

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 169 of 2014

CV No. 2013-00135

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant/Claimant

And

TOBAGO HOUSE OF ASSEMBLY

Respondent/Defendant

[By Original Appeal]

And Between

TOBAGO HOUSE OF ASSEMBLY

Appellant/Defendant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent/Claimant

[By Counter Notice of Appeal]

PANEL: A. Mendonça J.A.

G. Smith J.A.

A. des Vignes J.A.

Date of Delivery: October 21, 2019

APPEARANCES:

Mr. A Fitzpatrick S.C. and Ms. L. Lucky-Samaroo for the Attorney General

Mr. J. Jeremie S.C. and Mr. K. Garcia for the Tobago House of Assembly

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ G. Smith J.A.

I have read the judgment of Mendonça J.A. I also agree with it and have nothing to add.

/s/ A. des Vignes J.A.

JUDGMENT

Delivered by A. Mendonça J.A.

1. This appeal raises important questions on the true construction of the Tobago House of Assembly Act (“the THA Act”) and the Central Tenders Board Act (“the CTB Act”).
2. These proceedings began as judicial review proceedings in which the Attorney General sought to challenge the decision of the Tobago House of Assembly (“the THA”) by its Executive Council whereby it accepted a proposal by a third party for the construction and financing of the Administrative Complex of the Division of Agriculture, Marine Affairs, Marketing and the Environment of the THA by means of a Build, Own, Lease and Transfer agreement. Such an agreement is commonly referred to by the acronym BOLT which refers simply to “Build-Own-Lease-Transfer”. I will hereafter refer to such an agreement as a BOLT agreement.
3. The judicial review proceedings were however amended by the consent of the parties and converted into a construction summons by which the Court was asked to consider the power of the THA to enter into a BOLT agreement and whether the THA can enter into such an agreement other than in accordance with the provisions of the CTB Act.
4. Two questions were put before the Court. These were:
 - i. Whether upon a true construction of the THA Act, the THA is not empowered to enter into BOLT arrangements for the purpose of developing and financing construction without the consent of the Minister of Finance and/or outside the statutory framework in the THA Act for the control of expenditure (the first question); and
 - ii. Whether upon a true construction of the CTB Act, the THA is not empowered and/or it is unlawful, illegal and void for the THA to enter

into BOLT arrangements for the purpose of developing and financing construction/projects other than in accordance with the CTB Act (the second question).

5. As to the first question, the Trial Judge held that the THA is empowered to enter into a BOLT agreement for the purpose of developing and financing construction without the consent or approval of the Minister of Finance. He further held that in entering into such an agreement the THA is not acting outside of the express statutory framework for finance/expenditure under the THA Act. On the second question the Trial Judge held that the THA cannot enter into a BOLT agreement except in accordance with the provisions of the CTB Act.
6. Both the Attorney General and the THA have appealed. The Attorney General in his Notice of Appeal contends that the Judge's decision in relation to the first question is erroneous. He seeks an order of this Court setting aside the Judge's decision and granting a declaration that on a proper construction of the THA Act the THA is not empowered to enter into a BOLT agreement for the purpose of developing and financing construction without the consent of the Minister of Finance or outside the statutory framework in the THA Act for the control of expenditure. The THA in its Counter Notice of Appeal contends that the Judge's decision on the second question was wrong. The THA seeks an order of this court setting aside the Judge's decision.
7. I will first address the first question.
8. The THA was established by Section 141(A) of the Constitution and has the powers and functions in relation to Tobago as are prescribed (See Section 141(B) of the Constitution). Under Section 25(1) of the THA Act, the THA shall, in relation to Tobago, be responsible for the formulation and implementation of policy in respect of the matters set out in the Fifth Schedule to the THA Act. That Schedule contains a list of 26 "areas of

responsibility” of the THA. Section 25(1) is however subject to Section 75(1) of the Constitution which provides that there shall be a Cabinet for Trinidad and Tobago which shall have general direction and control of the Government of Trinidad and Tobago and shall be collectively responsible therefor to Parliament.

