IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2008/0577

BETWEEN:

CHARLES THOMAS WATSON

Claimant

and

STATE INSURANCE CORPORATION

Defendant

Appearances:

Sir Clare Roberts, Q.C. and Ms. Andrea Roberts for the Claimant
Mr. Roger Ford Q.C. and Ms. Althea Jarrett for the Defendant

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2009: October 12
2010: April 12
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JUDGMENT

[1] **MICHEL, J.:** By Claim Form and Statement of Claim filed on 6th October 2008 the Claimant, Charles Thomas Watson, claimed against the Defendant, State Insurance Corporation, for a declaration that the Defendant is in breach of trust and breach of agreement, damages for breach of contract and breach of trust as trustee of a fund, namely the State Insurance Corporation Pension Plan Fund, an order commanding the

Defendant by itself, its servants or agents or howsoever otherwise to pay the Claimant his pension entitlements under the terms of the Plan and to continue to pay the Claimant his Government pension and interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143 as the Court may think just.

[2] On 8th December 2008 the Defendant filed a Defence denying the Claimant's claim.

[3] On 9th January 2009 the Claimant filed a Reply joining issue with the Defendant on its Defence.

[4] On 3rd April 2009 the Defendant filed a Written Brief on Preliminary Issues, while on 9th April 2009 the Claimant filed a Summary of Issues in advance of the Case Management Conference, which took place on 8th May 2009.

[5] The Claimant filed his List of Documents on 29th May 2009, while the Defendant filed its List of Documents on 5th June 2009 and a Supplemental List and Further Supplemental List of Documents on 24th July and 4th September 2009 respectively.

[6] On 10th July 2009 the Defendant filed its Witness Statement, while on 17th July 2009 the Claimant filed his Witness Statements.

[7] On 28th August 2009 Pre-Trial Memoranda were filed by both parties.

[8] On 2nd October 2009 the Claimant filed Trial Bundle I (containing the pleadings), Trial Bundle II (containing the Witness Statements) and Trial Bundle III (containing the listed documents) and on 7th October 2009 filed a Supplemental Trial Bundle (containing additional listed documents).

[9] The trial of the matter took place on 12th October 2009.

[10] At the commencement of the trial, and by agreement of both parties, all documents contained in Trial Bundle III and the Supplemental Trial Bundle were admitted into evidence.

[11] The evidence of the Claimant, as per his Witness Statement, is that he is a trained accountant and was the Financial Comptroller of the Defendant from its inception until he retired in 2005, having been transferred to the Defendant when it was converted from a department of government to a statutory corporation. That he had worked with the State Insurance Department from 1979 until his employment with the Defendant. That in a letter dated 21st February 1986 he was employed to work with the Defendant with effect from 1st January 1986. That it was pointed out in his offer of employment that section 10 (1) of the State Insurance Act, Cap. 413 of the 1992 Revised Laws of Antigua and Barbuda (which established the State Insurance Corporation) safeguarded all contracts and agreements which he may have entered into with the State Insurance Department since the date of his employment. That his pension rights would be safeguarded was a major factor in his decision to be transitioned. That he was not severed from government service; in other words, he was not paid out for his service with the government department but rather his pensionable service was continued. That as an employee of the State Insurance Department he was entitled to a non-contributory pension on reaching the retirement age of 60 years. That this liability was vested in the Defendant by virtue of section 10 (1) of the Act when he accepted employment with the Defendant. That it was clear to him and to the representatives of Government and of the Defendant that his pensionable rights would be unbroken and safeguarded and that his government pension would be paid by the Defendant. That he was promised that he would be paid his government service and he relied on that promise and he fully expected therefore to receive his government pension from the Defendant, especially as he had known it to be the policy and practice of Government and it was clearly and expressly understood between him and the then General Manager, Dr. Rolston Barthley, before Dr. Barthley wrote the offer letter, that that would be the case.

[12] The Claimant stated that by letter dated 24th January 2005 from Mr. Josiah (the General Manager of the Defendant at the time) he was asked to proceed on retirement on 28th February 2005 "in keeping with the Government's policy that Public Officers and Civil Servants may be asked to retire at age 60 years." That the letter also stated that "a further correspondence will follow outlining your pension entitlement and any other benefit that might be due to you." That he had already been receiving his government pension from the Defendant since 2003 based on the formula that had been provided to the Defendant by Mr. Cordell Weston (the Permanent Secretary in the Ministry with responsibility for State Insurance at the time of the Rolston Barthley case).

