



PRESS SUMMARY

26 May 2022

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)

[2022] UKPC 24

On appeal from the Court of Appeal of the Republic of Trinidad and Tobago

JUSTICES: Lord Lloyd-Jones, Lady Arden, Lord Kitchin, Lord Leggatt, Lord Stephens

BACKGROUND TO THE APPEAL

The question on this appeal is whether a secured loan made to the Hindu Credit Union Cooperative Society Limited can be enforced by the lender. The credit union is a co-operative society registered under the Co-Operative Societies Act 1971 (“the Act”) and governed by the Co-Operative Societies Regulations made under the Act. Regulation 14 provides that: “(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 ... (3) No society shall receive loans or deposits in excess of the maximum liability approved or fixed by the Commissioner”.

SR Projects Ltd (the “lender”) made a loan of some US\$2.8m to the credit union in 2004, secured by a promissory note and a deed of mortgage over certain property owned by the credit union. The credit union became insolvent and in October 2008 the Commissioner for Co-Operative Development ordered that it be wound up and appointed a liquidator. Most of the loan, and interest accrued on it, has not been repaid. The President of Trinidad and Tobago appointed a retired judge from the UK to investigate the causes of the credit union’s collapse. The liabilities of the credit union far exceed its assets.

The liquidator applied to the High Court for declarations that the loan and the security are void and unenforceable on the grounds that: (i) when the loan was made and the security given, the maximum liability of the credit union approved by the Commissioner in respect of loans or deposits had been exceeded; and (ii) the credit union had no legal power to receive any loan in excess of its maximum liability or, alternatively, acted unlawfully in doing so.

The High Court granted the declarations sought and the Court of Appeal dismissed the lender’s appeal. The lender now appeals to the JCPC.

JUDGMENT

By a majority of 3 to 2, the Board allows the appeal. Lord Leggatt (with whom Lord Lloyd-Jones and Lord Stephens agree) gives the majority judgment. Lady Arden and Lord Kitchin give a dissenting judgment.

REASONS FOR THE JUDGMENT

The issues raised are: (1) whether, when the loan was made, the maximum liability approved by the Commissioner under regulation 14 had already been exceeded; (2) if so, whether it was beyond the powers of the credit union (*ultra vires*) to receive the loan with the result that the loan and security are void; and (3) alternatively, if it was unlawful for the credit union to receive the loan (rather than being beyond its powers), what is the legal consequence of the illegality?

Issue 1: When the loan was made, had the maximum liability approved by the Commissioner under regulation 14 already been exceeded?

The Board unanimously upholds the findings of the courts below that, at the time when the loan was made, the maximum liability approved by the Commissioner was TT\$100m, which applied to the total of both loans and deposits [8-18]. As the liabilities of the credit union at that time far exceeded this figure, the receipt of the loan was contrary to regulation 14(3) [19].

Issue 2: Was the receipt of the loan beyond the powers of (ultra vires) the credit union?

The next issue is whether regulation 14(3) is to be interpreted as (a) a restriction on the powers of a co-operative society to borrow money or (b) as a prohibition against borrowing in excess of the maximum liability which makes it against the law to do so. The distinction between whether it is beyond the legal powers of an entity (*ultra vires*) to enter into a transaction or whether it is illegal to do so is important because, depending on the answer, different legal consequences may follow [23].

In the majority judgment, Lord Leggatt considers the history and current scope of the *ultra vires* doctrine [28-48], and the current law of illegality following *Patel v Mirza* [2016] UKSC 42 which has been adopted by the Trinidad and Tobago Court of Appeal [49-55]. Where a transaction is beyond the powers of an entity (*ultra vires*), the transaction is void. He concludes that the doctrine of illegality allows a more flexible approach which is more likely to achieve practically just results than the doctrine of *ultra vires* [52-56]. It is reasonable to presume, unless clearly shown otherwise, that the legislature did not intend to nullify transactions without regard to whether this is otherwise provided by law or is in the public interest. Therefore, if a provision can be interpreted as a prohibition rather than a restriction on the powers of a corporation, such an interpretation is in general to be preferred [57].

Lord Leggatt further concludes that it is plain from the word “shall” in regulation 14(3), as well as from consideration of the regulatory regime as a whole - including the regulatory objectives of the Act, the Regulations and the credit union’s own bye-laws - that regulation 14(3) is a prohibition against borrowing in excess of the maximum liability and not a restriction on the powers of a co-operative society [59-72]. Thus, although in receiving the loan the credit union breached regulation 14(3) and acted illegally, it did not act outside its legal powers and therefore the loan and the security for it were not *ultra vires* and void [73].

Issue 3: What is the legal consequence of unlawful borrowing?

There is no provision of the Act or Regulations which states or implies that a breach of either the Act or Regulations generally, or Regulation 14(3) specifically, should make any contract

which gives rise to the breach void or unenforceable. Nor can this be inferred from the purpose of the legislation. Considering the aims of the Act and Regulations, and the potentially unfair and injurious consequences of such a result, treating such contracts as void or unenforceable would be inconsistent with the legislative intention [74-82]. Further, applying the criteria identified in *Patel v Mirza*, denying the lender's claim to enforce the loan contract would not be a proportionate response to the breach in circumstances where the lender did not itself act illegally or knowingly participate in the breach [83-88]. The lender is thus entitled to enforce the loan agreement and security, subject now to the rules applicable on insolvency [89].

Lady Arden and Lord Kitchin, dissenting on Issues 2 and 3, agree with the trial judge and the Court of Appeal that Regulation 14 limited the capacity of the credit union to borrow [94]. The Board has given insufficient weight to the statutory scheme. In particular, Regulation 14 has to be read with section 44 of the Act, which confers the power to borrow "subject to the regulations" [122-140]. The Parliament of Trinidad and Tobago must therefore have intended that if the borrowing powers were exceeded, the consequences of an ultra vires transaction would apply [144]. The purpose of the doctrine of ultra vires is to protect members and depositors against inappropriate and unauthorised risk-taking by the management [112, 141]. Under that doctrine the interests of the depositors and members are balanced with those of the lender. The depositors and members would receive a measure of protection by the avoidance of both the loan and the security, but the lender is not left without a remedy because he has an unsecured restitutionary claim for the monies lent [143-156].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at:

www.jcpc.uk/decided-cases/index.html.