Privy Council Appeal No 45 of 2006

Dominica Social Security Board *Appellant*

v.

(1) Nature Island Investment Company Limited
(2) Marpin Telecoms and Broadcasting Company Ltd *Respondents*

FROM

THE COURT OF APPEAL OF DOMINICA

- - - - - - - - - - - - - - - - -

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 2nd April 2008

- - - - - - - - - - - - - - - - -

Present at the hearing:-

Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

- - - - - - - - - - - - - - - -

[Delivered by ***Lord Walker of Gestingthorpe****]*

The course of the litigation

1. This appeal is concerned with the scope of the investment powers of the Dominica Social Security Board ("DSSB"), a statutory body incorporated by the Social Security Act 1975 ("the 1975 Act"). The litigation leading up to the appeal has followed an unusual and rather unsatisfactory course.

2. The litigation began with an application to the Eastern Caribbean Supreme Court made on 2 July 2004 by Mr Michael Toney as receiver of

Marpin Telecoms and Broadcasting Company Ltd ("Marpin"). Marpin is a telecommunications and broadcasting company incorporated in Dominica in 1982. It got into financial difficulties and on 14 June 2004 Mr Toney was appointed as receiver under a debenture dated 30 May 1994. He was appointed by the debenture-holder, National Bank of Dominica Ltd (and not by the court). Mr Toney deposed that Marpin's total indebtedness was in excess of EC$33m, of which about EC$8m was owed to the debenture-holder.

3. The receiver's application was two-fold: to seek authority for the receiver (i) to borrow a further EC$1m from the debenture-holder to be used as working capital in Marpin's business; and (ii) to sell Marpin's assets (other than its non-transferable licences) as a going concern, and as a single lot, by a tender process set out in draft documents laid before the court. Their Lordships were told that applications for approval of sales by receivers are often made in Dominica and other East Caribbean territories, in order to pre-empt last-minute applications for injunctions by disappointed would-be purchasers; and that the practice is based on Canadian precedents. Their Lordships observe that in all the Canadian precedents cited to them, the receiver making the application had been appointed by the court and was an officer of the court. Although section 295 of the Companies Act enables the court to entertain applications by receivers of both types, their Lordships would not wish to encourage applications to be made, without good reason, by receivers who are not officers of the court; it increases costs and may, as this case shows, provoke controversy rather than avoiding it.

4. On 27 July 2004 Wason J approved the receiver's application, and he proceeded to advertise for offers for a sale by tender, as a single lot, of Marpin's assets (other than the non-transferable licences). The procedure for making offers was set out in considerable detail in the tender documents approved by the court. The original closing date for tenders was 4 October 2004, but this was extended to 11 October 2004. Each offer was to be accompanied by a deposit of 10% of the amount of the tender. By the revised closing date five offers had been received, including offers of (i) EC$15,250,000 from Nature Island Investment Company Ltd ("NII"); (ii) EC$14,250,000 in a joint offer from DSSB and an external company, WRB Enterprises Inc ("WRB"); and (iii) EC$12m from SAT Telecommunications Ltd ("SAT"). Each of these offers was accompanied by the requisite deposit, and the offer from DSSB and WRB was accompanied by a hand-delivered letter dated 11 October 2004 signed by the Board's Director, Mr Steven Mayers and WRB's President, Mr G Robert Blanchard Jr. (this letter is referred to further below).

5. WRB is incorporated in Florida, United States of America. It was not at the material time registered as an external company under section 340 of the Companies Act 1994.

6. The receiver spent some time considering the offers, and made various enquiries, many of them directed to the financial viability of NII. On 12 November 2004 the receiver wrote to DSSB and WRB accepting their joint offer. On 17 November 2004 he made a further application to the court to approve this sale. On 3 December 2004 NII intervened in the proceedings (to which the receiver and Marpin were at that stage the only parties) opposing approval of the sale to DSSB and WRB. The original grounds for NII's intervention were that NII was financially sound, and that the receiver had acted unreasonably and unfairly in failing to recognise this and accept NII's offer, which was the highest.

