Easter Term
[2022] UKPC 24
Privy Council Appeal No 0036 of 2020

JUDGMENT

SR Projects Ltd (Appellant) *v* Rampersad, the Liquidator of the Hindu Credit Union Co-Operative Society on behalf of the Hindu Credit Union Co-Operative Society Ltd (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lady Arden
Lord Kitchin
Lord Leggatt
Lord Stephens

JUDGMENT GIVEN ON
26 May 2022

Heard on 25 October 2021

Appellant
Vernon Flynn QC
Laura Newton
(Instructed by Juris Chambers)

Respondent
Douglas Mendes SC
Dharmendra Punwasee
Rishi P A Dass
(Instructed by Duke Street Chambers (Trinidad))

LORD LEGGATT: (with whom Lord Lloyd-Jones and Lord Stephens agree)

Introduction

1. The question on this appeal is whether a secured loan made to the Hindu Credit Union Co-operative Society Limited is enforceable by the lender. The credit union, represented by its liquidator, contends that it is not - either because the credit union had no legal power to receive any loan or deposit when its statutory maximum liability had been exceeded or because it acted unlawfully in doing so. In either case the consequence is said to be that the credit union has no contractual duty to repay the loan or to pay any interest on the loan and that the security given for the loan is likewise unenforceable. If this contention is correct, the lender is entitled to restitution of the sums advanced; but, as an unsecured creditor, it would only be likely to receive around 20 cents in the dollar in the liquidation.

2. The credit union is a co-operative society registered under the Co-Operative Societies Act (Chapter 81:03) 1971 and thus governed by the Co-Operative Societies Regulations made under the Act. It will be necessary to consider the statutory regime in more detail, but the basis of the liquidator's case is regulation 14, which provides as follows:

> "(1) 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.
>
> (2) The maximum liability fixed under sub-regulation (1) shall be subject to the approval of the Commissioner, who may at any time reduce it.
>
> (3) No society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner."

The references to "the Commissioner" are to the Commissioner for Co-operative Development who, pursuant to section 3 of the Act, has general powers of supervision of the affairs of co-operative societies registered under the Act.

3. In the courts below, the lender argued unsuccessfully that, on the facts and the proper interpretation of regulation 14, its loan was within the maximum liability approved by the Commissioner. That argument is renewed on this appeal but, for the reasons given below, the Board considers it to be without merit. The real issue concerns the legal consequence of the receipt by the credit union of a loan when the maximum liability had been exceeded. On the liquidator's application to the High Court, Charles J granted declarations that the loan and the security were "null, void and of no effect, being ultra vires the powers of the [credit union] and illegal". The Court of Appeal (Rajkumar JA, with whom Smith and Moosai JJA agreed) dismissed the lender's appeal from that order. The lender now appeals to the Board.

The loan

4. The lender, S R Projects Ltd, is a company incorporated under the laws of Trinidad and Tobago which lent money to the credit union between October 2004 and January 2005. The total principal sum advanced was some US$2.8m (or TT$17.7m). The loan was secured - or so at least the lender thought - by a promissory note in the sum of US$1.5m and a deed of mortgage over certain property of the credit union. Apart from one capital repayment of US$256,000, the principal sum remains outstanding along with arrears of interest.

5. In October 2008 the Commissioner ordered that the credit union be wound up and appointed a liquidator. In 2010 a retired British judge, Sir Anthony Colman, was appointed to conduct a Commission of Enquiry into the failure of the credit union and of a separate group of companies. His report into the credit union dated 16 July 2014 describes how, from 2000 onwards, a shift occurred in its affairs from the core activities of a credit union - taking deposits and making loans to members - to investing in real estate and subsidiary companies, nearly all of which lost money. This led to decreasing liquidity and increased borrowing. The report attributed the collapse of the credit union to mismanagement, failures by the auditors, non-compliance with the regulatory regime and lack of proper supervision by the Commissioner.

6. The government intervened in July 2010 to protect depositors and shareholders of the credit union by establishing a grant relief payment scheme, under which repayments were made out of public funds in return for an assignment of rights. But this scheme did not extend to outside lenders. The present action, begun by the liquidator in 2015, is said to be one of many pieces of litigation which have arisen from the collapse of the credit union.

What was the maximum liability?

7. The first issue raised on this appeal is whether, when the loan was made, the maximum liability approved by the Commissioner under regulation 14 had already been exceeded.

8. The judge found that at all relevant times the maximum liability approved by the Commissioner under regulation 14 was TT$100m; that it applied to the aggregate of loans and deposits; and that, in October 2005, when the first advances were made by the lender and the security for the loan was given, deposits alone amounted to around TT$848m. The maximum liability had therefore been far exceeded.

9. The lender argues that, on the proper interpretation of regulation 14, it was possible to fix separate maximum liabilities for loans and deposits. The liquidator does not dispute this. His case is that it is not what actually happened. In fact, a single maximum liability of TT$100m covering both loans and deposits was fixed by the credit union at a special general meeting on 17 April 2004 and was approved by the Commissioner in a letter dated 25 June 2004. This was the applicable limit at all relevant times.

10. The minutes of the special general meeting record the Chairman, "after identifying the various financial investments of the [credit union] and given the growth of depositors", saying that it was necessary for the credit union to have the approval of the Commissioner to increase its liability "by" (sic) TT$100m "to cover these deposits/shareholders fund[s]". He added: "Also, this increase in liability is needed to cover borrowing and other credit facilities". A motion was then moved that "the liability of the [credit union] be raised to 100m to facilitate the expansion of the organization". The members present voted unanimously in favour of the motion.

11. By a letter dated 19 April 2004, the credit union informed the Commissioner of a correction to the minutes of the meeting such that the description of the motion passed should now read:

> "A motion was moved … that the liability of the [credit union] be raised to One Hundred Million Dollars ($100,000,000) the liability increase shall be used to cover deposits and borrowing by non-members …"

The Board assumes that the word "by" is a typographical error and that the final words quoted above were meant to read "from non-members".

12. In a further letter to the Commissioner dated 21 June 2004, the credit union referred to the special general meeting, stating that its purpose was "to seek approval to increase the borrowing liability of [the credit union] from $20,000,000.00 to $100,000,000.00" and that the 2,345 members who attended the meeting had unanimously approved the increase. The reasons for the increase were said to be "to cover liability resulting from an increase in members' deposits" of $45m and to incur debt in the purchase of printing and television equipment in amounts, respectively, of $5m and $30m. The credit union requested the approval of the Commissioner for "the above increase".

13. By a letter dated 25 June 2004 in reply, the Commissioner informed the credit union that his approval "to incur the Maximum Liability in the sum of One Hundred Million Dollars ($100,000,000) is granted" in accordance with regulation 14(2). He went on to remind the credit union of the stipulation in regulation 14(3) that no society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner.

14. Some aspects of these events raise unanswered questions. For example, the requested increase in the maximum liability of the credit union from $20m to $100m appears to have ignored the fact that the Commissioner had previously approved an increase in the maximum liability from $20m to $50m by a letter dated 10 September 2002. Another puzzling feature is that the minutes of the annual general meeting held in December 2002 record that a resolution was approved at that meeting to increase the maximum liability to $2 billion "in order to continue the [credit union's] operations" for the financial year to 30 September 2003 and "to allow the [credit union] to receive deposits and conduct normal business". The following year, the minutes of the annual general meeting held in December 2003 record that a motion was approved that the maximum liability of the credit union be increased to $3 billion having regard to "the amount of deposits and investments coming into the credit union". According to the minutes, the Commissioner was present at both these annual general meetings; but there is no evidence that his approval for either proposed increase in the maximum liability was sought or granted.

15. It is apparent from the audited accounts of the credit union for the years ended 30 September 2003 and 2004, and was found as a fact by the judge, that at the time when the maximum liability of TT$100m was fixed at the special general meeting in April 2004 and approved by the Commissioner in June 2004, the total liability of the credit union for deposits alone was far in excess of TT$100m.

16. Against this background, the lender has argued that the maximum liability of TT$100m pertained solely to loans and not to deposits.

17. At the trial the lender's director and decision-maker, Mr Shamshudeen, gave uncontradicted evidence that he believed this to be the case. According to this evidence, before agreeing to make the loan Mr Shamshudeen was provided with copies of the minutes of the special general meeting held on 17 April 2004 and of the Commissioner's letter of 25 June 2004 and was told by the President and Secretary of the credit union that the amount of existing borrowings from third parties was under TT$60m. He was also told by them and relied on their representation that the maximum liability of TT$100m applied only to loans and not to members' shares and deposits.

18. But the question is not what the lender, or the officers of the credit union, believed the position to be. It is what, objectively, was the meaning and legal effect of the motion passed at the special general meeting in April 2004 which fixed the maximum liability and of the letter from the Commissioner which approved it. The judge and the Court of Appeal rejected the contention that the relevant documents could properly be interpreted as fixing a maximum liability which applied solely to loans received from non-members and which did not include members' deposits. In the Board's opinion, they were plainly right to do so. The minutes of the meeting and the subsequent letters to the Commissioner make it clear beyond doubt that what was approved at the meeting was an increase in "the" liability of the credit union to TT$100m to cover deposits as well as other borrowing. It is equally clear from the Commissioner's letter of 25 June 2004 that it was this single maximum liability relating to both deposits and other borrowing which the Commissioner approved. There is no evidence that the Commissioner was ever asked to approve, or ever did approve, a separate limit for deposits.

19. It follows from the fact that the maximum liability approved by the Commissioner had already been exceeded when the loan was made that the receipt of the loan by the credit union was contrary to regulation 14(3). The real issue in the appeal is what is the legal consequence of that fact.

The liquidator's case

20. The liquidator's case, which was accepted by the courts below, is that the effect of the loan transaction being contrary to regulation 14(3) was to make it ultra vires (meaning beyond the powers) of the credit union and hence void. Counsel for the liquidator also submitted in their written case that the position would be the same

applying the law relating to illegality. No reference was made by either party to the argument based on illegality at the hearing of the appeal and after the hearing the Board asked for further written submissions on that issue.

21. In its further submissions the lender argued that it is not open to the liquidator to rely before the Board on the law relating to illegality when no submissions on that doctrine were made in the courts below and that, to raise this issue, the liquidator would have needed permission to cross-appeal.

