

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 78/2016

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA**

BETWEEN	FITZROY FAGAN	APPELLANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1st RESPONDENT
AND	THE NATIONAL HOUSING TRUST	2nd RESPONDENT
AND	THE MINISTER OF FINANCE	3rd RESPONDENT

Hugh Wildman and Miss Faith Gordon instructed by Hugh Wildman & Company for the appellant

Mrs Susan Reid-Jones and Miss Carla Thomas instructed by the Director of State Proceedings for the 1st and 3rd respondents

Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the 2nd respondent

5 November 2019 and 13 November 2020

MORRISON P

Introduction

[1] The questions which arise in this appeal are (i) whether the National Housing Trust Act (‘the NHT Act’) constitutes the National Housing Trust (‘the NHT’/‘the Trust’) a

statutory trust for the benefit of contributors; and (ii) whether contributors to the NHT retain a property right in their contributions, so as to render any compulsory removal of funds from the NHT a deprivation of property, contrary to section 15(1) of the Constitution of Jamaica ('the Constitution').

[2] In a judgment given on 28 July 2016, the Full Court of the Supreme Court¹ ('the Full Court') unanimously answered both questions in the negative.

[3] In this appeal, the appellant, who is a self-employed businessman and a sometime contributor to the NHT, contends that the Full Court fell into error in coming to this decision. The respondents, on the other hand, maintain that the judgment of the Full Court was correct and should not be disturbed.

[4] The appeal came on for hearing on 5 November 2019, when the court heard submissions from Mr Hugh Wildman for the appellant, Mrs Susan Reid-Jones and Miss Carla Thomas for the 1st and 3rd respondents, and Messrs Kevin Powell and Sundiata Gibbs for the 2nd respondent.

[5] At the conclusion of the hearing, the court dismissed the appeal, with costs to the 2nd respondent to be taxed if not agreed. However, the court made no order as to costs in relation to the 1st and 3rd respondents.

[6] With apologies for the delay, these are my reasons for concurring in this decision.

¹ [2016] JMFC Full 7 (Hibbert, Thompson-James and Dunbar-Green JJ)

The statutory framework

[7] The NHT was established by section 3(1) of the NHT Act.

[8] Pursuant to section 4(1) of the NHT Act, the functions of the NHT are to (a) add to and improve the existing supply of housing in Jamaica, and (b) enhance the usefulness of the funds of the NHT by promoting greater efficiency in the housing sector.

[9] Broadly speaking, the NHT performs these functions by, among other things, promoting such housing projects as may from time to time be approved; making available to such contributors as may be prescribed loans to assist in the purchase, building, maintenance, repair and improvement of houses; and providing finance for housing development projects and associated social services and physical infrastructure².

[10] Section 2 of the NHT Act defines a contributor to the NHT as “any employed person, self-employed person, voluntary contributor or domestic worker and every employer who is required to make contributions”. Section 2 also defines “the Trust” as meaning the NHT established under section 3 of the NHT Act.

[11] Section 5(1) establishes a Board of Directors of the Trust, with responsibility for “the policy and general administration of the affairs of the Trust”.

[12] Section 6 provides that “[t]he Minister may, after consultation with the Chairman, give to the Board such directions of a general character as to the policy to be followed

² NHT Act, sections 4(1)(a)(i) and (ii), and 4(2)(a)(i) and (ii)

by the Board in the performance of its functions as appear to the Minister to be necessary, and the Board shall give effect thereto".

[13] Section 7(1) provides that the resources of the NHT are made up of:

- “(a) moneys derived from contributions;
- (b) moneys derived from loans raised by the Trust from time to time in accordance with the provisions of this Act;
- (c) moneys earned by or arising from investments made on behalf of the Trust;
- (d) such moneys as may from time to time be placed at the disposition of the Trust by Parliament;
- (e) moneys recovered under this Act as costs or interest under section 32 or penalties under section 37;
- (f) all moneys properly accruing to the Trust under this Act, including, without prejudice to the generality of the foregoing, the repayment of loans;
- (g) such other moneys as may lawfully be paid to the Trust.”

