IN THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

CA P NO. 090 OF 2018

S R PROJECTS LIMITED

APPELLANT

AND

RAMDATH DAVE RAMPERSAD, THE LIQUIDATOR OF THE HINDU CREDIT UNION CO-OPERATIVE SOCIETY LIMITED ON BEHALF OF THE HINDU CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

RESPONDENT

PANEL: **Justice of Appeal Smith**
Justice of Appeal Moosai
Justice of Appeal Rajkumar

APPEARANCES: Mr. J. Phelps, instructed by Ms. A. Sooklal on behalf of the Appellant

Mrs. D. Peake S.C, Mr. R. Dass, instructed by Mr. D. Poonwasie on behalf of the Respondent

DATE OF DELIVERY: 4th October, 2019

I have read the judgment of Rajkumar J.A. and I agree with it.

……

Justice of Appeal Smith

I too agree.

……

Justice of Appeal Moosai

JUDGMENT

Delivered by Peter A. Rajkumar J.A.

Background

1. The appellant is a company which, through its principal Mr. Shamshudeen, granted a loan facility to HCU. That loan was initially in the sum of $1.5 million US dollars at a rate of interest of 13% per annum (the loan). It was secured by a deed of mortgage[1] and two promissory notes, (the security)[2]. The respondent is the liquidator (the liquidator) of the Hindu Credit Union (HCU). He was appointed after the loan and security were granted.

2. Although between October 2004 and December 2006 HCU made payments of interest and one capital repayment of $256,000 dollars (U.S), the loan was not repaid in full.

3. The loan was accessed between October 2004 and January 2005. Prior to the grant of the loan the membership of the HCU had passed various resolutions, purportedly seeking to increase its **maximum liability** and/or its maximum borrowing liability.

4. The respondent liquidator was subsequently appointed on October 10, 2008. He refused to accept the liability incurred by HCU in respect of the loan facility, the security it provided therefor, and accrued interest, on the basis that it was granted at a time that the HCU had exceeded its statutorily permitted approved maximum liability. He contended as a result,

[1] *The deed of mortgage was dated 14th October 2004 and executed on 19th October 2004 over HCU's property at Freeport.*

[2] *The first promissory note was dated 26th October 2004 and stamped to secure $1.5 million US dollars and subsequently up stamped to secure additional advances. It was agreed that monthly interest for the period of January to June 2007 would be capitalized and in respect of the capitalized interest HCU executed a further promissory note in the sum of $144, 742, 77.*

that the loan transaction, including the security that it provided therefor, was *ultra vires* and void.

5. The appellant contends in summary inter alia, that:-

    a. as a question of law and construction of the Co-operative Societies Act (the Act), the regulations made thereunder (the regulations), and the Bye laws of the HCU, (the Byelaws), supported by the evidence of the practice of the HCU and the Commissioner for Co-operatives there was a **maximum liability** for **deposits**, and a **separate** maximum liability for loans/ borrowing.

    b. that as a question of fact the evidence before the trial judge revealed that the loan, even with interest, was well **within the approved maximum liability for borrowing** of the HCU. (This was purportedly $100,000,000). Therefore it could not be *ultra vires* and the security therefor could not be unenforceable.

    c. that even if the loan exceeded any approved maximum liability, it could not be rendered ultra vires, or the security therefor rendered void and unenforceable, because:

        i. the HCU was **not prohibited from taking loans**, (and therefore from providing security therefor), and;

        ii. in fact it was **expressly permitted** by its bye laws and the Act **to take loans** (and therefore provide security therefor).

        iii. That any borrowing limits in the HCU byelaws applied to its board of directors and not to the society itself. The society's capacity to borrow, as distinct from its Board, was therefore unfettered.

Issues

6. i. Whether as a question of **law** the term "the maximum liability" within Regulation 14 of the Regulations included **separate** maximum liabilities for borrowing and deposits.

ii. whether the society's capacity to borrow was unfettered.

iii. Whether as a question of **fact** the loan was within the maximum liability permitted under the Act and the Regulations.

iv. If the loan was not within the maximum liability permitted under the Act and the Regulations whether that rendered the loan **ultra vires** (despite the fact that its bye laws, the Act, and the Regulations, conferred on the HCU the power to borrow).

v. If the loan was **ultra vires** whether the **security** therefor (the deed of mortgage and the promissory notes) was rendered **void** and unenforceable.

vi. Whether any **estoppel** applied to preclude that result.

Conclusion

7. As a question of **law**, construction, logic and language the term **"maximum liability"** within Regulation 14 of the Regulations means one maximum liability. It therefore does **not** include **separate** maximum liabilities for borrowing and deposits.

8. As a question of **fact** the loan exceeded the maximum liability permitted under the Act and the Regulations, given that:-

    a. the evidence accepted by the trial judge was that at the time the loan was effected the maximum liability approved by the Commissioner by his letter of June 25th 2004 was one hundred million dollars ($100,000,000).

    b. despite evidence of the resolutions of the HCU's members approving proposed increases of maximum liability in the amounts of i. two billion (14th December, 2002) or ii. three billion (6th and 7th December, 2003) there was no evidence of these proposed increases or any other increased maximum liability having been **approved** by the Commissioner, (as required under Regulation 14 (2).

    c. the respondent had by that letter therefore discharged the onus of establishing by evidence the maximum liability permitted.

d. the evidence was that **deposit liabilities** and **shares** at the time the loan was taken were already in excess of $1 billion, and therefore the maximum approved liability had been exceeded.

9. The society's capacity to borrow was not unfettered. It was clearly fettered by its enabling statute.

10. Borrowing in excess of the statutory approved maximum liability rendered the loan **ultra vires**. This is because although the Act, the Regulations and its bye laws conferred on the HCU the power to borrow:

    a. There was an express **statutory prohibition** on incurring liability in respect of loans (or deposits) in excess of the maximum liability. The HCU, being created pursuant to statute and subject expressly to Regulations and oversight by the Commissioner for Cooperative Development (the Commissioner), could not ignore or act in violation of that express statutory prohibition.

    b. Further the Act and the regulations were public documents which would place any potential lender on notice of the existence of an **approved statutory maximum liability.**

    c. Further the evidence of the appellant's principal, an attorney at law, revealed that he was actually aware of the existence of such a **statutory maximum liability.**

11. The appellant and the HCU could not therefore ignore the **statutory maximum liability** by entering into the subject loan transaction**.** To do so would unilaterally increase the level of exposure of the HCU even further beyond its approved maximum liability. To provide security for such a loan at the same time would further encumber the HCU's assets. By providing security over such assets to secure the loan it reduced the assets available to

satisfy liabilities for members' deposits on a liquidation. In fact by providing such security it sought to confer priority on the appellant over claims of its member depositors. These are all matters that the stipulation of an **approved statutory maximum liability** is intended to prohibit. If it were otherwise the legislation and approved statutory maximum liability could be ignored without consequence, with the security for ultra vires loans being nevertheless accorded priority and therefore unavailable for liabilities of unsecured creditors. This is not a construction that the legislation can bear. In those circumstances violation of the express statutory prohibition against exceeding the **approved statutory maximum liability** rendered the loan and consequential **security documents** generated to secure it, (the deed of mortgage and the promissory notes), ultra vires the Act and the Regulations.

