HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 197 of 1994

HON. CHRISTOPHER COLUMBUS ABE

-v-

MINISTER OF FINANCE AND ATTORNEY GENERAL

High Court of Solomon Islands
(Muria, CJ.)

Hearing: 29 September 1994
Judgment: 4 October 1994

C. Abe Applicant
Minister of Finance 1st Respondent
Attorney General 2nd Respondent

MURIA CJ: This case is concerned with the alleged claim by the applicant that the Government had borrowed money in excess of the legal limits laid down by sections 4 and 5 of the 1994 Appropriation Act 1993 (No. 7 of 1993) ("the Appropriation Act"). He consequently sought a number of declarations from the Court. These are:

1) *a declaration that the Government has contravened the provisions of Section 5(3) of the 1994 Appropriation Act 1993 hereinafter referred to as "the Act") by borrowing sums in excess of the amounts stipulated in the first column of the Second Schedule to the Act, without first column of the Second Schedule to the Act for the purposes specified in the second column of the Second Schedule to the Act, without first obtaining the requisite further authority of Parliament;*

2) *consequently upon the grant of the declaration sought in (1) above, a declaration that the Government has contravened Section 105 (3) of the Constitution by borrowing money or entering into a guarantee involving financial liability in defiance of the provisions prescribed by Parliament in Section (3) of the Act;*

3) *a declaration that upon the proper construction of Section 4 of the Act, the Government's borrowing powers pursuant to the provisions thereof is limited thereby (and in the absence of supplementary legislation) to an aggregate sum of Eighteen Million Solomon Island dollars ($18,000,000) for the whole of the 1994 fiscal year;*

4) *consequently upon the grant of the declaration sought in (3) above, a declaration that the Government has contravened the provisions of Sections 4 and 5 of the Act by borrowing sums in excess of the aggregate amount of Thirty-Nine Million Solomon Island dollars (SI$39,000,000), which amount represents the ceiling fixed by Parliament for Government borrowing from domestic sources;*

5) *consequently upon the grant of the declarations sought in (1), (2), (3) and (4) above, a declaration that any further borrowing by the Government and/or the First Respondent will be ultra vires the Act and Section 105 (3) of the Constitution;*

6) *a declaration that the First Respondent has breached his constitutional and/or statutory and/or fiduciary obligations and has otherwise acted unlawfully by permitting and/or procuring the Government to borrow funds exceeding the prescribed amounts in violation of the Act and the Constitution;*

The brief background to the case is as follows. On 17 December 1993, the National Parliament passed the 1994 Appropriation Act 1993 which appropriated the sum of $298,140,998.00 to be applied for the service of the year ending 31 December 1994. Of that sum, $204,620,725 is for recurrent expenditure while $93,520,273 is for development expenditure. Parliament has also authorised the Government under the Act to borrow money by way of overdraft and advances not exceeding $18,000,000. Further Parliament has authorised the Government to borrow the maximum of $23,000,000 for development projects in natural resources, economic infrastructure and human resources and the maximum of $21,000,000 for locally financing of development projects and deficits the sources of which comes from sale of Development Bonds, Treasury Bills, Saving Certificate and term loans from domestic financial institutions and NPF.

It is necessary, before I proceed further, to set out the relevant provisions of the law relied on in this case. These are section 105(3) of the Constitution and sections 4 and 5 of the Appropriation Act. Section 105(3) of the Condition is in the following terms:

> *"105 (3) The Government shall not borrow money or enter into a guarantee involving any financial liability except in accordance with such provisions as may be prescribed by Parliament."*

I shall set out the provisions sections 4 and 5 of the Appropriation Act a little later in this judgement.

The applicant had taken the Court into an examination of the various constitutional and statutory provisions regarding the sources and the extent of the Government's power to borrow money. I am grateful to the applicant for doing so. However, the question that the Court must answer, at the end of the day, is: Has the Government exceeded its domestic borrowing limits as provided by law? The applicant says that the Government has exceeded the limits set by law while the respondents say, they have not.