[14] Section 21 provides for the circumstances in which contributors to the NHT will be entitled to a refund of their contributions:

“21.-(1) Subject to the provisions of this Act, a contributor shall be entitled –

- (a) within twelve months after the seventh anniversary of the end of the first contribution year to a refund equivalent to the contributions made by him during the first contribution year together with any bonus awarded thereon pursuant to section 17; and

(b) thereafter within twelve months after the end of every contribution year to a refund equivalent to the contributions made by him during the year immediately after that on which the calculation in relation to his previous refund under this subsection was based, together with any bonus awarded on such contributions pursuant to section 17.

(2) Subsection (1) shall not apply in relation to contributions made by any person as an employer.

(3) ... "

Background

[15] The background, which is not in dispute, was provided by Mr Devon Rowe, the then Financial Secretary of Jamaica³. In early 2013, the Government of Jamaica ('the GOJ') proposed an amendment to the NHT Act to enable the NHT to provide financial assistance to the GOJ for the purpose of budgetary support. The need to do so arose out of the GOJ's ongoing discussions with the International Monetary Fund ('the IMF'), with a view to securing a four-year funding facility⁴ ('the IMF agreement'). The overall objective of the negotiations was to address the unsustainability of Jamaica's chronic debt problem. As a condition of its assistance, the IMF stipulated that the GOJ should maintain an annual primary surplus⁵ of 7.5%. In order to achieve this target, it was necessary to achieve a nominal increase in the country's primary surplus. This the GOJ determined to do by way of a requirement for the NHT to make a contribution of approximately \$11.4 billion per year for the life of the IMF agreement.

³ Affidavit of Devon Rowe sworn to on 19 May 2015

⁴ An "Extended Fund Facility"

⁵ That is, the difference between the country's annual current income and current spending.

[16] This requirement was made pursuant to the power granted to the Financial Secretary under section 4(5) of the Public Bodies Management and Accountability Act (‘the PBMA Act’), by virtue of which “a public body may be requested by the Financial Secretary to pay a special distribution into the Consolidated Fund in accordance with regulations made under section 24”⁶.

[17] In light of these considerations, the GOJ tabled the National Housing Trust (Amendment) (Special Provisions) Bill (‘the Bill’) in the House of Representatives on 26 February 2013. The Memorandum of Objects and Reasons appended to the Bill, over the signature of the then Prime Minister⁷, stated the following:

“Arising from current international loan negotiations, the Government will be obliged to meet certain fiscal targets, including raising the primary surplus to 7.5% annually between the financial years 2013/2014 to 2016/2017.

It is recognized that [the NHT] has, since its incorporation in 1976, operated profitably while delivering on its mandate of providing affordable housing solutions. The NHT is therefore in a position to facilitate the Government in achieving these fiscal targets by making a contribution of \$11.4 billion annually for the abovementioned period. Importantly, this contribution will enable the Government to undertake necessary expenditure to bolster social and physical infrastructure, particularly in areas where construction is being undertaken by the NHT.

This Bill seeks to amend the National Housing Trust Act to enable the NHT to provide financing support for fiscal consolidation for the period beginning with financial year 2013/2014 and ending at the end of financial year 2016/2017. It is further provided that the financing may be by way of

⁶ The relevant regulations are the Public Bodies (Financial Distribution) Regulations, 2012, issued by the Minister of Finance and Planning on 10 April 2012.

⁷ The Most Honourable Mrs Portia Simpson Miller, ON

distribution, grant or otherwise as the Minister responsible for finance may determine."

[18] The Bill was in due course enacted as the National Housing Trust (Amendment) (Special Provisions) Act, 2013 ('the amendment Act'), which was brought into force on 28 March 2013. Sections 2 and 3 of the amendment Act provided that:

"2. During the continuance in force of this Act, section 4 of the principal Act shall have effect as if the following were inserted next after subsection (1), as subsections (1A) and (1B) –

'(1A) In addition to the functions specified in subsection (1), the Trust may provide financing up to a maximum annual amount of eleven billion, four hundred million dollars for fiscal consolidation in respect of each of the financial years ending, respectively, on –

(a) March 31, 2014;

(b) March 31, 2015;

(c) March 31, 2016; and

(d) March 31, 2017.

(1B) Financing provided under subsection (1A) may be by way of distribution, grant or otherwise as the Minister responsible for finance may determine.'