12. The security for the ultra vires loan provided by HCU, (namely the deed of mortgage, the first promissory note, and the second promissory note), was provided pursuant to the ultra vires act of entering into a loan in excess of its maximum statutorily permitted liability. It was accordingly itself ultra vires, **void**, and **unenforceable**.

13. No estoppel applied to preclude that result, either as a question of fact or equally importantly, as a question of law, given that there can be no estoppel in relation to a breach of statute.

Order

14. In the circumstances the appeal is dismissed.

Analysis

Issue i.

15. i. Whether, as a question of law, the term "**maximum liability"** within Regulation 14 of the Regulations included separate maximum liabilities for a. borrowing and for b. deposits.

Authority to receive loans not of itself ultra vires

16. The power of a cooperative society to receive loans is provided for by Section 44 (1)[3] of the Co-operative Societies Act Chapter 81.03. Section 44 (2) also provides that a society may by mortgage or in any other manner it deems appropriate guarantee repayment of any sums received by it pursuant to sub section 1. Therefore it is clearly not *ultra vires* for a cooperative society to receive loans from persons who are not members of the society and to provide security for their repayment. However that power is expressly made subject to the **regulations** or any **byelaws** of a society made for the purpose. Those regulations, apart from specifically providing for the approved and therefore permitted maximum liability, also provide for a general regulatory framework under the supervision of the Commissioner.

Regulatory Framework – Powers and Duties of the Commissioner

17. By Section 3 of the Act the Commissioner for Cooperative Development ("The Commissioner"), "*shall have general powers of supervision of the affairs of societies and shall perform the duties of registrar of societies*".

18. Further by Section 4 (1) (a)[4] of the Act, in the exercise of his **power of supervision** the Commissioner has the power, including on his own motion, to hold an enquiry into the constitution, operations, and financial position of that society.

---

[3] ***Section *44.*** *(1) Subject to the regulations or any bye-laws of a society made for the purpose, a society may receive deposits and loans from persons who are not members of the society for the purpose of meeting any of its obligations or discharging any of its functions under this Act.*

[4] **4.** (1) In the exercise of his powers of supervision referred
to in section 3 the Commissioner may—
(a) on his own motion;
(b) on the application of a creditor of a society;
(c) in accordance with regulations made in that behalf, on the requisition of a society in respect of one of its members being itself a society; or
(d) on the application of a majority of members of the board of management or one-third of the members of a society,
hold an inquiry into the constitution, operations and financial position of that society and in the course of such inquiry shall inspect the books, accounts and other records of the society.

19. By Section 4(3)[5] of the Act the Commissioner has the drastic power in certain circumstances (after issuing notice to the society, and failing compliance with that notice, and after providing the board an opportunity to be heard), to order the dissolution of the board and direct that the affairs of the society be managed by such persons as he may appoint.

20. By Section 5[6] of the Act the Commissioner is empowered at all times to have access to the books, accounts, and records, inter alia of a society.

21. Under section 81[7] of the Cooperative Societies Act the Minister may make regulations to carry out the purposes of the Cooperative Societies Act and such regulations may inter alia, provide for the constitution and management of societies. It is in that context that the Minister is empowered to make regulations – "to carry out the purposes of this act, which

[5] (3) Where a society fails to comply with the notice referred to in subsection (2), the Commissioner may, after giving the board an opportunity to be heard in general meeting called by him for the purpose, order the dissolution of the board and direct that the affairs of the society be managed by such persons as he may appoint for a period not exceeding two years.

[6] **5.** The Commissioner shall at all times have access to the books, accounts, records and securities of a society and is entitled to inspect the cash in hand, and every officer of a society shall furnish such information respecting the operation and transactions of a society as the Commissioner may require.

[7] **81.** The Minister may make Regulations to carry out the
purposes of this Act and in particular such Regulations may—
(a) prescribe all things required by this Act to be prescribed;
(b) provide for the constitution and management of societies, specifying the rights and obligations of members;
(c) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings;
(d) prescribe the returns to be submitted by a society to the Commissioner, the persons by whom and the form in which such returns shall be submitted;
(e) set out the procedure for the certification of copies of documents or entries in the books of societies and fix the charges to be levied for such copies;
(f) provide for the writing off of bad debts;
(g) prescribe the manner in which any question as to the breach of any bye-laws or contract relating to the disposal of produce to or through a society may be determined, and the manner in which liquidated damages for any such breach may be ascertained or assessed;
(h) provide for the procedure to be followed by a liquidator appointed under section 58 or by the Commissioner under section 4;
(i) provide for the appointment of arbitrators and the procedure to be followed in proceedings before them;
(j) prescribe the procedure to be followed in presenting and disposing of appeals; and
(k) specify the conditions and the rates of payment of contributions by societies to any pension fund which they may establish for the benefit of their servants and employees.

includes those purposes identified previously and inter alia to "prescribe all things required by this act to be prescribed".

These are simply examples of the powers of the Commissioner, not intended to be an exhaustive enumeration of all of his powers, but rather an illustration of the fact that cooperative societies are subject to regulation. It is therefore clear that the Act provides a framework for the administration of cooperative societies and the supervision of that administration by a Commissioner who has significant powers to restrain or prevent mismanagement[8]including financial mismanagement of the affairs of a society.

Maximum liability

The maximum liability of a credit union is provided by the Cooperative Societies Regulations made pursuant to Section 81 of the Cooperative Societies Act

Regulation 14 (1) provides that "*every society shall, from time to time, fix at a general meeting, the* ***maximum*** *liability it may incur in respect of loans or deposits whether from members or non-members*". (All emphasis added)

Regulation 14(2) provides as follows: "*the* ***maximum*** *liability fixed under sub regulation (1) shall be* ***subject to the approval of the Commissioner****, who may at any time* ***reduce*** *it*".

Regulation 14(3) provides as follows: "*No society shall receive* ***loans*** *or deposits in excess of the* ***maximum liability approved*** *or* ***fixed by the Commissioner***".

Maximum Liability – The Effect of Regulation 14

22. Regulation 14 is clear in its terms. While it provides that a society shall from time to time fix at a general meeting **the maximum liability it may incur whether from members or**

[8] Section 4 (2) Where having held an inquiry under this section the Commissioner is of the opinion that the board has mismanaged the affairs of the society or otherwise performed its duties improperly, he may by notice to the society call upon it to remedy the situation within three months from the date of such notice.

nonmembers in respect of loans or deposits, i. Regulation 14(2) makes it clear that the maximum liability fixed under sub regulation 1 is **subject to the approval of the Commissioner**. ii. Regulation 14(2) also makes it clear that the Commissioner may at any time **reduce the maximum liability** that he has approved. This reinforces the point that the **approval** of the Commissioner for the maximum liability fixed is essential.