[13] The Claimant stated that he received his Government pension from the Defendant by a State Insurance Corporation cheque until 31st July 2007 when he received his government pension by a cheque drawn on an account with the address "State Insurance Employee Pension Fund." That through his lawyers he wrote to the Defendant pointing out that he had received the cheque without a cover letter and that it would appear that the funds of the contributory pension fund were being diverted to meet an obligation of the Defendant to pay the government pension and he requested a full explanation of the cheque. That there was no response to the letter, but he continued to receive his government pension paid in this way. That he however received a letter dated 5th March 2009 from the Chairman of the Defendant's Board threatening to reduce his government pension from $3,382.16 per month to $1,566.66 per month and he has from June 2009 been paid a pension of a mere $1,566.66 per month, which is lower than what the Defendant agreed under a collective agreement to pay to employees in much lower positions than his. That neither the Defendant nor its Chairman is authorized to reduce his government pension which he had been receiving for over 6 years and which is a vested right and was guaranteed to him in 1986.

[14] The Claimant stated that in 1988 a contributory pension plan was set up between the Defendant and its staff for the purpose of providing pension benefits for employees of the Defendant. That he was a member of the plan and contributed to it from its inception. That he made a contribution of 3% of his salary from 1st January 1988 until 1st January

2000 when he was required to contribute 5% of his pensionable earnings as a designated employee, meaning "an Employee who is a member of the Executive Committee or Senior Management as determined by the Company." That it was agreed that he would pay a further 2% of his pensionable earnings and that he would thereby be entitled to an enhanced pension of 3% of final average salary for each year of pensionable service. That these contributions were deducted each month from his salary by the Defendant. That the enhanced aspect of the plan was on a recommendation by the actuary in 1999, which was accepted by the Board and on which the Board acted by making the additional contribution from management's salary. That it is not true to say that senior managers purported to make changes to the pension plan which would provide those senior managers with an enhanced pension. That the Board was at all times fully aware of and sanctioned the enhancement of the pension for senior management on the recommendation of the actuary. That on its part the Defendant committed itself to the terms of the plan and agreed to make contributions to the plan in accordance with the advice of the actuary. That based on the actuarial valuations, the Defendant paid contributions of 6.67% of the pensionable salary of the employees, including the Claimant's. That it was clear that the contributory pension was separate and apart from the government pension to which employees like the Claimant were entitled. That in fact the main purpose of the contributory pension plan was to improve on the government pension.

[15] The Claimant stated that it was a term of the plan that there was to be no diversion of the pension fund and that no person shall have any interest in or right to the pension fund or any part thereof, except as expressly provided by the plan, yet the Defendant ostensibly used the pension fund to meet its obligation to pay him his government pension, which is a liability it acquired by statute when it (the Defendant) was established.

[16] The Claimant stated that under the terms of the plan he was entitled to a pension from 1st February 2003 of 3% of his final average salary multiplied by his years of pensionable service. That the pension is payable by monthly instalments during his lifetime. That up to the time of filing this case the Defendant had refused to calculate his pension under the

plan and to have it checked by the actuary or to pay him his pension under the plan notwithstanding several demands by him to be so paid. That the Defendant has refused to pay him his pension under the plan on the misguided excuse that he was not entitled to "two pensions from Government."

[17] The Claimant stated that the Defendant is contending that it is not responsible for payment of the government pension and that the pension that it had been paying was an interim arrangement based on the Pension (Non-Established Government Employees) Act which was used as a matter of convenience and not entitlement and that the enhanced aspects of the pension plan had not been ratified. That after this case had progressed to case management, the Chairman of the Defendant's Board wrote to him indicating that the Defendant had now had his pension under the plan calculated by the actuary and that the pension that he was receiving would be reduced. That the position now is that what he regards as his government pension has been arbitrarily and illegally reduced from $3,382.16 to $1,566.66 per month and he has not been paid a pension under the plan to which he contributed. That he is entitled to have his government pension (which was paid to him by the Defendant for 6 years) reinstated and the arrears paid to him with interest and he is entitled to have his contributory pension properly calculated and paid to him from when it was due in 2003, with interest on the backdated payments.

[18] The Claimant stated that to his knowledge, employees of all statutory corporations in Antigua received a government pension, both in respect of employees who were employed in the departments and those who were employed by the corporations after incorporation and this pension is paid by the statutory corporation. That in some cases this is part of the collective agreement covering the workers in the bargaining unit. That in the case of the Defendant, the collective agreement provides that the corporation will pay a pension of not less than the amount that would be paid under the Pension (Non-Established Employees) Act, Cap. 310. That he was induced to work for the statutory corporation because he was promised that he would receive a government pension when he reached 60. That at the meeting with Dr. Rolston Bartley referred to in his letter of employment, it was made clear that he would not lose his pensionable service and that he would receive a government