With that question in mind, I now turn to consider the provisions of the laws referred to. Section 105(3) of the Constitution, says the applicant, is a constitutional prohibition on Government borrowing without authority from Parliament. I agree to that submission as it is clearly supported by the language of the provision which simply re-enforces the aged-old constitutional principle that Parliament retains the power to authorise the raising and expenditure of public finance. See *AG -v- Wilts United Dairies Ltd* [1921] 38 TLR 884, 886 where Lord Atkin stated:

> *"No power to make a charge upon the subject for the use of the Crown could arise except by virtue of the prerogative or by a statue, and the alleged right under the prerogative was disposed of finally by the Bill of Rights... Though*

> *the attention of our ancestors was directed especially to abuses of the prerogative, there can be no doubt that this statute [i.e. the Bill of Rights] declares the law that no money shall be levied for or to the use of the Crown except by grant of Parliament. We know how strictly Parliament has maintained this right - and, in particular, how jealously the House of Commons has asserted its predominance in the power of raising money. An elaborate custom of Parliament has prevailed by which money for the service of the Crown is only granted at the request of the Crown made by a responsible Minister and assented to by a resolution of the House in Committee."*

As such any borrowing by the Government of money for its use must be authorised by Parliament. Expressed in another ways, as the learned Attorney General has submitted, it enables Parliament to control Government financing.

On the same constitutional principle, reference has been made to section 209(1) of the Constitution of PNG and the case of the *SCR No. 1 of 1990 (Re Provincial Grants)* [1990] PNGLR 532 which concerned that provision section 209(1) of the PNG Constitution provides as follows:

> *"209. (1) Notwithstanding anything in this Constitution, the raising and expenditure of finance by the National Government, including the imposition of taxation and the raising of loans, is subject to authorisation and control by the Parliament, and shall be regulated by an Act of Parliament."*

The Supreme Court of Papua New Guinea observed that provision as vesting the control over public finances in Parliament. Kapi, DCJ in his separate judgement had this to say on the same Constitutional provision:

> *"The whole of the raising and expenditure of finance 'is subject to authorisation control by the Parliament.' To put it simply, the National Government cannot raise or spend any money under any law unless it is authorised by Parliament under Section 209 (1) of the Constitution."*

The point has also been stated in *Halsbury's Laws of England*, Vol. 8 4 Ed, page 832, paragraph 1368 where it is stated that:

> *"Parliament control over the revenue is threefold. It is exercised in respect of (1) the raising of revenue (by taxation or borrowing); (2) its expenditure; and (3) the audit of public accounts."*

There are numerous other authorities on this point and it is not necessary for me to dwell in them. See G.C. Thornton, *Legislative Drafting*, Butterworths, London 1987, page 218; Professor Cheryl Sanders, *"Government Borrowing in Australia"* (1989) 17 Melbourne University Law Review, 187; and S.M. Mehta, *A Commentary on Indian Constitutional Law* (1990), 2nd ed. page 373.

Like other common law countries that follow the British system of government, Solomon Islands had made certain that the time honoured principle of Parliamentary supremacy is recognised under the Constitution and the words in section 105(3) have clearly done that.

If I may, I should like to mention briefly the other two Acts of Parliament relied on by the applicant. These are the Public Finance and Audit Act, 1978 and the Government Loans and Securities Act 1979.

The Public Finance and Audit Act is an Act to provide for, among other things, the control and management of the public finance of Solomon Islands, the collection, issue and payment of public moneys and the regulation of public debt. For our present purpose, section 27 of the Act is relevant. It provides as follows:

> *"27. (1) The Government shall not borrow money except in accordance with the provisions of an Act or resolution of Parliament.*
>
> *(2) Any moneys borrowed under the provisions of subsection (1) shall be paid into and form part of the Consolidated Fund.*
>
> *(3) Under this section the borrowing of money by way of advance from a bank or overseas agents may be by fluctuating overdraft."*

As had been rightly pointed out by the applicant, that section is simply echoing the constitutional principle of Parliamentary control over the Government's finances. It will be noted that the section restricts the Government's borrowing power which must be "in accordance with the provisions of an Act or resolution of Parliament."

I do not say that the words "prescribed by Parliament" includes "resolution of Parliament." That must await another day. What the Act does is clearly to regulate the exercise of the control as provided by section 105(3) of the Constitution.