23. That point is further reinforced by Regulation 14 (3) which emphasizes that **no society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner.**

24. Regulation 14 (1) specifically provides for a maximum liability in respect of loans **or** deposits, whether from members or non-members. It does **not** provide for i) a **maximum** liability in respect of loans and ii) a **separate** maximum liability in respect of deposits. Neither does it seek to separately categorize the maximum liability depending upon whether the loans or deposits are from members or non-members. This language suggests that both loans and deposits are to be taken into account in fixing the maximum liability of the society. Therefore both loans and deposits can contribute to exceeding the approved maximum liability. A cooperative society therefore is not empowered under its constituting statutory framework to receive or incur liability in respect of loans that, in combination with its deposit liabilities, would exceed the maximum liability approved or fixed by the Commissioner.

25. The financial affairs of a cooperative society are the responsibility of the Commissioner justifying his being provided with the powers under section 4(1) and (5) of having access to and being able to inspect books, accounts and other records of a society. Regulation 14 (3) requires that the maximum liability be subject to the **approval** of the **Commissioner**. There is no reason to interpret "maximum liability" as meaning anything other than precisely what it states. The term ***"the maximum liability"*** is necessarily a **total liability** providing as it does that it is the maximum liability that a society may incur in respect of **loans** or **deposits**

whether from **members or non-members**. The maximum liability in effect is the maximum exposure of a society to repay liabilities (incurred as a result of loans or deposits whether from members or non-members). This is a critical matter that the Commissioner is empowered to approve, oversee and regulate.

Whether separate borrowing liability

26. Regulation 29 provides as follows: "*the board may **borrow** on behalf of the society to an amount not exceeding the **maximum liability** fixed in accordance with regulation 14".* The appellant contends therefore that regulation 29 and **byelaw 49 (**infra**)** contemplate a maximum liability for **borrowing** and that maximum liability does not deal with **deposits.** This contention is completely inconsistent with regulation 14.

Regulation 14

27. The appellant contends that regulation 14 refers to loans **or** deposits and not loans **and** deposits. However on the plain language of regulation 14 it is clear that it deals with **the maximum liability**, and not a maximum liability in respect of **loans** or a separate maximum liability in respect of **deposits**. It expressly contemplates that **the maximum liability** may be incurred in respect of **loans** or in respect of **deposits**. It expressly contemplates that **deposits** therefore must be taken into account in respect of **the** maximum liability and that there is to be **no distinction** between loans and deposits, whether from members or non-members in determining that maximum liability. Whatever the source of that liability, whether from loans, whether from deposits, whether from members, or whether from non-members, the regulation provides that:

    i. it is to be fixed under regulation 14 (1) and (2).

    ii. It is to be subject to the approval of the Commissioner under regulation 14(2).

    iii. It is not to be exceeded under regulation 14 (3).

28. The contention at paragraph 72 of the appellant's submissions that **deposits** were not included in the calculation of maximum liability, is therefore directly contrary to the express wording of regulation 14(1).

Law

The relationship between deposits and liabilities

29. The deposits of members of the credit union are no different in character from deposits in a bank in that a credit union is obligated to return a member's deposit upon request, subject to any peculiar terms of the contract between them. In the meantime as in the case of a deposit with a bank the Society has in effect borrowed the proceeds from the member and undertakes to repay them. See for example byelaw 14 of the HCU's byelaws which confirm the liability of a Society to a member who wishes to withdraw any portion of his share capital. See also byelaw 15 (1) (c) re withdrawal of deposits. See also **N Joachinson v Swiss Bank Cooperation** [1921] 3 K.B. 110 at 127 per Atkin LJ in relation to the analogous case of banks.

> *I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them.*

30. See also **Halsbury Laws of England Financial Institutions Vol. 48 Relationship of Banker and Customer at Paragraph 136 "***The receipt of money on* ***deposit*** *account constitutes the banker a debtor to the depositor***."**

The Commission of Enquiry

31. The issue of the maximum liability within the context of the Cooperative Societies Act was considered by the Commission of Enquiry into the factors that led to the deterioration of

the financial condition of the HCU. The report, prepared by the sole Commissioner, Sir Anthony Coleman, dated 16th July 2014, was tendered into evidence before the Trial Court as SROA 2 - 132 (see paragraph 51 of page 19 of the respondent's submissions).

32. The Coleman report supports the reasoning aforesaid and corroborates that the purpose of regulation 14 is to place in the hands of the Commissioner ultimate control over the total exposure of the society to demands for repayment, as confirmed by his being permitted to reduce as well as to increase a society's maximum liability.

33. He also considered the contention by HCU's former Chairman that the calculation of maximum liability was to be confined to liabilities external to the society such as **borrowings**, and excluding members' **deposits** and shares. For reasons similar to the reasoning above the Commissioner rejected that interpretation. In fact the appellant's interpretation is simply not consistent with plain English. The conclusions of that report corroborate the conclusions of this court derived from first principles and statutory interpretation, which are both inconsistent with the interpretation contended for by the appellant.

34. Any such suggested distinction between maximum liability in respect of loans/borrowing and maximum liability in respect of deposits from members or nonmembers is simply not reflected in the regulations.

35. The point was raised by the appellant that the initial position of the respondent was that the loan made by the appellant was *ultra vires* the powers of the **board**, not the society itself. At paragraph 46 of the appellant's submissions filed on January 21st 2019 he contends "*it is plain that when Bye law 49 was approved and the HCU registered under section 17 of the Act the HCU was thereby constituted with* ***unfettered capacity to borrow*** *from third parties, but with a limit on the power of the* ***directors*** *to exercise that capacity on the HCU's behalf. That limit was the "maximum liability" fixed from time to time" (all emphasis added)*

36. . At paragraph 47 of those submissions it is contended that "*by section 44 of the Act the HCU had an express power to borrow*" *(and give security for) money from third parties who were not members of the HCU".* However it was clearly raised before the trial judge[9] in the pleadings and the cross examination of Mr. Shamsudeen[10], and certainly on appeal before this court that the reason that the loan was *ultra vires* was that it exceeded the **maximum liability** provided under the regulation 14 (3) which expressly prohibited the **Society** from receiving a loan which had this effect. The appellant therefore cannot claim to have been misled in the conduct of its case and nothing further needs to be said about that point.

Issue ii. Whether the Society's capacity to borrow was unfettered

37. The flaws in the argument that the society's capacity to borrow is unfettered are as follows:

    i. The HCU is a creature of statute. The Act and the regulations made thereunder deliberately and expressly fetter the maximum liability that the society may incur by restricting it to that approved by the Commissioner. It is clear also from Section 4 that the financial position of a society is a matter that the Commissioner is empowered to be aware of, enquire into, and take action to regulate. The statute under which the HCU is constituted expressly provides for its regulation by the Commissioner within a framework that confers upon him wide powers. These include supervision of the management of a society to prevent mismanagement, including financial mismanagement[11]. Among his supervisory powers is the power to prevent financial mismanagement by even being given the power to dissolve the board and appoint other persons to manage a society. In this context it cannot be contended that the need for his approval of the maximum liability in relation to loans and deposits can be disregarded.