pension on retirement paid by the Defendant. That this was very important to him because he was accepting a smaller salary than he would have earned in private practice. That it was made clear to him that the pension position was not just a matter of long-held government policy but, in the case of the Defendant, the policy was expressed in legislation. That there was no doubt that the reference to section 10 (1) of the Act in his "letter of offer" was to give him the comfort that the promise was backed up by legislation. That he would not have agreed to leave a non-contributory pensionable employment for one in which he would not receive a pension. That he was acutely aware of the pension provision since the salary was smaller than he would have attracted as a trained accountant but he was satisfied by the security of a pension at age 60. That this was reinforced by the fact that he was aware that in every case of transition from a department of government to a statutory corporation the employees did so on conditions not less favourable than what they were leaving. The law and practice of the pension rights of government employees who were transitioned to statutory corporations were well known in Antigua and this was the context of his "letter of offer." That there was no ambiguity as to what was being offered. That it would not have made any economic or commercial sense for him to have left employment with a non-contributory pension for employment with no pension.

[19] The Claimant stated that in 2003 his government pension was duly calculated and paid by the Defendant. That it was not an interim pension as is now asserted by the current Chairman of the Board and it was in no way referable to the contributory pension plan. That it is a blatant lie that there was a decision of the Board that he would be paid an interim pension calculated on the basis of the Pension (Non-Established Employees) Act or that it was decided, as a goodwill gesture, to include in his years of service for purposes of his calculations, the 7 years that he served with the State Insurance Department. That the current Chairman of the Defendant has declared that the practice and law must be changed and he has single handedly set about retroactively changing what was his (the Claimant's) contractual right.

[20] Under cross examination, the Claimant testified that he was first employed with the State Insurance Department in January of 1979. That since the date of that employment he did not enter into contract with the department. That the letter dated 21st February 1986 was the offer of employment to him. That it would be true to say that he accepted the offer in the letter dated 21st February 1986. That his employment with the Defendant commenced in January 1986. That prior to that date he would have been a public officer. That up to that date he had served 7 years as a public officer. That he is aware that one needs to serve a minimum of 10 years before one qualifies for a pension. That he said in his Witness Statement that he had been receiving his government pension since 2003. That he never received any letter saying that the money he was receiving was his government pension. That it is correct that all he can safely say is that the cheque he was receiving was calculated based on the government pension. That as of 2003 there was a pension plan established by the Defendant, but the actuaries had not yet calculated his entitlement under that plan. That he does not agree that the pension payments he was receiving were merely interim payments until the calculation under the Defendant's pension plan had been made. That his understanding was that he was receiving a government pension. That he knows that the Defendant's pension plan has trustees. That he does not know who the trustees are. That he knows that the Defendant is not the trustee of the plan.

[21] Under re examination, the Claimant testified that his understanding of the first sentence of the letter to him of 21st February 1986 is that the letter is a follow up to meetings that he had previously had with the General Manager. That his understanding of the second sentence of the letter is that all rights and benefits that he would have received as an employee of the State Insurance Department would be transferred to the Defendant. That the reason why there was a specific reference in the letter to section 10 (1) of the State Insurance Corporation Act was as a result of the importance of this section and the benefits that would have been transferred. That the pension plan contained from inception the formula for calculating the entitlement.

[22] The second witness for the Claimant was Cordell Weston. In his Witness Statement he stated that he held various offices, including that of Permanent Secretary in the Ministry of

Public Works and Public Utilities from 1998 to 2004, which was the Ministry responsible for the State Insurance Department and the State Insurance Corporation. That he also served as a member of the State Insurance Board. That the first employee of the Defendant to be considered for a government pension was Dr. Rolston Barthley, who had been the general manager. That the Board gave the directive that Dr. Barthley should be paid his government pension, to which he was clearly entitled. That at about the same time he brought the decision of Malcom Edwards v APUA to the attention of the Board. That in that case the Privy Council said that Malcolm Edwards had to paid a government pension by the APUA notwithstanding that at the time of the transition from telephone department to statutory corporation he was a contract officer and did not carry over pensionable service. That it was felt that Barthley, having carried over pensionable service, was even more entitled to have the Defendant pay his government pension. That Barthley received his full government pension from the Defendant. That in so deciding the Board was moved by the then current practice and policy of the Government and, in the case of State Insurance, the law as they understood it that government employees would not lose anything in the transition to corporate status, in particular, their pensionable service. That there was however some delay in paying the contributory pension to Dr. Barthley, but there was never any doubt about his entitlement to it, only a question as to quantum. That Dr. Barthley died before the matter of his contributory pension was resolved.

