

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

CLAIM NO. ANUHCV 2005/0105

BETWEEN:

LLEWELLYN SMITH

Claimant

and

ANTIGUA PORT AUTHORITY

Defendant

Appearances:

Mr. Hugh Marshall Jr. for the Claimant

Mr. Craig Christopher and Ms. Nina Joseph for the Defendant

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2006: November 20
2007: March 28
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JUDGMENT

Port Authority Act - Creation of post of executive chairman - Whether post authorized by the Act - Whether Claimant entitled to pension and gratuity after serving in post of Executive Chairman.

[1] **Thomas J:** On 8th March 2005 Llewellyn Smith, the Claimant, filed a claim form in which he claims against the Antigua Port Authority, the Defendant, a gratuity and pension under a contract of employment.

PLEADINGS

[2] In his statement of claim, the Claimant contends that all material times he was a Commissioner within the meaning of paragraph 1 of the First Schedule to the PORT AUTHORITY ACT CAP. 333 ("the Act"). Further, that he was appointed Chairman of the Board

of Commissioners within the meaning of paragraph 3 of the First Schedule to the Act by the Governor-General on 8th March 1993 and again on 4th February, 1977.

[3] At paragraph 3 of the statement of claim the Claimant contends further that he “performed these functions from 1st April 1991 and it was agreed between the Claimant and the Defendant that his appointment would deemed effective as of that date”.

[4] The Claimant says that effective 23rd March 2004 he retired from the Board and that such retirement entitled him to a pension and gratuity. In this connection he says that it was agreed with the Defendant that the gratuity would be in the amount of \$84,141.75 and the pension in the amount of \$1,682.84 per month. An entitlement to 21 days vacation is also claimed.

[5] At paragraph 8 of the statement of claim the following is stated:

“In the breach of the said agreement and in further breach of the terms of employment the Defendant has refused, failed or otherwise neglected to pay the Claimant his gratuity and pension and vacation thereby occasioning the Claimant loss.

PARTICULARS OF CLAIMANT’S LOSS

A. Gratuity in the amount of	\$ 84,141.75
B. Monthly pension from April 2004 to present @ \$1,682.84 per month	\$ 20,194.08
C. 51 day vacation pay @ \$398.31 per day	<u>\$ 20,313.53</u>
	<u>\$124,649.36</u>

AND THE CLAIMANT CLAIMS

- (a) \$124,649.36
- (b) Interest pursuant to the Supreme Court Act
- (c) An order that the Claimant’s pension be paid monthly in the sum of \$1,682.84
- (d) Costs”.

DEFENCE

- [6] In its defence the Defendant admits paragraph 1, 2 and 3 of the statement of claim which relate to the Claimant's appointment as a Commissioner and then as Chairman of the Board of Commissioners on 8th March 1993 and again on 4th February 1997.
- [7] With respect to paragraph 4 of the statement of claim the Defendant contends that it is a statutory corporation under the PORT AUTHORITY ACT and that its policy, management and administration is subject to the said Act.
- [8] In so far as the pension and gratuity are concerned, the Defendant says as follows:
- (a) the Claimant's employment as Chairman of the Board of Commissioners of the Defendant came to an end when the said Claimant by letter dated 7th April 2004 resigned as a Commissioner of the said Board of Commissioners of the Defendant.
 - (b) the Claimant's employment by the Defendant was as a Commissioner and Chairman of the Board of Commissioners which position is that of Board member and not that of management or officer of the Defendant;
 - (c) the Port Authority Act does not provide for the provision of gratuity and pension upon the retirement of a Commissioner.
- [9] With respect to paragraphs 6, 7 and 8 of the statement of claim, which concern an alleged agreement on pension and gratuity, vacation and loss, the Defendant contends as follows:
- (a) save for the Claimant's appointment as a Commissioner and chairman of the Board of Commissioners, there exists no separate or collateral contract of employment between the Claimant and the Defendant which contains terms in relation to gratuity and pension due to the Claimant upon retirement.
 - (b) the Act does not provide for nor does it contemplate the position of Executive Chairman as part of the management of the Defendant or of the Board of Commissioners or at all.
 - (c) the Claimant as a member of the Board of Commissioners or as the Chairman of the Board of Commissioners in accordance with the Act is not entitled to 21 days vacation or to any vacation whatsoever.
 - (d) the Defendant is not in breach of any terms of its employment of the Claimant as alleged or at all.

