981**. This came into operation on October 31, 1981. **Section 109 (1), (2), (3) and (4)** states as follows:-

“(1) The law to be applied with respect to any pensions benefits that were granted to any person before 1st November, 1981 shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

(2) The law to be applied with respect to any pensions benefits (not being benefits to which subsection (1) of this section applies) shall-

(a) in so far as those benefits are wholly in respect of a period of service as a judge or officer of the Supreme Court or a public officer that commenced before 1st November, 1981, be the law that was in force on that date; and

(b) in so far as those benefits are wholly or partly in respect of a period of service as a judge or officer of the Supreme Court or a public office that commenced after 31st October, 1981, be the law in force on the date on which that period of service commenced,

or any law in force at a later date that is not less favourable to that person.

(3) Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law for which he opts shall for the purposes of this section, be deemed to be more favourable to him than the other law or laws.

(4) All pensions benefits shall (except to the extent that they are by law charged upon and duly paid out of some other fund) be a charge on the Consolidated Fund."

- [82] Prior to the implementation of the Corporation's Pension Plan it may have been reasonable for the Corporation to engage the public service Employees in an exercise to determine which of the two pension programmes was more favourable to them. (This exercise assumes that they were previously the holders of pensionable offices in the public service).

Conclusion

- [83] Mr. Cumberbatch submits that those Employees who were first employed with the Corporation "*should continue to benefit under Cap. 311 as long as they have served for at least 33 1/3 years. The result is that if (the new Pension Plan) and (Article) 28 are both made applicable a number of Employees will both benefit under Cap. 311 and the new Pension Plan."*
- [84] Mr. Cumberbatch also submitted that "*the number of Employees who at any one time would work for 33 1/3 years would be such as not to impose any undue financial burden on the Corporation and that there is nothing wrong in morality, principle or good sense in permitting those Employees who worked for 33 1/3 years to have the benefit of both pensions. In fact and in law (they) are entitled to it."*
- [85] I fully recognise the submissions of Mr. Cumberbatch. However, for the reasons set out at paragraphs [78] to [80] above, they lead to a solution which, in the words of **Brightman J** in the **Law Land Company Ltd v Consumers' Association Ltd [1980] 2 E G L R 109 at 112:-**
- "is not practical and cannot possibly have been contemplated by the parties."*
- [86] In **Miriam Corp v Holborn Oil Ltd [1984] 2 All ER 326 (HL)** at page **329 Lord Diplock** made reference to a matter which involved a consignee's exposure to "*a potential liability to pay an unknown and wholly unpredictable sum for demurrage which may, unknown to him,*

already have occurred or may subsequently accrue without any liability on his own part to prevent it,..."

[87] Lord Diplock in the said case at page 329 stated inter alia as follows:-

"My Lords, I venture to assert that no businessman who had not taken leave of his senses would intentionally enter into a contract which exposed him to a potential liability of this kind; and this, in itself, I find to be an overwhelming reason for not indulging in verbal manipulation of the actual contractual words...so as to give to them this effect..."

[88] In his submissions Mr. Cumberbatch did not state who is the party that would bear the burden of the payment of these two pensions. In addition Mr. Cumberbatch did not indicate the sums of money which would be payable in these circumstances.

[89] I note however, the implicit submission of Mr. Cumberbatch that some Employees should be rewarded with the payment of two (2) pensions for the performance of an identical service.

[90] In addition, a strict interpretation of Article 28 leads to a conclusion that ALL Employees would be entitled to the benefit of two pensions, if allowed to stand. If Mr. Cumberbatch's submission applies to the former "public officers" then it equally applies to all employees.

[91] (a) In **Debenhams Retail PLC v Sun Alliance and London Assurance Co. Ltd. [2006] 1 P. & C.R.8** the Court of Appeal had to decide whether or not Value Added Tax (VAT) which came into operation in 1973 applied to determine "the gross amount of the total sales" in a lease which took effect in 1965.