[23] Mr. Weston stated that, as Permanent Secretary responsible for the State Insurance Corporation, he provided the Defendant with the formula for calculating the government pension. The formula was based on the Pension (Non-Established Government Employees) Act. That this was not an interim payment, nor was it referable to the pension plan. That the two entitlements were separate – the government pension was paid by the Defendant and the contributory pension was to be paid from the pension fund and would be administered by the pension committee. That the employees from the State Insurance Department were never severed from the government service; they were never paid off before they went over to the statutory corporation, but rather their pensionable service was carried over and became the liability of the Defendant by virtue of section 10 (1) of the Act.

[24] Mr. Weston stated that when the Claimant reached 60 he was paid his government pension. That it is quite untrue to say that his pension was an interim pension. That it was his full government pension. That it is also untrue to say that the pension was referable to his contributory pension under the Defendant's pension plan. That these were two separate pensions. That the formula used to pay the Claimant's government pension was the one that he (Mr. Weston) had provided in respect of Rolston Barthley. That the formula was not used as a substitute for the Defendant's contributory pension plan as this plan had its own simple formula. That there would have been no need to use the Government's more complicated formula. That the government formula was used because the Claimant was being paid his government pension and there was no decision by the Board to make a goodwill gesture by including the Claimant's department service in the calculation. That this was included because the Claimant was to be paid for his pensionable service which commenced with the Department and continued with the Corporation. There was no controversy about the Defendant paying the Claimant's government pension because his case was on all fours with the Rolston Barthley case. That the Claimant was entitled to 2 pensions – his government pension paid by the Defendant and his contributory pension paid from the pension fund under the pension plan.

[25] Under cross examination, Mr. Weston testified that his wife is employed with the Defendant. That she was previously employed with the State Insurance Department and was employed by the Defendant upon its incorporation. That his basis for saying that Dr. Barthley was clearly entitled to a government pension was because he moved over from the Department to the Corporation without any cut in his entitlement. That Dr. Barthley was a public officer when he worked in the department. That he does not know whether public officers receive severance. That he is not familiar with the terms of employment between Dr. Barthley and the Defendant.

[26] Mr. Weston was referred to a letter from the Defendant to Dr. Barthley dated 29th November 2002 and contained in pages 65 and 66 of Trial Bundle 3 and was asked to

read paragraph 3 thereof. Mr. Weston agreed that the letter refers to the pension paid to Dr. Barthley as an interim arrangement.

[27] Mr. Weston was then referred to a letter from Dr. Barthley at pages 68 and 69 of Trial Bundle III and was asked to read paragraph 2 thereof. Mr. Weston agreed that Dr. Barthley is saying in the letter that he is not entitled to a government pension.

[28] Mr. Weston testified that Dr. Bartley retired in November 2002. That he does not recall the year that the Privy Council decided the case of Malcolm Edwards v APUA. That he agrees that he could not have brought the Malcolm Edwards decision to the Board because the Privy Council decision in that case was in October 2003 while Dr. Barthley's retirement was in November 2002.

[29] Mr. Weston testified that when he said at paragraph 2 of his Witness Statement that it was felt that Dr. Barthley, having carried over pensionable service, was even more so entitled to have the State Insurance Corporation pay his government pension, he meant that it was felt by him. That he cannot identify the source from which he derived the current policy of government to which he referred in paragraph 2 of his Witness Statement. That when he said in the same paragraph of his Witness Statement "the law as we understood it," that was his opinion of how the Board understood the law. That he did not seek a legal opinion on the interpretation of section 10 (1) of the Act, but he did have a conversation with a lawyer in the Attorney General's Chambers. That it was his understanding that if one was not severed as a public officer then one's pensionable service went across to the Corporation. That there is no dispute that the calculation of the Claimant's pension was in accordance with the government pension. That Dr. Barthley's pension was also similarly calculated. That the letter at page 67 of Trial Bundle 3 shows that that pension was paid to Dr. Barthley as an interim payment. That the Claimant in this case was treated the same way as Dr. Barthley was treated with respect to pension. That he was not aware that the Claimant's pension was interim. That he agrees that at the time the Claimant retired the pension plan had not been regularised.

[30] Mr. Weston was referred to minutes of a meeting of the Board of Directors of the Defendant contained in pages 73 to 77 of Trial Bundle 3 and was asked to read Minute 6.4 on page 76, after which he testified that it was not his opinion that the sums paid to the Claimant were interim until the calculation by the actuary. That to the best of his knowledge, at the date of retirement of the Claimant, the actuaries had not calculated the Claimant's pension.

[31] Mr. Weston testified that at paragraph 6 of his Witness Statement he said it was a full government pension. That that is according to the Act. That, in his opinion, at the date of the Claimant's retirement he was still a public officer. That as a public officer he would be entitled to his pension. That if the Claimant were not a public officer he (Mr. Weston) has not considered what would be the consequence. That he stated that the case was on all fours with Dr. Barthley's case and he thought that Dr. Barthley was entitled to a government pension. That he read in Dr. Barthley's letter that Dr. Barthley's position was that he was not entitled to a government pension. That it was not his opinion that the payment to Dr. Barthley was an interim payment.