3. This Act shall continue in force until March 31, 2017 and then expire."

The appellant's claim

[19] By a claim form filed on 7 March 2013, the appellant initially sought a declaration that the Bill was unconstitutional and void, and an injunction restraining the NHT from handing over any funds to the 3rd respondent. However, as has been seen, the

amendment Act came into force on 28 March 2013. The appellant accordingly filed an amended claim form on 26 April 2013, in which he sought the following reliefs:

“i. A declaration that [the amendment Act], insofar as it seeks to withdraw the said funds from the [NHT] 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 NHT] from handing over the funds to [the 3rd respondent].”

[20] At the cornerstone of the claim was the proposition that the NHT Act constituted the NHT as a statutory trust for the benefit of the appellant and other contributors to the NHT. This is how it was put in the amended particulars of claim:⁸

“15. The [appellant] claims that the [NHT] is a statutory trust for the benefit of the [appellant] and other contributors to the [NHT]. The [NHT] is holding the contribution of the [appellant] and other contributors on trust. Those contributions represent the private property of the contributors including that of the [appellant]. It is a breach of trust for the Board of Directors of the [NHT] to hand over the funds held on trust to the [3rd respondent].”

[21] The appellant also claimed that the provisions of the PBMA Act did not apply to the NHT Act and, therefore, could not avail the GOJ as the basis for removing funds from the NHT. Further, and in any event, if the PBMA Act was intended by Parliament to apply to the NHT, those provisions would conflict with the provisions of section 15(1) of the Constitution.

⁸ Amended particulars of claim filed on 26 April 2013, para. 15

[22] All three respondents disputed the appellant's claim that the NHT Act established a statutory trust for the benefit of contributors, or that the Board of Directors of the NHT acted as trustee of contributors funds for this purpose⁹. All three respondents also averred that the PBMA Act applied to the 2nd respondent, did not conflict with section 15(1)(a) of the Constitution, and was therefore not void as alleged or at all.

[23] In an affidavit in support of his claim for constitutional reliefs¹⁰, the appellant identified himself as a self-employed businessman, and a contributor to the NHT, "since 1993 by way of statutory deductions and also self employed contributions"¹¹. He also described himself as a member of "the civil lobby group Citizens' Action For Principles and Integrity (CAPI)", a group which "has been resolute on issues of governance and accountability which impact the general citizenry"¹².

[24] In explaining the basis of the claim, the appellant said this¹³:

"It is my understanding that the NHT was set up under the National Housing Trust Act to provide and facilitate low income Home ownership for its contributors and that the contributions by contributors to the National Housing Trust represent private property which cannot be taken by the government without prompt and full compensation as guaranteed under the Charter. No proposal has been made by the Government to compensate the contributors promptly and fully for the monies the government proposes to withdraw from the National Housing Trust.

⁹ Defence of the 1st and 3rd defendants filed and dated 27 May 2013, para. 3; amended defence of the 2nd defendant filed 15 July 2013, para. 5

¹⁰ Affidavit of Fitzroy Hugh Fagan, sworn to on 22 March 2016

¹¹ Paras. 3 and 4

¹² Para. 8

¹³ At paras. 11-12

12. It is also my understanding that this proposed withdrawal of funds by the government from the National Housing Trust will significantly erode the capital base of the Fund and impair the funds [sic] ability to fulfill its statutory mandate of delivering housing solutions to its contributors, many of whom find the dream of home ownership elusive under the trust.

13. At the time of filing this claim, the government initiated an amendment of the National Housing Trust Act to facilitate the withdrawal of the funds.

14. I am advised by my Attorney-at-Law and do verily believe that this amendment does not protect the government as the amendment itself is unconstitutional."

[25] In a witness statement given on behalf of the NHT¹⁴, Mr Martin Miller, the acting Managing Director of the Trust, stated that "[c]ontributions to the NHT were sporadically made on behalf of [the appellant] from 2004 to 2014", and that the appellant's total contributions during that period totalled \$184,290.82.

[26] Mr Miller also stated¹⁵ that an audit of the NHT's accounts done in July 2012 showed that the NHT:

"(a) earned revenue from various sources other than contributions from employees;

(b) had approximately \$22 Billion of accumulated surplus and approximately \$79 Billion of accumulated non-refundable employers contributions; and

(c) was liable to refund approximately \$62 Billion in employees' contributions."