As to the Government Loans and Securities Act, 1979, that Act is to provide for the raising of loans and issue of securities both locally and overseas by the Government and for other incidental matters. For the present proceedings, sections 3 and 4 of that Act are relevant:

> *"3. (1) The Minister is hereby empowered, subject to the provisions of this Act, to raise internally or externally loans of such sums of money as Parliament may from time to time authorise by Act or resolution together with such further sums as may be required to defray the expenses of issue.*
>
> *(2) All moneys raised under the authority of this Act shall be applied for such purposes as shall be specified by the resolution authorising the raising of such moneys."*

Section 4 then specifies the methods of raising loans. It provides:

> *"4. (1) Loans may be raised under the provisions of this Act in any of the following ways -*
>
> *(a) by the creation and issue of registered or inscribed stock which shall be known as Solomon Islands stock;*
>
> *(b) by the issue of securities in the form of bonds or savings certificates;*

(c) by the issue of Treasury Bills; or

(d) in such other manner as the Minister may, in consultation any lender, decide.

(2) The Minister in respect of any loan may direct that such loan be raised by both the issue of inscribed stock and the issue of bonds.

By virtue of section 5, the loans thus raised are charged on the consolidated Fund.

Once again Parliament has seen it fit that in order to regulate the exercise of its Parliamentary control over public finance, especially where the Government through the Minister of Finance is required to raise money through loans and thereby incur debt on the security of the revenue of the Government or the Consolidated Fund, it is necessary to pass an Act such as this.

I now turn to the 1994 Appropriation Act 1993 (No. 7 of 1993) upon which the present action is brought. That Act authorises the issue from the Consolidated Fund the sum of $298,140,998 to be applied to the service of the year ending 31 December 1994. That sum shall be appropriated for the supply of the Heads in the Recurrent and Development Expenditure as specified in the First Schedule.

Sections 4 and 5 are the provisions of contentions in these proceedings and I shall set them out in full.

"4. The Government may, at any time or times not later than 31st December 1994, borrow by way of overdraft and advances within or outside Solomon Islands or partly within, any sum not exceeding the whole eighteen million on such terms and conditions as the Minister of Finance may deem expedient.

5. (1) The Government may, in addition to its borrowings under the provisions of section 4, borrow or enter into agreements to borrow on such terms and conditions as it may determine amounts up to such sums of money for such purposes and from such sources as are respectively specified in the first, second and third columns of the Second Schedule."

(2) No amounts may be borrowed under subsection (1) except in accordance with an agreement under that subsection entered into on or before 31st December 1994.

(3) The Government shall not, without first obtaining further authority of Parliament borrow for the purposes described thereto any sum of sums in excess of the figure shown in the first column in the Second Schedule.

(4) The Minister shall report to Parliament at the next meeting following such borrowing or agreement any borrowing or the making of any agreement to borrow money under subsection (1).

I shall also set out the Second Schedule referred to in section 5.

SECOND SCHEDULE
(Section 5).

COLUMN 1 MAXIMUM Borrowings	COLUMN 2 Use of Funds	COLUMN 3 Source of Funds
23,000,000	Development projects in natural resources, economic infrastructures.	Asian Development Bank (ADB), foreign multi-lateral and bilateral financing and sources and other foreign financial institutions.
21,000,000	Local financing of development projects deficit.	Development Bonds, Treasury bills, Savings Certificate and term loans from domestic financial institutions and National Provident Fund.

The validity of the Appropriation Act is not in issue here nor is there any challenge to the form of setting out all the items of the appropriation in a schedule which has been the practice used in the drafting of appropriation bills in this country. Equally there is no dispute that for the supply of the Heads specified in the First Schedule (for the Recurrent and Development Expenditures) Parliament had appropriated $298,140,998 which must be issued out of the Consolidated Fund.

What is this Consolidated Fund? Section 2 of the Public Finance and Audit Act defines "Consolidated Fund" to mean the Consolidated Fund as established by section 100 of the Constitution. Turning then to the Constitution we see that section 100(1) provides as follows:

> *"100. (1) All revenues or other moneys raised or received by or for the purposes of the Government (not being revenues or other moneys that are payable by or under any law into some other fund established for any specific purpose or that may, by or under any law, be retained by the authority that received them for the purpose of defraying the expenses of that authority) shall be paid into and form one Consolidated Fund.*
>
> *(2) Parliament may make provision for the establishment of Special Funds, which shall not form part of the Consolidated Fund."*

It can be seen that the Consolidated Fund is the common basket into which "all revenues or other moneys raised ... for the purposes of the Government" are paid and from which money is to be drawn not only for the supply of the Heads in the First Schedule to the Appropriation Act but also *"for the purposes of the Government"* as provided by section 100 of the Constitution. It is important to note that it is section

100 which is the foundation of the supremacy of the Parliament to appropriate money which is to be issued out of the Consolidated Fund.