22. The Board rejects that contention. Even though the issue was not addressed in the reasons for her decision, the order made by the judge included declarations that the loan and the security were void, not only as being ultra vires, but also as being illegal. The Court of Appeal dismissed the lender's appeal against that order, though again the reasons for the decision did not address the question of illegality. Rule 25(1) of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/244) stipulates that "a respondent who wishes to argue that the order appealed from should be upheld on grounds different from those relied on by the court below, must state that clearly in the respondent's written case (but need not cross-appeal)." The liquidator's written case, as well as supporting the reasoning of the Court of Appeal on the issue of ultra vires, stated clearly that its order should be upheld on the further and alternative ground that the loan and the security were void for illegality. In accordance with rule 25(1), this was sufficient to raise the issue before the Board and there was no need to cross-appeal. The Board would add that the issue of illegality, involving as it does a question of law, is an issue which the Board would have felt bound to raise itself, even had it not been raised by the liquidator.

Ultra vires, illegality and agency

23. The concepts of ultra vires and illegality were not clearly distinguished when the ultra vires doctrine was first established in English law and have not always been clearly distinguished since. But the distinction is important. The term ultra vires, in its strict sense in which it has properly been used by the courts below in this action, refers to a situation where a corporation has no legal power (or capacity, as it is often put) to enter into a transaction. That is different from saying that it is against the law for the corporation to enter into a transaction. The two may coincide. There could in principle be a case where, for example, a corporation does not have the power to make a contract and where, even if it did have such power, it would be illegal for the corporation to do so. But lack of power or capacity and illegality are different concepts and the legal consequences of each may differ.

24. A third concept which has not always been clearly distinguished from ultra vires is that of lack of authority of a person or body to act for a corporation. Thus, it may be argued that, for example, a contract entered into or approved by the board of directors of a company is not binding on the company on the ground that it was beyond the powers of the board to make such a contract. This is different from saying that the company itself did not have the power to make the contract. It is a question of agency, governed by the law of agency.

25. One aspect of the law of agency as it applies to companies is what is known as the rule in *Turquand*'s case after *Royal British Bank v Turquand* (1856) 6 E & B 327. The rule is that a person dealing with a company is generally entitled to assume that matters of internal management have been regularly carried out and that the formalities (if any) necessary to enable the company's officers to exercise their powers have been duly performed. The rule only applies when the person dealing with the company is acting in good faith and without notice that the agent is contracting in excess of their authority.

26. The rule in *Turquand*'s case is of no relevance, however, where an act is not merely beyond the powers of the company's board of directors (or other organ of the company) but beyond the powers of the company itself. The doctrine of ultra vires operates as a legal sledgehammer. Where it applies, it is of no avail that the person dealing with the company was acting in good faith and did not know or even have means of knowing that the company lacked the capacity to enter into the transaction. The consequence at common law is that the transaction is treated as a nullity.

27. On this appeal counsel for the lender cited *Turquand*'s case and other cases in that line of authority and sought to rely on the evidence already mentioned that the lender's director and decision-maker, Mr Shamshudeen, understood the loan to be within the limit on borrowing by the credit union. But here too this evidence is beside the point. The liquidator has never put his case on the basis that the officers or board of directors of the credit union had no authority to enter into the loan agreement or to grant the security for the loan on its behalf. If he had, then questions of whether the lender had knowledge or notice of such want of authority would have been relevant. They are not relevant to whether the credit union had the legal capacity to enter into the transaction.

The rise of the ultra vires doctrine

28. It is sometimes said, as if it were a necessary truth, that a corporation, being an artificial creation of the law, is only capable of doing what it is given power to do by

the legal instrument which creates it. But there is nothing necessary about such a rule. All powers, whether of corporations or individuals, are creations of the law and, once a corporate body is accorded separate legal personality, there is no logical reason why it should not be accorded the same legal powers in general as a natural person. That is the position for corporations created by charter. It has been the law at least since *Sutton's Hospital Case* (1612) 10 Co Rep 23a; 77 ER 960 that a corporation created by charter has the same powers of contracting and dealing with its property as a natural person and that contracts made by such a corporation outside the terms of its charter are valid: see among other later authorities *Riche v Ashbury Railway Carriage and Iron Co Ltd* (1874) LR 9 Ex 224, 263 (Blackburn J); *Bonanza Creek Gold Mining Co Ltd v The King* [1916] 1 AC 566, 583-584; *Institution of Mechanical Engineers v Cane* [1961] AC 696, 724-725; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] QB 549, para 32.

29. In the 19th century it was for some time uncertain whether the same principle applied to a corporation created by statute. That question was conclusively answered in the negative by three decisions of the House of Lords.

The *Ashbury* case

30. The leading case of *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653 concerned a company incorporated under the Companies Act 1862 for the purpose - as defined in more detail in its memorandum of association - of making and selling railway carriages and wagons and other railway plant and equipment. The company's directors entered into contracts for the company to purchase a concession to build a railway line in Belgium and to employ the firm of Mr Riche to construct the line. The construction work began but the company afterwards repudiated the contracts as being ultra vires. Mr Riche sued the company for damages for breach of contract contending that the contracts were valid.

31. All 14 judges who heard the case at different levels had no doubt that the contracts were not within the objects for which the company was established as set out in its memorandum of association. But they disagreed about the legal consequence of that conclusion. The Court of Exchequer (by a majority of two to one) held that the contracts had been ratified by the company's shareholders and thus were binding on the company. On appeal to the Exchequer Chamber the six judges were equally divided. Three (who included Blackburn J) affirmed the decision of the majority of the Court of Exchequer, but the other three judges considered that the contracts were incapable of ratification (and that anyway it had not been shown that the contracts had been in fact ratified by all the shareholders).

32. In the House of Lords the five members of the appellate committee unanimously held that the consequence of the contracts being outside the scope of the company's memorandum of association was that the contracts were incapable of being ratified by the shareholders and were void. Two different explanations for this result were given in the judgments - one based on lack of capacity and the other on illegality.

33. Both explanations were based on an interpretation of the Companies Act 1862 as intended to limit a company incorporated under that Act to the pursuit of those objects set out in its memorandum of association, and no other object. On one view this was a limit on the capacity of the company. On the other view it was a limit on what it was legal for the company to do.

34. The Lord Chancellor, Lord Cairns, expressed the first view - that the limit was on the company's capacity - in clear terms when he said at p 672:

> "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract."

Yet a little later in his speech, at p 673, Lord Cairns quoted this statement of Blackburn J in the court below:

> "I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified."

Lord Cairns said that this statement “sums up and exhausts the whole case”. He went on:

> “In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description.”

“Should not enter” or “shall not enter” means “is forbidden to enter”. It is a matter of illegality, as Blackburn J had said. It is not the same as “does not have the legal power or capacity to enter”.

35. Of the other members of the appellate committee, Lord Chelmsford reasoned in terms of illegality, characterising any contract for any objects beyond those contained in the memorandum of association as one which the company was prohibited by the statute from entering into (p 678). Similarly, Lord Hatherley saw the disputed contracts as being for a purpose prohibited by the legislature and hence “illegal and void” (p 689). Lord O’Hagan likewise considered such contracts to be “void and illegal” (p 692). Lord Selborne, on the other hand, analysed the question as one of capacity, thinking it:

> “far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.”

<u>The *Great Eastern Railway* case</u>

36. Five years later, in *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473, the House of Lords considered the position of a company created by a special statute. The three members of the appellate committee who heard the appeal all reached the conclusion on the facts that the disputed acts of the Great Eastern Railway Company were expressly authorised by the statute which created it; but they took the opportunity to resolve a difference of opinion among the judges in the courts below as to whether what had been decided in the *Ashbury* case applied to companies

incorporated by special statute as well as to companies incorporated under the Companies Act 1862.

37. "I assume", said Lord Selborne LC at p 478, "that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company v Riche*; it appears to me to be important that the doctrine of ultra vires, as it was explained in that case, should be maintained." His colleagues did not seek to recede from that doctrine. Lord Blackburn in his concurring speech recognised that (as the practice was until 1966) "this House has no more right than any other tribunal to depart from the principle of the decisions which have been already arrived at." He explained that he was alluding more particularly to the *Ashbury* case and continued, at p 481:

> "That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the *Great Eastern Company*, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose."

38. Likewise, Lord Watson (at p 486) said that the principle in the *Ashbury* case "applies with equal force to the case of a railway company incorporated by Act of Parliament" and went on:

> "That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication."

<u>Wenlock v River Dee</u>

39. In *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354, the question arose whether a company created by a special Act of Parliament for the purpose of recovering and preserving the navigation of the River Dee had the power to borrow. In the House of Lords Lord Blackburn held that, on the proper construction of the legislation, the company had "power to borrow £25,000 and no more" (p 360). Lord

Watson was willing to assume that earlier statutes gave the company an implied power to borrow but considered that the most recent Acts prohibited the exercise of the power beyond the limit of £25,000. The third member of the committee, Lord Fitzgerald, did not think that the company had ever been given power to borrow but said, at p 363, that:

> "if prohibition were necessary to render the contracts in question illegal we have that prohibition sufficiently expressed in the [most recent Acts]."

The underlying principles

40. It can be seen that there were in these seminal decisions of the House of Lords two lines of reasoning. One was based on a principle of limited legal power or capacity. This principle was that a corporation created by statute only has the legal capacity to do that which it is expressly or impliedly empowered under the statute to do. In particular, where the corporation has been created for specified objects or purposes, its capacity is limited to pursuing those objects and exercising the particular powers given to it - either expressly or impliedly on the basis that they are reasonably incidental to the pursuit of those objects. The other line of reasoning was that a statute creating a corporation is to be interpreted as prohibiting the corporation from doing anything which it is not expressly or impliedly permitted by the statute to do. Any such act is therefore illegal.

41. The explanation for why no clear distinction was drawn between these principles is no doubt that the distinction made no difference in practice, as the legal effects of incapacity and of illegality were understood at that time to be the same: that the transaction was void. The leading authority for the proposition that a contract prohibited by statute, either expressly or impliedly, was void was the judgment of the Court of Exchequer delivered by Parke B in *Cope v Rowlands* (1836) 2 M & W 149. The statutory provision in issue in that case prohibited any unauthorised person from "acting as a broker" within the City of London. It was held that an otherwise valid brokerage contract made by an unauthorised person was illegal and void. Parke B said, at p 157:

> "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect."