¹⁴ Witness statement of Martin Miller dated 17 November 2014, para. 10

¹⁵ At para. 14

[27] On this basis, Mr Miller concluded¹⁶ that making the distributions which the NHT had agreed to make to the GOJ "would not hinder the NHT's ability to refund employees' contributions in accordance with section 21 of the National Housing Trust Act".

The judgment of the Full Court

[28] In a judgment with which Thompson-James and Dunbar-Green JJ agreed, Hibbert J concluded, after a detailed review of the provisions of the NHT Act, counsel's submissions and the authorities cited, that¹⁷ –

"[30] ... I find nothing to indicate that Parliament intended either expressly or by implication to establish a statutory trust. I find that the use of the word 'Trust', which is always capitalized, is to denote the name of the body and not the functions it was established to perform.

[31] I also agree with the Attorneys for the [respondents] that no certainty of subject matter ie property or certainty of objects ie beneficiaries can be discerned from the Act. Section 7 of the Act which deals with the resources of the Trust indicates an ever changing and unascertainable subject while in section 4, which sets out the functions of the Trust, no ascertainable beneficiaries can be found."

[29] But Hibbert J also considered¹⁸ 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

¹⁶ At para. 15

¹⁷ Judgment of the Full Court, paras [30]-[31]

¹⁸ At para. [38]

was not possible to construe section 2 of the amendment Act as authorising the compulsory taking of his contributions:

“[38] Firstly, section 2 (1A) states that the Trust may provide financing for fiscal consolidation. The use of the word ‘may’, to my mind does not suggest compulsion. Secondly, there is nothing contained in section 2 to suggest that any amount provided should be taken from contributions. The answer must therefore be in the negative. Further, in an affidavit of Mr. Martin Miller, then Acting Managing Director of the NHT ... he stated that based on audited reports, even if the NHT were to provide financing pursuant to the provisions of [the amendment Act] the Trust would still have sufficient resources to refund employees’ contributions in accordance with the provisions of section 21 of the NHT Act, and to fulfil its other statutory functions.” (Emphasis in the original)

[30] In the result, the Full Court dismissed the claim, but “[i]n keeping with the general rule”¹⁹, made no order as to costs.

The grounds of appeal

[31] The appellant initially relied on the following three grounds of appeal²⁰:

- a) That the Learned Trial Judges erred in law in holding that the National Housing Trust as established under the National Housing Trust Act is not a Trust.
- b) That the Learned Trial Judges erred in law in the holding that the appellant has not demonstrated that he would be deprived of his property by virtue of the amendment to the National Housing Trust Act.
- c) That the Learned Trial Judges erred in failing to appreciate that once the appellant demonstrates that there was merit in the claim, the appellant would have

¹⁹ Per Hibbert J at para. [44]

²⁰ Notice of appeal filed on 9 August 2016

satisfied the requirements under the Constitution to show that he was an aggrieved person and as such would be entitled to pursue the relief sought in the Fixed Date Claim Form."

The submissions

[32] As counsel for the 2nd respondent pointed out in their written submissions²¹, the question which the third ground of appeal raises, which is, in effect, whether the appellant had standing to bring the claim, was not a basis for the Full Court's decision. In fact, as has been seen, Hibbert J dealt with this aspect of the claim on the assumption that the appellant had the necessary standing, but had failed to prove any infringement of his constitutional rights. In any event, Mr Wildman made no submission on the point while on his feet before us and I will therefore say nothing more about it.

[33] However, Mr Wildman submitted strongly that, firstly, the NHT qualifies as a trust, in that the three certainties required by the authorities for the creation of a trust were all present: that is, certainty of intention, certainty of subject-matter and certainty of objects. He submitted that the first certainty was satisfied by the clear references to the word "Trust" in the NHT Act, which was established for the specific statutory purpose of alleviating the scarcity of housing for the less well-off members of society. The second and third certainties were satisfied by the definition and description of the Trust's funds in section 7 of the NHT Act and the prescribed category of contributor in sections 4(1)(a)(ii) and 11.

²¹ 2nd respondent's submissions dated 29 July 2019, para. 15

[34] Secondly, Mr Wildman submitted that the appellant was personally affected by the amendment Act, the effect of which was to deprive him of his property, *viz*, his contributions, contrary to section 15(1) of the Constitution, without any amendment having been made to that section.

