

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA  
THE HON MISS JUSTICE EDWARDS JA  
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)**

**SUPREME COURT CIVIL APPEAL NO 78/2016**

**MOTION NO COA2019MT00018**

<b>BETWEEN</b>	<b>FITZROY FAGAN</b>	<b>APPLICANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE NATIONAL HOUSING TRUST</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>THE MINISTRY OF FINANCE</b>	<b>3<sup>RD</sup> RESPONDENT</b>

**Hugh Wildman instructed by Hugh Wildman & Company for the applicant**

**Ms Lisa White instructed by the Director of State Proceedings for the 1<sup>st</sup> and 3<sup>rd</sup> respondents**

**Sundiata Gibbs instructed by Hylton Powell for the 2<sup>nd</sup> respondent**

**15, 16 and 23 February 2024**

**Constitutional Law - Motion for conditional leave to appeal to Her Majesty in Council - Whether an appeal lies of right - Whether the questions identified by the applicant involve an interpretation of the Constitution - Constitution of Jamaica sections 110(1)(c), 15(1), and 19(1)- (2)**

**P WILLIAMS JA**

[1] I have read in draft the reasons for judgment of Shelly-Williams JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

## **EDWARDS JA**

[2] I, too, have read the draft reasons for judgment of Shelly-Williams JA (Ag) and agree. There is nothing that I wish to add.

## **SHELLY-WILLIAMS JA (AG)**

[3] This is a relisted amended notice of motion for conditional leave to appeal to Her Majesty in Council ('the Privy Council') filed on 13 June 2023, which stated:

“That the Applicant be granted Conditional Leave to appeal as of right to His Most Excellent Majesty in Council from the decision this Honourable Court delivered on 5<sup>th</sup> day of November 2019 That:-

1. The National Housing Trust Act did not create a statutory trust on behalf of the contributors of the National Housing Trust, such as the Applicant.
2. That the National Housing Trust (Special Provision Act) 2013, does not infringe section 15(1) (a) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, insofar, as it provides for the 2<sup>nd</sup> Respondent to make available the sum of 44 Billion Dollars over four years from the National Housing Trust to the 3<sup>rd</sup> Respondent for budgetary support.
3. Whether the Applicant as a contributor to the National Housing Trust, has standing to bring the said claim on the basis that as a contributor the proposed action of the 2<sup>nd</sup> Respondent infringes the Applicant's constitutional rights, not to be deprived of property without compensation.
4. Whether the Applicant, as a contributor, has standing to bring a claim under the charter, given his status as a citizen[, ] who has an interest in ensuring that the rights enshrined under the Charter of Fundamental Rights and Freedoms Act, are not infringed by the Respondents.” (Underlining as in the original)

[4] The applicant had filed a notice of motion for conditional leave to appeal to Her Majesty in Council on the 26<sup>th</sup> of November 2019 from the decision of this court delivered

on the 5<sup>th</sup> of November 2019. A relisted amended notice of motion filed on the 13<sup>th</sup> of June 2023 was heard on the 15 February 2024.

[5] The motion is brought pursuant section 110(1)(c) of the Constitution of Jamaica on the ground that the questions involved in the appeal concerned final decisions in civil proceedings on questions as to the interpretation of the Constitution, specifically section 15(1) of the Charter of Fundamental Rights and Freedoms ('the Charter') and section 49 of the Constitution.

[6] On 16 February 2024, after considering the written and oral submissions of counsel, we made the following orders:

1. The application for conditional leave to appeal to Her Majesty in Council as of right from the decision of this court made on 5 November 2019, pursuant to section 110(1)(c), of the Constitution is refused.
2. No order as to costs.

At the time we made the orders, we promised that written reasons would follow. This judgment is a fulfillment of that promise.

## **Background**

[7] The factual background was thoroughly outlined in the judgment of Morrison P in the substantive matter **Fitzroy Fagan v The Attorney General of Jamaica et al**, cited at [2020] JMCA Civ 57, so I will only set out a summary of the facts.

[8] In 2013, to enable the National Housing Trust ('NHT') to provide financial assistance to the Government for the purpose of budgetary support, the Government of Jamaica proposed an amendment to the National Housing Trust Act ('NHT Act'). Consequently, the bill was tabled on 26 February 2013 in the House of Representatives and on 27 March 2013 the National Housing Trust (Amendment) (Special Provisions) Act

2013 ('2013 Amended Act') was assented to by the Governor General and came into force on 28 March 2013. It is to be read and construed as one with the NHT Act and all amendments thereto.

[9] On 7 March 2013, Fitzroy Fagan (the applicant), a self-employed businessman and a contributor to the NHT, filed a Constitutional claim in the Supreme Court seeking a declaration that the bill, insofar as it sought to withdraw funds from the NHT, constituted a deprivation of his property, in breach of the Constitution, and was therefore void. He also sought an injunction to restrain the NHT from handing over the funds to the Ministry of Finance.