He added that:

> "it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract."

42. As discussed below, the law on illegality has evolved significantly in recent times so that it can no longer be said that a contract made in breach of a statutory prohibition is necessarily void.

Subsequent history of the ultra vires doctrine

43. Although well intentioned, the ultra vires doctrine proved to be a blunt and unsatisfactory instrument. The rationale given for it was that it protected both the shareholders and creditors of the company. Both were entitled to assume that the company in which they invested (in the case of shareholders) or to which they provided credit (in the case of creditors) would use the funds provided only for its stated "objects": see the *Ashbury* case (1875) LR 7 HL 653, 684 (Lord Hatherley); *Cotman v Brougham* [1918] AC 514, 520 (Lord Parker of Waddington) and 522 (Lord Wrenbury). Yet, in practice, the doctrine prejudiced both shareholders and creditors. Shareholders were restricted from diversifying the company's business beyond the originally articulated objects (which could not easily be altered under the companies' legislation). Creditors had imposed on them the cost of ascertaining before dealing with a company the scope of its objects and powers. They also bore the risk that, even if they had acted in good faith and made every effort to verify that the company had the capacity to enter into a transaction, the transaction would still be null and void if it was later held to be ultra vires. All too often the ultra vires doctrine was a means by which a corporation could escape the consequences of a contract freely entered into but which turned out to be a bad bargain.

44. The ultra vires doctrine was mitigated to some extent by Lord Selborne's qualification in the *Great Eastern Railway* case, at p 478, that:

> "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those

> things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

In similar vein, Lord Blackburn said, at p 481, that "those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited".

45. The scope of this qualification, however, was itself a fruitful source of litigation, as was pointed out as early as 1916 in an article by Harold Laski in the Harvard Law Review:

> "Now this theory of ultra vires is fundamental in the law of corporations. What is to be said for it? This, of a certainty, that it is in some wise needful to protect the corporators. A man who gives his money to a railway company does not expect it to engage in fishing; he ought to be protected against such activity. But an act incidental to the purposes of the company is not ultra vires. What is so incidental? It is incidental to the business of the South Wales Railway Company to run steamboats from Milford Haven; but that function was seemingly beyond the competence of the Great Eastern. One steamship company may, without hindrance, sell all its vessels; but another company makes the mistake of retaining two of its boats, and its act is without the law. There were two railway companies within recent memory which agreed to pool their profits and divide them with judicial blessing; but two other railway companies speedily discovered their powerlessness when they attempted partnership. It is fitting, so the courts have held, that Wigan and Ashton should supply their citizens with water; but there was, so we may suppose, something unfitting when Southampton and Sheffield attempted that enterprise."

See Harold Laski, "The Personality of Associations" (1916) 29 Harv LR 404, 410-411 (citations omitted).

46. In 1945 a committee chaired by Cohen J and appointed by the President of the Board of Trade to consider what reforms were needed to company law concluded that "the doctrine of ultra vires is an illusory protection for the shareholders and yet may

be a pitfall for third parties dealing with the company," and that the doctrine "serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation." The committee recommended the abolition of the doctrine and that every company registered under the Companies Acts should have as regards third parties the same powers as an individual. See Report of the Committee on Company Law Amendment, June 1945, Cmd 6659, para 12.

47. That recommendation was not implemented, however, and it was not until the United Kingdom joined the European Community in 1973 that legislative reform took place to comply with the EC First Directive on Company Law (First Council Directive 68/151/EEC of 9 March 1968). Subsequently, the UK Companies Act 1985 was amended in 1989 to provide in section 35(1) 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 memorandum."

See now section 39 of the Companies Act 2006. A similar provision is contained in section 23 of the Trinidad and Tobago Companies Act (Chapter 81:01). The ultra vires rule in company law has also been effectively abolished in the United States, Canada, Australia, New Zealand and Barbados: see Stephen J Leacock, "The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience over Logic" (2006) 5 DePaul Business & Commercial Law Journal 67.

48. In the United Kingdom and in Trinidad and Tobago the ultra vires doctrine nevertheless remains applicable to bodies incorporated not under company legislation but under other statutes. In recent times cases in which the doctrine has been applied in England and Wales have concerned public authorities: see eg *Credit Suisse v Allerdale Borough Council* [1997] QB 306. In such cases questions arise about the interrelationship of the concept of ultra vires in public law and the capacity of a corporation in private law to enter into transactions. It is not necessary to consider those questions in this case as co-operative societies are private and not public bodies.

Illegality

49. Whereas reform of the ultra vires doctrine has been left almost entirely to the legislature, the law relating to illegality has been rationalised and put on a coherent footing in England and Wales by the decision of a nine-judge panel of the Supreme

Court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467. Two subsequent decisions of the Supreme Court have left no doubt that the approach articulated in *Patel v Mirza* applies across all areas of private law: see *Grondona v Stoffel & Co* [2020] UKSC 42; [2021] AC 540, para 1; *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43; [2021] AC 563, para 76.

50. In the case of conduct prohibited by statute, the law had already moved on from the rigid position adopted in *Cope v Rowlands* towards a more nuanced approach. In *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 293, Lord Wright emphasised that:

> "Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

51. In *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, 389, Devlin LJ observed that "it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void." He stressed the need to "have regard to the language used and to the scope and purpose of the statute" and concluded that, in that case:

> "the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. Moreover, the value of the relief given to the wrongdoer if he could escape what would otherwise have been his legal obligation might, as it would in this case, greatly outweigh the punishment that could be imposed upon him, and thus undo the penal effect of the statute."

52. A critical development has been to see the proposition that a contract prohibited by statute is void, not as a rule of common law, but as, in the first instance, a question of interpretation of the statute. In *Henderson* [2021] AC 563, para 75, the Supreme Court approved the following statement of the law by Underhill LJ in *Okedina v Chikale* [2019] EWCA Civ 1393; [2019] ICR 1635, para 12:

> "The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute."

Or, as Lord Hamblen succinctly put it in *Henderson* at para 74: "Where the effects of the illegality are dealt with by statute then the statute should be applied."

53. Where the statute does not provide, expressly or impliedly, that a breach of a statutory prohibition against making or performing a contract has (or does not have) the effect of rendering the contract void or otherwise unenforceable, the court must go on to consider whether the public interest in preserving the integrity of the justice system should result in denial of a claim to enforce the contract. At this stage of the analysis the relevant considerations are those stated by Lord Toulson in *Patel v Mirza* at para 120, that is to say:

> "(a) … the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) … any other relevant public policy on which the denial of the claim may have an impact, and (c) … whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."

In considering proportionality, Lord Toulson declined to try to lay down a prescriptive or definitive list of factors that may be relevant "because of the infinite possible variety of cases", but said, at para 107:

> "Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

54. The Trinidad and Tobago Court of Appeal has adopted and applied these principles in a case arising under the Co-Operative Societies Act: *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corpn* (25 January 2017) (unreported). In that case a co-operative society had made a loan to an

entity which was not a member of the society without the consent of the Commissioner, contrary to section 43(1) of the Act (quoted at para 64 below). The Court of Appeal held that, although the loan agreement was illegal because made in breach of this provision, it was nevertheless valid and enforceable.

55. Mendonca JA, with whom Bereaux and Mohammed JJA agreed, reached that conclusion by first considering whether the Act on its proper construction rendered the loan agreement unenforceable. Having found that it did not, Mendonca JA went on to consider whether it would be contrary to the public interest to allow the society to enforce the loan agreement, applying the criteria in *Patel v Mirza*. He assessed the purpose of the relevant statutory provision and other policy considerations and whether denial of the claim to recover the loan would be a proportionate response to the illegality. He concluded that to allow the agreement to be enforced would not be harmful to the integrity of the legal system and that the illegality defence failed.

56. As summed up in *Grondona v Stoffel & Co*, para 1, the approach to illegality adopted in *Patel v Mirza* has the merit of being:

> "a more flexible approach which openly addresses the underlying policy considerations involved and reaches a balanced judgment in each case, and which also permits account to be taken of the proportionality of the outcome."

In the Board's opinion, such an approach is much better calculated to achieve practically just results than the doctrine of ultra vires, understood as a limit on the legal capacity of a corporation which automatically renders a transaction beyond that limit devoid of all legal effect.

57. The more flexible approach applicable where a transaction is illegal means that the distinction between incapacity and illegality which made no practical difference when the doctrine of ultra vires was formulated in the 19th century has become of real importance. The Board considers that, in applying the distinction, it is reasonable to presume, unless the contrary is clearly shown, that the legislature did not intend to nullify transactions otherwise within the express or implied powers of a corporation without regard to whether this is otherwise provided by law or is in the public interest. Thus, if a statutory provision is capable of being interpreted as a prohibition rather than a restriction on the powers of a corporation, such an interpretation is in general to be preferred.

Interpretation of regulation 14(3)

58. It is necessary then to decide whether, as the liquidator contends and the courts below accepted, regulation 14(3) of the Regulations made under the Co-Operative Societies Act is a restriction on the capacity of a society registered under the Act to borrow money, so that any borrowing above the limit is ultra vires and void; or whether, properly construed, regulation 14(3) is not a restriction on capacity but a prohibition against borrowing in excess of the maximum liability, so that such borrowing is illegal but not ultra vires.

59. Counsel for the lender did not focus on this question in argument before the Board, and do not appear to have done so in the courts below. No doubt for that reason the question was not addressed in the judgments of those courts. Once the question is posed, however, the answer to it in the Board's opinion is straightforward. Regulation 14(3) is a prohibition and not a restriction on the powers of a co-operative society. This is clear from the words of regulation 14(3) itself. It is confirmed by viewing regulation 14 in the context of the regulatory regime as a whole - which we will first of all do.

The Act

60. The Co-Operative Societies Act is not a statute which itself creates or constitutes any corporate body. Its function is to regulate co-operative societies (of which credit unions are a species) by enacting a system of registration and a regime of rules with which societies registered under the Act are required to comply.

61. Section 7 of the Act provides that no undertaking may style itself a co-operative or credit union society unless it is registered under the Act. Sections 8 and 9 specify criteria which a society must satisfy to be eligible for registration. Section 16 prescribes the procedure for making an application for registration. Section 17 empowers the Commissioner, on being satisfied that the relevant requirements are met, to approve the society's bye-laws and register the society. Section 18 gives the Commissioner power to cancel the registration of a society at any time, if he thinks fit, and wind up its affairs.

