

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013-00135

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

CLAIMANT

AND

THE TOBAGO HOUSE OF ASSEMBLY

DEFENDANT

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Alvin Fitzpatrick SC, Mrs Lesley Lucky-Samaroo, Mr Martin George and Ms Tamara Maharajh instructed by Ms Lesley Almarales and Ms Rishma Ramrattan for the Claimant

Mr John Jeremie SC, Mr Kerwyn Garcia and Mr Stuart Young instructed by Ms Kahaya Nanhu for the Defendant

Dated: 30 April 2014

JUDGMENT

1. This claim concerns the powers of the Tobago House of Assembly (THA) under the **Tobago House of Assembly Act, Chap. 25:03** (the THA Act). This matter started as a judicial review claim seeking the review of what has commonly come to be called the “Milshirv project” for the construction of an administrative complex to house certain departments of the THA. The project itself was challenged. Two other parties were involved, Milshirv Properties Limited and First Citizens Bank.
2. By a consent order entered into by all the parties, that judicial review matter was converted to a construction/ interpretation summons to consider the powers of the THA in relation to a specific type of arrangement called BOLT.
3. Each side filed a statement of facts. At the hearing the issue for decision was enlarged to:
 1. 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;** and
 2. Whether upon a true construction of the Central Tenders Board Act (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.

FACTS

4. The parties helpfully agreed on the nature of the BOLT arrangement (as described and summarised at paragraphs 7 to 11 of the defendant’s unagreed statement of facts). The term 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.

6. It is not in dispute that the Milshirv project, which was the initial subject of this claim, is an example of a BOLT arrangement which the THA entered into around November 2011 for the construction of the Office Complex for the Division of Agriculture, Marine Affairs, Marketing and the Environment (the DAMME Administrative Complex).

Preliminary Point

7. In replying to the Attorney General's submissions Mr Jeremie SC for the THA submitted that the matter had now become hypothetical or academic since there was no specific factual backdrop to the matter. There was no specific BOLT arrangement or issue in dispute between the parties.

8. He cited three cases in particular to advance his submission. These were **Lewis v Dempster and Fleming [2002] EWHC 3138**; **Padden v Arbuthnot Pensions & Investments Ltd [2004] EWCA Civ 582**; and **R v London Borough of Waltham Forest [2009] EWHC 1097**. These cases highlight that the court will generally decline to entertain an academic or theoretical question which has no practical application or decide issues upon facts which have not arisen.
9. While there is some force in what Mr Jeremie says that there is no dispute to be resolved, it remains clear that both the Attorney General and the THA disagree on whether the BOLT arrangement for building construction projects requires the approval of the Cabinet or the Minister of Finance. Further, they dispute whether such arrangements are subject to the provisions of the **Central Tenders Board Act, Chap 71:91** (CTB Act).
10. Both issues are issues of public interest and involve distinct points of statutory construction that have arisen in the past and may no doubt arise again. As noted at paragraph 24 of the **London Borough** case, Lord Slynn in **R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450** stated that:

“the discretion [of the Judicial Committee of the House of Lords] to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

11. It is noted that although what was said in the **Salem** case related specifically to the Judicial Committee of the House of Lords, there is no reason why this should not apply with equal force to other courts.

12. I am of the view that although now academic, the circumstances identified in the **Salem** case are met in this matter. I will therefore adopt the approach of the court in the case of **Lewis** (cited above) and give my views on the matter, for what they are worth, in case it affords any useful guidance for the parties in any future litigation or construction endeavour – see paragraph 31 of the **Lewis** judgment.

First Question

13. The parties agree that as a matter of general law, the THA, being a corporation established by statute, has only such powers as are conferred on it by statute, or as may fairly be regarded as incidental to or consequential on them – see the judgment of Pennycuik J in **Attorney General v Crayford Urban District Council [1962] Ch. 246**. In determining whether a power is incidental, the provisions of the statute which confer and limit its functions must be considered. The power must not merely be convenient or desirable or profitable, but must arise by reasonable implication from the language of the legislation: see **Hazzel v Hammersmith and Fulham London Borough Council [1992] 2 AC 1 at 31E**. Further, the context in which the powers are to be exercised and the purpose and powers of the Act and the THA as a whole, must be considered - **Credit Suisse v Allerdale Borough Council [1997] QB 306**.

14. The THA Act sets up the THA to govern certain aspects of the affairs of Tobago. Section 25 of the Act provides:

25. (1) Without prejudice to section 75(1) of the Constitution, the Assembly 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.