[10] The applicant additionally filed particulars of claim in which he contended that the NHT Act established a statutory trust for the benefit of the contributors such as the applicant and that the Board of Directors of the NHT are trustees. He also contended that the contributions represent the private property of the contributors including the applicant.

[11] However, upon the enactment of the bill, the applicant filed an amended claim on 26 April 2013 in which he sought the following:

- i. A declaration that the Act "The National Housing Trust (Special Provisions) Act 2013" insofar as it seeks to withdraw the said funds from the 2nd [Respondent], constitutes a deprivation of the claimant's property in breach of the Constitution of Jamaica and is therefore void.
- ii. An injunction to restrain the 2nd [Respondent] from handing over the funds to the 3rd [Respondent]."

[12] The Full Court dismissed the claim. Hibbert J, in his judgment on behalf of the Full Court concluded that there was nothing to indicate that Parliament intended either expressly or by implication to establish a statutory trust and that the use of the word "Trust", which was always capitalized, was to denote the name of the body and not the functions it was established to perform. He also found that there was no certainty of the

subject matter, that is, the property or certainty of objects, nor the beneficiaries, that could be discerned in the NHT Act. The Full Court found that section 7 of the NHT Act, which deals with the resources of the Trust, indicated an ever changing and unascertainable subject while no ascertainable beneficiaries can be found in section 4, which sets out the function of the NHT. Further, he considered that, even if Parliament did, in fact, intend to create a statutory trust, and the appellant retained property in his contributions in this case, it was not possible to construe section 2 of the 2013 Amended Act as authorising the compulsory taking of the applicant's contributions.

[13] The applicant appealed to this court against the Full Court decision. The appeal was heard by a panel comprising of Morrison P, McDonald-Bishop JA and P Williams JA. The panel, at para. [53] of their decision, found no basis to interfere with the decision of the Full Court and upheld the decision in this regard.

### **The submissions**

[14] In this motion, Mr. Wildman for the applicant, in his written submissions to this court, contended that there are arguable grounds under the Constitution deserving of the consideration of the Privy Council. He submitted that on an examination of the provisions of the NHT Act, a statutory trust was created. He argued that the NHT Act contains all the features of a trust, that is, the three certainties: certainty of intention, subject matter and objects. He further argued that the fact that the legislation provides for the trustee to have certain discretionary spending did not negate it being a trust. He submitted that from the very name of the institution, it was the clear intention of Parliament to create a trust.

[15] Further, he submitted that the 2013 Amended Act was in breach of section 15(1) of the Charter, as the removal of funds from the NHT to finance the Government's debt to the International Monetary Fund ('IMF'), affected contributors' property rights.

[16] In oral submissions, Mr Wildman reframed the proposed question for consideration of the Privy Council as follows:

“Whether the NHT Act created a statutory trust on behalf of contributors and the withdrawal from the Trust by the executive for the purpose other than those intended by the Act, constitutes a breach of section 15(1) of the Charter of Fundamental Rights and Freedom, not to be deprived of property without compensation.”

[17] The applicant did not rely on his written submissions that section 49 of the Constitution had been breached. This had not been argued in the Full Court, nor at the Court of Appeal. This was the same position adopted in relation to the *locus standi* of the applicant.

[18] The motion was strongly opposed by The Attorney General of Jamaica and The Ministry of Finance (the 1<sup>st</sup> and 3<sup>rd</sup> respondents). Ms. White, on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, contended that the proposed appeal to the Privy Council entails no question that gives rise to an appeal as of right, and none having to do with the interpretation of the Constitution. She further argued that neither the Full Court nor this court fell into error in deciding that Parliament did not intend the NHT to be set up as a trust, in the classic sense, and the use of the word ‘trust’ was not conclusive of this.

[19] Further, she contended that the applicant had not met the threshold in section 110(1)(c) of the Constitution, as the issue raised was not one of constitutional interpretation and thus not applicable to a leave to appeal as of right. She submitted that the claim was, instead, concerned with the application of section 15 of the Constitution.

[20] Nevertheless, it was Ms. White’s submission that the applicant having been refunded his contribution, with interest, there has not been, is not presently, or not likely to be a breach of his constitutional right at section 15(1), so as to justify a constitutional claim, per section 19(1) of the Charter. She also submitted that the applicant had also not satisfied the criteria to bring a claim in a representative capacity as per section 19(2) of the Charter. Her position was, therefore, that the motion ought to be denied.

## Disposal

[21] The amended Motion for conditional leave to Her Majesty in Council was made pursuant to section 110(1) © of the Constitution which states that :

'An appeal shall lie from decisions of the Court to of Appeal to Her Majesty in Council as of right in the Her Majesty in Council. following cases-

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution;'

[22] In the Privy Council case of **Eric Frater v R** (1981) 1 WLR 1468 Lord Diplock on behalf of the Board opined in relation to the approach to be taken as regards section 110(1) (c) of the Constitution that:

Claims made by appellants to be entitled to appeal as of right under section 110(1) (c) are not granted unless they do involve a genuinely disputable question on *interpretation* of the Constitution.