7. This cross-application was supported by an affidavit made on 30 November 2004 by Mr Samuel Wyke, NII's managing director, deposing to that company's financial soundness. The receiver made two further affidavits addressing those issues. Finally on 17 December 2004 (which was a Friday, and the last working day before the application was to be heard) Mr Wyke made a second affidavit raising new issues as to the joint offer from DSSB and WRB. He complained that WRB was a foreign company not registered under section 340 of the Companies Act; that the joint offer was made on behalf of an unnamed and possibly non-existent entity, that is the proposed corporate vehicle for the joint venture between DSSB and WRB; and that WRB had not countersigned its acknowledgement of the receiver's acceptance of the joint offer.

8. The application was heard by Wason J on 20 December 2004. Counsel was instructed at very short notice to appear on behalf of DSSB. It is not clear that DSSB was ever formally joined as a party in the proceedings, but it has since 20 December 2004 been treated as a party. The judge heard argument for about an hour and made an order approving the sale. There is no record of the submissions made to her but she is recorded as having said in her short oral judgment:

> "I am satisfied that the Receiver followed the process that was set up by the Court, and there certainly has been no challenge to the process. I believe further, that the decision that the Receiver made at the material time was a commercially reasonable one and . . . that the Court's powers to interfere with that decision is limited, and that the Court certainly cannot intervene for the sole basis of getting a

> higher price even though a substantially higher price is now on the table."

The last observation was directed to the fact that SAT had, since the closing date, submitted a further offer of EC$15.5m.

9. NII then appealed to the Eastern Caribbean Court of Appeal. The skeleton argument in support of the appeal went far beyond the grounds which had been considered by the judge. The central point made (though it was developed in various ways) was that DSSB's powers of investment did not extend to acquiring and running a business, even if the business was acquired as part of a joint venture and was conducted by a different incorporated body (the joint venture vehicle). Reliance was also placed on WRB's status as an unregistered external company, and on the argument that DSSB and WRB were acting as agents (for the joint venture vehicle) rather than as principals. But the Court of Appeal rejected those points and they are not issues before the Board.

10. NII's appeal to the Court of Appeal was opposed by DSSB and the receiver. Neither of the respondents' counsel seems to have objected strongly to the new points being taken on appeal, and neither applied for leave to put in fresh evidence relevant to the new points that were being raised. The appeal was allowed by the majority of the Court of Appeal (Alleyne JA and Rawlins JA (Ag), Gordon JA dissenting). The majority took the view (para 58 of the judgment of Alleyne JA, with which Rawlins JA (Ag) agreed) that,

> "in undertaking this joint venture through which to acquire the assets of Marpin with the intention of running it as a going concern, and committing the funds of the DSS, apparently without limit, not only to the initial acquisition of the assets, but also 'whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the operation of Marpin the board has acted in excess of the powers of the DSS, and its action is therefore ultra vires and void."

In this passage the quotation is taken from the letter dated 11 October 2004 signed by the Director of DSSB and the President of WRB.

11. DSSB now appeals to the Board. WRB is not a party to the appeal but there is nothing to suggest that it opposes the appeal or wishes to end its business association with DSSB. The receiver has supported the appeal. NII is a respondent to the appeal but has not appeared,

presumably because it is now clear that the receiver would not in any event proceed with a sale to NII. Their Lordships have not therefore had the benefit of argument against the appeal. They have however had the benefit of two fully reasoned arguments in the Court of Appeal, that is the judgment of Alleyne JA in favour of NII, and the dissenting judgment of Gordon JA.

The statutory powers of DSSB

12. It is apparent from the 1975 Act that DSSB was set up as a successor to the National Provident Fund, and also with the intention of superseding, in due course, superannuation schemes under the Pensions Act and the Police Pensions Act (see sections 57 and 58 of the 1975 Act). DSSB's constitution, powers and functions are set out in the 1975 Act as amended, and in regulations (amounting to nearly twenty different pieces of subsidiary legislation) made under the 1975 Act. DSSB is (by section 4) a body corporate with perpetual succession consisting (First Schedule, para 1) of at least five persons appointed by the Minister, including the Director and "four other persons … having knowledge in law, social science, business management, industrial relations, local government, accounting and finance." The Director is the chief administrative officer of the Board and is appointed by the Minister (section 7). There is also an Investment Committee (section 13) consisting of the Director and "four members to be appointed by the Minister from persons experienced in business administration, finance, industrial relations and accountancy."