9. The THA has law-making powers but they are limited. Under Section 29(1) of the THA Act, the THA may propose and adopt bills in relation to matters for which under section 25 (1) it is responsible. Bills adopted by the THA shall not seek to abrogate, suspend, repeal, alter, override, or be contrary to any written law of the Republic of Trinidad and Tobago or impose any indirect or direct taxation. If adopted, the bills shall be transmitted to Cabinet with a request for their introduction into Parliament for enactment into law (See Section 29(2) of the THA Act). Upon the decision of Cabinet for the purpose, the bills shall be introduced into Parliament. If passed by Parliament they become “Assembly Laws”.
10. In view of the above it was common ground between the parties that the THA is not a sovereign body. It is established by the Constitution and has such powers as are given to it by the Constitution and by statute, namely the THA Act or as are incidental thereto. I will say more about this later. But it is in that context that the first question arose and was put before the Court.
11. Critical to this appeal in relation to the first question is section 25(2)(b) of the THA Act and the provisions therein relating to finance. I will set out that section as well as other sections of the THA Act that are of particular relevance to the first question.

“25. (2) For the better performance of its functions, the Assembly is hereby empowered to do all such acts and take all such steps as may be necessary for, or incidental to the exercise of its powers or for the discharge of its duties and in particular the Assembly may—

- (b) enter into such contracts as it deems fit for the efficient discharge of its functions”

Part IV of the THA Act is headed “Finance” and contains provisions relating to financial matters of the THA. The following provisions are taken from that part:

“38. In this Part—

“financial institution” has the meaning assigned to it by the Financial Institutions Act;

“financial year” has the meaning assigned to it by section 3 of the Constitution;

“Fund” means the Tobago House of Assembly Fund established under section 141D of the Constitution;

“former Fund” means the Tobago House of Assembly Fund established under the former Tobago House of Assembly Act, 1980 repealed by this Act;

“Secretary” means the Secretary to whom responsibility for finance is assigned;

“Minister” means the Minister to whom responsibility for finance is assigned.

39. All expenditure incurred by the Assembly shall be paid out of the Fund.

41. (1) The Secretary shall in each financial year submit to the Assembly for its approval, draft estimates of revenue and expenditure respecting all functions of the Assembly for the next financial year.

(2) The Assembly shall approve the draft estimates submitted in accordance with subsection (1), with such modifications as it thinks fit.

(3) The Chief Secretary shall transmit for consideration and approval by Cabinet, the draft estimates approved by the Assembly in accordance with subsection (2).

(4) Upon the coming into force of this Act, draft estimates shall be submitted to the Cabinet in accordance with subsection (3) before the expiration of three months from the date of the first meeting of the Assembly held in accordance with section 62.

(5) All draft estimates, capital and recurrent, subsequent to those referred to in subsection (4) shall be submitted to the Cabinet in accordance with subsection (3) before the end of the third quarter of each financial year.

42. (1) Where the Assembly fails to complete consideration of its draft estimates in time to allow the Chief Secretary to proceed in accordance with section 41(3), (4) and (5), there shall be allowed an extension for a period of one week.

(2) Where the Chief Secretary is unable to submit the estimates within the period referred to in subsection (1), the Minister shall proceed to prepare such draft estimates as he thinks fit and may take into account any draft estimates subsequently submitted by the Assembly.

43. In considering the estimates as submitted by the Chief Secretary, Cabinet shall give due consideration to the financial and developmental needs of Tobago in the context of Trinidad and Tobago and shall allocate financial resources to Tobago as fairly as is practicable, and in determining what is fair and practicable, the following considerations, among others, shall apply:

- (a) physical separation of Tobago by sea from Trinidad and Tobago's distinct identity;
- (b) isolation from the principal national growth centres;
- (c) absence of the multiplier effect of expenditures and investments (private and public) made in Trinidad;
- (d) restricted opportunities for employment and career fulfilment;
- (e) the impracticability of participation by residents of Tobago in the major educational, cultural and sporting facilities located in Trinidad.

- 44.** Where the Assembly is dissatisfied with the allocation or any part thereof referred to in section 43 it may refer the matter to the Commission in accordance with the provisions of Part V.
- 47.** Monies appropriated by Parliament for the service of the financial year of the Assembly shall be credited to the Fund in quarterly releases in advance *en bloc*.
- 48.** Notwithstanding section 42 of the Exchequer and Audit Act, monies appropriated by Parliament to the Fund for the service of a financial year which remain unexpended at the end of that financial year shall be retained in the Fund and utilised for the purposes of capital investment.
- 49.** (1) Notwithstanding section 13 of the Exchequer and Audit Act, all revenue collected in Tobago on behalf of the Government and payable thereto in respect of activities undertaken or discharged in Tobago shall be paid into the Fund.
- (2) Upon the coming into force of this Act, any company, financial institution or a person operating a business in Tobago shall pay in Tobago all taxes, fees, duties, levies and other imposts in respect of its operations in Tobago.
- (3) Monies credited to the Fund in accordance with subsections (1) and (2) shall be set-off against the annual allocation appropriated by Parliament to the Fund.
- 50.** (1) Subject to subsection (2), where in any financial year, monies paid into the Fund in accordance with section 49 exceed the quantum appropriated by Parliament to the Fund for that year, the Assembly shall retain fifty per cent or such larger portion as the Minister may by Order specify in respect of that year, of such excess to be applied towards such projects as it considers fit.
- (2) The Assembly shall surrender the balance of the excess to the Consolidated Fund within the first quarter of the following financial year.