[23] Brooks JA, as he then was, in the case of **John Legister and others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1 adopted the same position and stated at paragraph 23 that:

The fourth basic principle is that paragraph (c) of section 110(1) is not generally aimed at addressing breaches of constitutional rights. Section 110(1)(c) speaks to "questions as to the interpretation of this Constitution". Mr Ledgister's submission that the case involves breaches of his constitutional rights must, therefore, fail. There are, despite the force with which those submissions were made, no questions of interpretation of the Constitution involved in this matter.

[24] The question before the Supreme Court was whether NHT was a Trust and if was whether the applicant's right to property as provided by section 19 of the charter had been breached. The issue as to whether NHT was a trust was addressed in the Full Court decision. In para. [28] the Full Court had considered the pre-requisites as to what

constitutes a trust and then went on in para. [29] to indicate why NHT could not be deemed a trust. Hibbert J stated that:

“[28] Did the use of the word „Trust“ in the NHT Act signify an intention by Parliament to create a trust? In **Re Ahmed & Co., (a firm) and Others** Collins, J. at paragraph 111 stated:

‘There is no doubt that when the word “trust” is used in a statute it does not necessarily mean a classic private trust. Thus in Tito v. Waddell (No. 2) [1977] 1 Ch 106 the relevant Ordinance described the resident commissioner as being paid compensation to hold on trust on behalf of the former owner or owners of a native or natives of the colony subject to such directions as the Secretary of State may from time to time give. Sir Robert Megarry V-C said (at 211) that, when the word ‘trust’ was used one has to look to see whether in the circumstances of the case, a sufficient intention to create a true trust is manifested: ‘One cannot seize upon the word ‘trust’ and say that this shows that there must therefore be a true trust’ [Emphasis added]

[29] On an examination of the NHT Act it is noted that nowhere in the Act are the words ‘trustee(s)’, ‘beneficiaries’ or ‘on trust’, words commonly found in trusts, to be found. Significantly, section 5.(1) of the Act states:

5-(1) There shall be established for the purposes of this Act, a Board of Directors of the Trust which shall, subject to the provisions of this Act, be responsible for the policy and general administration of the affairs of the Trust. Additionally, by virtue of section 6, the Board is obliged to give effect to directions given by the Minister as to the policy to be followed in the performance of its functions.” (Underlining as in the original)

[25] Morrison P, in delivering the Court of Appeal’s decision in this case, also considered the issue as to whether NHT was a trust. He opined that the NHT was not a trust. Morrison P considered and applied the principles regarding the three certainties to be



considered in determining whether a trust existed, as laid out in the case of **Knight v Knight** (1840) 3 Beav 148 and the application of the three certainties in the case of **Rosemarie Wright-Pascoe v Zoe Cecile McHugh and others** (unreported), Supreme Court, Jamaica, Claim No 2010 HCV 00024, judgement delivered 21 October 2011. Morrison P stated at paras. [47] to [49] of his judgment that:

“[47] Firstly, under section 7, contributions to the NHT are listed as part of the resources of the Trust. Secondly, under section 4, in addition to making loans available to contributors to purchase, build, maintain, repair or improve houses, the NHT may also promote housing developments and encourage, stimulate improved methods of production of houses, and enhance the usefulness of the funds of the Trust by promoting greater efficiency in the housing sector. Thirdly, under paragraph 3 of the First Schedule, the expenses of the NHT, including salaries, ‘shall be defrayed out of the income of the Trust or from sums provided for the purpose by Parliament’. And fourthly, and of direct 30 At para. [30] relevance to this case, the resources of the NHT, as a public body, would not have been made subject to the GOJ levy under the provisions of the PBMA Act.

[48] As Messrs Powell and Gibbs submitted, I would have expected that, had the intention of Parliament been to create a trust, provision would have been made for contributions to be segregated from the remainder of the resources of the NHT; income attributable to contributions would have been credited directly to contributors, rather than form part of the general resources of the NHT; and contributions would not have been permitted to be used on projects, the benefits of which might enure to persons other than contributors.

[49] These considerations led me to the view that Hibbert J was clearly right in concluding that the scheme established by Parliament in the NHT Act did not reflect certainty of intention, of subject-matter or of objects. Accordingly, the funds of the NHT do not form part of a statutory trust.”

[26] The question raised by the applicant is whether NHT is a trust and if payments from it by the executive would amount to a breach of the applicant’s right to property guaranteed under section 15(1) of the Charter. This purported breach of the right to

property would not require an interpretation of the Constitution. We therefore concluded that the applicant had not satisfied the criteria laid down under section 110(1)(c) of the Constitution for conditional leave to be granted as of right.

[27] In light of the conclusions herein, we made the order outlined at para. [5] above.

[28] No order was made for cost as Ms. White had indicated that she would not pursue cost in matter.