One of the means by which revenue is raised for the purposes of the Government is by borrowing. We can see that subsection (2) of section 27 of the Public Finance and Audit Act provides that moneys borrowed must be paid into and form part of the Consolidated Fund. This provision is simply re-iterating what section 100(1) of the Constitution provides. But it is this power to borrow moneys that the applicant is now challenging and to which I shall now turn.

The applicant's case is not that the Government has no power to borrow, for clearly the Government has that power. The applicant is here saying, that yes, apart from the moneys appropriated by Parliament, the Government has the power to borrow by way of overdraft and advances the total sum of which is $18 million under section 4 and in addition the Government can borrow the sum of $21 million for local financing, development projects and deficit under section 5 of the Appropriation Act. But, the applicant says, in this case the Government had exceeded those limits without Parliamentary sanctions and as such those borrowings were unlawful.

It is worth noting the difference between the two provisions. Section 4 speaks of the Government having power to borrow at any times not later than 31 December 1994 by way of overdraft and advances any sum "not exceeding" $18 million. There is no provision under that section which allows the Government to borrow in excess of the $18 million limit. Whereas under section 5(1) authorises the Government to borrow "up to" the sum of $21 million and it is permitted to borrow in excess provided the authority of Parliament is first obtained. No purpose has been specified for the borrowing under section 4, whereas the borrowing under section 5 has specific purposes which are "Local financing of development projects deficit."

It has been submitted by the applicant that the words "Local financing of development projects deficit" do not clearly show whether the use of the funds is intended for local financing of development projects deficit or local financing of development projects 'and' deficit. The applicant submitted that "deficit" is intended to be a separate item under the 'Use of Funds' in Column 2 and as such the word "and" had been omitted by the draftsman. The $21,000,000 says the applicant should be for "Local financing of development projects and deficit."

I am of the view that the use of the $21,000,000 as presently provided is ambiguous. The Court must therefore construe the words used so as to ascertain what Parliament had intended. But if in so doing the result is an absurdity, as in this case, then the Court is justified in going outside the words used by the statute in order to ascertain the intention of Parliament particularly here where it is plainly obvious that a drafting omission had been made. On this approach of statutory interpretation Lord Scarman had this to say in *Stock -v- Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 238; [1978] 1 All ER 948 at 955:

> *"If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the stature, one can see that Parliament must have made a drafting mistake. If words 'have been inadvertently used,' it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated.... This is an acceptable exception to the general rule that plain language excludes a consideration of anomalies, ie mischievous or absurd*

consequences ... but mere 'manifest absurdity' is not enough: it must be an error (of commission or omission) which in its context defeats the intention of the Act."

Lord Denning robustly put it this way in *Camden London Borough Council -v- Post Office* [1977] 1 WLR 892 at 897 when construing the words used in paragraph 8(1) in the Schedule to the General Rate Act, 1967:

"But that gives rise to such an absurd result that there must be some mistake in the drafting. Such mistakes do occur from time to time: and when they occur the courts must do what they can to put things right. I think the courts should correct these words ...."

In the present case I feel the court also must, as a matter of duty, draw the intention of Parliament from the ambiguous words used by having regard to materials that are potentially of use in ascertaining that intention. It would be inexcusable if the court were to ignore such sources which may assist in finding the intention behind the words used.

In this case the court has the benefit of consulting similar provisions in the 1991 and 1992 Appropriation Acts. In both Acts the use of the funds under Column 2 were for "Local financing of development projects and deficit" (underlining added). In this case I hold that the $21,000,000 mentioned in the Second Schedule to the 1994 Appropriation Act should be for "Local financing development projects and deficit."

It should also be noted that when one considers sections 4 and 5 of the Appropriation Act along with the Constitutional provisions dealing with finance, in particular sections 100, 103 and 105 of the Constitution, the two sections of the Appropriation Act are clearly designed to cater for two separate borrowing purposes.

To return to section 4 of the Appropriation Act, it must be accepted that the authority to borrow money under this section is a general one. This general authority in my view is essential to enable the Government to incur expenditure by borrowing money without the need to wait for Parliamentary approval for any purpose for which no sum has been appropriated or for a purpose in respect of which money has been appropriated but has been found to be inadequate. The control, however, which Parliament has put on this general authority to borrow is that it had fixed in advance the limit of such borrowing, being $18,000,000 in this case.