51. The Secretary may—
- (a) with the approval of the Assembly, borrow by way of overdraft, such sums as the Assembly considers fit for the discharge of its functions; or
 - (b) with the approval of the Minister, borrow sums by way of term loans for the purposes of capital investment.”

12. It is to be noted that the word “Fund” where it appears in the sections set out above is defined at section 38 of the THA Act to mean the Tobago House of Assembly Fund established under section 141D of the Constitution. That provision of the Constitution is as follows:

“There is established a fund to be called “the Tobago House of Assembly Fund” which shall consist of –

- (a) such monies as may be appropriated by Parliament for the use of the Assembly; and
- (b) such other monies as the Assembly may lawfully collect.”

13. There was no dispute between the parties as to the nature of a BOLT agreement. The Judge noted that the parties had agreed on that and he proceeded to describe it in these terms:

“4...The term [BOLT] is an acronym for “Build, Own, Lease, Transfer and it, essentially, is an arrangement for the purpose of developing and financing construction projects. It can be described as non-debt based form of financing for the end user whereby a private or public sector client (in this case the THA) gives a concession to an entity to build a facility, own the facility, lease the facility to the client, then, at the end of the lease period, to transfer the ownership of the facility back to the client. The client pays for the facility in the form of lease rent over an agreed period of time. The project is thus financed by the entity and constructed. The THA gets use of the facility during the lease and the land and facility is transferred back to the THA at the end of the lease.

5. One of its main advantages is that the entity contracted by the client has the responsibility to raise the project financing during the construction period. This permits the client to utilise recurrent expenditure to pay for the facility over a period of time as opposed to upfront capital expenditure. After construction, the client leases the facility at an agreed rent for a fixed period of time. These lease/rent payments are the methods of repaying the private entity for the investment. At the end of the lease period, the ownership of the facility is transferred back to the client and the client gets an asset it has paid for over an agreed period while having had full use and occupation of the facility in the meantime.”

14. To similar effect is the following taken from Shukla, Panchal and Shah titled “Built-Own-Lease-Transfer (BOLT): “A Public Private Partnership Model that Bridges Gap of Infrastructure in Urban Areas” in the International Journal of Civil Engineering Research (Volume 5, Number 2 (2014), pp 135-144, where the authors describe a BOLT arrangement as follows:

“It is a non-traditional procurement method of project financing whereby a private or public sector client gives a concession to a private entity to build a facility (and possibly design it as well), own the facility, lease the facility to the client, then at the end of the lease period transfer the ownership of the facility to the client.

As a system of project financing this procurement method has a number of advantages the major one being that the private entity, contracted by the client, has the responsibility to raise the project finance during the construction period. What this does is to remove the burden of raising the finances for the project from the client (i.e. the public enterprise) and places it on the private entity. This way the BOLT developer assumes all the risk, the risk of raising the project financing and the risk during the construction period. Of course such risk is not undertaken for free by the developer but comes at a cost, which is passed onto the client. The operational and maintenance responsibility for the facility is the developer’s, as the facility is owned by them until the lease period ends.

The lease period will see the client who in essence becomes the tenant of the facility, paying the developer a lease (monthly or annually) for the use of that facility at a predetermined rate for a fixed period of time. The lease payment becomes the method of repaying the investment, and ultimately rewarded the developer's shareholders. At the end of the lease period, ownership of and the responsibility for the facility are transferred to the client from the developer at a previously agreed price."