62. Section 22 of the Act provides that:

> "Every society shall be constituted and managed in accordance with its bye-laws and the Regulations."

Subsequent sections of the Act prescribe a series of things which a society registered under the Act “may” or “may not” do, or which such a society “shall” or “shall not” do. The Board construes these provisions - as is to be expected of a statute which establishes a regulatory regime and does not create or constitute any corporate body - as prescribing matters which a society is legally permitted or not permitted to do, or which a society is under a duty to do or not to do. The Act does not define the objects of any particular society or powers which a society may exercise in order to pursue those objects. The place in which to find such objects and powers is not the Act but the society’s own constitution.

63. So, for example, section 28(1) of the Act states:

> “A society may make advances by way of loan to its members in accordance with its bye-laws.”

In the Board’s view, it would be wrong to interpret this provision as giving a society a power to lend money to its members. The source of such a power will be the instrument by which a society is constituted, namely, its bye-laws. The meaning and effect of section 28(1) is to make it lawful for a society to lend money to its members (provided it is acting in accordance with its bye-laws). The evident reason for including this provision in the Act is to ensure that a society does not, by engaging in such lending, contravene laws against unlicensed lending - as is further made clear in the following subsections which specifically exempt a society from requirements to obtain a licence under the Banking Act, the Local Savings Banks Act or the Moneylenders Act.

64. In contrast to the rule permitting lending to members, section 43(1) of the Act, considered in the *First National Credit Union* case, states:

> “A society may not, save with the consent of the Commissioner, make a loan to any person other than a member.”

In the *First National Credit Union* case, Mendonca JA said, at para 79:

> “Section 43(1) does not present any difficulty in its interpretation. Where a society lends its money to a non-member, it must obtain the consent of the Commissioner. When it lends its money to a non-member without the

> Commissioner's consent, it does so in breach of section 43(1)."

The Board agrees. Section 43(1) is a prohibition against lending to non-members without the consent of the Commissioner, and not a restriction on the powers of a society.

65. We then come to section 44(1) of the Act, which states:

> "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."

In the Board's view, section 44(1) also presents no difficulty in its interpretation. Like section 28(1), and in keeping with regulatory function of the Act, section 44(1) confers a liberty or permission (and not a power). A society is permitted to borrow money (by way of deposits and loans) from non-members for the stated purpose, provided that it acts in accordance with any relevant provisions of the Regulations and of its bye-laws.

66. The Act provides means of enforcing compliance and penalising non-compliance with the rules contained in and made under it. Section 3 establishes the office of Commissioner and confers on the Commissioner powers of supervision of co-operative societies, including credit unions, registered under the Act. Those powers include a power under section 4(3) to dissolve the board of directors and appoint new managers; and the drastic power already mentioned under section 18 at any time to cancel the registration of a society and order that it be wound up. A further sanction for non-compliance is provided by section 71 which creates a criminal offence where a society (or any officer or member or any other person) "fails without reasonable cause or wilfully neglects or refuses to comply with any requirement of this Act or the Regulations". Pursuant to section 73, the penalty applicable on summary conviction for such an offence (as no other penalty is expressly specified) is a fine of 2,000 dollars and, in the case of a continuing offence, a further fine of 100 dollars for each day that the offence continues after conviction.

The bye-laws

67. It is convenient to consider next the credit union's own bye-laws, as approved by the Commissioner. This is the instrument by which the credit union was constituted by its members and which corresponds to the memorandum of association of a company registered under the Companies Acts. Bye-law 3 sets out the objects of the society. The main object is the promotion of the economic welfare of its members by (among other things) promoting thrift and savings amongst members and providing loans to members. The objects also include, at bye-law 3(b)(v):

> "To do all such lawful things incidental or conducive to the attainment of the objects and exercise of the powers of the Society."

Other bye-laws deal with membership of the society, share ownership, deposits, lending to members, matters of corporate governance (including general meetings and the constitution, powers and duties of the board of directors) and books and accounts.

68. It is arguable that a power to borrow from non-members is incidental or conducive to the attainment of the objects of the credit union and therefore authorised by bye-law 3(b)(v). But any doubt about the existence of such a power is removed by bye-law 49(b) which, under the heading "Borrowing Powers", states expressly:

> "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."

The Regulations

69. The Co-Operative Societies Regulations are delegated legislation made under section 81 of the Act. They are an extension of the regime established by the Act. The Regulations contain more detailed rules stipulating what it is lawful or unlawful for a society registered under the Act to do and imposing various duties on such societies. These rules cover various aspects of how a society is required to be managed and run, such as mandatory arrangements for general meetings, the preparation and auditing of accounts and the making of loans. However, the Regulations do not define the objects or powers of any individual society.

70. We repeat for convenience the wording of regulation 14:

> "(1) 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.
>
> (2) The maximum liability fixed under sub-regulation (1) shall be subject to the approval of the Commissioner, who may at any time reduce it.
>
> (3) No society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner."

71. As signified by the word "shall", regulation 14(1) imposes a legal duty on every society registered under the Act to fix an amount which will be the maximum liability it may incur in respect of loans or deposits. This must be done at a general meeting. Regulation 14(2) requires the approval of the Commissioner to be obtained for the maximum liability fixed under sub-regulation (1) and, in addition, permits the Commissioner to reduce the amount of the maximum liability at any time.

72. As again signified by the word "shall", regulation 14(3) imposes a further legal duty on every society, in this case a negative one. Regulation 14(3) is not expressed as a restriction on the powers of a society. It does not say that no society "shall have the power to" receive loans or deposits etc. It does not even say that no society "may" receive loans or deposits etc - where the word "may" could (depending on the context) mean "is permitted to" or "has the power to". The words used are "[n]o society shall receive …". In the Board's opinion, these words are unambiguous. They can only reasonably be read as a command not to do what is then stated, in other words a prohibition. The meaning of regulation 14(3) is that a society is prohibited from receiving loans or deposits in excess of the maximum liability approved or fixed by the Commissioner. If a society does receive such a loan or deposit, it will be acting in breach of the regulation - but not beyond its powers.

73. It follows that, by receiving the loan in issue in this case when its maximum liability approved by the Commissioner under regulation 14 had been exceeded, the credit union acted in breach of regulation 14(3) and thus illegally. But it did not act outside its legal powers, which expressly included the power to borrow loans from non-members. It is not disputed that, insofar as the credit union had the power to

borrow, it was reasonably incidental to the exercise of that power, and therefore also within the powers of the credit union, to give security for such borrowing. The loan agreement and the security for it were therefore not void by reason of being ultra vires.

The effect of illegality in this case

74. We turn to the liquidator's alternative case that the result reached by the courts below should be upheld on the basis of the law relating to illegality. It is argued that the judge was right to grant declarations that the loan agreement and security are void (or at least unenforceable) by reason of illegality and that the appropriate outcome is for the lender to be left to a claim in restitution which would not have priority over other creditors in the liquidation of the credit union.

Statutory interpretation

75. As discussed at paras 52-53 above, in considering this argument the first question is whether the applicable legislation prescribes, expressly or impliedly, what legal consequences a breach of the relevant statutory prohibition is to have. More particularly in this case, do the Act or the Regulations provide, expressly or impliedly, that a breach of regulation 14(3) has the legal effect that any contract under which a loan is received by a society when its maximum liability has been exceeded is void or, alternatively, unenforceable by the lender?

76. The answer to this question, in the Board's opinion, is plainly "no". As described at para 67 above, the Act gives the Commissioner powers to take regulatory action against a society which fails to comply with a requirement of the Act or the Regulations. It also makes failure without reasonable cause, or wilful neglect or refusal, to comply with such a requirement a criminal offence, punishable by a fine. But there is no provision of the Act or Regulations which states or implies that a breach of the Act or Regulations generally, or of regulation 14(3) specifically, is to have the effect of making any contract which gives rise to a breach void or unenforceable. Nor can it be inferred from the purpose of the legislation that this was its intended effect.

77. It is common ground that the purpose of regulation 14 is to prevent co-operative societies from acting imprudently and imperilling their solvency or existence by incurring excessive liabilities. Counsel for the liquidator submitted that there is no surer way of achieving this purpose than disentitling lenders from enforcing

agreements entered into by the society the performance of which gives rise to a breach of regulation 14(3).

78. This argument might have had more merit if the maximum liability imposed by regulation 14 had applied only to loans received from non-members. However, it applies also to deposits. A member of the public who deposits money with a credit union or other co-operative society cannot reasonably or realistically be expected, before making a deposit, to acquaint themselves with the statutory regulations applicable to the society, find out that there is a maximum liability which the society may incur in respect of loans or deposits, and then undertake an investigation to find out what this maximum liability currently is and whether it has been exceeded. Such an investigation would notionally require inspection of: (1) minutes of general meetings to ascertain what maximum liability had been fixed by the society at a general meeting; (2) correspondence between the society and the Commissioner regarding approval of the maximum liability fixed in general meeting (and to show whether this has subsequently been reduced by the Commissioner); and (3) the society's accounting records, to ascertain the current levels of loans and deposits in order to compare them with the maximum liability. We say "notionally" because, even if (which seems doubtful) all this material is publicly available, no prospective depositor would in real life have the knowledge or, even if they did, think it worth incurring the time and cost required to carry out such an investigation. Placing on depositors the risk that the contract under which their deposit is made will be unenforceable if, unknown to them, the society's maximum liability had been exceeded when the deposit was made would in these circumstances be wholly unreasonable. It would take clear and express language to justify interpreting the legislation as intended to have this effect. As noted, such language is nowhere to be found.

79. Such a consequence would also be antithetical to the broader purpose of the legislation of promoting and strengthening co-operative societies, which in many cases have as a main object providing loans to members. A "credit union" is defined in section 2 of the Act as "a society which has as its objects the promotion of thrift and the creation of a source of credit for its members". It would deter rather than encourage the making of deposits as savings and as a source of credit for members of the society if depositors and other lenders were put at risk of finding that their contracts with the society were void or unenforceable if it turned out that, unknown to them, the society's liabilities were in excess of the maximum liability approved or fixed by the Commissioner at the time when the loan or deposit was made.