ISSUES

- [10] The following are the issues to be determined by the Court:

1. Whether the Claimant can lawfully use witness statements to change his statement of case.
2. Whether the Claimant is entitled to a pension or gratuity by virtue of the fact that he held the office of Chairman of the Board of Commissioners at the Antigua Port Authority.

ISSUE NO.1

WHETHER THE CLAIMANT CAN LAWFULLY USE WITNESS STATEMENTS TO CHANGE HIS STATEMENT OF CASE.

[11] This issue is raised by the Defendant and the contention is that the Claimant's case is pleaded on the basis of his former office as Chairman of the Board of Commissioners and not as executive chairman. Accordingly, the submission is that parties to a civil action are legally obligated to operate within the bounds of their filed statement of case. Reliance is placed on the following dictum of Lord Wolf MR in *MC PHILEMY v TIMES NEWSPAPERS LTD* [1999] 3 ALL ER 755:

“Statements of case are required to mark out the parameters of the case that is being advanced by each party. It is important that they identify the issues and the extent of the dispute between the parties. They should state concisely the general nature of each party's case. However, the need for extensive detail and particulars has been reduced by the requirements that witness statements must be exchanged. In the majority of proceedings, identification of the documents upon which a party relies, together with copies of the party's witness statements will make the detail of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise”.

[12] The further contention of the Defendant is that the case of *RIXON v CHIEF CONSTABLE OF KENT* [2000] *The Times* April 11 supports the proposition that it was not acceptable to use witness statements to fill a gap in a party's statement of case.

[13] In Part 2.4 of CPR 2000 it is stated that “statement of case” means

- (a) a claim form, statement of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
- (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court”

[14] The essence of the Claimant's case, as pleaded at paragraphs 2 and 6 of his statement of claim is that he served as a Commissioner and Chairman of the Board of Commissioners during the period March 1993 to March 2004; and that it was agreed with the Defendant that his pension and gratuity would be in the amounts of \$1,682.84 monthly and \$84,141.75, respectively.

[15] The notion of executive Chairman only arises in the witness statements. Therefore, given on the definition of 'statement of case' plus the authorities cited by learned counsel, Mr. Craig Christopher, the Court agrees that 'executive Chairman' is outside of the Claimant's case. The further point is that Part 20 of CPR 2000 prescribes a procedure to be followed for changes to statements of case. There is no evidence to suggest that this procedure was followed with or without the permission of the Court.

ISSUE NO. 2

WHETHER THE CLAIMANT IS ENTITLED A PENSION AND GRATUITY BY VIRTUE OF A PENSION AND GRATUITY BY VIRTUE OF THE FACT THAT HE HELD THE OFFICE OF CHAIRMAN OF THE BOARD OF COMMISSIONERS AT THE ANTIGUA PORT AUTHORITY.

COMMON GROUND

[16] It is common ground between the parties that:

1. By instruments under the hand of the Governor-General, the Claimant was appointed as a Commissioner and Chairman of the Board of Commissioners of the Antigua Port Authority during the periods 1st April 1993 to 31st March 1996 and 1st April 1996 to 31st March 1998. In fact the Claimant submitted his resignation by letter dated 7th April 2004.
2. Certain letters from the Permanent Secretary, and the Minister of State, dated 1st October 1991 and 2nd November 2001 make reference to the fact that the Claimant functioned as Executive Chairman at the Antigua Port Authority.
3. The letter dated 2nd November 2001 directed that the Claimant is to function as a member of Management at the Port on a daily basis.
4. The Claimant occupied an office at the Port Authority.
5. At the time of his resignation the Claimant earned a monthly salary of \$8,629.93.

6. Certain calculations of pension and gratuity were prepared by the Defendant in relation to the Claimant.

SUBMISSIONS

- [17] The following are the submissions tendered on behalf of the Claimant:

According to the pleadings the Claimant was engaged by the Defendant, was appointed Chairman of the Board and that the Authority is subject to the Effective Control of the Executive. It was further pleaded that the Claimant would be paid gratuity and pension. It is submitted that this is an entitlement pursuant to the directive of the Minister at the time of his appointment, as the Claimant was to “enjoy all privileges and benefits as other members of Management” (Ref Page 32 of Trial Bundle – Letter of 2nd November 2001).