15. Save for the agreement as to the nature of a BOLT agreement, the case proceeded before the Judge, as it did before this Court, without evidence or any agreed factual position. There was therefore no evidence, or agreed position as to, for example, the lands that might be subject to the BOLT agreement or the construction that the agreement may seek to achieve. I think, however, it is fair to say that there was a common assumption that the BOLT agreement would concern lands in Tobago which the THA may lawfully deal with and that the construction sought would be similar to the administrative complex project undertaken by the THA and which was subject to the judicial review proceedings. I will characterise such construction as a facility or a building.
16. In coming to his decision on the first question, the Judge stated that the BOLT agreement is a form of financing not involving a loan. It is not a borrowing of money as contemplated by Section 51 of the THA Act and therefore does not offend against that section. This, he said was accepted by both parties.
17. The Judge further stated that the THA has power over lands in Tobago and could enter into agreements to lease lands and take a "lease back" of the lands or to take a transfer of the lands to it which are all components of the BOLT agreement. The Judge opined that a BOLT agreement, when broken down, comprises a series of contracts to:

- a. Enter into a contract with a third party to build a facility on lands that it owns;
- b. Convey lands it owns to a third party;
- c. To lease the lands now owned by the third party; and
- d. To take a transfer of the lands from the third party.

He found that under Section 25(2)(b) the THA has the express or implied power to enter into such contracts. Accordingly, the THA had the express or implied power to enter into a BOLT agreement.

18. In relation to the financial provisions in Part IV of the THA Act, the Judge accepted that they contained arrangements for the control of expenditure and borrowing by the THA. He however stated “but the arrangements for control set out in Part IV are what they are, no more, no less. What has to be approved by government are finance arrangements for annual expenditure and revenue based on estimates supplied and revenues received by the THA.” And “where funds are insufficient the THA may borrow with the appropriate approvals under Section 51”. The provisions do not require prior consent or approval before entering into a BOLT agreement.

19. The Judge was therefore of the view that there was no legal requirement to discuss or consult or to obtain the Minister’s approval before entering into a BOLT agreement. That would be to impose on the THA a restriction not provided for in the THA Act which gave to the THA autonomy for matters within its area of responsibility. The Judge however was of the view that from a practical point of view it would be prudent for the THA to engage in discussions with the Government if it plans to enter into a BOLT agreement. In that regard he stated:

“29. From a practical point of view, it would be prudent however for the THA to engage in discussions with the central government through the relevant Minister or Prime Minister

about plans it may have to enter BOLT type arrangements since ultimately it is funding primarily from the allocation by the Minister of Finance that will pay for it and the fact that by entering such an arrangement the THA commits the Fund to recurrent expenditure. This would be particularly important where significant funding would be required on an annual basis for the payment of the lease rent for the facility. Without consultation, the THA risks that the Minister of Finance will not allocate recurrent expenditure each year to cover the payment of its lease rent. The THA would then place itself in the precarious position of having to find alternative sources of funding or to redistribute funds from other recurrent expenditure to apply to its rental payments. It also then risks defaulting on the BOLT arrangement with attendant consequences for the loss of its land.”

20. Mr. Fitzpatrick appearing for the Attorney General submitted that the Judge erred in his construction of the THA Act. He argued that the power contained in section 25(2)(b) is not an express power to enter into a BOLT agreement. The question is whether it is a power incidental to the powers expressly conferred on the THA. His core submission was that Part IV of the THA Act, which contains the provisions relating to finance, creates a statutory code for the control of the expenditure of financial resources and the obtaining of finance by the THA, which it must comply with. What the THA would do if it were to enter into a BOLT agreement, without appropriate approval, is to incur expenditure and raise finance outside the controls of the THA Act and so unlawfully circumvent that statutory code. In those circumstances, a power to enter into a BOLT agreement could not be regarded as a power incidental to the powers expressly given to the THA.

21. Mr. Jeremie for the THA supported the conclusion and reasoning of the Judge. In particular, he submitted that the Judge was right to conclude that section 25(2)(b) confers an express or implied power on the THA to enter into a BOLT agreement. The section did not require the THA to obtain the consent of the Minister. The only circumstance in which approval of the

Minister is mandated by the THA Act is that provided by section 51 and that is where the THA is seeking to borrow money. But a BOLT agreement is not an attempt to borrow money. This was accepted to be so by the Attorney General. There was therefore nothing to the submission that a BOLT agreement is intended to or has the effect of circumventing the statutory code.

22. As a matter of general law a body established by statute would have only such powers as are expressly conferred upon it and, as a matter of implication, those that can fairly be regarded as incidental or consequential upon them (See **AG v Crayford [1962] Ch 246**). However, in relation to the THA it must be recognised that Section 25(2) of the THA Act expressly provides that the THA is empowered to do all such acts and take all such steps as may be necessary for or incidental to the exercise of its powers or for the discharge of its duties. The section goes on to identify certain powers that the THA has. Relevant to this appeal is the power given to the THA to enter into such contracts as it deems fit for the efficient discharge of its functions. As I mentioned above, the Judge was of the opinion that this gave to the THA the express or implied power to enter into a BOLT agreement and there was nothing in the section requiring the THA to seek any approval before so doing.