13. Section 14 provides:

> "(1) Moneys in the Fund may, subject to the approval of the Minister, be lawfully expended by the Board in the purchase of any land or building deemed by the Board to be necessary for the proper administration of this Act.
>
> (2) The investment of moneys in the Fund not otherwise required shall, subject to any direction of the Minister or in the absence of any direction by the Board, be made by the Director in accordance with any directions of the Investment Committee.
>
> (3) The Investment Committee shall submit a report of its work to the Board quarterly and at such other times as the Board directs."

Apart from section 14(3) there are other detailed provisions for reporting and the preparation and auditing of accounts. Section 17 covers accounts and audit, including (in subsections (3) and (4)) annual reports to the Minister which are to be laid before the House of Assembly. Section 18

requires a formal actuarial review and report to the Minister (also to be laid before the House of Assembly) every three years.

14. The variety of benefits to be provided by the Board appears from section 27 (supplemented by section 28, relating to employment injury benefit, which consists of injury benefit, disablement benefit and death benefit). Section 27(1) lists seven types of benefit:

> (a) Sickness benefit
> (b) Maternity benefit
> (c) Invalidity benefit
> (d) Survivors' benefit
> (e) Funeral grant
> (f) Age benefit ("a payment or periodical payments to an insured person who has reached 60 years of age") and
> (g) Medical benefit.

All these benefits are to be paid out of the Social Security Fund ("the Fund") administered by DSSB, which is to be financed from the sources mentioned in section 3(1) of the 1975 Act. These include contributions, income derived from the assets of the Fund, and other sums provided by the House of Assembly.

15. The financial management of the Fund by DSSB is provided for mainly by the Social Security (Financial and Accounting) Regulations made under section 17(2). These provide for the establishment of an accounting system which distinguishes between the various short-term and long-term reserves appropriate to the different benefits to be provided out of the Fund. Regulation 33 (investment of reserves) is in the following terms:

> "Subject to any direction which the Minister may give for the purpose of investment, each reserve constituted under these Regulations shall be invested in accordance with general or specific directions given by the Board after consultation with the investment committee; and due regard shall be had to the nature and purpose of each reserve and to the probable period at which it may be necessary to realise the investment."

Paucity of evidence

16. As already noted, no evidence has been put in by DSSB. Their Lordships have not seen any of the accounts or reports referred to in sections 13, 17 and 18 of the 1975 Act; they have no knowledge of what

part the Investment Committee (or the Minister) played in DSSB's decision to go into a joint venture with WRB. The only evidence on the latter point is what can be gleaned from the letter of 11 October 2004 (which Mr Astaphan SC for the Board rather surprisingly chose to describe as a "puff letter").

17. That letter informed the receiver:

> "WRB has a 30-year history in the Caribbean region including the ownership and management of Cable TV and Internet Company in the Turks and Caicos Islands and Electric Utility Companies in Grenada, Dominica and Grand Turk, Turks and Caicos Islands. WRB is the majority shareholder of Dominica Electricity Services."

It also stated:

> "WRB and DSSB have individually the financial and other resources to ensure the success of this new entity. Our ability to work together has been clearly seen in the successful bid and acquisition of the majority ownership in Dominica Electricity Services and ongoing partnership in governance and management of that Company."

This prompts the question whether DSSB is or was a minority shareholder in Dominica Electricity Services. The last sentence of the letter (quoted by Alleyne JA in his judgment) suggests that DSSB and WRB were prepared to commit substantially more than EC$14.25m to re-establishing Marpin as a successful enterprise.

18. The paucity of evidence has been to some extent supplemented by the judgment of Gordon JA (in para 11 of his judgment, not subject to any adverse comment by the majority):

> "I take judicial note of the fact that the Fund represents in Dominica, as do comparable organisations in most, if not all, of the developing territories in the English speaking Caribbean, one of the most significant financial repositories in the country. As such there has been a recognition that not only must it fulfil its primary function of providing benefits to contributors, but it must also use its surplus moneys as an economic resource to advance the development of the country (of course, without compromising the primary function)."