In conclusion it is submitted that the Claimant’s appointment as Executive Chairman falls well within the ambit of section 1 (1) of the Second Schedule of the Port Authority Act and as such it follows that the Claimant is entitled, as an employee of the Port, to the relief sought herein which relates to his management services rendered to the Port as Executive Chairman from April 1991 through March 2004 upon the directive of the Minister.

- [18] The submissions on behalf of the Defendant are as follows:

7. [A]lthough the defendant statutory corporation is seized of the capacity to contract and to hire its own employees, the Defendant statutory corporation cannot whatsoever howsoever contract to appoint persons as Commissioners or Chairman of the Board of Commissioners, and cannot therefore treat such persons as its employees.
8. This legal disability or incapacity is made quite clear in the provisions of clauses 1 and 3 (1) of the First Schedule to the Port Authority Act (Cap. 333) of the Revised Laws of Antigua and Barbuda 1992. Clause 1 of the said Schedule, which clause concerns the appointment of Commissioners, expressly provides that:

The Authority shall consist of seven persons to be designated Commissioners, appointed by the Governor-General from amongst persons appearing to him to be qualified by reason of having had experience of and shown capacity in matters relating to trade, law, finance, science, administration or labour relations.

Clause 3 (1) of the said Schedule stipulates that *the Governor-General shall appoint one of the Commissioners to be the Chairman of the Authority.*

9. To say that the Claimant was an employee of the Defendant statutory corporation would be manifestly absurd. Throughout his statement of case and his evidence adduced at the trial, the Claimant relies upon this erroneous belief that he was such an employee and thereby entitled to gratuity and pension. Again, such a belief is without legal basis.
10. Both the Claimant and the former Minister responsible for ports and harbours stated, as part of their evidence, that the said former Minister directed that the Claimant be employed as a part of management and enjoy their privileges and benefits. Further, under cross-examination, the Claimant stated that owing to the fact he used a ‘hands-on’ approach adopted to motivate the workers of the Defendant statutory corporation, and had an office at the Defendant statutory corporation, and was present at all hours at the Defendant statutory corporation that this provided the legal basis for him to be considered as an employee of

the Defendant statutory corporation. *Can the foregoing change the provisions of the Act which provisions clearly stipulate that persons filling the posts of Commissioners or Chairman of the Board of Commissioners are not employees of the said corporation?* It is humbly submitted to this Honourable Court that these circumstances cannot construe a contract of employment between the Claimant and the Defendant statutory corporation.

11. The basic tenet of the Port Authority Act (Cap. 333) of the Revised Laws of Antigua and Barbuda 1992 reveals that the position of Chairman, in particular, is an onerous one. Clause 3 (2) of the First Schedule to the said Act reads:

The Chairman shall keep the Minister fully informed concerning the activities and business of the Authority; and shall furnish the Minister with such information as the Minister, acting in his discretion, may request with respect to any particular matter relating to the activities and business of the Authority.

Despite this great duty to discharge, and despite the nature and ambit of the methods undertaken by the Chairman to perform his tasks, the Act does not elevate such a person to the rank of employee. Quite notably, by virtue of clause 11 of the First Schedule to the said Act, Commissioners and Chairman, unlike employees, are not even entitled as of right to remuneration. The payment, *if any*, of remuneration, whether by way of salaries or other allowances, is purely an exercise of the Governor-General's direction. Similarly, clause 1 (2) of the Second Schedule to the Act clearly reserves the payment of pension to *only* employees of the Defendant statutory corporation.

PURPOSE OF THE PORT AUTHORITY ACT

[19] The central purpose of the PORT AUTHORITY ACT is to establish a body corporate to manage and operative the harbours of Antigua and to charge and collect dues in relation to such operations.

[20] To this end section 3 establishes the Port Authority (defined as "Authority"). It is a body corporate with perpetual succession and a common seal with power, *inter alia*, to enter into contracts and to do all things necessary for the purposes of the Act.

[21] Sections 5 and 6 of the Act set out the functions and powers of the Authority. Included among the functions of the Authority are: (b) to operate port services in accordance with this Act and (d) generally to be responsible for the carrying out of the provisions of this Act.