23. I, however, do not accept that the section gives to the THA the express power to enter into a BOLT agreement. While the section gives an express power to the THA to enter into such contracts as it deems fit for the efficient discharge of its functions, the section does not expressly speak to BOLT agreements. What the section does (25(2)) is that it gives the THA the power to do such acts and take such steps as may be necessary or incidental to the exercise of its powers or the discharge of its duties. Expressed in other words, section 25(2) (b) gives to the THA the power to do all such acts and take such steps as may be necessary for or incidental to the exercise of its

functions. The section goes on to particularise certain acts the THA may do and certain steps the THA may take. Among them is the power at 25(2)(b) to enter into such contracts as the THA deems fit for the efficient discharge of its functions. That power at 25(2)(b) therefore has to be read in the context of the general power given by the section to do all such acts and take all such steps as may be necessary for or incidental to the exercise of its powers and the discharge of its duties. The issue therefore in the context of question 1 is whether the THA has either an incidental or necessary power to enter into a BOLT agreement without the consent of the Minister of Finance and/or outside the statutory framework in the THA ACT for the control of expenditure.

24. There is no suggestion by anyone that a BOLT agreement is necessary to the exercise of the THA's power or for the discharge of its duties. The relevant question is whether it is an incidental power. Incidental in this context does not mean "in connection with" or simply related to but has a narrower meaning that might be derived by reasonable implication from the language of the THA Act (See **AG v Crayford** (supra)). It is also not enough if the proposed power is convenient, desirable or profitable. Further, a power cannot be incidental if it would be contrary to or inconsistent with any expressed or implied statutory provision.
25. Whether a power to enter into a BOLT agreement without the consent of the Minister of Finance and/or outside of the statutory framework for the control expenditure can be said to be incidental to the powers expressly conferred on the THA therefore requires the interpretation of the THA Act.
26. The primary task of the Court in the interpretation of legislation is to give effect to the intention of the legislature. As Lord Bingham said in **R (Quintavalle) v. Secretary of State for Health** [1999] 2 All ER 791, 805:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

27. In **Smith v. Selby** [2017] C CJ 28 (AJ) 40 the Caribbean Court of Justice noted:

“[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge’s view of what is just and expedient. The courts must give effect to the intention of Parliament.....

[12] In *Rambarran v The Queen*, we noted that when a court is called on to interpret legislation it is not engaged in an academic exercise. Interpretation involves applying the legislation in an effective manner for the well-being of the community. Giving words their natural and ordinary meaning does not necessarily produce a different result than would be produced if a purposive approach was taken in the process of interpretation. Both principles assist the court in performing its primary task of giving effect to the intention of the legislature.

Parliament's intention is discerned by understanding the objective of the legislation; what is the change that it is aimed to produce; what is its purpose. This often requires consideration of the social and historical context and a review of the legislation as a whole. But its intentions are also discerned from the words it uses. The underlying principle is that the court has a different function from Parliament. The court is ensuring that the legislative intent is properly and effectively applied. It is not correcting the legislative intent nor substituting its own views on what is a just and expedient application of the legislation".

28. The crux of Mr. Fitzpatrick's submissions is that the power of the THA to enter into a BOLT agreement without the appropriate consent or outside the statutory framework for the control of expenditure is not incidental because it is inconsistent with or contrary to or offends the statutory provisions dealing with the control of expenditure and the obtaining of finance by the THA.
29. It is clear from the THA Act that the revenue and expenditure of the THA are subject to statutory controls. The existence of the Fund established by section 141D of the Constitution is material to understanding the controls contained in the THA Act. As provided for in section 141D, the Fund consists of (a) monies appropriated by Parliament for use of the THA and (b) such other monies as the THA may lawfully collect. With respect to (a) – the monies appropriated by Parliament – sections 41 to 43 of the THA Act are very material. The essence of those provisions is that the monies allocated to the Fund are determined on the basis of annual estimates of income and expenditure approved by the THA for the next financial year. The estimates so approved are sent to Cabinet for its consideration. Section 42 deals with the case where the THA fails to complete its estimates. In such a case, the Minister of Finance shall proceed to prepare estimates as he thinks fit but may take into account draft estimates subsequently submitted by the THA.