[9] Paragraphs 17 to 21 of the statement of case at pages 18 to 21 Record of Appeal, paragraph 16 (1) of the Defence and Counterclaim page 339 Record of Appeal and the joinder of issue at paragraph 6 of the defence to counterclaim at page 352 of the record of appeal.
[10] Page 177 of the Transcript of the High Court Proceedings.
[11] See section 4(1) and 4 (2)

ii. This is reinforced by the fact that the HCU was registered under the Act as a society with limited liability[12]. One of the matters that must be prescribed under the Act is the limit of liability for a society which is registered as having **limited** liability. The Act does provide for a society which can have unlimited liability Section 8 (2)[13]. The HCU does not fall within that category. Consequently under regulation 14 of the regulations it is logical and necessary that provision be made by regulations under section 81 to fix, or determine the mechanism for fixing, the maximum liability that a society with limited liability may incur.

iii. Nowhere in the Act does it provide that such an entity incorporated thereunder has an unlimited power to borrow. To read the Act as constituting HCU with an unlimited power to borrow is simply not borne out by the plain language of the Act.

iv. To contend that the **regulations**, (and in particular Regulation 14), do not affect the unfettered capacity of the HCU to borrow ignores the fact that there is no such unfettered right to borrow in the first place to be found anywhere in the Act. In particular section 44 of the Act is expressly subject to, and is to be read together with, the regulations.

Byelaw 49

v. Neither do the HCU's byelaws support this contention. Section 17[14] of the Act makes provision for the Commissioner to approve the byelaws of the Society upon being satisfied that they are not contrary to cooperative principles. No unfettered power to borrow is to be found in the byelaws of the HCU. In particular byelaw 49 (b), cited in support by the appellant, is subject to byelaw 1 (b). Byelaw 1(b) is as follows: "These byelaws are

[12] see Sections 7, 8 (2) and 9 (4) of the Act

[13] **8.** (1) Subject to section 9, any society established for the promotion of the economic welfare of its members in accordance with co-operative principles or a society established to facilitate the operations of such a society is eligible to be registered under this Act.
(2) A society may be established with or without limited liability save that, unless the Minister by general or special order otherwise directs—
(a) a society of which a member is another society shall have limited liability;

[14] 17. The Commissioner may, on being satisfied that a society has complied with the provisions of this Act and the regulations and that its proposed bye-laws are not contrary to co-operative principles, approve the bye-laws and register the society.

supplementary to the provisions of the Act, and the regulations and the society shall be **guided by the Act**, the **regulations and the byelaws read together"**. In construing it therefore the regulations cannot be disregarded.

38. The appellant contended that **byelaw** 49 (b) gave the appellant an unfettered right to borrow (and to provide security) and was to that extent in conflict with regulation 14. It further contended in effect that the byelaw being approved by the Commissioner pursuant to section 17 of the Act, could not be read as being modified by subsidiary legislation such as regulation 14 (3) because section 81 of the Act does not empower the Minister to make regulations for limiting the borrowing power of the HCU[15]. Accordingly regulation 14 (3) was inapplicable, being subsidiary to HCU's unfettered borrowing powers under its **byelaws**. However the submission of the appellant[16] that "*the byelaws, (not the regulations), delimit the objects and powers of the HCU"* is flawed. The byelaws are supplementary to the Act and are to be read together with the Act and the regulations[17]. They are therefore not to be read as superceding the regulations, or allowing them to be disregarded. Byelaw 49 (b) cannot be read in isolation from regulation 14.

39. The HCU's byelaws which were statutorily approved by the Commissioner, provide for the HCU's borrowing powers as follows:

    a) byelaw 49 - the board may **borrow** money on behalf of the society to an amount **not exceeding** the **maximum liability fixed by the members in general meeting** and **approved by the Commissioner,**

    b) the society may borrow loans from persons who are not members for the purpose of meeting any of its obligations or discharging any of its functions or objects. (All emphasis added).

[15] Paragraph 51 of the Appellants submissions.
[16] At paragraph 49 of its submissions
[17] See byelaw 1b.

The appellant seeks to read into that byelaw a distinction between the Board's borrowing powers which are limited and the Society's borrowing powers which it contends are unfettered.

40. Byelaw 1 (b) however speaks for itself[18]. It does not permit the strained stand-alone construction of byelaw 49 (b) of the artificial distinction between fettered borrowing powers by the board but allegedly unfettered borrowing powers by the Society. It does not permit the fetter on loans imposed by regulation 14 (3) to be ignored. Any proposition that a society could yet despite this, have an unfettered right to incur liability by borrowing or to give security therefor, is unsustainable and completely misconceived.

41. In fact, if such a misconception were allowed to be perpetuated, it could give rise to a repetition of the scenario illustrated in the instant case, where the liabilities of the society are far in excess of the society's ability to satisfy them, with all the consequential dangers to **members** of the society.

42. Such a construction would render it unsafe for anyone to be a member of such a society, which considered itself to have unfettered powers to borrow. Concomitant with such powers would be unfettered discretion to provide security for such borrowing and reduce the pool of unencumbered assets available for members to repay any liabilities to them arising from their deposits.

43. Any such misconception must be corrected. In particular it must be emphasized that the Act, and the regulations made thereunder, in particular regulation 14, expressly provide a regulatory framework for the Commissioner to regulate societies within his jurisdiction, precisely to avoid any such situation being repeated. In the instant case were it not for the intervention by the State to protect depositors, the thousands of members of the appellant would have suffered considerable losses.

[18] As set out at paragraph 36 above

44. In order for the regulatory framework to be effective it must provide for effective sanction to avoid the maximum statutory liability being exceeded. In this case the legislature has drawn the line with an **express statutory prohibition** against a society incurring liability in respect of loans (and deposits) in excess of the maximum liability approved by the Commissioner. At the time of the taking of the loan the society's maximum liability had already been exceeded by its deposit liabilities. The consequence of exceeding that liability in the face of such an express prohibition is to render the transaction – the loan and its security taken in contravention of that prohibition – ultra vires.

45. In the context of a regulation which provides for a **maximum** liability to be **approved** by the Commissioner, and in the context of a statutory framework which requires him to regulate, supervise and oversee the financial position of the society, it would be artificial in the extreme to contend that the express statutory limit of maximum liability could be ignored, whether because of either section 44 of the Act or a strained reading of byelaw 49 (b) or section 81 or even regulation 29[19]. The regulations and byelaws are to be read together. They all therefore lead back to regulation 14 which is specific. Nothing cited can displace the clear language of regulation 14 (3). The loophole of alleged unfettered capacity to borrow simply does not exist.

46. There is no basis for contending therefore that the **HCU** was constituted with **unfettered capacity to borrow** from third parties but with a limit on the powers of **directors** to exercise that capacity on "*the HCU's behalf that limit being the maximum liability being fixed from time to time*". The prohibition on receiving loans in excess of the maximum liability applies to the Society. This clearly contradicts any contention that its capacity to borrow was unfettered. Further, as previously explained, that regulation was entirely consistent with the powers conferred on the Minister to make regulations to carry out the purposes of the Act and to prescribe all things required by the Act to be prescribed. There would be no basis

[19] 29. The Board may borrow money on behalf of the society to an amount not exceeding the maximum liability fixed in accordance with regulation 14.

whatsoever therefore to suggest that the regulation is ultra vires. Further any such alleged unfettered capacity to borrow by a credit union is simply not consistent with the statutory framework, under which such societies are established, for the protection of members and depositors. Even from a cursory examination of the Act it is clear that the regulatory framework was sufficiently robust to permit detection of any over exposure and to authorize its prevention. The powers of enforcement were there to be used.