FUNCTIONS AND DUTIES OF THE AUTHORITY

[22] There can be no doubt that the Authority is the central power under the Act given its functions and powers. But having regard to the Claimant's contention, it becomes

necessary to remove all doubts. It has already been noted that section 5 of the Act prescribes the functions of the Authority.

[22] In terms of powers section 6 (1) of the Act vests extensive powers in the Authority in order to carry out its functions. In particular section 6 (1) provides as follows:

“6 (1) With respect to the carrying out of any duties falling within its functions, the Authority may arrange for the duties to be carried out either by the authority directly through its own officers, servants, and employees, or indirectly through persons with whom the Authority has entered into contracts; and for that purpose the authority may lease any lands, buildings, facilities or equipment”.

[23] Paragraph 3 (2) of the First Schedule creates a link between the Chairman of the Authority and the Minister responsible for ports and harbours. It is in these terms:

“3. The Chairman shall keep the Minister fully informed concerning the activities and business of the Authority, and shall furnish the Minister with such information as the Minister, acting in his discretion, may request with respect to any particular matter relating to the activities and business of the Authority”.

[24] Paragraph 9 (1) of the said First Schedule relates to the question of meetings of the Authority. It is provided that: “The Authority shall meet at such times as may be necessary or expedient for the transaction of business, and such meetings shall be held at such places and times and on such days as the Authority shall determine”.

THE EVIDENCE

[25] The question is whether the evidence adduced by the Claimant supports his claim.

THE CLAIMANT

[26] In his witness statement the Claimant says that at the time of his engagement it was represented to him by the Minister responsible for the Port, that he was to enjoy the same retirement privileges with respect to retirement of senior management. He also says that his directives were that he was to function as a member of management at the Port.

[27] At paragraph 6 of his witness statement, the Claimant says that as Chairman he was charged by the Minister with the management of the Port on a daily basis.

- [28] With respect to salary, the Claimant says that he last earned \$8,629.23 per month and had his entitlements calculated as at 26th March 2004. He adds that this figure was used to calculate his pension and gratuity. He adds that he requested but has not received 51 days vacation which were due to him. According to him this was calculated to be \$20,313.53.
- [29] In cross-examination the Claimant said that in April 1991 when he was engaged at the Port, he does not recall signing a contract. He said that initially he was taken on to be a Board member, and Chairman and to carry out the duties of Executive Chairman.
- [30] It is the Claimant's testimony that in April 1991 he was provided with a job description when he went to work at the Port at the invitation of Minister Molwyn Joseph. At this time, according to him, he did not receive any document but that later on he did receive an instrument which were left at the Port Authority.
- [31] As Executive Chairman at the Port Authority, the Claimant said that he was at the top of the hierarchy then the Manager and other persons in management. He added that he had the last say and had direct contact with the Ministry of Finance.
- [32] Llewellyn Smith, the Claimant, further testified that he had knowledge of the Act setting up the Port Authority and sought advice from the Authority's lawyers. He also said that the Act recognized the office of Chairman but that he carried out the functions of Executive Chairman since the Government wanted him to do so based on his experience and did not agree that the position of Executive Chairman was entirely political. At a later stage of his testimony he added that he felt that he had legal authority as Executive Chairman and was so advised by the Authority's lawyers.
- [33] With respect to the matter of pension and gratuity, the Claimant testified that it was his understanding that two other persons who functioned as Executive Chairman received such payments but he was not in a position to verify it one way or the other.

[34] Finally, the Claimant said that he was under a contract of employment. He also said that he did a lot of work and as an employee he was entitled to a pension and gratuity like any other worker over the years.

[35] When it was put to him by learned counsel for the Defendant that he could not get the same benefits as management, he disagreed. He further disagreed that as Chairman and Executive Chairman did not constitute a contract of employment.

MOLWYN JOSEPH

[36] In his witness statement Molwyn Joseph says that he is a former Minister of Finance and the Port Authority fell under his portfolio. He says further that he knows Llewellyn Smith and he believed this individual was appointed by him as a Commissioner and Chairman of the Board of Commissioners. According to this witness, all commissioners received a monthly fee as sitting Board members. However, the Chairman, in addition to his Board fee also received a monthly salary plus an office and secretary from where he performed duties of Executive Chairman.