30. In considering the estimates Cabinet is mandated by section 43 of the THA Act to give due consideration to the financial and development needs of Tobago in the context of Trinidad and Tobago as a whole and allocate financial resources to Tobago as fairly as is practicable. In determining what is fair and practicable, the considerations outlined at section 43(a) to (e) among others shall apply. Where the THA is dissatisfied with the allocation or any part thereof as approved by Cabinet, it may refer the matter to the Dispute Resolution Commission in accordance with the provisions of Part V of the THA Act. The allocation that is ultimately determined as fair and practicable is included in an Appropriation Bill for passing by Parliament. The monies ultimately appropriated by Parliament for the service of the financial year are credited to the Fund in quarterly releases in advance en bloc (see s 47). The monies so appropriated and paid are paid out of the Consolidated Fund (See section 113 of the Constitution).
31. In relation to the funds that the THA can lawfully collect, section 49 of the THA Act is relevant. The monies so collected are paid into the Fund and are set-off against the annual allocation by Parliament to the Fund. They do not represent an increase over and above what Parliament may allocate to the Fund.
32. By Section 39 of the THA Act all expenditure incurred by the THA shall be paid out of the Fund. Two things should be noted here. First, the reference to all expenditure means what it says. Section 39 does not distinguish between recurrent or capital expenditure. Secondly, it seems to me that the Fund is not to operate at a deficit. This I think is apparent from the fact that all expenditure is to be paid out of the Fund and the THA Act provides what monies are to be paid into the Fund.

33. However, the THA Act does contemplate that there may be occasions where the monies allocated by Parliament and the monies collected by the THA may not meet the expenditure of the THA in the discharge of its functions. Section 51 gives the Secretary the power to borrow by way of overdraft, with the approval of the THA, such sums as it may consider fit for the discharge of its functions (See Section 51(a)). The THA may also borrow with the approval of the Minister of Finance sums by way of term loans for the purpose of capital investment (See Section 51(b)). There is no other provision in the THA Act authorising the THA to borrow money. The only other monies the THA may receive is by way of grants or aid.
34. I think it is clear from the provisions providing (i) for the monies the Fund comprises; (ii) that all expenditure of the THA is to be met from the Fund; (iii) that Parliament allocates monies to the Fund on the basis of essentially Cabinet's approval of annual estimates of the THA's income and expenditure (or where there is dissatisfaction with Cabinet's approval, the decision of the Commission, which I would think is rare); (iv) the restricted borrowing powers of the THA, that it is the intention of the THA Act for Cabinet's and ultimately Parliamentary control of the THA's revenue and expenditure. That is the obvious purpose of the provisions of Part IV of the THA Act that I have considered above. Quite clearly it is Parliament's intention to control the expenditure of the THA in circumstances where the expenditure is met by allocations to the Fund from the nation's limited financial resources which are to be used to meet the needs of the nation as a whole.
35. According to the nature of a BOLT agreement on which there was agreement by the parties, it is an arrangement for, inter alia, financing construction projects. I agree with the position taken by the parties that it does not amount to a borrowing within the meaning of section 51 of the THA Act. However, under a BOLT agreement the THA would incur significant expenditure which is to be met from the Fund and would be dependent

largely on monies appropriated by Parliament to the Fund. When it is remembered that the THA Act sets out a process for the allocation of funds essentially on the basis of estimates of the THA's revenue and expenditure approved by Cabinet, then it is clear that if the THA were to enter into a BOLT agreement it would be committing itself to incurring significant expenditure - likely very significant expenditure- otherwise than in accordance with the THA Act. That would be inconsistent with the obvious purpose and intention of the THA Act and would support the conclusion as contended for by Mr. Fitzpatrick that the power to enter into a BOLT agreement outside the statutory framework in the THA Act cannot be an implied power.

36. It was pointed out by Mr. Jeremie that the estimates referred to in section 41 are prepared on an annual basis. Section 41(1) refers to the preparation of estimates of revenue and expenditure respecting all functions of the THA for the next financial year. However, under a BOLT agreement the THA may not be required to incur any expenditure for a few years after the agreement is made so there will be nothing to be included in draft estimates for the financial year next following the year the agreement is made. The implication being suggested is that the THA Act does not require the consent of anyone before the THA can enter into a BOLT agreement. I do not agree.