(b) Jacob L.J. stated at page 129 that "the words are to be construed in their commercial context." At page 130 **Mance L.J.** stated *inter alia* as follows:

"The argument now is that VAT is a completely different animal from purchase tax. So it is no doubt, viewed from some

angles. But in the present context, where the issue is what should count as “the gross amount of the total sales” for the purposes of determining rental, I think it clear that VAT should be regarded as a substitute for purchase tax and as part of the gross amount.”

(c) At page 131 of the judgment **Mance L.J.** stated *inter alia* as follows”

“ In these circumstances, it would be wrong to treat the differences between the incidence and operation of purchase tax and of VAT as relevant under clause 3 (a) of the Third Schedule of the lease. One system replaced the other, with almost identical impact on final consumer expenditure and on the total received by Debenhams.

(d) The Court held that VAT is to be included in turnover for the purpose of calculating the Turnover Rent in place of purchase tax.

[92] (a) Should the computation of the Employees’ pensions benefits be done in accordance with the State Insurance Corporation’s Pension Plan and in such a manner which is more favourable to the Employees, then this conclusion should be the true meaning and object of the contract between the two parties.

(b) Put another way, the State Insurance Corporation’s Pension Plan should replace any reference to Cap 311 if the pensions benefits are more favourable to the Employees than if computed pursuant to Cap 311.

[93] In the circumstances of this case, I do not accept Mr. Cumberbatch's submissions. In addition to what I stated at paragraph [90], if the Corporation is required to pay some or all Employees two (2) pensions then this may expose the Corporation to an unspecified potential financial liability which may prove burdensome. In these circumstances there needs to be a modification of Article 28 so that it makes some business or commercial sense.

- [94] In summary, I conclude that the intention of the parties as expressed in the Agreement having regard to the factual matrix is that Article 28 should be modified to read as follows:

"For the computation of retirement benefits the provisions of the State Insurance Corporation Pension Plan for Salaried Employees, as amended and adapted, shall apply to all employees."

The second issue

What is the proper interpretation to be given to Article 21 (2) (b) of the existing written contract or Agreement in the formulation of a new contract or collective Agreement?

- [95] Mr. Cumberbatch, Counsel for the Employees submit that no change should occur to the existing Article 21 (2) (b). In essence learned Counsel submits that all Employees be at liberty to have a total of 28 days leave due to illness without the presentation of a medical certificate.
- [96] Mr. Brown for the Employer submits that the Employees should be allowed 12 days.
- [97] Mr. Cumberbatch provided some relevant statistics with regard to how certain business places treat this issue. Three establishments grant a period of 28 days each. One other entity allows 12 days.
- [98] For Mr. Brown, learned Counsel submitted that in four other establishments they do allow the Employees 12, 28, 13 and 18 days uncertified days of leave due to illness without the presentation of a medical certificate.

Findings

- [99] An objective fact is that Public Officers who are employed by the Government are entitled to a maximum of 12 days uncertified sick leave.
- [100] Another objective fact is that Section C 17 of the Labour Code provides for an allowance of a minimum of 12 days uncertified sick leave which an employee may utilize in any year of his employment.
- [101] I also take note that one of the major trade unions generally negotiates for a maximum of 12 days of uncertified sick leave for its members.
- [102] The taking of uncertified sick leave is not a right. I am also very mindful of the economic reality of the society in which employees live, work and perform their other functions. The conditions under which employees work may vary from wonderful to harsh, taking into consideration the salary earned and the nature of employment.
- [103] Having examined some objective factors I hold that the Employees should be at liberty to take up to 12 working days of sick leave per annum without the presentation of a medical certificate.
- [104] Clause 21 (2) (b) of the Collective Agreement should therefore be modified to read as follows:
- "An employee may be granted up to two (2) days sick leave on any one occasion without the submission of a medical certificate up to an aggregate of twelve (12) working days per annum in any calendar year. Such sick leave granted under this Clause must be recorded."***

Dated the 17th day of October, 2013

A handwritten signature in black ink, appearing to read 'P. A. Pilgrim', written over a horizontal line.

PHILIP A. PILGRIM

President

I agree:

A handwritten signature in black ink, appearing to read 'Samuel R. Aymer', written over a horizontal line.

SAMUEL R. AYMER

Member