47. Regulation 14 recognizes that a society incurring liability **apart from borrowing/loans** also incurs **liabilities** to members (or non-members) who have placed sums on **deposit**.

48. Any over exposure of a society by incurring liability to repay **loans** from **third parties** cannot be segregated from the **liability** of that society to repay deposits to its **members**. There is no justification for interpreting the regulations in any other way. The ability of a credit union to repay its members in respect of any deposit liabilities to them would be directly impacted by any liability it incurred via loans taken including from third parties.

49. It is logical therefore for the regulations to provide for the total maximum liability which is not to be exceeded, since in practical terms it is the ability of a society to repay both its members and any third parties from whom loans and deposits had been taken. For the purpose of ensuring any ability to repay liabilities the source of such liabilities would not be important, and the regulation in recognising this seeks to make no such distinction.

50. In fact members would be less likely to have the benefit of security for liabilities to them arising from their deposits, which a third party lender would usually insist upon. Provision of such security would have the effect of reducing the pool of assets available, and/or the priority of liabilities to **members** for repayment of their **deposits**.

51. Any submission that the statutory power of the HCU to borrow was **unlimited** must therefore be misconceived.

52. The Act does not contemplate the HCU or any other cooperative society regulating itself. It contemplates and empowers regulation and oversight by the Commissioner. If a society were permitted to borrow without limit, save for any limit it chose to impose upon itself then there would be no point in stipulating in regulation 14 a maximum liability to be approved by the Commissioner. Any such alleged unlimited liability:
    a. is directly contradicted by the general structure of the Act which provides for regulation of its financial affairs by the Commissioner,
    b. is directly contradicted by the very specific imposition of a maximum liability,
    c. is further contradicted by the fact that such maximum liability is subject to approval by the commissioner, and not to be left to the society.

53. Any submission that the maximum liability need not take into account approval of the Commissioner must therefore be misconceived. The regulations expressly provide for the maximum liability as adjunct to the powers of the Commissioner to oversee the financial affairs of a society such as the HCU with limited liability, and to take action if he is not satisfied with the management of that society for the benefit of its members. Any submission that the regulations cannot impact the corporate capacity of the HCU in its bylaws must equally be misconceived. The Act does not permit self-regulation.

54. Regulation 14 (3), unlike in the cases cited by the appellant, **expressly** provides a prohibition on the society's receiving loans in excess of the maximum liability approved or fixed by the Commissioner. In the face of that **express** statutory prohibition the contention that:
    i. the society acted within the power to receive loans provided for in section 44 of the Act, or
    ii. the contention that that power to receive loans was unfettered,
    iii. that a lender could assume it to be,
    cannot be sustained**.**

Issue

iii. Whether as a question of fact the loan was within the maximum liability permitted under the Act and the Regulations

Background

The essential facts are not disputed.

55. i**.** On the **14th December 2002** the HCU held its 17th annual general meeting (AGM). At that meeting it was agreed that the **liability** of the HCU for the financial year October 1st 2002 to September 30th 2003 would be increased to $2 billion dollars[20]. The then Commissioner was present.

ii. On the **6th and 7th of December 2003** (before the subject loan transaction) the HCU held its 18th annual general meeting. At that meeting it was resolved that the HCU's **maximum liability** was to be increased to **three billion dollars**. At this meeting the acting Commissioner was present. The minutes of the 18th AGM record "*Mr Chairman I Neil Ramdath wish to move that with the amount of **deposits** and investments coming into the credit union that the maximum liability of the Hindu Credit Union Cooperative Society limited be increased to $3 billion TT dollars. This I feel will adequately suffice until the next financial year. Mr Chairman I Ramnarine Ramoutar do second this motion. All members present agreed*."[21] It does not appear that the Commissioner ever agreed to this proposed maximum liability pursuant to regulation 14(2).

iii. On the 17th April 2004 a special general meeting was held. A representative of the Commissioner's office was present. The minutes of that meeting record that "*the **Chairman** after identifying the various financial investments of the (HCU) and given the growth of **depositors** it was necessary for the (HCU) to have **the approval of the Commissioner of Cooperatives**. Thereby having the need to increase its **liability** by one hundred million **TT***

[20] Record of Appeal Volume 2 page 469
[21] Record of Appeal Volume 2 page 593.

dollars *to cover these* ***deposits/shareholders fund (sic)****. Also, this increase in liability is needed to cover borrowing and other credit facilities. A motion was moved by Mr. G. Bhagwandeen and seconded by Mr. P. Phillip that the liability of the HCU be raised to (sic) one hundred million (dollars) to facilitate the expansion of the organization*"[22].

56. It is clear that at the special general meeting it was recognized that the **approval** of the Commissioner was required.

57. Significantly however at that special general meeting of 17th April 2004 the minutes record that *"…also this increase in liability is needed to cover* ***borrowing*** *and* ***other credit facilities***" the motion that was recorded as being approved was "*that the liability of the HCU be raised to (sic) 100 million (dollars).*

58. By letter dated 19th April 2004, the Secretary of the HCU wrote to the Commissioner seeking to correct the minutes of the special general meeting held on the 17th April 2004. The proposed correction was as follows: "*a motion was moved by Ganga Bhagwandeen and seconded by Paul Phillip that the liability of the HCU be raised to 1 hundred million dollars the liability increase shall be used to cover* ***deposits*** *and* ***borrowing*** *by non-members*".

59. To contend in the face of that statement that the increase in liability proposed was not to cover both **deposits** and **borrowing** flies in the face of the evidence.

60. At paragraph 10 of the appellant's written submissions it is contended that "*It is obvious that both the members and the Board of the HCU considered that the increase in permitted liability* ***only related to borrowing from third parties****. If it was being used in part to cover deposits which everyone knew at the time far exceeded one hundred million dollars, it could not be an increase in the level of deposits that the HCU was allowed to accept*". This submission is startling given the terms of even the proposed amended minutes, (namely,

[22] Record of Appeal Volume 1 page 133 to 135.

"*the liability increase shall be used to cover deposits **and** borrowing by non-members*"). It was always contemplated, because it was expressly stipulated and documented, that the one hundred million dollars proposed maximum liability was to be used to cover deposits and borrowing.

61. By letter dated 21st June 2004 the HCU sought the Commissioner's approval for an increase in the HCU's **borrowing liability** as follows: "*the purpose of the meeting was among other issues to seek approval to increase the **borrowing liability** of the Credit Union from $20,000,000 to $100,000,000 … The reasons for the increase are: 1) to cover **liability** resulting from (the increase in members **deposits**) $45,000,000 2) **to incur debt** in the purchase of printing equipments (sic) $5,000,000 and 3) **to incur debt** in the purchase of television equipments (sic) $30,000,000.00* total $80,000,000.00" **The approval** of the Commissioner of Cooperatives was requested for that increase.