37. It is correct to say that section 41 refers to the preparation of estimates of revenue and expenditure respecting the functions of the THA for the next financial year and monies are appropriated by Parliament for that financial year. I am prepared to assume that if the THA were to enter into a BOLT agreement in year one it may not incur any expenditure for a few years later - say year four. So for those in-between years there would be nothing to show in the draft estimates, which is material to the statutory framework for control of expenditure by the THA since the funds allocated to the THA for the discharge of its functions are on the basis of the estimates. But that cannot lead to the conclusion that the THA has an incidental power to enter

into a BOLT agreement since that ignores the clear intent and purpose of the THA Act regarding the control of revenue and expenditure and is inconsistent with them. The fact that a BOLT agreement cannot be reconciled with the provisions of the THA Act or does not sit easily with the provisions is no reason to ignore the statutory provisions. Indeed the fact that a BOLT agreement commits the THA to expenditure otherwise than in accordance with the carefully drafted provisions for the control of the THA's expenditure supports the proposition that there can be no implied power to enter into the agreement outside of the statutory provisions for the control of expenditure.

38. The Judge expressed the view at paragraph 29 of his judgment (which has been quoted earlier in this judgment) that although there was no restriction to the THA entering into a BOLT agreement from a practical point of view it would be prudent for the THA to engage in discussions with the central government before so doing. He recognised that if the THA did so without consultation there could be a risk that the central government would not allocate funds to the THA and it could suffer the consequence of the loss of its lands that are subject to the BOLT agreement. But the THA would still be free to enter into the agreement with the possibility that it may be unable to meet its liability and lose its lands if Parliament does not allocate the necessary financial resources. I cannot agree that that is the intention of the legislature. The inability of the THA to meet its financial liabilities would be embarrassing not only to the THA but to the nation as a whole. And as Mr. Fitzpatrick said, it is "no slight thing" to say that the THA would lose its lands. This is emphatically so where the land may very well be lands vested in the THA in the right of the Republic of Trinidad and Tobago (See Section 54 (a) of the THA Act), which seems to me to mean that those lands are held by the THA on behalf of the State.

39. The THA Act was intended to give to the THA greater autonomy and functional status than that of a county council and somewhat greater autonomy than its predecessor 1980 Act. It is designed to give to the people of Tobago greater control over their affairs. The fact of the matter, however, is that by the THA Act, Cabinet and Parliament have maintained control over the THA's revenue and expenditure in the manner set out in the provisions to which I have referred above. The THA cannot have an incidental power that is inconsistent with or contrary to those provisions and the clear intent and purpose of the THA Act. The BOLT agreement commits the THA to incur expenditure without the THA complying with the provisions for the control of expenditure. In my judgment, therefore, the THA does not have an incidental power to enter into a BOLT agreement outside the statutory framework for the control of expenditure.
40. In the circumstances I would allow the appeal in relation to the first question and set aside the Judge's order and hold that on a proper construction of the THA Act, the THA is not empowered to enter into a BOLT agreement for the purposes of developing and financing construction outside the statutory framework in the THA Act for the control of expenditure.
41. On the second question, as I mentioned, the Judge held that the THA is not empowered to enter into a BOLT agreement except in accordance with the provisions of the CTB Act.
42. The CTB Act establishes the Central Tenders Board (the Board) and vests the Board with the authority on behalf of the government and the statutory bodies to which the CTB Act applies to accept or reject offers for the supply of articles or the undertaking of works or any services in connection therewith necessary for the carrying out of their functions. This is provided for at Section 4(1)(a) as follows:

“4. (1) There is hereby established a Central Tenders Board which save as is provided in section 20A and in section 35 of this Act shall have the sole and exclusive authority in accordance with this Act—

(a) to act for, in the name and on behalf of the Government and the statutory bodies to which this Act applies, in inviting, considering and accepting or rejecting offers for the supply of articles or for the undertaking of works or any services in connection therewith, necessary for carrying out the functions of the Government or any of the statutory bodies;”

The word “works” in Section 4(1)(a) is defined to mean “building and engineering works of all kinds” and “articles” is defined to mean “goods, materials, stores, vehicles, machinery, equipment and things of all kinds”.

43. The Board is composed of eight members consisting of five public officers appointed by the President and such other members at large appointed by the President as may be necessary to fill up the membership of the Board.
44. The purpose of the Act is to place in the hands of an independent body (subject to exceptions which are not relevant to this appeal) the responsibility for procuring articles, works or services on behalf of the government and statutory bodies to which the CTB Act applies. The intention of the CTB Act is to insulate the government and the statutory bodies from direct participation in the procurement process, to provide transparency with respect to expenditure of public funds, to minimise the possibility of collusion or favouritism in the award of contracts and allocation of state funds and to obtain the best value for the expenditure of public funds (See Civil Appeal No. 31 of 2018 Attorney General of Trinidad and Tobago v. Motilal Ramhit and Sons Ltd and Section 24(1)).