The constitutional basis for the enactment of the provision such as section 4 of the Appropriation Act can be found in section 103 (2) and (3) of the Constitution which authorise the Minister of Finance to incur expenditure for the purposes mentioned. The Minister is required to include the amount expended in a Supplementary Appropriation Bill to be presented to Parliament. Section 103 (2) and (3) provide as follows:

"103. (1) .....

(2) Where in respect of any financial year the Minister is satisfied that an urgent and unforeseen need has arisen to authorise for any purpose issues from the Consolidated Fund for expenditure in excess of the sum appropriated for that purpose by an Appropriation Act, or for a purpose for which no sum has been

so appropriated, he may, subject to the provisions of any law or regulations for the time being in force in that regard, authorise, with the prior approval of the Cabinet, such issues by warrant and shall include such amount in a Supplementary Appropriation Bill for appropriation at the meeting of Parliament next following the date on which the warrant was issued:

Provided that if there shall be no further meeting in the same financial year, the Bill may be deferred to any meeting held before the end of the following financial years

(3) No expenditure shall be authorised or incurred under the preceding subsection unless Parliament has specified in advance of the expenditure that may be incurred under that subsection."

I now turn to consider the question: Has the Government borrowed money in excess of the amount of $18,000,000 under section 4 of the Appropriation Act in this case. This is largely a question of fact. However, a question of law may arise as to whether certain of the Government's transactions can be termed as "borrowing" or "Loan" within the meanings of the various Acts which empower the Government to borrow or obtain loans.

The evidence produced by the applicant are contained in his affidavits filed on 18 July 1994 and 12 September 1994 in support of his application. According to the applicant, the Government had borrowed a total of $51,981,610.42 which, if interest charged by the Central Bank of $1,134,273.33 is excluded, would come to $50,847,337.09 which the applicant says it is beyond the limit of $18,000,000 fixed by Parliament under section 4 of the Appropriation Act. This amount says the applicant can be obtained by simply adding the amounts shown in Column 3 of the "Statement of SIG Overdraft Account 1010 003" which is exhibited to his affidavit of 12 September 1994 and marked "CCA1".

In addition to the $50,847,337.09 the applicant says that the ANZ Bank had also lent money to the Government by way of overdraft in the sum of $838,518.82. This was confirmed by the First Respondent in his affidavit of 17 August 1994. The total amount borrowed by the Government by way of overdraft is $51,686,855.91 says the applicant. This is $33,685,855.91 more than the $18,000,000.00 limit and this is on overdraft alone.

As to the Government's borrowing by way of advances also under section 4, the applicant says that the Government has borrowed up to 5 August 1994 the sum of $14,552,052.48. According to the applicant this sum can be obtained by adding the amounts in Column 3 of the "Statement of SIG Advance Account 1010 001" referred to in the applicant's affidavit of 12 September 1994 and marked "CCA2".

Another borrowing by the Government under section 4 is the loan from NPF in the sum of $9,870,000.00 for the re-purchase of the former State House. It is argued by the applicant, that this loan is not for the purpose of "Local financing of development projects and deficit" and cannot be a borrowing under section 5(1) of the Act.

The total loan, says the applicant, obtained by the Government in the period from 1 January 1994 to 5 August 1994 is therefore $75,269,389.57 which is more than three times than that which the Government is lawfully authorised to borrow under section 4 of the Appropriation Act.

The first respondent, agrees that the NPF loan is a loan obtained under section 4, although the amount of that loan is said to be $8.9 million. Mr. Leslie Teama who is the General Manager of the NPF deposed that the loan obtained by the Government on 19 May 1994 to re purchase the former State House is $9,870,000.00.

It is therefore obvious that the $8.9 million is the balance remaining of that loan after the Government had made some repayments. But the loan is determined at the time the money is advanced and not by the balance outstanding. There can be no doubt that in this case, the Government has borrowed $9,870,000.00 from NPF on 19 May 1994 by way of advance for the re-purchase of the former State House. This is a borrowing authorised by section 4 of the Appropriation Act.

The first respondent strongly disputes that the total loan under "SIG Advance Account 1010 - 001" amounts to $14,552,052.48. He further disputes the correctness of the applicant's argument relating to the $50,847,337.09 which the applicant says is the total loan as shown in the "Statement of SIG Overdraft Account 1010 003." The first respondent argued that it would be wrong to simply add up all the amounts in Column 3 of both SIG Advance and SIG Overdraft Accounts and say that they constitute the loan obtained by the Government.