[32] Mr. Weston was again referred to and asked to read the letter at page 67 of Trial Bundle III and he said that the sum referred to there is the sum calculated in accordance with the Pensions Act.

[33] Under re examination, Mr. Weston testified that the subject of Dr. Bartley's letter (at pages 68 to 69 of Trial Bundle III) is "SIC Employees Pension Plan" and that this letter was responding to the letter from the Defendant contained in pages 65 to 66 of Trial Bundle III.

[34] Mr. Weston was referred to a document at page 64 of Trial Bundle III, which he testified is a memorandum written to the Board of Directors of the Defendant by him as the then Permanent Secretary. That the reference in the memo to "the absence of a staff pension scheme" refers to the fact that the Defendant's pension plan was not yet finalized. That this would suggest that if it was finalized then there would be no such payment, but this is misleading, because the government pension was still payable.

[35] Mr. Weston was referred to Minute 6.4 and 6.5 of the minutes contained on pages 73 to 77 of Trial Bundle III and testified that the Claimant qualified under the staff pension scheme and so the pension fund would have to refund, but in the other case where Ms. Terry did not qualify the Board said that they would have to make a determination about that.

[36] Mr. Weston testified that in order to regularise the staff pension plan there was a pension committee which had to decide a number of things. That the figures of 3% and 5% were set by the actuary, but they had to be endorsed by the pension committee, which had not been done. That the pension plan was taking contributions from employees and receiving contributions from the Defendant. That the plan was functioning. That the actuaries had not calculated the Claimant's pension. That he does not know whether they had been asked to do so.

[37] Mr. Weston testified that he was aware of the case of Malcolm Edwards. That he knew what the case was about. That he recalled mentioning about the case to the Board, but he cannot now remember when he did so.

[38] The third and final witness for the Claimant was Robert Josiah. Mr. Josiah stated in his Witness Statement that he retired as General Manager of the Defendant. That he and Dr. Rolston Barthley were founders of State Insurance, having been employed by the Government to start up an insurance department of government. That in 1979 the Government employed the Claimant as the Financial Comptroller of the State Insurance Department. That he (Mr. Josiah) was involved in the recruitment of the Claimant. That one of the inducements for the Claimant was the fact that his employment would have been long term and pensionable. That in 1985 legislation was passed to incorporate the State Insurance Department. That one aspect of the legislation was to codify the then and current policy and practice of the Government with respect to payment of pensions to its employees who were transferred to statutory corporations on the transition from departments. That the policy was that the corporation would pay the government pensions of such employees calculated over the period of service with the department and with the

corporation. That section 10 (1) of the State Insurance Corporation Act was designed to put the liability of payment of the government pension beyond doubt. That section 10 was construed by the employees and management as providing that the liability for the pensionable service, which continued after incorporation, was to be that of the Defendant, which is why section 10 (1) was referred to in the letter of offer to the Claimant and other employees, including Mr. Josiah himself. That each employee of the State Insurance Department received such a letter confirming the reassurance to them that their pensionable service would continue and that on retiring they would be paid full government pension by the Defendant. That this was a very important issue for all employees since it made no sense to be asked to give up a job with non-contributory pensionable service for a job without. That the letter to the Claimant followed meetings with the staff and Dr. Barthley where assurances of the continuity of the pensionable service were given. That it was made clear that this government pension would be paid by the Defendant.

[39] Mr. Josiah stated that in 1988 the Defendant introduced a contributory pension plan. That from 1st January 1998 employees contributed 3% of their salaries towards the pension plan. That from 1st January 2000, designated employees of the Defendant (defined as employees who are members of the Defendant's Executive Management) were required to contribute 5% of their pensionable earnings. That on the recommendation of the actuary in 1999 (following an actuarial review of the plan) it was agreed by the Board and management that senior managers, such as the Claimant, would pay a further 2% of their pensionable earnings and that they would thereby be entitled to an enhanced pension of 3% of final average salary for each year of pensionable service.

[40] Mr. Josiah stated that, by memo dated 7th May 2003, he sent the Claimant the calculation of his pension benefits on the instructions of the Board. That his pension was calculated in accordance with the Pension (Non-Established Government Employees) Act. That the formula that he used was the one that had been previously provided by Mr. Cordell Weston in respect of Dr. Rolston Barthley when he retired. That it was not an interim pension and it definitely was not an interim pension under the contributory pension plan, nor was it a goodwill gesture to include his full pensionable employment from 1979 to

2003. That the pension that the Claimant received was his non contributory government pension to which both the Ministry and the Board had no doubt he was entitled. That in any event the Board would not be the entity to make a decision as to matters dealing with the pension under the contributory pension plan. That the pension committee would have made these decisions and the pension would be paid from the pension fund rather than from the Defendant's payroll.