45. There is no doubt as to the applicability of the CTB Act to the THA. This is clear from Section 3(1) of the CTB Act and section 28 of the THA Act. The latter provision is as follows:

“28. The Assembly, in pursuance of its functions, shall be subject to the Central Tenders Board Act until such time as there is in effect alternative provision therefor made by the Assembly under Section 52.”

It was common ground between the parties that no alternative provisions as contemplated by section 28 have been made.

46. Sections 20(1) and section 26 of the CTB Act provide as follows:

“20. (1) Subject to section 19, whenever articles or works or any services in connection therewith are required to be supplied to or undertaken on behalf of the Government or a statutory body to which this Act applies, the Government or such statutory body shall make written request to the Board to invite on its behalf offers for the supply of those articles or for the undertaking of the works or services in connection therewith.

26. (1) Where an offer has been accepted by the Board or a committee acting for and on behalf of the Board, the Government or the statutory body at whose request the invitation to offer was issued and the person whose offer has been accepted shall enter into a formal contract for the supply of the articles or the undertaking of the works or services, as the case may be.

(2) A formal contract shall be in such form, and contain such terms, conditions and provisions, as the Board may determine.

(3) The Board shall publish in the Gazette the name of the person or body to whom the contract is awarded, the amount of the tender and the date on which the award was made.”

It is clear from those provisions that where the THA requires to be supplied with articles, works or services it shall make a written request to the Board to invite on its behalf offers for their supply and if an offer is accepted by the CTB, the THA shall enter into a formal contract for the supply of such articles, works or services.

47. Mr. Jeremie for the THA submitted that the CTB Act does not apply to a BOLT agreement because by such agreement the THA is not procuring articles, services or works. His contention was that by a BOLT agreement, the THA is obtaining a lease or transfer of the lands in question neither of which is included in the meaning of works or articles or services.

48. A similar submission was made before the Judge but rejected by him. He accepted that a BOLT agreement is “a lease and lease back arrangement”. He, however, stated:

“46... But that arrangement cannot be divorced from the ultimate purpose of the arrangement. In a case where the goal is the provision of a building or buildings and these are to be used to house departments of the THA, and after a certain number of years has passed and rent has been paid, the land together with the building is transferred back, the CTB Act will apply. BOLT is merely a mechanism to facilitate the construction by a third party of that building with payment being done over a period of time instead of upfront capital expenditure being undertaken by the THA.

47. As submitted by the defendant itself, a BOLT arrangement entails the THA entering into a contract with a third party to construct a facility on lands that it owns for the ultimate purpose of housing various departments under its responsibility in the discharge of its statutory functions. The ultimate object of the arrangement is to procure the development and construction of an intended facility for the THA. The aspect of constructing on the lands is a fundamental part of the arrangement.”

49. I agree with the Judge. It is not possible to ignore the fact that one of the purposes of a BOLT agreement (and realistically the main or primary one) is to secure the construction of a building or the performance of other engineering works. It would be to take an unreasonably unrealistically artificial view of a BOLT agreement to disregard the fact that under such an agreement the THA would be securing such a construction or performance of engineering works within the meaning of the THA Act without the involvement of the Board as contemplated by the CTB Act. As the Judge noted:

“I therefore agree with the claimant’s submission that a BOLT arrangement by the THA, being a transaction which fixes the cost of development and construction without the benefit of a competitive tender, would be a breach of THA’s obligations to follow the procedures set out in the CTB Act and defeat the policy and purpose of the Act.”

50. In the circumstances the BOLT agreement is caught by the provisions of the CTB Act and the THA would be required to make a written request to the Board to invite appropriate offers.

51. In view of the above, I would allow the appeal and hold in relation to the first question that upon a true construction of the THA Act, the THA is not empowered to enter into a BOLT agreement for the purpose of developing and financing construction outside of the statutory framework in the THA Act for the control of expenditure; and in relation to the second question that upon a true construction of the CTB Act, the THA is not empowered and/or it is unlawful for the THA to enter into a BOLT agreement for the purpose of

developing and financing construction projects other than in accordance with the CTB Act.

52. I would hear the parties on costs.

A. Mendonça J.A.