62. The letter of 21st June 2004 itself specifically states that the reasons for the increase include, first, to cover **liability** resulting from the increase in members **deposits**. It requested the **approval** of the Commissioner of Cooperatives for the above increase. Therefore the letter does not provide any support for the construction of regulation 14 as providing for separate **borrowing** limits and **deposit liability** limits, because both liabilities are addressed in the request for an increase.

63. Whether or not (as contended at paragraph 10 of the appellant's written submission), the HCU considered that this was only an increase in the **borrowing** liability, this does not carry the interpretation of regulation 14 any further. Further as a question of fact the HCU could not be said to have considered that this was only an increase in the **borrowing** limit when $45 million dollars of that proposed increase was expressly for the purpose for covering the increase in members' **deposits**.

64. The contention at paragraph 12 of the appellant's written submissions that "*it was nothing to do with an increase in the overall level of* ***deposits*** *that it could take*" is therefore unsustainable.

Increase in maximum approved liability

65. On the 25th June 2004 the Commissioner approved the maximum liability of one hundred million dollars. Whether or not both the Commissioner and the society knew that liabilities from members' deposits and shares were at that point in time one billion dollars does not detract from the fact that it was a requirement under the regulations that a maximum liability be established and approved. The Commissioner established and approved that maximum liability in the sum of one hundred million dollars as requested in the society's letter of June 21st, 2004 to which he was responding. He did so in a letter headed "*Approval of Maximum Liability*" in express and categorical terms as follows: "*I refer to your letter dated June 21st 2004 with respect to approval for (sic) Maximum Liability. I wish to inform you that approval to incur the Maximum Liability in the sum of one hundred million dollars ($100,000,000) is granted in accordance with the Co-operative Societies Act Regulation number 14 (2). I wish to draw to your attention the provision of subsection (3) regulation 14 stipulates (sic) that* ***no society shall receive loans or deposits in excess of the Maximum Liability approved or fixed by the Commissioner***"[23]. (The emphasis by underlining in the last sentence is that of the Commissioner). That letter could not be any clearer.

i. The Commissioner refers to both regulation 14 (2) and 14 (3) in making it clear that his approval is in respect of maximum liability under the regulation.

ii. For the avoidance of all doubt he sets out regulation 14 (3) in bold type and underlines it for emphasis.

iii. His letter puts to rest any doubts about the quantum of the approved maximum liability.

[23] Volume 2 Supplemental Record of Appeal page 036.

66. At paragraph 14 of the appellant's submission it notes that "*the 2003 resolution of over five thousand members of the HCU in the presence of the acting Commissioner to increase the maximum liability to* ***three billion dollars*** *was just four months before the special resolution of 17th April 2004 at which nearly 2,500 members resolved in the presence of a representative from the Commissioner's office, to increase the maximum liability to one hundred million dollars*". This is explicable simply by the fact that the resolution to increase the maximum liability to three billion dollars was not approved by the Commissioner. As the 2004 special resolution recognizes and accepts, the Commissioner's approval was required. This would provide an explanation as to why a three billion dollars maximum liability limit increase, not having been approved, a more realistic maximum liability limit increase to one hundred million dollars would have been then sought. This is borne out by the fact that the Commissioner actually approved an increase of maximum liability to one hundred million dollars on 25th June 2004. Even if that is not the explanation the appellant is left with an approved maximum liability under regulation 14 of one hundred million dollars $100,000,000 and a warning from the Commissioner not to exceed it by receiving loans or deposits in excess thereof.

67. There is no dispute that between October 2004 and January 2005 when the advances were made by the appellant that members' deposits and shares totalled around TT $1 billion dollars[24]. It accepts that the financial statements show that members' deposits of **$528 775 505** were way in excess of the then maximum liability of $20 million dollars according to the 2003 accounts dated 28th November 2003[25].

68. The appellant reasons from this[26] that it was perfectly obvious to everyone at HCU, its Auditors and the Commissioner that the maximum liability **figure could not possibly include members' deposits and shares** and that when the members voted to increase the maximum liability they knew that members deposits were over five hundred million dollars. However

[24] (See paragraph 79 of the appellant's submissions)
[25] Supplemental Record of Appeal Volume 2 page 40.
[26] Paragraph 80 of the appellant's submissions.

even if that were so, the fact that all these parties might have known that HCU's accounts confirmed that even at that stage its maximum liability had been exceeded, does not justify the appellants continuing to exceed the maximum approved liability. Nor does it justify a waiver of the consequences of regulation 14(3) when the appellant issued loans to the respondent in excess of that maximum liability.

69. Even if HCU's letter of the 21st of June 2004 seeking the proposed increase of maximum liability assumed that members' **deposits and shares** were not included in the maximum liability this carries the appellant's case no further. As a matter of law its maximum liability had by then been exceeded by its deposit liabilities alone.

70. Nothing in the evidence justifies or corroborates the appellant's contention that that one hundred million dollars was anything other than the **maximum liability** limit as provided for in regulation 14. This in fact is the basis for approval by the Commissioner. The presence of the Commissioner or his representative at meetings which proposed different amounts carries the matter no further. This certainly cannot be used or relied upon as reflective of any implicit approval by the Commissioner to any increase other than the maximum liability increase that he specifically reduced to writing on 25th June 2004.

71. The fact that there were two figures relating to maximum liability, three billion dollars proposed by the membership, and the one hundred million dollar figure for which approval was actually sought from the Commissioner, are not inconsistent at all. While three billion dollars was a proposal by the membership, the figure that was actually approved pursuant to a more realistic request was one hundred million dollars. It certainly cannot be contended that three billion dollars was a maximum statutory **borrowing** limit in its own right because:
    i. any maximum liability statutory limit had to be approved by the Commissioner; and,
    ii. the only approval that the Commissioner gave was for a limit of one hundred million dollars.

The effect of the resolutions

72. It is therefore completely irrelevant what the appellant intended to resolve and approve by its various resolutions. The fundamental requirement of regulation 14 was that whatever was intended, whether it was to increase a liability limit from loans, or a liability limit from deposits, the fact is regulation 14 makes no distinction between these two. It simply provides for **the** maximum liability that the appellant may incur whether in respect of **loans** or **deposits**.

73. However, even if the respondent's intentions in passing the various resolutions are relevant, the fact is that those resolutions, upon examination, do not support its argument that a specific maximum liability was provided for in respect of **borrowing**, which was not exceeded. The resolutions themselves demonstrate this as set out hereinabove.

74. Any submission that there is a factually separate **borrowing** limit and a **separate deposit** limit is:

    i) devoid of any statutory basis.

    ii) contrary to the evidence that approval was never sought for any such separate limit, and

    iii) completely unsupported by evidence that any such **separate** limits were ever **approved**.