[41] Mr. Josiah stated that the employees from the State Insurance Corporation were never severed from the government service. That they were not paid off before they went over to the State Insurance Corporation but rather their pensionable service was carried over and became the liability of the Corporation by virtue of section 10 (1) of the Act. That after a new Government took office in Antigua and Barbuda in 2004 a new Chairman (Mr. Pedro Corbin) was appointed for the Defendant, who seemed to have ideas contrary to the policies and practices of the previous Government. That in particular, the new Chairman declared that there should be only one pension. The he set about applying his views retroactively. That in his (Mr' Josiah's) case, the new Chairman wrote a letter informing him that the government pension that he had been receiving for over 6 years would be reduced from $6,000 per month to $2,125 per month, in effect denying him of his non contributory pension. That the Defendant sought to renege on the agreement with respect to the enhanced pension.

[42] Under cross examination, Mr. Josiah testified that he was a retired General Manager of the Defendant. That prior to his employment with the Defendant he was employed with the State Insurance Department, which he believes is one and the same thing. That he commenced employment with the department on 1st January 1977. That at the date of his employment he was a public officer. That in 1986 the Defendant made an offer of employment to him by letter. That he assumes that he received the same letter as the Claimant. That he always considered the Department and the Corporation the same. That in 1979 the Government employed the Claimant as Financial Comptroller of the State Insurance Department. That he knows that in 1986 the Claimant accepted employment with the Defendant. That he is not aware of any policy document by the Government on

the payment of pensions. That he is not aware of the details of all the corporations and the transfer of their staff. That he knows that if you were employed with a government department and you are transferred to a corporation you would be guaranteed your pension rights. That he knows that this would arise either from the statute or from your contract. That he does not know whether section 10 (1) says anything about pensions.

[43] Upon being shown section 10 (1) of the Act, Mr. Josiah says that the word "pension" is not mentioned there. Upon being shown the letter of 21st February 1986 to the Claimant (the offer of employment) Mr. Josiah says that there is no mention of pension in the letter. That the letter does not say anything about confirming or assuring anyone as suggested by his Witness Statement. That the letter does not say anywhere that you shall be paid a full government pension.

[44] Mr. Josiah testified that he was familiar with the case of Dr. Barthley and his pension.

[45] Mr. Josiah was referred to and asked to read a letter written by him to Dr. Barthley (which letter is at page 67 of Trial Bundle 3) and he agrees that the letter refers to an interim pension. That no reference was made to the Pensions Act. That the letter was written on behalf of the Defendant's Board.

[46] Mr. Josiah was then referred to and asked to read paragraph 2 of a letter from Dr. Barthley contained in pages 68 to 69 of Trial Bundle III and states that the letter is speaking specifically of the contributory pension plan.

[47] Mr. Josiah testified that his understanding is that once you were not severed/paid out by the Government your pension is continued. That he does not know whether there is provision for paying severance to or paying out public officers. That he disagrees with the suggestion that civil servants are not entitled to severance. That he thinks he understands the concept of secondment. That he does not see the word "secondment" mentioned anywhere in the Claimant's offer letter. That it is his position that at the date of the Claimant's retirement he was still a public officer. That the Claimant is entitled to a

government pension on the basis of the terms on which he was employed by the Defendant. That up to 1986 the Claimant did qualify for a pension in that the years that he served were pensionable. That he is not aware that 10 years is the qualifying period for a pension. That one earns a pension through one's years of service.

[48] Mr. Josiah testified that one of the benefits of working for government is the receipt of pension. That he knows what induced the Claimant because the Claimant told him. That he sat in meetings with the Claimant before, during and after his employment. That he did not think it was necessary to speak of the inducements in the offer letter to the Claimant. That the payment of a pension is not the only consideration in accepting a job. That job security is also a consideration. That he did not do a survey of all businesses in Antigua as to the salaries of accountants in the private sector. That the Claimant worked for more where he came from. That the way he sees it the issue of pension goes some way to compensate the Claimant. That he sees employment with the Department as the same as employment with the Corporation. That he is aware that in October 2003 the Board reversed the position on the enhanced pension and refunds were given. That he cannot put his hands on any document setting out the recommendations of the actuary which he referred to in his Witness Statement.

[49] Mr. Josiah testified that he is here to support the Claimant because he wants to see him get justice. That he is himself seeking two pensions.