15. Section 75(1) of the Constitution provides:

75. (1) There shall be a Cabinet for Trinidad and Tobago which shall have the general direction and control of the government of Trinidad and Tobago and shall be collectively responsible to Parliament.

16. These responsibilities set out in the Fifth Schedule of the THA Act include as follows:

- i. Finance (the collection of revenue and the meeting of expenditure incurred in the carrying out of the functions of the Assembly);
- ii. State Lands;
- iii. Land and marine parks;
- iv. Public buildings;
- v. Tourism;
- vi. Agriculture;
- vii. Fisheries;
- viii. Food production;
- ix. Infrastructure, including air and sea transportation, wharves and airports and public utilities;
- x. Industrial Development;
- xi. The Environment;
- xii. Housing.

17. Section 25(2) of the Act further provides:

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—

(a) devise mechanisms to ensure the protection and security of property, buildings, or other assets under its control;

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

(c) obtain from international donors any grant, aid or technical assistance.

18. The provisions in respect of finance set out in Part 4 of the Act are also relevant. These provide in summary as follows:

i. All expenditure incurred by the THA shall be paid out of the THA Fund (section 39);

ii. The THA shall submit to Cabinet for consideration and approval draft estimates of revenue and expenditure respecting all functions of the Assembly for the next financial year (section 41);

iii. Based on these estimates and consideration of certain needs of Tobago, Cabinet shall allocate financial resources to Tobago (section 43);

iv. The THA shall submit annual statements of accounts showing all monies paid into, and the expenditure met from the Fund (section 45);

v. All revenue collected in Tobago on behalf of the Government shall be paid into the Fund and set off against the annual allocation appropriated by Parliament to the Fund (section 49).

19. With respect to the THA's powers to borrow, section 51 of the Act sets out:

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.

20. Both sides accept that the BOLT arrangement under consideration does not amount to an attempt to borrow money for capital expenditure as contemplated by section 51 of the Act. Although the overall arrangement is a form of financing arrangement, it does not involve a loan – see **Eastern Nitrogen v Commissioner of Taxation** [2001] FCA 366. For the purposes of section 51 therefore, I am of the view that the consent of the Minister is not required.

21. It is clear from the Fifth Schedule to the THA Act that the THA has power over lands. All State lands in Tobago are vested in the THA by section 54 of the Act. They can lease lands and enter into lease back arrangements (necessary or incidental to the exercise of its power over lands). They are also clearly entitled to enter into contract arrangements: section 25(2) of the Act.

22. The BOLT mechanism is a contract arrangement and it falls within the powers of the THA. When broken down the defendant submits that the BOLT arrangement is a series of contracts by the THA:

- To enter into a contract with a third party to build a facility on lands that it owns;
- To convey lands it owns to a third party;
- To lease lands owned by a third party; and
- To take a transfer of lands from a third party.

23. I agree with the defendant's submission that the THA has an express and/or implied power by section 25(2) of the Act to enter into such contracts which constitute a BOLT arrangement. The Act makes no provision for the approval of the Cabinet or any Minister for such arrangements to be approved. If Parliament intended this to be so it could easily have used words limiting the powers of the THA. It did not do so.
24. In fact, the claimant submits on the authority of **Halifax Building Society v Chamberlain Martin Spurgeon (1994) 2 BCLC 540** that it is clear that a lease for building purposes followed by a leaseback to the THA may, in certain circumstances, facilitate or be incidental to the discharge of its wider functions set out in section 25(1) of the Act. They submit that the question for the court's determination is not whether the THA can enter into a BOLT arrangement *per se* but whether it can do so outside the financial and funding framework set out in the THA Act.
25. In this regard, the claimant relied heavily on the English case of **Credit Suisse**. Here, the defendant Council wished to build a swimming pool in its area pursuant to its responsibility to provide recreational facilities. Purportedly acting under its powers under section 111 of the Local Government Act 1972 (which permitted the council "to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge" of any of its functions), the council created a company to develop the site by building a leisure pool and time-share units, the sale of which would defray the costs of building the pool. The company, whose directors were 3 council members and one council officer, was given a guarantee by the Council to finance the project and facilities were accordingly extended by the plaintiff bank. Sale of the time-share units was unsatisfactory and the company went into liquidation, following which the bank sought to recover from the Council the sums owed to it by the company. The Court of Appeal of England held that the establishment of the company and the giving of the guarantee were part of a scheme designed to circumvent the controls imposed on local authority borrowing by the Act and fell outside both the express and

implied powers of the Council and were therefore ultra vires. The decision to adopt the scheme also could not be treated as being made for a proper purpose or within the discretionary powers of the Council.