The bank managers of NBSI, Westpac and ANZ and NPF General Manager have each filed affidavit in this action and each have set out their financial dealings with the Government. The Governor of Central Bank of Solomon Islands has also filed an affidavit which I consider it extremely helpful in setting out the Government's financial situation not only with CBSI but with the other commercial banks and financial institutions as well.

The argument by the applicant is that each of the transactions recorded in the two Accounts is a borrowing and as such the Court must looked at the legal nature of the liability created by each of those borrowings. However, this, really depends on the question whether or not each of those transactions is a "borrowing" for the purpose of section 4 of the Appropriation Act. The burden of establishing that rests with the applicant.

In the present case, the applicant simply argued that each of the transactions in the two Accounts is a borrowing and asks the Court to accept that the sum total of all those transactions constituted the total borrowings by the Government both by way of Advances and Overdrafts. I do not think this Court should simply do that.

On the other hand, the Governor of Central Bank has clearly outlined the Government's position with regard to its borrowing both by way of Advances and Overdraft. In his affidavit of 25 August 1994 the Governor deposed that the Government's Gross Domestic Debt from January 1994 to 3 August 1994 is $42.2 million which comprises as follows:

Central Bank of Solomon Islands	$1.5 m
Commercial Banks	22.8 m

National Provident Fund & Financial Institution	13.7 m
Public	4.2 m
	$42.2 m

When one turns to Exhibit "RNHI" and "RNHII" of the Governor's affidavit, it can be clearly seen how the amount $42.2 million is arrived at. Of that amount, $10.9 million represents loans and advances while $31.3 million represents the amount raised or borrowed through the issue of Treasury Bills, Development Bonds and Treasury Bonds. It will be noted that the $42.2 million is expressed as the "Gross Domestic Debt" from the beginning of the year to 3 August 1994.

The annexure "AN1" exhibited to the first respondent's affidavit is a letter dated 25 August 1994 from the Governor of Central Bank to the first respondent confirming the "SIG Domestic Borrowing." This letter set out the "total new borrowings by SIG from January 1, 1994 to August 3, 1994." It shows that the Government's "new borrowings" by way of Loans and Advances is $10.900 millions and "new borrowings" through the issue of Treasury Bills, Development Bonds and Treasury Bonds in the sum of $31.072 million, bringing the "total new borrowings" to $41.972 million. These "balances have been re-confirmed with the respective banks today," added the Governor.

On the evidence before the Court the Government has clearly borrowed money by way of Overdraft and advances pursuant to section 4 of the Appropriation Act. I accept the figures put by the first respondent and supported by the Governor of CBSI except for the figure representing the term loan from NPF. That loan is for $9.870 million which is the amount of the loan obtained by the Government on 19 May 1994. The total borrowing by the Government under section 4 must therefore be $11.898 which is made up as follows:

CBSI Advances & Overdraft	$ 1.528 m
ANZ Bank " "	.500 m
National Provident Fund	9.870 m
	$11.898

As to the borrowing under section 5(1) of the Appropriation Act, the evidence produced by the Governor of the CBSI is clearly one that must be accepted. If for any reason, the CBSI is by virtue of s.27(1)(d) of Central Bank of Solomon Islands Act, 1976 "a banker to the Government" and is authorised by s.30(h) of that Act" to undertake for the Government, the issue, placement and service of any Government securities and act as registrar of such issues of Government securities." See also section 25 of the Government Loans and Securities Act which empowers the CBSI to repay the principal moneys represented by the Treasury Bills issued on behalf of the Government. The CBSI plays a considerable role in the way the Government raised moneys through the issue of Government securities and as such its records in this regard must be of great weight.

I do not accept the argument raised by the applicant that the total borrowings by the Government through the issue of Government Securities is $295,960,545.00 which can be accounted for by adding all the new purchases of Treasury Bills, Development Bonds and Treasury Bonds. It is an argument which is, in my view, unsound. The transactions covered by section 5(1) extends beyond "borrowing" in the ordinary

sense of that word to a situation where the Governement is authorised to "enter into agreements to borrow on such terms and conditions" as the Government may determine. It is pursuant to this provision that the Government has entered into financial arrangements to raise money by way of loans through the issue of Treasury Bills, Development Bonds and Treasury Bonds. In legal term such transaction can be described as a transaction for a consideration which consists in the issue of Government Securities. The money is payable from time to time in accordance with the arrangements between the CBSI (on behalf of the Government) and the holders of the securities. It would therefore not be correct to say that the Government has borrowed a total of $295,960,545.00 when what is being done here is really to "enter into agreements to borrow " which is creating a contractual relationship between the Government and purchasers of those securities. This applies equally to "roll-overs."