[37] On the matter of the pension and gratuity, the witness say that two other persons were in receipt of such payments which the Claimant is also entitled to receive like all other executive employees of the Port Authority. He contends that this was understood and accepted by all parties from the outset.

[38] In cross-examination Molwyn Joseph said as Minister of Finance he understood the Act and as such did not seek legal advice.

[39] With respect to the appointment of Llewellyn Smith, the witness said the normal procedure was for the Cabinet to deliberate on such appointment. He said he did not recall the exact procedure but whatever it may have been, it was followed.

[40] The witness testified as follows with respect to the office of Executive Chairman: "The person is expected to chair and regulate board meetings and to direct the day to day

operations of the Port with the Manager. He heads the Port on a full-time basis. The terms of engagement were made by the Cabinet. The terms of reference existed prior to Llewellyn Smith's appointment as there were other executive Chairmen".

WIGLEY GEORGE

[41] In his witness statement Wigley George says that he knows the Claimant and worked with him during his tenure as executive chairman at the Antigua Port Authority.

[42] In cross-examination the witness said he was not familiar with the Act. He said further that he did no check to see if as executive chairman the Claimant was properly appointed.

CLAUDIA CHATHAM-PETERS

[43] In her witness statement Claudia Chatham-Peters says that she is the Human Resource Manager at the Antigua Port Authority from November 2005 to date.

[44] In cross-examination the witness said in her position as Human Resource Manager she had knowledge of payments to management and those below that level. She said, however, that she did not pay the Commissioners.

[45] It is the testimony of Claudia Chatham-Peters that she is responsible for the management of the staff and his accounts for her access to the records of the Claimant. According to her, he paid medical benefits and social security payments. She said further that the records do not show directly that the Claimant was an employee of the Port Authority. She contends that the deductions and the corresponding employee contributions paid by the Port Authority do not necessarily suggest that the Claimant was an employee.

[46] With respect to the question of gratuity payment, the witness said that there are such payments in relation to management but she did not see any in relation to the Claimant.

[47] In relation to the letter at **CB p. 13**, the witness said that she saw this letter in which the Claimant is being classified as management of the Port Authority.

LESLIE WILLIAMS

- [48] On 28th April 2006 Leslie Williams gave a witness statement in which he states that he is the General Manager of the Antigua Port Authority and has been employed by that body for twenty-five years and held the posts of Accountant, Deputy Port Manager and acted as Manager.
- [49] He states that he is aware of the circumstances of the tenure of the Claimant as Chairman of the Board of Commissioners of the Port based on documents made available to him.
- [50] The witness says that as at the month of June 1991 he became concerned about the status of the Claimant and wrote to the Permanent Secretary, Ministry of Finance for clarification. The clarification came by way of a letter (**CB p. 27**) dated 1st October 1991 and the directive contained therein were complied with. He contends that in spite of directive there still existed "great confusion" at the Port as to the nature and ambit of the Claimant's position at the Port and his entitlement according to law.
- [51] According to the witness further clarification was sought in relation to the Claimant's position at the Port. A response came from the Minister of State in the Ministry of Finance by letter dated 2nd November 2001 (**CB p. 32**). He says that the Port's management gave effect to the directive from the Minister of Finance.
- [52] At paragraphs 16 and 17 of his witness statement Leslie Williams raises issues concerning the tenure of the Claimant at the Port. He says: "I am unable to say exactly what management or administrative functions the Claimant carried out on a daily basis for his period of tenure".
- [53] In an amplification of paragraph 5 of his witness statement, the witness said that he was not aware of any document being in existence when the Claimant was introduced by the Minister at the Port.