75. Clearly therefore the trial judge was not plainly wrong in finding at paragraph 72 of her judgment as a question of fact that the loan was not within the maximum liability permitted under the Act and the Regulations because:

    i) the Resolutions themselves which the appellant seeks to rely upon clearly contemplate that the increase in maximum borrowing liability being proposed by the members was in respect of **both deposit** liability and **borrowing** liability;

    ii) that **deposit** liability alone of members at the time that the loan had been made, and the security provided, was already in excess of ($500,000,000) five hundred million dollars;

iii) the maximum borrowing liability under the regulations was to be **approved** or **fixed** by the Commissioner of Cooperative Societies;

iv) the mere presence of a representative from the Commissioner's officer or the Acting Commissioner of Cooperative Societies is not sufficient to constitute approval by the Commissioner of any increased borrowing limit;

v) the approved maximum liability of HCU at the time the loan was granted was one hundred million dollars.

Issue iv. If the loan was not within the maximum liability permitted under the Act and the Regulations whether that rendered it ultra vires (despite the fact that its bye laws, the Act, and the Regulations, conferred on the HCU the power to borrow).

Ultra vires

76. At paragraph 66 of the appellant's submissions it is contended that that "*the society having had an **unlimited** power to borrow, the doctrine of ultra vires does not apply to this transaction at all*".
This is unsustainable and must be rejected because it cannot possibly be demonstrated that this society had an unlimited power to borrow.

77. A lender was required to have regard to the fact:
    i. that the **maximum** liability was provided for by regulation 14;
    ii. that the maximum liability was the maximum liability approved or fixed by the Commissioner;
    iii. that therefore the **maximum** liability was ascertainable from the Commissioner;
    iv. that failure to ascertain the maximum liability and to proceed to make loans which were in excess of that maximum liability carried the risk of exceeding the borrowing limits of the society;

v. that this was a matter which was expressly prohibited under the regulations, in particular regulation 14, (validly made under section 81 of the Act).

The Nature of Statutory Entities

78. See **Crédit Suisse v Allerdale BC** [1997] Q.B. 306 at page 349per Hobhouse LJ as follows:-

> *It has long been established in English law that statutory corporations have **limited** capacity. In* **Chapleo v. Brunswick Permanent Building Society** (1881) 6 Q.B.D. 696, 712-713, Baggallay L.J. said:
>
> *"**persons who deal with** corporations and **societies** that owe their constitution to **or have their powers defined or limited by Acts of Parliament**, or are regulated by deeds of settlement or rules, deriving their effect more or less from **Acts of Parliament**, are **bound to know or to ascertain for themselves** the nature of the constitution, and the **extent** of the **powers** of the corporation or **society** with which they deal. The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing, **except such as is conferred upon it by its rules**, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or **whether any limited power it may have has been exceeded, they must take the consequences of their carelessness**. It may be that the plaintiffs in the present case have been misled, by the misrepresentations or conduct of others, into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal; such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so conducting themselves, but in my opinion **they can in no way give rise to or support a claim against the society."*** (all emphasis added)

Although the Act confers on HCU the power to borrow, as do its byelaws approved by the Commissioner, the regulations circumscribe that power and **expressly prohibit** receipt of loans or deposits by the society in excess of the approved maximum liability. It is this express prohibition, ascertainable by anyone contemplating lending to the society, which renders the instant loan transaction, and its associated security, ultra vires.

Issue v. If the loan was ultra vires or contrary to statute whether the <u>security</u> was rendered void and unenforceable

79. The respondent contends[27] that the effect of the lending by the appellant in breach of regulation 14(3) is that the transaction is void. This was the position in the case of ***Credit Suisse*** (ibid) where this issue was considered in the case of another type of entity created by statute namely a local authority. In that case borrowing by a local authority outside the terms of its statutorily conferred borrowing powers was held to be ultra vires and void. Accordingly, the security that it provided by way of guarantee was unenforceable.

80. Similarly, a society such as the HCU derives its existence and its powers from the Act. Logically therefore it can have no power to take actions which are beyond those powers. Accordingly if such a statutorily created and empowered entity enters into a transaction, which is expressly prohibited within its enabling statutory framework, then it can hardly be argued that such a transaction is nevertheless valid. See ***Credit Suisse*** ibid at page 349 to 350.

*The effect of exceeding the **statutory** authority was clearly stated by the House of Lords in Riche v. Ashbury Railway Carriage and Iron Co. Ltd., L.R. 7 H.L. 653. The company had in good faith entered into a contract which in the opinion of their Lordships was not authorised by the memorandum of the company and the Companies Act 1862 (25 & 26 Vict. c. 89). Lord Cairns L.C. adopted, at p. 673, the words of Blackburn J., L.R. 9 Ex. 224, 262:*

[27] Paragraphs 70 to 91 of the respondent's written submissions.

*"If so … every court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as extra vires, and wholly null and void, and to hold also that a contract wholly void cannot be ratified." Other members of the House stressed that such a contract was not voidable but "**absolutely void**" and "ultra vires of the corporation itself:" see pp. 679 and 694.*

*In the present century the same principles have been reaffirmed. In **Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 A.C. 1, 22** the interest rate swaps case, Lord Templeman reaffirmed the limited powers of a local authority: "A local authority, although democratically elected and representative of the area, is not a sovereign body and can only do such things as are **expressly or impliedly authorised by Parliament…***

*……Parliament has conferred on a local authority controlled power to borrow short-term and long-term. The borrowing powers of a local authority are defined and controlled by the provisions of Part I of Schedule 13 to the **Act of 1972** … Those provisions limit the purpose and method of borrowing by a local authority and dictate internal accounting for repayment."*

Later he continued, at p. 31:

*"Individual trading corporations and others may speculate as much as they please or consider prudent. But a local authority is **not a trading or currency or commercial operator with no limit** on the method or **extent of its borrowing** or with powers to speculate. The local authority is a public authority dealing with public moneys, **exercising powers limited by [statute]**."*

*Finally he said, at p. 36: "**The object of the doctrine of ultra vires is the protection of the public**". (All emphasis added)*

81. Cases cited in relation to companies are not here applicable. The significant distinction is between the cases dealing with ultra vires acts of companies, and cases such as the instant case of a society whose powers are created by statute.

82. In relation to companies the effect of a transaction being ultra vires the company's objects or memorandum rendering it void at common law, was mitigated in the United Kingdom[28]. However that relates to issues of ultra vires actions outside the company's memoranda. In the instant case the challenge to the vires of the borrowing does not come from the byelaws. Rather it comes from the statute, which enables the existence of the society itself, and defines and limits its borrowing powers, (in particular by regulation 14(3).

83. The result of such borrowing in excess of the maximum approved statutory liability would therefore be that the loan transaction was void. The loan transaction comprised both the taking of a loan by the society and its provision of security for that loan. Both aspects of this transaction offended against the statutory prohibition against exceeding the society's approved maximum liability. The loan by itself was taken at a time when the society's maximum liability had been exceeded. The provision of security by the society encumbered its assets by conferring priority on the appellant in relation to the society's liability to it. It did so at the expense of its unsecured creditors such as its members.