The language of section 5(1) also, in my view, reflects a distinction between "borrowing" and "issuing of securities" for the purpose of borrowing. The former connotes cash consideration which is to be repaid on demand or at a fixed time while the latter is a transaction in consideration of the issue of securities. See *London Property Investments Ltd -v- AG* [1953] 1 All ER 436.

The obligation to repay is the very essence of borrowing and in the latter situation, that is, where securities are issued for the purposes of borrowing that obligation only arises when moneys become payable. Only then can "borrowing" be said to have been made through the issue of securities.

I agree that the Court must look at the legal nature and form of the borrowing and not its financial accounting or economic effect. It is the form of the transaction which shows it legal nature. See *Chitty on Contracts*, Vol. II (26th ed), London, Sweet & Maxwell, (1989), para. 3577 where it is stated that:

> *"... it must be stressed that what matters is the real legal nature of the transaction and not its economic nature....."*

In the present case, the legal nature of the transactions is that which I had already described and one which is envisaged in the language of section 5(1) of the Appropriation Act as well as the provisions of the Government Loans and Securities Act dealing with the issue of Government Securities to raise loans. The construction of those provisions do not favour the contention relied on by the applicant regarding the mere adding of all purchases of Treasury Bills, Development Bonds and Treasury Bonds to show the total borrowings by Government.

Having said that I return to the evidence which I had earlier accepted from the Governor of CBSI. His evidence as confirmed by "AN1" exhibited to the first respondent's affidavit of 25 August 1994 shows beyond argument that the Government has borrowed money by way of securities in the sum of $31.072 millions. The Governor's evidence in this case is, in a way, reflective of the Central Bank's concern expressed at page 4 of the CBSI *Quarterly Review* issued in March 1994, that "the Government exceeded its budgeted ceiling, $21.6 million for overall domestic borrowing by mid April this year". It has been argued by the first respondent that $13.700 million representing Treasury Bonds should be discounted as they relate to loans obtained by Solomon Islands Government up to the end of 1993 and now transferred by CBSI to the Private sector. While this may have the effect of reducing the Government's level of borrowings from CBSI, the liability arising out of that $13.700 million still remains with the Government despite the transfer and one that

falls to be discharged out of moneys to be provided by the Parliament. As it is at the present, those Treasury Bonds remain very much securities still enabling the Government to raise money creating indebtedness on the part of the Government to be met out of public money.

The evidence have clearly established that the Government has borrowed moneys by way of Securities in the sum of $31.072 million. This is a borrowing made pursuant to section 5(1) of the Appropriation Act and one which has been done in excess of the limit specified under that section.

I have already stated that sections 4 and 5 of the Appropriation Act refer to two entirely separate borrowings and with separate purposes. Hence it would be wrong to simply say that the Government has exceeded its total borrowing limit under the two sections combined. To do so would be to deprive the Government of its legal power to raise money under a provision which has not yet been exhausted.

The evidence has shown that the Government has borrowed $11.898 million under section 4 of the Appropriation Act. This is well below the ceiling fixed by Parliament under that section. In the light of what I have just said earlier, it would be wrong for this court to say that the Government has exceeded its borrowing power under this section on the basis that the total borrowings when combined with section 5(1) exceeds the total limit of $39,000,000.

What is the effect of the Court's finding that the section 5(1) borrowing has been exceeded? There are copious authorities in England, Australia and U.S.A. which have shown that restrictions on borrowing power must be strictly observed particularly where such restriction is constitutionally imposed. See *State -v- Medbury* 7 Ohio St. 22 (1857); *State ex rel. Kitchen -v- Christman* 285 NE 2d 362 (1972); *Turnpike Authority -v- Wall* 336 SW 2d 551 (1960); *People -v- Green* 47 NE 2d 465 (1943) and *Edward -v- Lewis and Clark County* 165 P 297, 299; 53 Mont. 359.