- [54] With reference to paragraphs 10 and 11 of his witness statement, Leslie Williams said, that at the time when the letter was written to the Permanent Secretary the atmosphere was charged and it was necessary to cover himself.
- [55] In commenting on paragraph 6 of the Claimant's witness statement, this is what the witness said: "The Port was a great deal of confusion with two managers – a de facto and a de jure manager. This caused confusion. Micro management resulted in Mr. Smith involving himself with the day to day management. Mr. Smith was the last stop. Because of his political connection he was able to quell situations".
- [56] In cross-examination the witness said: "I agree that Mr. Smith had unbridled intension into management. He did not control everything. I do not regard him as management. He was performing the role of General Manager. During his tenure there was no industrial action at the Port".
- [57] In further cross-examination the witness testified that he was aware of the Port Authority Act and in particular he was aware that paragraph 1 (1) of the Second Schedule to the Act dealt with employees such as the Port Manager, the accountant and other such employees.
- [58] It was put to the witness that the directive from the Ministry of Finance was saying that the Claimant was to be treated as the most senior employee at the Port. This was his response: "I did not recognize the position of executive chairman. I did not seek confirmation because it did not exist. The Act and the regulations do not create it".
- [59] The relevant aspects of the evidence are to be derived from the testimony of the Claimant and Molwyn Joseph.
- [60] In the case of the Claimant despite the prolixity of his evidence he is in essence saying that at the time of his engagement he was told by the then Minister being Molwyn Joseph, that he was entitled to the same benefits as senior management. He also said that he did

not sign a contract at the time of his engagement and that the two persons had in the past received a pension and gratuity.

[61] The Claimant's evidence was in no way contradicted by the evidence of Molwyn Joseph. He too was clear in his testimony that the Claimant was entitled to a pension and gratuity. In fact his clear testimony is that the executive chairman unlike the other commissioners does not receive a fee alone but also a monthly salary plus an office and a secretary. Specifically, on the question of pension and gratuity, this witness said that the Claimant was entitled like all other executive employees of the Authority.

[62] At the other extreme Leslie Williams' evidence is that he always had a difficulty with the legal position of the Claimant and that when he sought clarification from the Ministry of Finance, the matter was compounded.

ANALYSIS

[63] The Authority is a creature of statute so that the ultra vires doctrine is central to the issue.

[64] The doctrine is dealt with extensively by Wade & Forsyth, *ADMINISTRATIVE LAW* (7th ed.) and the basic elements of this doctrine are expressed thus at pages 41- 43:

“The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law. Where the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying it to the facts.

An act which is for any reason in excess of power (ultra vires) is often described as being ‘outside of jurisdiction’, in this context means simply ‘power’ though sometimes it bears a slightly narrower sense of ‘power to decide’

Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorization and if it is not within the powers given by the Act, it has no legal leg to stand on”.

[65] Bollers CJ in the case of *TAPPIN v LUCAS* [1973] 20 WIR 229 explained the ultra vires doctrine more succinctly by saying that one is confined to the four corners of the statute.

[66] This dictum must be contrasted with what a former Minister of Finance, with responsibility for ports and harbours, Molwyn Joseph, said in cross-examination in this connection. He said: "I do not think that the Act intended to put the Minister in a straight jacket".

[67] As also indicated before the Governor-General duly appointed the Claimant on two occasions as a Commissioner and Chairman of the Board. This accords with paragraphs 1 and 3 of the First Schedule. However, the contention arises in relation to the Claimant's position of executive chairman. In this regard the evidence of Molwyn Joseph is paramount.

[68] The then Minister of Finance testified that the matter of the appointment was deliberated on by the Cabinet, that he was satisfied there was nothing illegal about the appointment. For him there was nothing in the Act which precluded it given the need for intense management of the Port.

"I did satisfy myself that there was nothing illegal about the executive chairman. There was nothing in the Act which precludes the position of executive chairman at the Port. I did not seek legal advice. I read the Act. I knew the structure existed in other organizations. I am aware that the Port Authority is a creature of statute and it governs the Port Authority Section 3 (2) of the First Schedule sets out the reporting procedure with respect to the Chairman. Section 1 (1) of the Second Schedule deals with the employment of officers by the Port Authority – not the Minister. In section 11 of the First Schedule to the Act I do not see any provision for the Governor-General to fix remuneration. Likewise in section 4 (1) of the same Schedule I do not see any benefit attached to the tenure of the Executive Chairman. I cannot find anything in the Act which makes it illegal to appoint an executive chairman – nothing disallows it. Given the reality of operating a Port it was necessary to have a Chairman on a daily basis. It requires intense management if the chairman only attended meetings. He was called executive chairman so as to permit him to be able to function in relation to the Minister. The Port required intense management as there are ships and issues on a daily basis.

The Port Manager functions at a different level and as Minister I needed a manager. In the real world of the Port Authority the General Manager deals with issues relating to the ongoing operation of the Port.