[50] The sole witness for the Defendant was Mr. Pedro Corbin. Mr. Corbin stated in his Witness Statement that he is the Chairman of the Board of the Defendant, having assumed the position of Chairman in May 2004. That the Defendant was established as a body corporate in January 1986. That its purpose is to carry on the business of the former department of government known as the State Insurance Department. That when it was established, the Defendant gave the opportunity to all employees of the State Insurance Department to remain in the civil service or to accept offers of employment with the Defendant. That by letter dated 21st February 1986 written by the General Manager, Dr. Rolston Barthley, the Claimant was offered employment with the Defendant with effect

from 1st January 1986 and he was asked to indicate his willingness to accept the offer of employment by signing a copy of the offer letter, which he did. That the Claimant had previously served 7 years with the State Insurance Department. That prior to his acceptance of employment with the Defendant, the Claimant's entitlement to pension was governed and prescribed by the Pensions Act, Cap. 311 of the Laws of Antigua and Barbuda. That the Claimant joined the staff of the Defendant as Accountant at the same salary which he was earning at the Department.

[51] Mr. Corbin stated that in 1988 the Defendant's Board established a pension plan for the employees of the Defendant. That pension rules were drafted that same year, but a trust deed was not prepared until 2008. That the pension rules were distributed to all members of staff. That under the pension plan the Defendant's employees contributed approximately 3% of their monthly salary and the Defendant as employer contributed approximately 6.7% of that salary. That at the commencement of the pension plan it was administered and managed by the executive managers of the Defendant. That retirement age under the pension plan is 60 years. That the pension plan took effect from January 1988 and, by words and conduct, the Claimant participated in the plan. That the records of the Defendant show that sometime in 1999 the executive managers of the Defendant purported to revise the pension rules and prepared a document which they called "Pension Plan for Salaried Members (Amended and Restated as at January 1, 1999)." That the records of the Defendant show that there was no Board approval for this purported revision, by virtue of which the executive managers designated themselves enhanced pensions on retirement as a result of enhanced contributions to be made by them. That the executive managers who were involved in this purported revision to the pension plan and who would have been the sole beneficiaries thereof were the Claimant, Mr. Barthley (the then General Manager), Mr. Josiah (the then Deputy General Manager) and a Mr. Dalmer McCoy (the then Manager of the General Division of the Defendant). That under the purported revision of the plan the monthly contributions of the executive managers increased from 3% to 5% with improved benefits on retirement of up to a maximum of 90% of their salaries. That the records of the Defendant show that the above revision of the pension plan was made without the approval and/or consent of the Board. Minutes of a

meeting of the Board on 23rd October 2002 show that the Board became aware of the purported revision to the pension plan in that month and made a decision that all employees should contribute 3% of their salary to the pension plan, that no contributor to the plan should be considered superior and that all contributions paid in excess of 3% were to be refunded. That the Claimant had made enhanced contributions of 5% of his salary to the pension plan from January 1999 to October 2002 and in January 2007 he was presented with a cheque of $7,621.94, representing a refund of the extra 2% contribution made by him to the pension plan between January 1999 and October 2002. That the Claimant refused to accept the cheque and as a consequence it was never negotiated, but the other 3 executive managers accepted their refunds.

[52] Mr. Corbin stated that in January 2003 the Claimant attained the age of 60 years and so reached retirement age under the pension plan. That at a meeting of 19th March 2003 the Board decided that the Claimant should begin receiving his monthly pension with effect from 1st February 2003, based on the calculations for non established government employees. That once the pension plan was finalized and the Claimant's pension entitlement was determined, the appropriate reconciliation would be made by the actuaries of his entitlement under the pension plan. That the Board also took the decision that, despite reaching the age of retirement, the Claimant would remain with the Defendant under contract. That in calculating the Claimant's pension, the Board decided as a goodwill gesture to include the 7 years that the Claimant would have served with the State Insurance Department. That, effective 1st February 2003, the Defendant began paying the Claimant $3,382.16 calculated on the basis of the formulation used for the non established government employees and in view of the fact that the actuaries had not yet made the calculation of the Claimant's entitlement under the pension plan. That this pension was paid from the Defendant's funds and not from the funds of the pension plan because the pension plan had not yet been regularized. That all cheques were sent to the Claimant on the basis that they were interim monthly pension payments under the pension plan. That this arrangement continued until July 2007 when the pension plan was in fact regularized and all reconciliations made with the Defendant and thereafter the Claimant received all his monthly pension payments from the funds of the pension plan. That no representation

was ever made to the Claimant that the monthly pension payments of $3,382.16 were being made to him on behalf of the Government as its pension or as the Defendant's contribution to any pension due to him by the Government.

[53] Mr. Corbin stated that, based on the Defendant's documents, at no time did the Defendant promise, agree and/or represent to the Claimant that it would pay to him a government pension. That in fact at no time did it pay to him a government pension. That all pension payments made to him since February 2003 have been payments under the pension plan. That as the Accountant for the Defendant the Claimant never made any provision in the Defendant's accounts for the payment of any liability for government pension.