80. There is still less reason to infer that the intended result of a breach of regulation 14(3) is to render the relevant contract of loan or deposit void or

unenforceable when, as discussed, the Act provides a range of other sanctions for breaches of the Act and the Regulations made under it. Unlike the indiscriminate response of making all contracts which give rise to breach of a regulation ineffective, those sanctions can be invoked by the Commissioner in a manner proportionate to the gravity of the breach.

81. To adopt the words of Devlin LJ in *Archbolds* quoted at para 51 above, rendering all contracts made by a society in breach of regulation 14(3) void or unenforceable by the lender or depositor would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute. It would also enable the society to profit from its own wrong in contravening the regulation by relieving it of its contractual obligation to pay interest on the sums borrowed and limiting the entitlement of the lender or depositor to restitution of the sums lent. The value of the benefit thereby gained by the society from its illegal conduct might greatly exceed the amount of the fine imposed on conviction of an offence under section 71 of the Act, and thus undermine the prohibition.

82. The Board concludes that the Act and Regulations cannot be interpreted as providing that the contract under which a loan or deposit is received by a society in breach of regulation 14(3) is void or unenforceable by the lender or the depositor. To the contrary, having regard to the aims of the legislation and the arbitrary and potentially unfair and injurious consequences of such a result, treating such contracts as void or unenforceable would be inconsistent with the legislative intention.

Public interest

83. In circumstances where the applicable legislation could have provided, but does not provide (expressly or impliedly), that a breach of regulation 14(3) shall have the effect of making a contract relating to a loan received by a society in excess of its maximum liability void or unenforceable, it is difficult to see how allowing enforcement of such a contract could be said, without some further factor, to be harmful to the integrity of the legal system. The most plausible, if not the only, additional factor which might justify such a conclusion would be knowledge on the part of the lender (or depositor) that it was participating in the commission of an illegal act. This is the approach taken, for example, in relation to employment contracts: see *Okedina v Chikale*, paras 13, 62.

84. There is, however, no finding of knowing participation in this case. On the uncontradicted evidence referred to at para 17 above, the lender's director and decision-maker, Mr Shamshudeen, did not know when the loan was made that the

credit union had exceeded its maximum liability and was therefore acting illegally by receiving the loan. His evidence at the trial was that he relied on assurances from the President and Secretary of the credit union that the maximum liability of TT$100m approved by the Commissioner applied only to loans and not to members' shares and deposits and that the amount of the loan was within that limit.

85. In their supplemental submissions, counsel for the liquidator describe Mr Shamshudeen's belief that the TT$100m limit applied only to loans as inexplicable and say that it is difficult to accept that the lender did not knowingly participate in a breach of regulation 14 or at least was wilfully blind to the breach which was being committed. The question, however, is not whether Mr Shamshudeen might be criticised for relying on assurances from officers of the credit union which did not reflect the underlying documents with which he was provided; but whether, having been concerned to check that the loan complied with regulation 14, he nevertheless knowingly or wilfully took the risk of lending substantial sums of money in breach of that regulation. The trial judge made no finding that he did and there is no basis on which the Board could properly conclude that the lender knowingly participated in illegal conduct or did not act in good faith.

86. Applying the criteria identified in *Patel v Mirza*, denying a claim to enforce a loan agreement made by a lender who was misled by the society's officers into believing that the society was complying with its regulatory limit on borrowing would doubtless promote the purpose of preventing a co-operative society from incurring excessive liabilities. But it would do so at the cost of subverting the fundamental principle that contractual obligations freely entered into should be upheld. In considering what impact the denial of the claim might have on other relevant public policies, the Board thinks it right to bear in mind the salutary words of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."

Preventing a lender who did not knowingly participate in a breach of regulation 14 from enforcing contractual rights against a society which contravened the regulation as a result of entering into the contract could not be said to be a proportionate response to the illegality, particularly bearing in mind the availability of regulatory and criminal sanctions for the breach. Denial of the claim would unjustly penalise the lender and damage the public interest by enabling the credit union to avoid contractual obligations freely entered into and thereby profit from its own illegal conduct at the expense of a counterparty which acted in good faith.

87. Counsel for the liquidator contended that, to properly assess the proportionality of the consequences of illegality, the court must consider the impact which enforcement of the security would have upon the depositors in circumstances where the credit union is insolvent. They submitted that there is nothing disproportionate in depriving the lender of its priority in the liquidation and treating it the same as the other creditors. It is necessary, however, to keep in mind that the legal consequences of a transaction being a nullity or unenforceable do not arise only in the event of insolvency, as has occurred here. They arise as soon as the transaction is entered into and apply even if the society is and remains solvent. While the purpose of regulation 14 in seeking to prevent a co-operative society from jeopardising its solvency through excessive borrowing is a relevant consideration, the Board does not consider that the consequence of the society's illegal conduct as regards whether obligations undertaken by the society are enforceable can be affected by the fact that the society has subsequently become insolvent or vary according to whether it is in liquidation.

88. In sum, it cannot, in the Board's opinion, be said that allowing a lender to enforce a loan agreement made and security accepted by the lender in good faith without knowing that the credit union was borrowing in excess of its legal limit would be harmful to the integrity of the legal system.

Conclusion

89. The Board concludes that, although the maximum liability fixed under regulation 14 had been exceeded when the loan in issue in these proceedings was made, the credit union in receiving the loan and providing security for it was not acting beyond its powers. As a result of receiving loans and deposits in breach of regulation 14(3), the credit union was potentially liable to regulatory and criminal sanctions. But the applicable legislation does not make a contract under which a loan or deposit is received by a society when its maximum liability has been exceeded void or unenforceable by the lender or depositor. Nor would denying the lender's claim in this case to enforce such a contract be a proportionate response to the breach in circumstances where the lender did not itself act illegally or knowingly participate in

the breach. The lender is thus entitled to enforce the loan agreement and security, subject now to the rules applicable on insolvency. Accordingly, the appeal will be allowed.

LORD KITCHIN AND LADY ARDEN: (dissenting)

90. This appeal arises in proceedings between Mr Rampersad, the liquidator of the Hindu Credit Union Co-Operative Society Ltd (respectively, "the Liquidator" and "the HCU"), and SR Projects Ltd ("SR Projects"), a company which loaned substantial sums to the HCU between October 2004 and January 2005. The loan amounted in total to in excess of US$ 2,821,000 and it was secured by a deed of mortgage dated 14 October 2004 and executed on 19 October 2004 over certain property of the HCU, and a promissory note in the sum of US$ 1.5m dated 14 October 2004. The loan carried a rate of interest of 13% per annum. The loan has never been repaid in full; and the obligation to pay interest has not been met. Indeed, a very substantial proportion of the loan and interest remain outstanding.

91. In June 2008 the statutory regulator, the Commissioner for Co-operative Development ("the Commissioner" or "the CCD"), exercising the power conferred upon him by section 4 of the Co-operative Societies Act, Chapter 81.03 of the laws of Trinidad and Tobago ("the Act"), began an inquiry into the constitution, operations and management and financial position of the HCU. That inquiry established, among other things, that the HCU had a significant shortfall in assets available to satisfy its liabilities and was hopelessly insolvent. By order dated 9 October 2008, the Commissioner, acting under section 58 of the Act, directed that the HCU be wound up and that, as of that date, all of the assets of the HCU would be vested in him. The Liquidator was appointed on 10 October 2008 with immediate effect.

92. The circumstances of and reasons for the failure of the HCU and various other companies of a similar nature have since been the subject of a Commission of Enquiry carried out by Sir Anthony Colman following his appointment by H E Professor George Richards, President of Trinidad and Tobago, by instrument dated 17 November 2010 under section 2 of the Commissions of Enquiry Act, Chapter 19.01. Sir Anthony's report, dated 16 July 2014 ("Sir Anthony's Report" or "the Report"), identified many reasons for the collapse of the HCU. They included a shift away from the core activities of a credit union of taking deposits from members and making loans to them, and a substantial increase in levels of investment in unprofitable subsidiary companies and property, so drastically diminishing the HCU's liquidity margin. In addition, there were multiple failures of management, consistent failures of compliance with the Act and other aspects of the regulatory regime and an absence of adequate oversight of the HCU by the Commissioner.

93. It is undoubtedly the case that many persons have suffered considerable losses in light of the collapse of the HCU. It is also true that some members have benefitted from a relief payment programme approved by the Government of Trinidad and Tobago in July 2010. Under the terms of this programme, those members who accepted the offer of relief were paid a sum equal to their deposits less any outstanding liability in exchange for the assignment to the Government of all their rights and entitlement as members of the HCU. To date the Government has acquired the rights of some 20,000 members with a nominal value in excess of TT $600m, and it has submitted a claim in respect of the rights it acquired for that sum in the liquidation of the HCU.

94. Against this background, the principal question raised by this appeal is whether, as the Board would hold, the HCU had an unlimited capacity to borrow, or whether, as the trial judge and the Court of Appeal held, the capacity of the HCU to borrow was conferred by and subject to limits and other restrictions imposed by the Act, the regulations made under the Act, and the bye-laws of the HCU. In our opinion the trial judge and the Court of the Appeal answered this question correctly.

95. We will explain our reasons for reaching that conclusion. But first we must say a little more about the statutory scheme and the regulations, the bye-laws of the HCU and the other issues arising on this appeal, in relation to many of which we are broadly in agreement with the Board. We do so only so far as necessary to provide the context for the issue upon which we disagree.

The statutory framework, the regulations and the bye-laws

96. The Act amended, consolidated and re-enacted the laws relating to co-operative societies, credit union societies and agricultural credit societies, as its short title makes clear. In so doing it provides, among other things, for the establishment, registration, constitution, management and operation of any such society; and it confers powers on the Commissioner to supervise the affairs of the society and, where appropriate, to hold an inquiry into its constitution, operations and financial position, and even order the dissolution of the board and, ultimately and in an appropriate case, direct that the society be wound up and appoint a liquidator.

97. The Minister is also empowered by section 81 of the Act to make regulations to carry out the purposes of the Act. In these proceedings we are concerned with the Co-operative Societies Regulations 1971, as amended, “the Regulations”.