The Chairman presides over the meeting of the Commissioners where policy and issues arising from the operation of the Port would be discussed. I do not think that the Act intended to put the Minister in a straight jacket.

I did not interpret the First Schedule to the Act to be the absolute range of positions the Port would have. As Minister it would be necessary to create different positions for the efficient management of the Port. I thought I was competent to exercise this discretion. The executive chairman position worked well especially in relation to information flow. I believe that the position of executive chairman was a creature of the policy directive. It was my interpretation that it was a policy. I would have difficulty with a normal chairman. I do not agree that I had no power".

[70] The Ministry's 'stamp of approval' on the matter of the executive chairman is evidence by two letters – one from the Permanent Secretary, Minister of Finance and the other from the Minister of State, Ministry of Finance.

[71] The first letter from the Permanent Secretary is dated 1st October 1991 and addressed to the Accountant, Antigua Port Authority and said in part:

“With reference to your letter of June 13, 1991 requesting official confirmation with respect to the directive you received from me by telephone regarding the salary to be paid to Senator Llewellyn Smith, I hereby confirm that Senator Smith’s salary as directed by the Honourable Minister of Finance is set at \$5,500.00 per month, and in the event of any increase in pay to the Port Manager there should always be a differential of \$500.00 in favour of Senator Smith”.

[72] The other letter is dated 2nd November 2001, addressed to the Port Manager signed by Senator The Hon. Asot A. Michael Minister of State in the O.P.M with responsibility for Finance and states as follows:

“Dear Sir:

Re: Executive Chairman, Board of Commissioners, Antigua Port Authority

Please be advised that further to previous correspondence from the Ministry of Finance re the above captioned, I am to note that the Ministry of Finance has approved and directed that the day-to-day functions of Senator Llewellyn Smith is to be the Executive Chairman of the Antigua Port Authority.

Senator Smith is to function as a member of Management at the Port on a daily basis, and is required to carry out his duties in compliance with the requirement of the Port Act.

He should report directly to the Minister of Finance, and should enjoy all privileges and benefits as other members of Management.

This advisory is a reminder and has been in effect since 23rd April, 1991.

Grateful if you should be guided accordingly”.

[73] Apart from the matter of the Claimant being a member of management at the Port on a daily basis with the enjoyment of all privileges and benefits of management, the letter also states that this advisory has been in effect since 23rd April 1991. At the same time it will be recalled that the instrument relating to the Claimant’s first appointment is dated 8th March 1993.

[74] It is the Defendant's contention that the Authority has a "legal disability or incapacity" having regard to paragraphs 1 and 3 (1) of the First Schedule. Further that whatever former Minister responsible for ports and harbours may say, cannot change the law. Further still, the Commissioner and Chairman of the Board are not employees of the Authority having regard to the duties of the Chairman and the question of remuneration as set out in the First Schedule to the Act.

[75] Parliament has made it abundantly clear that appointment under the Act fall into two categories: one by the Governor-General and the other by the Authority.

[76] In the case of the Governor-General, he is confined to the appointment of seven persons as Commissioners and one of these he may appoint as Chairman. This accounts for the disability mentioned by the Defendant. There is no discretion in the matter as paragraphs 1 and 3 (1) of the First Schedule make these appointments mandatory and there is no power to appoint an executive chairman.

[77] In the circumstances the question must be whether or not any executive chairman could be appointed under paragraph 1 of the Second Schedule which deals with the appointment of employees.

APPOINTMENT OF COMMISSIONERS

[78] Section 3 (2) of the Act provides that the provisions of the First Schedule shall have effect as to the constitution, members, committees, operations, procedure and meetings of the Authority. In turn paragraph 1 of the First Schedule provides thus:

"1. The Authority shall consist of seven persons to be designated Commissioners, appointed by the Governor-General from amongst persons appearing to him to be qualified by reason of having had experience of and shown capacity in matters relating to trade, law finance, science, administration or labour relations".

[79] By paragraph 3 the Governor-General is mandated to appoint one such commissioner to be the Chairman of the Authority.

[80] The matter of tenure of Commissioner is governed by paragraph 4 (1) of the said First Schedule. It says that they shall hold office for a period of not less than two years but not more than five years as any be specified in the instrument of appointment. At the same time it is provided that the Governor-General "may at any time revoke the appointment of any commissioner if he thinks it expedient so to do".