26. In my view, the type of arrangement in issue here and the nature of the THA and the powers given to it under the THA Act, make the **Credit Suisse** case distinguishable. **Credit Suisse** was a case of exercising improper/‘unusual’ borrowing powers outside of the provisions of the statute.

27. Further, in looking at the context in which implied powers are to be exercised as highlighted by Neil LJ at page 332 of **Credit Suisse**, the particular nature and powers of the THA as opposed to English local authorities must be considered. In this regard, the observations of McMillan J in the case of the **Tobago House of Assembly v The Attorney General** (HCA No. 3437 of 1982), albeit in relation to the 1980 THA Act, are noteworthy:

“The provisions of the Act as a whole show that while the Assembly enjoys a functional status superior to that of a County Council and has power to make bye laws, it is not a full legislature. As a Statutory Corporation it has only such powers as are conferred on it by Parliament which, for present purposes, means its Act of incorporation; it is subject only to such direction, control and supervision of the Government (i.e. Cabinet or a Minister) to the extent that Parliament has legislated for such direction, control and supervision.”

28. It is not in dispute that Part 4 of the THA Act creates the statutory arrangements for the control of expenditure and borrowing by the THA. But the arrangements for control set out in Part 4 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. Where funds are insufficient, the THA may borrow with the appropriate approvals under section 51. There is a specific level of autonomy given to the THA when looking at the provisions mentioned above and the Act as a whole. Section 25, as noted above, sets out, clearly, the responsibilities of the THA. Section 26 of the THA Act sets out that the THA shall not have responsibility for the matters set out in the Sixth Schedule. Section 25 (3) provides that where a statutory authority or State enterprise provides services in Tobago that authority or enterprise shall act in accordance with the policies and programmes of the THA and to this end may enter into a Memorandum of Understanding with the THA. The Act clearly sets out the areas of responsibility for the THA and provides for its autonomy within the framework of the THA Act.

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.

30. I should add that ongoing discussion, consultation and cooperation between the relevant central government authorities and the THA on matters that impact on both entities is

fundamental to good governance and efficiency. The Act itself at sections 30 and 31 provides as follows:

30. The Chief Secretary may, if invited by the Prime Minister so to do, attend meetings of Cabinet in order that the Chief Secretary may—
(a) apprise Cabinet of decisions taken by the Assembly in the exercise of its powers under this Act; or
(b) represent the interest of Tobago in any matter having or likely to have an adverse effect on Tobago, but the Chief Secretary shall not have the right to vote on any matter before the Cabinet.

31. The Prime Minister and the Chief Secretary shall hold regular discussions with a view to formulating administrative and legislative mechanisms for the promotion of harmony in the affairs of Trinidad and Tobago.

31. The Act, therefore, contemplates that both the central government and the THA would meet and hold regular discussions on matters affecting Tobago and to promote harmony in the affairs of Trinidad and Tobago.
32. But to say there is a legal requirement to discuss or consult or to obtain the Minister's approval before entering BOLT arrangements would be to impose on the THA a restriction not provided for in the THA Act construed purposefully and as a whole.
33. In answer to the first question therefore, I am of the view that the THA is empowered to enter into BOLT type arrangements as described above for the purpose of developing and financing construction without the consent/ approval of the Minister of Finance. Further, in entering into such arrangements the THA is not acting outside the express statutory framework for finance/ expenditure under the THA Act.

Second Question

34. The THA is expressed to be subject to the CTB Act. The question is whether a BOLT arrangement comes under the purview of the CTB Act.

35. Section 3(1) of the CTB Act states:

3. (1) This Act applies to such of the statutory bodies as are set out in the First Schedule to this Act notwithstanding any general or special power or authority vested in such statutory body either by Act or by virtue of its incorporation.

36. The THA is one of the statutory bodies listed in the First Schedule of the CTB Act. Further, the THA is made subject to the CTB Act by section 28 of its own Act:

“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.*” (Emphasis supplied)

37. Section 4 of the CTB Act establishes the CTB as the sole and exclusive authority (save as is provided in sections 20A and 35) -

(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;**

(b) to dispose of surplus or unserviceable articles belonging to the Government or any of the statutory bodies.