98. The Act and the Regulations in this way provided the framework for the establishment, registration and supervision of the HCU as a co-operative society. The HCU was not permitted to style itself a co-operative or credit union society or hold itself out as being operated in accordance with co-operative principles until it was registered under the Act: section 7. A society such as the HCU, with limited liability, was required to have the word "limited" as the last word in its name: section 9(4). Further and importantly, under section 17, the Commissioner was permitted to register the HCU only on being satisfied that it had complied with the provisions of the Act and the Regulations, and that its bye-laws were not contrary to co-operative principles.

99. The registration of the HCU established it as a body corporate: section 20 of the Act. The HCU could, in accordance with section 21 of the Act, at any time amend its bye-laws by resolution passed at a general meeting called for that purpose, but no such amendment would have effect until approved by the Commissioner. Under section 22 of the Act, it was required to be constituted and managed in accordance with the Regulations and its bye-laws. Further, as a society registered under the Act and as we have seen, the HCU was subject to the general powers of supervision conferred on the Commissioner.

100. Part IV of the Act is concerned with the property and funds of societies such as the HCU. It addresses various activities of a society including the making of loans to its members (section 28); the making of loans to non-members (section 43); the receipt of deposits and loans (section 44); the investment by a society of its funds (section 45); the payment of dividends and the making of distributions (sections 46-48); the establishment of a contributory pension fund (section 49); and for the accounts of the society to be audited every year (section 51).

101. The bye-laws of the HCU ("the Bye-Laws") were originally approved in 1985 but were amended on occasion thereafter and, so far as relevant to this appeal, were approved by the Commissioner, as amended, in January 2004. They were expressed to be supplementary to the provisions of the Act and the Regulations, and they stated in terms that the HCU was to be guided by the Act, the Regulations and the Bye-Laws read together. The objectives of the HCU were set out in broad terms in Bye-Law 3 and were directed generally to the promotion of the economic welfare of its members and the encouragement of the spirit and practice of thrift, self-help and co-operation among members, and the promotion of the development of co-operative ideas. Bye-Law 3 includes, at Bye-Law 3(b)(v), this objective: "To do all such lawful things incidental or conducive to the attainment of the objects and exercise of the powers of the Society". Membership was expressed to be open to "all persons of good character who are Hindus and any other person approved by the Board". Membership began on

payment of a non-refundable entrance fee and the purchase of a certain number of shares. Under Bye-Law 9, the liability of any member for the debts of the society was limited to the value of the shares held by that person. Bye-Law 49 deals with borrowing by the society and is a provision to which we will return in the next section of this judgment.

Liabilities in respect of loans or deposits

102. That brings us to the provisions dealing with the capacity and powers of the HCU, as a society established under the Act, to borrow and incur liabilities in respect of loans and deposits. Here the starting point is section 44 of the Act which, as we have mentioned, confers on a society a power to receive deposits and loans from persons who are not members, subject to the Regulations or any relevant Bye-Laws. It provides:

> "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.
>
> (2) A society may by mortgage or in any other manner it deems appropriate guarantee the repayment of any sums received by it pursuant to subsection (1)."

103. In this connection, regulation 14 requires the HCU, as a society falling within the scope of the Act, to fix the maximum liability it may incur in respect of loans or deposits:

> "14(1) 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.
>
> (2) The maximum liability fixed under sub-regulation (1) shall be subject to the approval of the Commissioner, who may at any time reduce it.

> (3) No society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner."

104. Regulation 29 is also significant and confers a power on the board of directors to borrow money on behalf of a society "to an amount not exceeding the maximum liability fixed in accordance with regulation 14".

105. Turning to the relevant Bye-Laws, the capital of the society included shares subscribed by members, deposits from members, loans from members, non-members, agencies or organisations regulated under legislation regulating financial institutions, and any sums capitalised from any annual surplus (Bye-Law 11). Members were permitted to deposit money as "normal deposits" or, from time to time, as "special deposits" (in each case under the terms of Bye-Law 15). Funds were to be used exclusively for achieving the stated objects of the society (Bye-Law 16) but could be invested or deposited by the society in a specified or approved manner (Bye-Law 17). The supreme authority of the society was vested in properly constituted general meetings of the members (Bye-Law 23). The powers and duties at the annual general meeting ("the AGM") included the consideration of the accounts, the election of a board of directors ("the Board" or the "Board of Directors"), and the approval of the maximum liability of the society (Bye-Law 27).

106. The powers and duties of the Board of Directors were the subject of Bye-Law 31 and were expressed to include the power to contract loans and to authorise expenditure; to appoint agents to act for and on behalf of the society; and to enter into contracts on behalf of the society. Loans by the society were addressed in Bye-Law 40, and borrowing by the society was addressed in Bye-Law 49.

107. Bye-Law 49 is therefore of some importance in connection with the liability of the HCU for loans it has taken. It deals, in paragraph (a), with a borrowing power of the Board, on behalf of the society, and in paragraph (b), with a power of the society to take loans from persons who are not members, and it does so in these terms:

> "(a) 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."

108. In this way and as one would expect, the Act, the Regulations and the Bye-Laws, read together, provide a scheme under which the HCU had the capacity and power, subject to appropriate limits and controls, to incur liabilities arising from its taking of loans and acceptance of deposits, and the Board was empowered to borrow money on behalf of the society to an amount not exceeding the maximum liability fixed by its members in general meeting and approved by the Commissioner. We turn now to consider these limits in rather more detail.

Maximum liability

109. The first question to which these provisions give rise concerns the meaning of the term "maximum liability" in regulation 14. The Court of Appeal, agreeing with the judge, held that this expression refers to the maximum liability, fixed by the society and approved by the Commissioner, that the society may incur at any point in time in respect of loans to and deposits with the society from members and non-members. It is important because it was on this basis that the Court of Appeal also agreed with the judge that, as of 19 October 2004, the HCU had exceeded that maximum.

110. On this further appeal, SR Projects again challenges the correctness of that interpretation. It submits that, on its plain wording, regulation 14 permits a society to set a maximum liability for loans or a maximum liability for deposits. Put another way, SR Projects continues, the word "or" in sub-regulation (1) is disjunctive rather than conjunctive and is not to be read as meaning "and". SR Projects argues that the wording of regulation 14(1) is to be contrasted with that of section 44 of the Act which does use the word "and", so making clear that, subject to the Regulations and its bye-laws, a society may receive loans and deposits from non-members for the purposes set out in that section.

111. The Court of Appeal rejected this submission as did the trial judge, and we have no doubt they were right to have done so. Regulation 14 imposes a restriction on the ability of any society to incur liabilities arising from the acceptance of deposits from members and non-members, and the taking of loans. It assumes that a society has an obligation to return deposits on request, subject to the terms of any agreement under which they were made. That assumption is reasonable. In the normal way, acceptance of a deposit is accompanied by an obligation, accepted by the society, to return it on request: see, for example and by analogy, *N Joachimson v Swiss Bank Corpn* [1921] 3

KB 110 at 127 per Atkin LJ. Regulation 14 also recognises (and it appears now not to be in dispute) that, in the normal way, a society incurs a liability to repay any loan which it takes in accordance with the terms of the agreement under which it was made.

112. Secondly, the purpose of this aspect of regulation 14, in the context of the regulatory scheme of which it is a part, can now be discerned: it is to impose a limit on the ability of a society to incur liabilities in respect of loans or deposits and so to provide a measure of protection for the assets of the society and its members and depositors against activities, such as those engaged in by the HCU, which may put its continued viability at risk.

113. Thirdly, recognising that a society incurs a liability in respect of deposits it receives, just as it does in respect of loans which it takes, it would make no sense for regulation 14 to permit the society to set a limit on the maximum liability it can incur in respect of such loans or deposits, at its election. So, for example, the regulatory scheme cannot have been intended to permit a society to set a limit on the liability it can incur in respect of deposits but not to require it to set a limit on the liability it can incur in respect of loans; nor would it make sense to permit a society to set a limit on the liability it can incur in respect of loans but not to require it to set a limit on the liability it can incur in respect of deposits.

114. It is not necessary for the purposes of this appeal to decide whether, if a society were to have fixed, and the Commissioner to have approved, separate maximum liabilities for loans and deposits, it could not be said that the maximum liabilities so established were unlawful. However, we unhesitatingly reject the suggestion that a society such as the HCU was free not to fix any maximum liability at all, or that it was free to fix a maximum liability for either loans or deposits, but not necessarily for both. We agree with the Liquidator that regulation 14 requires a society such as the HCU to fix a maximum liability, whether that liability is incurred in respect of loans or deposits. The terms of section 44 of the Act are entirely consistent with this interpretation, as indeed are the terms of regulation 29 and the Bye-Laws to which we have referred, including Bye-Law 49.

115. It also follows, in our view, that where, for a society such as the HCU, one maximum liability is fixed and approved, there is a presumption that it applies to both loans and deposits, and that in deciding whether it has been exceeded by the taking of a loan, the amounts of the deposits must also be taken into account. As we will now explain, that was the position in this case.

The maximum approved liability of the HCU

116. There was ample evidential support for the judge's conclusion, affirmed by the Court of Appeal, that at the time the loan was agreed and effected, the maximum approved liability of the HCU, that is to say the maximum liability of the HCU in respect of loans and deposits, being a maximum liability for which the approval of the Commissioner had been sought and given, was TT $100m. More specifically, a Special General Meeting of the HCU took place on 17 April 2004 at which the members present voted unanimously to increase the maximum liability of the HCU from TT $20m to $100m so as to facilitate the expansion of the organisation by permitting it to receive more deposits and to take greater loans; the approval of the Commissioner was sought by letter dated 21 June 2004; and the Commissioner gave that approval by letter dated 25 June 2004. We reject the submission advanced by SR Projects that the maximum liability of TT $100m to which we have referred related only to loans, and that properly understood, the Loan by SR Projects did not cause that maximum to be exceeded.

Did the HCU nevertheless have an unlimited capacity to borrow?

117. The next question is whether the HCU had an unlimited capacity to borrow, despite the provisions and their evident purpose to which we have referred. In our opinion and in disagreement with the Board, the answer to that question is that it did not. By virtue of section 44, read with regulation 14, the maximum limit in respect of loans or deposits that the HCU had power to incur is that set out in regulation 14. (This is in addition to the limitation implied by law on any power to borrow that it should be exercised for the purpose of a lawful business.) Our reasons are set out below.

118. For convenience and consistently with what we have already held, we use the word "borrow" to cover both the receipt of deposits as well as borrowings. We use the words "powers" and "capacity" interchangeably.