[81] Paragraph 5 provides a different procedure for the resignation of the Chairman and a Commissioner. But in any event the instrument of resignation ends with the Governor-General.

APPOINTMENT OF EMPLOYEES

[82] In respect of the appointment of employees, paragraph 1 (1) of the Second Schedule to the Act vests that authority in the Authority in these terms:

"1. (1) Subject to the provisions of this Act, the Authority may appoint and employ at such remuneration and on such terms and conditions as it thinks fit a Port Manager, an accountant and such other employees as may be necessary and proper for the due and efficient administration management and performance by the Authority of its functions under this Act".

[83] Paragraph 2 of the Second Schedule makes special provision with respect to persons who are public officers but in the service of the Authority. Such provisions relate to the payment of emoluments contributions under the Social Security Act and the Pensions Act.

[84] In the circumstances the question must be whether or not any executive chairman could be lawfully appointed under paragraph 1 of the Second Schedule which deals, wholly and exclusively, with the appointment of employees. The answer must be in the negative as for the good reason Parliament kept the Commissioners and employees in separate Schedules. Among other things paragraph 1(1) of the said Schedule speaks of terms and conditions. And the only person empowered to make appointments under paragraph 1 is the Authority. This leads to the absurdity that the Claimant could be part of a body making his own appointment. But the claim is that the Minister made the appointment when there is no such power vested in the minister responsible for ports and harbours or any other minister. Therefore, the Defendant's contention that the minister's words cannot alter an Act of Parliament has great merit.

[85] It follows that the 'office' of executive chairman has no basis in law as it is not authorized or contemplated by the Act. The minister is in a straight jacket as such office is ultra vires the Act.

PENSION AND GRATUITY

[86] To repeat the point, Commissioners and the Chairman of the Board of Commissioners can only be lawfully appointed in accordance with the First Schedule to the Act.

[87] A pension in the public sector is an entitlement which must be provided for in law¹. It cannot rest on the minister's say so as, inter alia, public funds will be involved as in this case.

[88] The first point to be noted in relation to Commissioners is that their period for holding office is in the discretion of the Governor-General. It must be between two to five years.

[89] The matter of remuneration is critical. It is provided for in paragraph 11 of the First Schedule in these terms:

"There shall be paid to the Chairman and other Commissioners such remuneration if any (whether by way of salaries or traveling or other allowances) as the Governor-General may determine".

[90] The flexibility in terms of remuneration "if any" must be seen in the context of content of paragraph 9 (1) of the First Schedule which mandates that the Authority shall meet at such times as may be necessary or expedient for the transaction of its business". It is further provided that the meetings of the Authority shall be held at such places and times and on such days as the Authority shall determine.

[91] The short point about the foregoing provisions is that there is no certainty as to the times during which the Chairman or the Commissioners are required to carry out their duties. And the same point applies with respect to the question of remuneration.

¹ See for example sections 3 and 5 of the Pensions Act, Cap. 311 in relation to "pensionable office" in the "public service".

[92] The non-provision for a pension in these circumstances will be readily understood. This stands in contrast to paragraph 1 (2) of the Second Schedule to the Act which makes express provision for a Pension Scheme or Provident Fund Scheme in the discretion of the Authority. But it is only for employees.

[93] The fact that other executive chairmen of the Board received a pension and gratuity cannot change the express terms of the Act. Also the fact that the Minister of State's letter stated that the Claimant should enjoy all the privileges and benefits as other members of management cannot change the express terms of the Act and in particular paragraph 1 (2) of the Second Schedule.

[94] Therefore, there is no legal basis which would render the Claimant entitled to a pension and gratuity as claimed. That would be ultra vires the Act.

ORDER

[95] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The Claimant cannot lawfully use witness statements to alter his statement of case.
2. There is no legal basis which gives rise to the post of executive chairman under the Antigua Port Authority Act and such office is ultra vires the Act.
3. There is no legal basis which gives rise to an entitlement to the Claimant to a pension and gratuity under the Port Authority Act and as such the matter of a pension and gratuity to the Chairman of the Board of Commissioners is ultra vires the Act.
4. The Claimant must pay the Defendants costs in accordance with Part 65.5 (2) (b) (i).

ERROL L. THOMAS
Judge