In *Auckland Harbour Board -v- The King* [1924] A.C. 318, the Privy Council stressed the constitutional principle of Parliamentary control over public finance. The Court stated at page 326 that:

> *"For it has long been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of NZ with the same - stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the Consolidated Fund made without Parliament authority is simply illegal and ultra vires,"*

In *Attorney General ex. rel. Henry Dodd -v- The Mayor of Ararat* (1911) VLR 489 the Court held that the authority to borrow money in excess of the prescribed amount must be obtained before borrowing.

See the various authorities on the restrictions on the power of company directors to borrow without authorities: *Baroness Wenlock -v- River Dee Company* (1885) 10 AC 354; *Attorney General -v- West Ham Corporation* (1910) 2 Ch. 560; In *re companies Act ex parte Watson* (1888) 21 QBD 301 and *Ashbury Railway*

Carriage and Iron Co. (Lrd) -v- Riche (1875) 7 LR 653. These authorities re-affirmed the principle that borrowing in excess of prescribed limit without authorisation is ultra vires.

I return to section 105(3) of the Constitution which prohibits the Government to borrow money involving any financial liability except in accordance with such provisions as may be prescribed by Parliament. The words "except in accordance with" are a directive by Parliament to the Government to follow distinctly that course which the legislature has prescribed. Such course is that which is provided by section 5 (3) of the Appropriation Act which prohibits excessive borrowing by Government without "first obtaining" Parliament authority.

In the present case the Government has clearly borrowed in excess of the limit fixed by law under section 5(1) of the Appropriation Act without first obtaining further authority from Parliament. Such excessive borrowing is unauthorised by law and must be declared ultra vires. That excessive borrowing has also been made contrary to section 105(3) of the Constitution and a declaration to that effect must also be made.

As to the borrowing under section 4 of the Appropriation Act, I have found that the Government has not exceeded its borrowing power under that provision. I must therefore refuse the declaration sought in this regard. For the reasons which I have already stated in this judgement, I cannot make the declaration regarding the excessive total borrowing of $39,000,000.

It must however be made certain that any further borrowing by the Government under section 5(1) of the Appropriation Act without first obtaining Parliamentary authority will be ultra vires, both the Act and the Constitution. A declaration to this effect must also be granted.

The applicant sought a declaration that the First Respondent has breached his constitutional, statutory and fiduciary duties and has acted unlawfully in this case to procure the Government to borrow in excess of the limit allowed by law. I do not think I should grant this declaration. It is the Cabinet who "shall be collectively responsible to Parliament .... for all things done by or under the authority of any Minister in the execution of his office." This is clearly provided for under section 35(2) of the Constitution. It is the Cabinet who must collectively answer for the Minister's action in this case.

Accordingly, I make the following orders on the declarations sought:

1. A declaration is hereby granted that the Government has contravened the provisions of Section 5(3) of the 1994 Appropriation Act 1993 by borrowing the sum of $31.072 million which sum is in excess of the $21 million stipulated in the first column of the Second Schedule to the Act without first obtaining further authority from Parliament.

2. A declaration is hereby granted that the Government has contravened Section 105(3) of the Constitution by borrowing money or entering into a guarantee involving financial liability in defiance of the provisions prescribed by Parliament in section 5(3) of the Act.

3. It has not been disputed by the Respondents that the Government's borrowing power under section 4 of the Act is limited to $18 million in total for the

whole of the 1994 fiscal year. It is therefore not necessary that the Court should make the declaration sought under this paragraph. I decline to make the declaration sought.

4. A declaration that Government has contravened the provision of sections 4 and 5 of the Act by borrowing in excess of the aggregate amount of $39 million fixed by Parliament is hereby refused as the Government has not yet exceeded its borrowing limit under section 4.

5. A declaration is hereby granted that any further borrowing under section 5(1) of the Act by the Government will be ultra vires the Act and section 105(3) of the Constitution.

6. A declaration that the first respondent has breached his constitutional and/or statutory and/or fiduciary obligations and that he has acted unlawfully by permitting and/or procuring the Government to borrow funds exceeding the prescribed amounts in violation of the Act and the Constitution is hereby refused.

Had the lawful course of obtaining Parliamentary authority as provided for under section 5(3) been followed, this action might well have not arisen. The applicant has to come to this court to show that the Government has violated the Constitutional and statutory powers and duties conferred on it by law.

In those circumstances, the applicant must have his costs in this action.

(G.J.B. Muria)
CHIEF JUSTICE