(A) The Act and the Regulations must be interpreted in their context, namely the regulation of societies providing security for the savings of individuals of limited means and an opportunity for them to raise money on reasonable terms

119. Any legislation must be construed contextually, taking account of its purpose and the "mischief" it was designed to remedy. So, it is important to the consideration of the issues of statutory interpretation which follow to recall the importance of credit union co-operative societies in Trinidad and Tobago. As the Board notes, and as the

statutory description of these societies as "co-operative societies" indicates, they are formed to promote the welfare of individual citizens and, as "credit unions", to encourage the spirit and practice of thrift, self-help and co-operation, and the promotion of the development of co-operative ideals. The aim of these societies is also to provide security for a member's savings and to obviate the need for a member to approach a moneylender when he or she needs an advance, perhaps to enable him or her to set up a small business. The credit union sector has therefore played and (so far as we are aware) continues to play an important role in the society and economy of Trinidad and Tobago.

120. According to Sir Anthony's Report, there were, by mid-1995, as many as 164 registered co-operative societies in Trinidad and Tobago (para E6). Other entities which Sir Anthony was called on to investigate (and which also failed) were the companies in the Colonial Life Insurance group of companies (collectively "CLICO"). The Board is already aware from its judgments in *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17; [2016] 1 WLR 3383 of the enormous impact these failures had on the economy of Trinidad and Tobago and of their consequences for individuals' savings. (CLICO was also connected with the HCU since it was significantly involved in attempts to resolve the liquidity problems of the HCU in 2006.) Indeed, these failures and their consequences were of sufficient national impact to justify investigation and report by a senior judge from England and Wales. According to Sir Anthony's Report, a statutory report by Ernst & Young presented to the Commissioner on 9 September 2008 (one month before the HCU was put into liquidation) showed that the HCU's deficiency of recoverable assets over liabilities was TT $486.5m (para J158).

121. One other point should be mentioned at this stage. The Act was passed in 1971, some 30 years after credit union co-operative societies were first set up in Trinidad and Tobago. It was always apparent from the objects of such societies that their members would be individuals, and often of limited means.

(B) The Act and the Regulations create a power to borrow up to the maximum limit fixed under regulation 14 and no more, so any borrowings in excess of the limit are ultra vires

122. The starting point is that the HCU, as a creature of statute, has no capacity to borrow save in so far as that capacity is conferred upon it by or under the Act. In our judgment there is no scope for an implied power to borrow because the implication of any such power is excluded by the express provisions of the Act, the Regulations made under it and by the Bye-Laws.

123. Indeed, the HCU is, in our opinion, a body whose capacity is governed exclusively by its founding statute, in this case the Act, the Regulations made under it and the Bye-Laws. The HCU has no power to change its objects of its own accord: it must obtain the prior approval of the Commissioner who must no doubt be satisfied that any amendment is appropriate and will not cause the society to cease to be registrable under the Act. A society, such as the HCU, is formed when it is registered as a society (section 20) but the Act, the Regulations under section 81 and the Bye-Laws (which must be filed with the Commissioner: section 16) are the exclusive source of its constitution, and, therefore, its powers, as section 22 (to which we have already referred) makes clear:

> "22. Every society shall be constituted and managed in accordance with its bye-laws and the Regulations."

124. The HCU's power to borrow from non-members is expressed in section 44(1) which we have set out above but which, for convenience, we set out again:

> "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."

125. The Board has concluded that section 44(1) confers "a liberty or permission (and not a power)" (para 65). The Board also considers that a power to borrow is within the implied powers of the society to do that which is reasonably incidental to the attainment of its objects.

126. We disagree. In our judgment, the approach taken by the Board is not correct: it amounts to putting the cart before the horse. It ignores the fundamental difference between, on the one hand, a society such as the HCU, which is constituted in the manner we have described under the Act, the Regulations and the Bye-Laws; and, on the other hand, a company established and registered under the Companies Act of Trinidad and Tobago upon which the capacity and power of an individual are now expressly conferred, as we will explain. It also attaches no sufficient weight to the statutory scheme under which the HCU is constituted and from which its powers are derived, which deals with the capacity of the HCU to borrow and which leaves no room for such a power to be implied. There is no need and it is not appropriate to confer upon a statutory body an implied power when that power is dealt with expressly by the Act, the Regulations and the Bye-Laws, as it is for the HCU.

127. The approach which we take to section 44, when read with regulation 14 and the Bye-Laws, namely that it confers a power to borrow, subject to a limitation, is supported by the leading case of *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354. The original statute which constituted the company in question contained no power to borrow, but a later Act gave a power to borrow up to a fixed amount. The House of Lords held that it did not need to decide whether there had been an implied power before this later Act. The consequence of the later Act was that the company had a limited power to borrow. So, the House did not say that there had been a power all along and that the later statutory limit was simply a “liberty or permission” to exercise an implied power. Applying ordinary principles of statutory interpretation, the express words of the legislature excluded matters which might otherwise have been implied.

128. In our judgment, section 44 and regulation 14 are properly to be read together as part of one scheme and the mere fact that the power to borrow is in one enactment and the limit on the power in a regulation does not mean that the outcome is any different from that of a case where both provisions are in a single section of one enactment, as in *Wenlock*.

129. *Wenlock* was a unanimous decision of the House of Lords that a provision in the Dee Standard Regulation Act of 1851, which expressly enabled a company to borrow, subject to an overall limit, constituted a limitation on the power to borrow. Lord Blackburn was of the opinion that thenceforward the company had the power to borrow that sum (that is to say, to the limit) “and no more” (p 360). Lord Watson was clear that the qualification was “fatal to the continued existence of any implied power which the company had under their previous statutes” (p 362). Lord FitzGerald, agreeing in the decision, was unable to satisfy himself that any of the Acts down to the Act in issue had, expressly or by implication, authorised the company to enter into the engagements the legality of which was questioned.

130. The Act is therefore a framework Act, and the Regulations carry the provisions of the Act into effect by dealing with matters such as the constitution of societies: section 81 expressly so provides that this should be one of the purposes of the Regulations made under it. In our view, the Board’s interpretation of section 44 pays no adequate regard to this framework and the nature of a society such as the HCU which is very different from that of a company established under the Companies Act.

131. The distinction between registered companies and companies formed under special statutes is important. The legislation regarding the former is not necessarily a safe guide to the law applying to the latter. A registered company is one formed under the Companies Act of Trinidad and Tobago. Such a company, once formed, has power

to amend its objects so that they include everything from running a fish shop to running a gold-mine. That is one of the reasons why the ultra vires doctrine is criticised. Ultimately, registered companies in Trinidad and Tobago were given the power to act as a natural person: see, section 21(1) of the Companies Act, which provides that "A company has the capacity, and, subject to this Act and any other law, the rights, powers and privileges of an individual including, without prejudice to the foregoing, the power to hold lands in any part of Trinidad and Tobago or elsewhere." That legislation does not apply to statutory entities such as the HCU, however, because, by virtue of section 4 of the Companies Act, "company" means "body corporate incorporated or continued under this Act."

132. This approach (and the distinction between a company registered under the Companies Act and an entity established under other legislation) is entirely consistent with the terms of reference of the Company Law Amendment Committee chaired by Cohen J and to which the Board has referred at para 46. These terms of reference were to consider amendments to the Companies Act 1929, that is to say, they were confined to registered companies (see Report, Cmd 6659, 1945, p 6), and any statement in that report relates only to registered companies.

133. We have not yet in this context addressed the detail of regulations 14 and 29 and the relevant Bye-Laws. For convenience, we set out regulation 14 again:

> "(1) 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.
>
> (2) The maximum liability fixed under sub-regulation (1) shall be subject to the approval of the Commissioner, who may at any time reduce it.
>
> (3) No society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner."

134. A borrowing limit of this kind was often found in statutory companies set up under special statutes, for example, railway companies and, as we have foreshadowed and by way of further illustration, the company constituted for the purpose of preserving and protecting the navigation of the River Dee, the subject of the *Wenlock* case. We do not accept that it has given rise to legal or practical difficulties of the type

or on the scale described by the Board. To the contrary, the limited power to borrow has an obvious economic purpose, namely to protect the members against any excessive borrowing by the officers in which they might otherwise and from time to time engage.

135. Regulation 14 has to be read as a whole. It provides that the society must fix at a general meeting the maximum liability it may incur; that this maximum is subject to the approval of the Commissioner; and that the society may not receive loans or deposits in excess of the maximum. We also note that, unlike section 43(1) of the Act (set out in para 64 above), regulation 14 does not empower the Commissioner to consent to any breach of the limit.

136. Moreover, regulation 14(3) makes it clear the society "shall not" incur any borrowing in excess of the maximum amount. It is in our view rather striking that this peremptory language does not appear in section 43(1) of the Act. We consider that the decision of the Court of Appeal of Trinidad and Tobago in *First National Credit Union Co-operative Society Ltd v Trinidad and Tobago Housing Development Corpn* (25 January 2017) (unreported), on which the Board places considerable reliance (see paras 54 and 64 above), is therefore distinguishable. We must return to this decision a little later in our judgment. But first we must complete our consideration of the elements of the scheme and say a little more about the other Regulations and the Bye-Laws which bear on this issue.

137. Regulation 29 and Bye-Law 49 are entirely consistent with the interpretation arrived at by the courts below and which we favour. Regulation 29 and Bye-Law 49(a), recited, respectively, at paras 104 and 107 above, confer on the board of the HCU the power to borrow money but only to the extent that the society itself has capacity to do so. Moreover, Regulation 29 expressly cross-refers to the limit on the society's borrowing powers under regulation 14. The purpose of Bye-Law 49(b) (also recited at para 107 above) is to extend the society's borrowing powers to loans from persons who are not members. Although Bye-Law 49(b) is silent on the limit of such borrowings, it must clearly be read with Bye-Law 49(a) and regulation 14.

138. The Board, on the other hand, considers that section 14(3) is unambiguous, and that it can only reasonably be read as a command not to do what is then stated, in other words a prohibition, so that a society which receives a loan or deposit so that the maximum limit is exceeded will be acting in breach of the Regulation and so illegally but not beyond its powers (para 72 above). In arriving at this conclusion, the Board has developed a point which was not addressed by the Court of Appeal. The Board has also placed considerable reliance on the terms of section 43 of the Act and upon the decision of the Court of Appeal in the *First National Credit Union* case to which we

have referred. In our judgment these cannot bear the weight the Board has placed upon them.