84. The consequence of breaching the statutory limit on borrowing prohibited by regulation 14 (3) could not be to yet permit the appellant to either i. retain the benefit of a secured position in priority to members or ii. to reduce the unencumbered securities available for settlement of the society's liabilities to unsecured creditors such as its members. This would defeat the very purpose of the express statutory prohibition against exceeding the statutorily approved maximum liability limit and render it meaningless. As recognised in *Hazell v Hammersmith BC* "**The object of the doctrine of ultra vires is the protection of the public.**" In the context of the Act the members of the Society would be a very

[28] By section 9(1) of the European Communities Act 1972, and then subsequently by the passage of the 1989 Companies Act UK, which introduced a new section 35 into the 1985 Companies Act. Section 35, subsection 1 provided that "*the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memoranda*. The equivalent of that provision is found at Section 23 of the local Companies Act Chapter 81:01.

important component of the public which the doctrine of ultra vires was intended to protect.

Issue vi. Whether any estoppel applied to preclude that result

85. The appellant contends that it was a mutual assumption shared by the society and the appellant that members' deposits were not included in the statutory maximum liability. However:

a) the instant loan is subject to a statutory regime. It is not simply one determined by the parties' negotiations with one another,

b) this cannot give rise to **an estoppel** in the face of an illegality, namely the express statutory prohibition against exceeding the maximum liability. Regulation 14(1) clearly indicates this is to be calculated in respect of deposits as well as loans.

c) the actual evidence including the resolutions and the correspondence between the society and the Commissioner cited previously, contradicts the contention that there was any such assumption.

d) there are third parties affected who are not parties to the instant transaction, namely members, for whose protection the statutory regime has been put in place. *See* ***Spencer Bower: Reliance Based Estoppel 5th Edition at paragraph 7.36:***

> *"No assumption of powers which are ultra vires any person, officer or corporation can be validated by raising an estoppel against the party who assumes them.* ***A contract beyond the powers conferred on a public body by statute, for example, cannot be validated by the application of an estoppel.*** *A building society* ***cannot be deemed by virtue of an estoppel to have greater powers than are given to it by its governing statute*** *or constitution. A company, as most recently held by Andrew Smith J in Credit Suisse International v Stitchting Vestia Groep,* ***cannot become entitled by estoppel to exceed its statutory powers*** *or those given to it by its memorandum of association; nor, for instance, be estopped from denying the*

legality of a payment out of capital for redemption of its own shares; nor can a tribunal acquire, by estoppel, wider jurisdiction than it possesses."

86. Acting in defiance of that statute resulted in the respondent entering into a transaction which was prohibited, being in excess of its authorized borrowing powers under its enabling statutory regime. It is apparent, based upon the structure of the statute, that statutory regime is in place for the protection of its members. Specifically the prohibition against incurring liability beyond an approved maximum is on its face designed to prevent a society from over extending itself beyond the maximum liability approved, and putting at risk members' ability to recover in respect of liability to them, based on their deposits. It seeks to maintain a correlation between a Society's assets and its liabilities, because in a worst case scenario the ability of members to recover their deposits would be linked to the realization of unencumbered assets held by the Society.

Whether additional maximum liabilities were unpleaded

87. The respondent contends that the allegation that there were separate maximum liabilities in respect of deposits and borrowings is a new case, as is the fact that it is now being argued that the maximum liability for members' deposits was $3 billion.

88. It contends that the case on the pleadings is that there was only one approved maximum liability of one hundred million dollars, and that this was common ground[29]. Accordingly it is unfair to allow the appellant to raise this issue on appeal given that there was evidence that could have been made available to confirm that there was in fact only one approved limit.

89. It is agreed that it would be unfair to allow the appellant to depart from its pleaded case to such a significant extent. Further however, the evidence as it stands is that there was only one approved statutory maximum liability limit of one hundred million dollars. In those

[29] Paragraph 62 of the respondent's submissions

circumstances while raising the issue at this stage is unfair it carries the appellant's case no further. In fact the glaring inability to point to any approved statutory maximum liability limit in excess of one hundred million dollars, or any approved limit in excess of one hundred million dollars that separately covered borrowings, serves to weaken its case.

Conclusion

90. As a question of **law**, construction, logic and language the term **"maximum liability"** within Regulation 14 of the Regulations means one maximum liability. It therefore does **not** include **separate** maximum liabilities for borrowing and deposits.

91. As a question of **fact** the loan exceeded the maximum liability permitted under the Act and the Regulations, given that:-

    a. the evidence accepted by the trial judge was that at the time the loan was effected the maximum liability approved by the Commissioner by his letter of June 25th 2004 was one hundred million dollars ($100,000,000).

    b. despite evidence of the resolutions of the HCU's members approving proposed increases of maximum liability in the amounts of i. two billion (14th December, 2002) or ii. three billion (6th and 7th December, 2003) there was no evidence of these proposed increases or any other increased maximum liability having been **approved** or **fixed** by the Commissioner, (as required under Regulation 14 (2).

    c. the respondent had by that letter therefore discharged the onus of establishing by evidence the maximum liability permitted.

    d. the evidence was that **deposit liabilities** and **shares** at the time the loan was taken were already in excess of $1 billion, and therefore the maximum approved liability had been exceeded.

92. The society's capacity to borrow was not unfettered. It was clearly fettered by its enabling statute.

93. Borrowing in excess of the statutory maximum approved liability rendered the loan **ultra vires**. This is because although the Act, the Regulations and its bye laws conferred on the HCU the power to borrow:

    a. There was an express **statutory prohibition** on incurring liability in respect of loans (or deposits) in excess of the maximum liability. The HCU, being created pursuant to statute and subject expressly to Regulations and oversight by the Commissioner for Cooperative Development (the Commissioner), could not ignore or act in violation of that express statutory prohibition.

    b. Further the Act and the regulations were public documents which would place any potential lender on notice of the existence of an **approved statutory maximum liability.**

    c. Further the evidence of the appellant's principal, an attorney at law, revealed that he was actually aware of the existence of such a **statutory maximum liability.**

94. The appellant and the HCU could not therefore ignore the **statutory maximum liability** by entering into the subject loan transaction**.** To do so would unilaterally increase the level of exposure of the HCU even further beyond its approved maximum liability. To provide security for such a loan at the same time would further encumber the HCU's assets. By providing security over such assets to secure the loan it reduced the assets available to satisfy liabilities for members' deposits on a liquidation. In fact by providing such security it sought to confer priority on the appellant over claims of its member depositors. These are all matters that the stipulation of an **approved statutory maximum liability** is intended to prohibit. If it were otherwise the legislation and approved statutory maximum liability could be ignored without consequence, with the security for ultra vires loans being nevertheless

accorded priority and therefore unavailable for liabilities of unsecured creditors. This is not a construction that the legislation can bear. In those circumstances violation of the express statutory prohibition against exceeding the **approved statutory maximum liability** rendered the loan and consequential **security documents** generated to secure it, (the deed of mortgage and the promissory notes), ultra vires the Act and the Regulations.

95. The security for the ultra vires loan provided by HCU, (namely the deed of mortgage, the first promissory note, and the second promissory note), was provided pursuant to the ultra vires act of entering into a loan in excess of its maximum statutorily permitted liability. It was accordingly itself ultra vires, **void**, and **unenforceable**.

96. No estoppel applied to preclude that result, either as a question of fact or equally importantly, as a question of law, given that there can be no estoppel in relation to a breach of statute.

Order

97. In the circumstances the appeal is dismissed.

Peter A. Rajkumar

Justice of Appeal