[35] On Mr Wildman's first point, Mrs Reid-Jones for the 1st and 3rd respondents submitted that, as the Full Court had correctly found, the NHT was not a trust in law, in that there was no indication in the NHT Act that Parliament intended to create a trust in the traditional sense of the word. And, on the second point, Miss Thomas submitted that there was no compulsory acquisition of the appellant's property in this case, since it was clear from the evidence that his contributions, even if they could be regarded as "property" for the purposes of section 15(1) of the Constitution, were unaffected by the provisions of the amendment Act.

[36] For the 2nd respondent, Mr Powell also submitted that the requirements for the creation of a trust were not satisfied in this case, and that the statutory contributions to the NHT were more akin to a tax. We were referred to the provisions of the NHT Act, to make the point that there was no indication that Parliament intended to create a trust in this case. Following, Mr Gibbs submitted that the amendment Act did not and was not likely to deprive the appellant of his property, given the evidence in the case.

[37] We were also referred to a number of authorities, to some of which I will come in a moment.

Discussion and conclusions

(i) A preliminary observation

[38] Despite the fact that, as Hibbert J noted in his judgment²², one of the issues joined between the parties was whether the PBMA Act applied to the NHT, there is no record in the judgment of any submissions having been made on the point by either side. At all events, the Full Court does not appear to have made any specific ruling on the matter.

[39] However, as has been seen, the point was not raised as a ground of appeal and, again, neither side mentioned it in their submissions before us. I therefore proceeded on the basis that there was no longer any question that the NHT is a public body within the meaning of section 2 of the PBMA Act, which defines a public body as “a statutory body or authority or any government company”.

(ii) Does the NHT Act constitute the NHT a trust?

[40] Mr Wildman’s submissions on this issue were based on the well-known principle, for which the older case of **Knight v Knight**²³ is usually cited as authority, that a private express trust can only be created if the three certainties are present, meaning (i) certainty of intention, (ii) certainty of subject-matter, and (iii) certainty of objects. In this regard, Hibbert J referred to the following passage from Mozley and Whiteley’s Law Dictionary²⁴:

“In order to create a trust a settlor’s declaration must meet the ‘three certainties’: the intention to create the trust, eg, as expressed in the words of a will, must be clear or certain; the subject matter of the trust, ie the property, must be certain,

²² At paras [8](d) and [9]

²³ (1840) 3 Beav 148

²⁴ 12th edn, page 369; para. [27] of the judgment of the Full Court

eg declaring a trust of 'the bulk of my estate' is too vague; and finally, the identity of the objects of the trust, ie the beneficiaries of the trust, must be ascertainable."

[41] Sykes J (as he then was) applied the principle in **Rosemarie Wright-Pascoe v Zoe Cecile McHugh and others**²⁵. In that case, it was held that the provisions of the Real Estate (Dealers and Developers) Act, relating to how payments made under a prepayment contract for the purchase of real estate should be dealt with, created a statutory trust in favour of the purchasers. As Sykes J put it²⁶:

"Lord Langdale's three certainties are present (***Knight v Knight*** 3 Beav. 148). There is certainty of intention as gleaned from the statute; there is certainty of property (the trust account) and there is certainty of objects (the beneficiaries). What makes this trust different is that it is not established by private law, that is to say, a private person asking an attorney at law to draft a trust instrument which usually contains all the relevant information regarding the trust. Parliament has provided the instrument in the form of legislation. Parliament has also provided the terms of the trust, in the detailed legislative provisions governing the money paid under a prepayment contract." (Emphasis in the original)

[42] In this case, therefore, in which it is also contended that Parliament intended to and did create a statutory trust in favour of contributors such as the appellant, it is necessary to consider the provisions of the NHT Act in light of the requirement that the three certainties must be present.

²⁵ (Unreported), Supreme Court, Jamaica, Claim No 2010 HCV00024, judgment delivered 21 October 2011

²⁶ At para. [35]

[43] As regards the first certainty, Mr Wildman placed great reliance on the fact that the word 'Trust' appears frequently throughout the NHT Act. However, Mr Powell countered this submission by referring us to **Re Ahmed & Co (a firm) and others**²⁷, a decision of the High Court of England and Wales, in which Lawrence Collins J pointed out that the use of the word 'trust' in a statute does not necessarily mean that Parliament intended to create a trust. The issue in that case was whether a provision in the Solicitors Act 1974²⁸ that, upon intervention by the Law Society in a solicitor's practice, all sums held by the solicitor for his client "shall be held by the Society ... upon trust for the persons beneficially entitled to them", gave rise to the range of obligations usually attendant upon a traditional private trust.