139. First, the approach adopted by the Board overlooks the combined effect of section 44 and regulation 14 which in our view must be read together in the manner we have described. Secondly, section 43 is cast in very different terms from (and provides no reliable guide to the proper interpretation of) section 44. In these circumstances it is not necessary for us to consider the correctness of the decision of the Court of Appeal in the *First National Credit Union* case so far as it deals with the meaning of section 43(1). We would, however, observe that the reasoning of the Court of Appeal on this point is very concise; and further, the point was not the subject of argument by both sides. Counsel for the society in question in that case made no submissions on the point in answer to those of the Commissioner, which were to the effect that the loan was illegal. (Counsel for the society's only submission, which the Court of Appeal rejected, was that it should not deal with the point because it had not been pleaded, and on this see generally the recent decision of the Board in *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] UKPC 10.)

140. In sum, the capacity of the HCU to receive loans and deposits is conferred by section 44 of the Act *subject to* the Regulations and any relevant bye-laws. Regulation 14 imposes a limit on any borrowing. It is not merely "a liberty or permission" to borrow as the Board has held. In our judgment, it follows from section 44 and regulation 14 that it is ultra vires for the HCU to borrow in excess of the maximum limit fixed pursuant to that regulation.

141. Further and as we have seen, the preservation of the ultra vires doctrine serves an important economic purpose that is well illustrated by the circumstances of this case. As explained in section (C) of this judgment, it provides a measure of protection for the members and intra vires creditors of such a society against inappropriate and unauthorised risk taking by the officers of the society. Indeed, as respects members, the passage cited by the Board from Professor Laski's article in the Harvard Law Review starts by observing in relation to the ultra vires doctrine that:

> "What is to be said for it? This, of a certainty, that it is in some wise needful to protect the corporators." (p 410)

142. We would also mention that the Report of Sir Anthony Colman reached the conclusion that loans to non-members without the Commission's approval were ultra vires and irrecoverable (Sir Anthony's Report, paras C23, M1(xvii)).

(C) An ultra vires lender (by which we mean a lender in respect of a loan which is ultra vires the borrower) is not left without a remedy: he has a claim in restitution, which prevents windfall gains by members from the ultra vires transaction

(1) the legislature did not need to specify the consequences of ultra vires loans because they are governed by the general law and the Act and Regulations should be interpreted on this basis

143. In our judgment, the Board falls into error in holding that the legislature has not made clear the legal consequences of ultra vires borrowing. As we shall show, the legislature did not have to do this because the consequences were governed by the general law, which it follows the legislature intended should apply. Any application of the doctrine of illegality, as reflected in the relatively recent decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, is excluded because the statute has by implication provided for the consequences of the ultra vires acts, even if (contrary to our view) those acts were also unlawful.

144. We consider that regulation 14 must therefore be interpreted against the context of the general law as it then stood (on the assumption that the Board is making that, in the absence of any contention that the law of Trinidad and Tobago is different from that of England Wales, the law of Trinidad and Tobago is be interpreted in accordance with that law). We note later in this judgment that the decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398 dealt comprehensively with lenders' remedies in relation to the type of situation with which this appeal is concerned. The Parliament of Trinidad and Tobago enacted the Act against the context of this by then well-established authority, and the courts should give effect to its evident intention that the consequences of excessive borrowing by a society should be governed by the general law relating to ultra vires transactions. Regulation 14 should be interpreted accordingly.

145. The Board has taken no adequate account of the authorities to which we will come in a moment. We do not agree with the Board that the doctrine of ultra vires is in the circumstances of this case, where the issue is one of remedies, "a legal sledgehammer" or "a blunt and unsatisfactory instrument" (see paras 26 and 43 above). On one view and as we will show, it produces a more equitable result than that obtained by applying the doctrine of illegality.

(2) it is not appropriate to describe a transaction which is outside the statutory powers of an entity as illegal

146. Nor do we accept that an ultra vires transaction is properly described (without more) as illegal. Apart from the holdings of Lord Cairns LC and Lord Selborne in *Ashbury Railway Carriage and Iron Co Ltd v Riche* (see paras 34 and 35 above), there is other authority that it is not appropriate to focus on the description "illegal". Those authorities include *Sinclair v Brougham* which explains the legal consequences of an ultra vires transaction. If, on the other hand, a transaction was illegal, then, under the law as it stood, money paid and property transferred under that transaction was in general irrecoverable.

147. Our view on this point is supported by Professor Andrew Burgess of the University of the West Indies (and who has since 2019 been a Justice of the Caribbean Court of Justice). He wrote in *Commonwealth Caribbean Company Law* (Routledge, 2013):

> "One aspect of the ultra vires doctrine which bears emphasis is that ultra vires transactions are not illegal transactions: they are transactions made by the company without the requisite capacity. This was stressed by Lord Cairns LC in the *Ashbury Railway Carriage* case …" (Chapter 6)

148. As Lord Cairns said:

> "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract." (p 672)

149. *Sinclair v Brougham* [1914] AC 398 concerned deposits received by a building society which was carrying on business, like the HCU, well beyond its objective of mutual benefit. This aspect of the business was held to be ultra vires and the question was how the deposits should rank if at all in the society's winding up.

150. In *Sinclair v Brougham*, the real issue was the priority in which claims against the building society should be met. Clearly the ultra vires lender or depositor could not rely on any security, but it would have a claim in the liquidation of the society for money actually used by the society for an intra vires purpose, such as paying legitimate creditors. The question was what to do with the balance of the claim of the lender on

the basis that it would be unfair simply to create a windfall for the members. Various solutions were suggested in the High Court, by Neville J, and in the Court of Appeal (by all three judges, Fletcher Moulton LJ dissenting). But the House of Lords adopted its own solution, namely that the intra vires creditors should be paid first, and then the members to the extent of their interest in the society and that any surplus should be shared pari passu between the members and the creditors. Such an order was also made in subsequent cases, for instance, *In re Jon Beauforte (London) Ltd* [1953] Ch 131.

151. It is to be noted that the House of Lords did not take the view that contracts made in the course of the ultra vires business were necessarily unlawful. If they had, no question of determining the order of priority would have arisen. The loans would have been illegal and void and no moneys could have been recovered under them under the law as it then stood. If, before the decision in *Sinclair v Brougham*, there was any doubt about the proposition that any contract which was ultra vires was not for that reason and without more illegal, it was most certainly dispelled by this decision, and no one has doubted the proposition since then.

152. We of course recognise that the House of Lords has since departed from aspects of the reasoning in *Sinclair v Brougham*. Indeed, some of that reasoning was later described as bewildering because no single ratio decidendi could be identified. Certainly, welcome clarification was provided in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. There the House of Lords explained that, in *Sinclair v Brougham*, the depositors should have had a personal claim to recover the balance of their moneys on the basis of a total failure of consideration. But they did not have an equitable proprietary claim to these moneys; nor did they have a claim to these moneys based on any implied contract. Further, they had no personal claim to these moneys in equity. Lord Browne-Wilkinson, giving the leading judgment for the majority, summarised the position in these terms:

> "If *Sinclair v Brougham*, in both its aspects, is overruled the law can be established in accordance with principle and commercial common sense: a claimant for restitution of moneys paid under an ultra vires, and therefore void, contract has a personal action at law to recover the moneys paid as on a total failure of consideration; he will not have an equitable proprietary claim which gives him either rights against third parties or priority in an insolvency; nor will he have a personal claim in equity, since the recipient is not a trustee." (p 714)

153. We would emphasise that Lord Browne-Wilkinson referred to the transaction as void, not illegal. If it had been illegal, no restitutionary claim would have been available to the lender because, under the law as it then stood, that would have involved the enforcement of an illegal transaction.

154. The Court of Appeal in England and Wales has also considered the effect of *Westdeutsche* on *Sinclair v Brougham* and reiterated that the fact that a contract of loan is ultra vires does not prevent the lender from pursuing a restitutionary claim: *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA 79; [2012] QB 549, at paras 87-88 per Aikens LJ, at para 132 per Etherton LJ and at para 155 per Pill LJ. We are not concerned to consider the priority of claimants inter se, and the law may yet have to be refined on that. It is sufficient for our purposes that there is a remedy. The lender is not excluded from making a claim against the society simply because the loan was ultra vires. That is to confuse an ultra vires transaction and (under the former law) an illegal one.

155. In summary, we find ourselves in disagreement with the Board. In particular, it is important to take full account of the remedies which were (and are) available to a lender in a case such as this. We are of the view that under the general law the lender's security would not be enforceable, but he would have an unsecured claim.

156. We are also concerned that the Board's approach is inconsistent with the statutory policy behind regulation 14. We have described this earlier in our judgment as a recognition that the society exists for mutual benefit and that the members are protected. The general law has never been that an ultra vires lender has no possibility of recovering any of his money. Indeed, if the Board is correct, far from the members not gaining any windfall, they are at risk of suffering a significant detriment, as depositors, in that the ultra vires lender will, subject to the rules applicable on insolvency, be paid out in full ahead of them. We have described the result of the general law as more equitable and more balanced as between depositors and the lenders, as we believe it to be.

Conclusions

157. To recap, we consider that regulation 14 goes to a society's capacity to borrow. The capacity of the HCU to receive loans and deposits is conferred by section 44 of the Act subject to the Regulations and any relevant Bye-Laws. As we have seen, regulation 14 is specifically directed to this issue and, in paragraph (1), requires the society to fix, at a general meeting, the maximum liability it may incur in respect of deposits or loans (and whether from members or non-members); in paragraph (2), makes this subject to

the approval of the Commissioner (who may at any time reduce it); and in paragraph (3), provides that no society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner, and in this way emphasises that it is not to be exceeded. As the Court of Appeal observed, the Act and the Regulations emphatically fetter the maximum liability the society may incur by restricting it to that approved by the Commissioner, and they do so in the context of a regulatory framework in which wide powers are conferred upon the Commissioner to ensure that the society is properly and prudently managed.

158. Further, we consider that the consequences of ultra vires lending are dealt with by the general law and that this is the law which the Parliament of Trinidad and Tobago intended should be applied, and not the law of illegality.

159. Accordingly, we would have dismissed this appeal.