38. “Works” is defined in section 2 of the CTB Act as “building and engineering works of all kinds”; “articles” means all goods, materials, stores, vehicles, machinery, equipment and things of all kinds.

39. The THA contends that BOLT is a lease arrangement classically. It is in respect of land. Land is not covered by the CTB Act, which provides for a tendering process for the supply of articles and the undertaking of works and services. It does not make reference to the acquisition of land nor is land included in the definition of ‘articles’ and ‘works’ in section 2 of the Act.

40. Section 20(1) of the CTB Act provides:

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.

41. Section 20(3) provides further that:

(3) On the receipt of any such request, the Board shall either—

- (a) invite members of the public in general to make offers for the supply of such articles or for the undertaking of such works or services, as the case may be, by Notice published in the Gazette and in local or overseas newspapers, or
- (b) subject to the approval of the Minister, invite such bodies or persons as may be selected by the Board to make offers for the supply of such articles or for the undertaking of such works or services, as the case may be, whenever the Board considers it expedient or desirable so to do.

42. Section 26 provides as follows:

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.

43. The Act as a whole is intended to provide for an accountability mechanism when public funds are being dealt with. It is also intended to provide control of public expenditure. A central purpose is to ensure fairness and equality of opportunity in the award of contracts utilising public funds; to provide a level playing field as it were. The underlying rationale has to do with giving suitably qualified companies and citizens a fair opportunity to tender for government projects. Ultimately, the provisions of the Act are intended to ensure that public procurement is conducted “above board”.

44. Counsel for the THA accepts that the THA is subject to the provisions of the CTB Act with respect to the undertaking of works or connected services necessary for carrying out its functions. They submit however that a BOLT transaction does not involve the entry by the THA into any contract for the construction of a facility *for the THA*. Rather it is in substance an arrangement for the purchase of lands and the lease back of same where the parties have in contemplation the construction (by a third party), the ownership (by that third party), the lease (by the THA) and the transfer of the facility (to the THA) in accordance with the terms of the transaction. As such, it is not a contract that is caught by the provisions of the CTB Act.
45. In my view the THA's contention would be to adopt too narrow a construction of what a BOLT arrangement is and what the CTB Act applies to. Given the objects of the CTB and the mechanisms that procurement legislation provides, a generous and purposive construction must necessarily be given to the legislation. This is especially so in the particular context that the THA Act very clearly says that the THA is subject to the CTB Act for the matters specified in the Act.
46. BOLT is a lease and lease-back arrangement. 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.

48. Given the purpose of the CTB Act, fairness would demand that any qualified entity ought to be given the opportunity to bid for a particular BOLT arrangement. Thus, for example, if the THA wishes to utilise the BOLT mechanism to undertake work leading to construction of a facility for its use, a tender process can be designed under the CTB Act to allow for any qualified entity to make a bid. The various bids can then be evaluated to determine best value for money in accordance with the project objectives. There may be good reasons to prefer one particular BOLT bid to another. Different bidders may offer competitive bids. All of the reasons for having a competitive bidding process can be realised.
49. In the context of the existing legislative framework and given that the THA is subject to the CTB Act, the reasonable and purposeful construction to be given is that the THA is obliged to act in accordance with the CTB Act in respect of any BOLT construction agreement. The THA must therefore act under the ambit of the Central Tenders Board (CTB) or by utilising one of the entities such as NIPDEC or UDECOTT if it is to operate outside the purview of the CTB tender rules: see section 20A (c) of CTB Act.
50. 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.
51. The THA cannot be in a special category outside the purview of the CTB Act when the THA Act plainly says it is subject to it. It also cannot seek to find unapproved ways to

get around the inefficiencies and problems it may perceive exist in dealing with the CTB. At the end of the day the THA, as does the Central government, deals with public funds and it must operate within the supervisory mechanisms that exist for overseeing the spending of public funds, however imperfect those mechanisms are. It is to be noted, however, that section 28 of the THA Act, as highlighted above, places the THA under the purview of the CTB until such time as it is able to make alternative arrangements under section 52.

52. In answer to the second question therefore, I am of the view that the THA cannot enter into a BOLT type arrangement as outlined above except in accordance with the provisions of the CTB Act and indeed the THA Act.

53. I thank the attorneys on both sides for their excellent submissions and the spirit of cooperation they showed in the conduct of this matter. As contemplated by the parties, each party will bear its own costs of this matter.

Ronnie Boodoosingh

Judge