[44] Rejecting the argument that it did, Lawrence Collins J held that the use of the word 'trust' was not conclusive of the matter. He said this²⁹:

"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' (at 227)."

²⁷ [2006] EWHC 480

²⁸ Sch 1, para. 6

²⁹ At para. [11]

[45] It seems to me that, as the definition section indicates, the word 'Trust' functions purely descriptively, as a shortened way of referring to the NHT in the NHT Act. As Hibbert J put it³⁰, in my view obviously correctly, "the use of the word 'Trust', which is always capitalized, is to denote the name of the body and not the functions it was established to perform".

[46] So, putting aside the use of the word 'Trust', I must therefore consider the NHT Act as a whole to see whether there is any other evidence that suggests that Parliament intended to create a trust in favour of contributors. In this regard, the respondents highlighted a number of factors which seemed to point in the opposite direction. It is only necessary to mention four.

[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.

(iii) Did the amendment Act deprive the appellant of his property, contrary to section 15(1) of the Constitution?

[50] I can deal with this question more shortly. Section 15(1) of the Constitution provides as follows:

“15(1) - No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –

(a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and

- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –
 - (i) establishing such interest or right (if any);
 - (ii) determining the compensation (if any) to which he is entitled; and
 - (iii) enforcing his right to any such compensation."

[51] The prohibition in section 15(1) is against the compulsory acquisition of property without adequate compensation. Hibbert J assumed for the purposes of this case that the appellant's right to a refund of his contributions under section 21 of the NHT Act amounted to property within the meaning of section 15(1).

[52] However, there was absolutely no evidence that the appellant's contributions, or any part of them, were compulsorily acquired by the State in this case. In the first place, as Hibbert J found, what the amendment Act provided was that "the Trust **may provide**" (my emphasis) financing of up to \$11.4 billion annually for each of the years 2014-2017. In other words, the amendment Act did not itself effect a compulsory acquisition of funds from the NHT. But, in any event, as the uncontradicted evidence of Mr Martin Miller demonstrated, the NHT's ability to refund all contributions, including the appellant's, would remain unimpaired by the proposed distribution of funds to the GOJ.

[53] Accordingly, despite Mr Wildman's energetic efforts, I could find no basis on which to interfere with the Full Court's decision in this regard.

Costs

[54] The Full Court made no order as to costs. Although no reason was given for the making of this order, the court no doubt had in mind rule 56.15(5) of the Civil Procedure Rules 2002 ('the CPR'), which states the general rule that "no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application". Rule 56.15(5) of the CPR is not one of those made applicable to appeals to this court by virtue of rule 1.1(10) of the Court of Appeal Rules, 2002. However, the spirit of the rule has generally been applied by this court in disposing of unsuccessful appeals from decisions of the Supreme Court dealing with administrative orders³¹.

[55] In this case, no doubt guided by the same spirit, neither the 1st nor the 3rd respondents asked for an order for the costs of the appeal in their favour. However, the 2nd respondent was not so minded and asked for its costs. I considered that, in light of this application and the general rule that costs should ordinarily follow the event³², the 2nd respondent was, despite Mr Wildman's resistance, entitled to its costs of the appeal, to be taxed if not sooner agreed.

³¹ See, for instance, **Jamaicans for Justice v Police Service Commission and Attorney-General** [2015] JMCA Civ 12, paras. [138] and [139]

³² Rule 64.6(1) of the CPR

Disposal

[56] These are my reasons for concurring in the decision of the court given on 5 November 2019.

MCDONALD-BISHOP JA

[57] I have had the privilege of reading, in draft, the reasons for judgment of the learned President. They fully reflect my reasons for agreeing with the decision of the court and there is nothing that I could usefully add.

P WILLIAMS JA

[58] I have also read the draft reasons for judgment of the learned President and they accord with my own reasons for concurring with the decision of the court.