[54] Mr. Corbin stated that in February 2009 the actuaries informed the Defendant by electronic letter that they had determined that the Claimant's pension entitlement was $18,800 per year. That this was later confirmed in a signed letter dated 2nd March 2009 and, by letter dated 5th March 2009, he (Mr. Corbin) informed the Claimant that his monthly pension was reduced to $1,566.66. That the Defendant is not in breach of trust or of any agreement with the Claimant. That the Defendant is not liable for the payment of any pension to the Claimant save and except the pension due to him under the pension plan. That the Defendant never represented to the Claimant that it would be liable for the payment of any pension other than the pension under the pension plan.

[55] Mr. Corbin testified that he has seen no agreement, such as is referred to in paragraph 6 of the Witness Statement of Robert Josiah, to the effect that the Board and management agreed that senior managers, such as the Claimant, would pay a further 2% of their pensionable earnings and that they would thereby be entitled to an enhanced pension of 3% of final average salary for each year of pensionable service.

[56] Under cross examination, Mr. Corbin testified that his ability to speak on matters concerning the Defendant prior to May 2004 is based on his reading of minutes and other documents of the Defendant at the time of his appointment as Chairman in 2004 and again in preparation for this trial.

[57] Mr. Corbin testified that the current Board of the Defendant recognises the pension plan as the only pension to be paid to employees of the Defendant. That the Board has no statutory obligation to pay pension as per the Pension (Non-Established Government Employees) Act to persons who had come over from the State Insurance Department.

[58] Mr. Corbin was referred to and invited to read the 4th paragraph of a letter contained in pages 65 to 66 of Trial Bundle III and agrees that the former Chairman of the Defendant's Board recognised a statutory obligation of the Defendant to pay a pension under the Pension (Non-Established Government Employees) Act.

[59] Mr. Corbin testified that the Claimant was paid his pension as calculated under the Act for about 6 years. That he was paid from the Defendant's account until sometime in 2007 when the Claimant's pension payments were drawn on the pension fund account.

[60] Mr. Corbin was referred by Counsel in cross examination to the document at page 144A of Trial Bundle III which refers to the monthly pension provided by the pension plan, along with the government pension and personal savings, as helping employees to secure their standard of living.

[61] Having reviewed the evidence in this case (both oral and documentary) and having perused the submissions made and authorities cited on behalf of the parties, this Court concludes that it was the common understanding and intention of the Claimant and the Defendant, at the time of entering into the contract of employment between themselves in January/February of 1986, that the Claimant would upon retirement receive a pension from the Defendant equivalent to the pension he would have received from Government had he continued as an employee of the State Insurance Department instead of transferring or transitioning to the State Insurance Corporation. What is not clear from the evidence, the submissions and the authorities is what was to have happened if and when the Defendant set up its own contributory pension plan, which did not exist at the time of its establishment or its employment of the Claimant in 1986. Absent any prior agreement as to what would

happen in that eventuality, the Court can only treat the contributory pension plan as a separate entity to be dealt with on its own and so, if the Defendant contributed to it on the basis that he would on retirement receive a certain benefit, he is entitled to that benefit on retirement independent of any other previously agreed pension entitlement.

[62] The Court is not however satisfied that the Board of Directors of the Defendant ever agreed to any enhanced contributions by or any enhanced pension payments to any designated employees (including the Claimant) under the Defendant's contributory pension plan and regards the purported revision of the pension plan in 1999 by the 4 top executives of the Defendant as an attempted self help project by the aforesaid executives.

[63] The Court finds no basis upon which it can make any order for breach of trust, it never having even been established who the trustees are that might have breached any trust.

[64] The Court makes the following orders:

1. A declaration that the Claimant is entitled to continue to receive a pension calculated under the Pension (Non-Established Government Employees) Act from June 2009 until his earthly demise.

2. A declaration that the Claimant is entitled to receive a pension calculated under the Defendant's Pension Plan from 1st February 2003 until his earthly demise.

3. An order that the Defendant shall pay to the Claimant forthwith the unpaid amount of his non-contributory "government pension" from June 2009 to the date of this judgment, with interest thereon at the rate of 5% per annum from the due date of each payment, and thereafter shall continue to pay to him the monthly pension, payment of which commenced with effect from February 2003.

4. An order that the Defendant shall pay to the Claimant forthwith the unpaid amount of his contributory pension from 1st February 2003 until June 2009, together with interest at the rate of 5% per annum from the due date of each payment.

5. Prescribed costs to the Claimant on the previously-agreed value of the claim of $60,000, which costs total $16,000.

Mario Michel
High Court Judge