19. The issue for the Board is a question of statutory construction. In the Court of Appeal the majority made clear that they were concerned with an issue of *vires*, not with whether or not DSSB's powers had been prudently exercised. Alleyne JA said in para 37 of his judgment, after a reference to the last paragraph of the joint letter:

> "In my view, the question that arises from this conclusion is whether such activities on the part of the Dominica Social Security are authorised by the legislation. It is not for the Court to examine the viability, or the wisdom of the investment, or to make a risk assessment. Those tasks fall to the Investment Committee, the Director and the Board. Our task is to determine the vires of the action of the Dominica Social Security in embarking on this venture."

20. It might be said that as the issue is a pure question of statutory construction, it is immaterial whether the total funds available for investment by DSSB amount to EC$10,000m, or EC$1,000m, or EC$100m. Their Lordships consider that that would be rather an unrealistic approach. They think it regrettable that DSSB did not, in a case that must be of the highest importance to its future, make an application to put in some evidence about the Fund. But their Lordships derive some assistance from the matters of which Gordon JA took judicial notice. They proceed on the assumption that the Fund is, in the context of the economy of Dominica, a very large investor capable of influencing the development of the economy.

The meaning of "investment"

21. Essentially the issue turns on the meaning of "investment" in section 14 of the 1975 Act and Regulation 33 of the Social Security (Financial and Accounting) Regulations, read in the context, and having regard to the purposes, of the 1975 Act as a whole. The word "investment" has no very precise legal meaning, but its natural meaning, in a financial context, is the acquisition of an asset to be held as a source of income: see for instance Jenkins J in *Re Power* [1947] Ch 572, 575.

22. The scope of its natural meaning can usefully be explored by considering other expressions which are often contrasted with it. Many institutions, especially charitable institutions, hold "functional land" and "investment land": the former is occupied and used for the institution's primary activities, the latter is held as a source of income. This distinction is reflected in subsections (1) and (2) of section 14 of the 1975 Act, but does not hold the solution to the question raised on this appeal.

23. Another, more directly relevant, distinction is between investment activities and trading activities. That distinction is clear in principle, although it may be elusive in particular factual situations, as appears from countless tax cases. There is no doubt that Marpin was a trading company when it went into receivership. The receiver was anxious to sell its assets as a going concern (in other words, as a functioning trading enterprise) in order to achieve a better price than would be achieved on a break-up sale. It is (as their Lordships understand it) still a going concern, in spite of the long delay caused by this litigation.

24. But DSSB and WRB do not intend to use Marpin's assets to carry on a telecommunications and broadcasting business themselves. Although they made their offer for the assets as principals, their expressed intention has always been to have the assets vested in a separate corporate entity which will carry on the business. It is regrettable that DSSB has provided such scanty information about the plan; their Lordships have only the "puff letter" which gives not even an outline of the proposed equity and loan capital structure of the new company. But DSSB does presumably expect to receive an income stream, in the form of interest on loan capital and dividends on equity share capital, from the new company. That loan capital and equity share capital would, on the face of it, be held by DSSB as an investment.

25. In the Court of Appeal the majority seems to have ignored the interposition of the new company as irrelevant. Throughout his judgment (but especially in para 58) Alleyne JA emphasised DSSB's intention of running the business as a going concern and its readiness to commit an unlimited amount of funds for that purpose.

26. The majority may have felt (though they did not in terms say) that the interposition of the company was a mere device, a bit of window-dressing that did not change the substance of the transaction. But that approach would in their Lordships' opinion overlook two important points of substance. First, the new company would acquire Marpin's assets (valued in 2004 at about EC$14m) but not its liabilities. It would therefore have valuable assets (including freehold property) available as security for bank borrowing. Of course the new company might need to call on its shareholders for further capital. In their joint letter DSSB and WRB indicated an intention "to provide whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the operation of Marpin," but that was not a legally binding commitment. Once the receiver had his money, he was no longer concerned. DSSB and WRB would no doubt look to their own financial

interests, as any investor would, in deciding how much further capital to commit to the new company.

27. Second, the new company would have its own board of directors, chosen by DSSB and WRB for their skill and experience in the telecommunications and broadcasting business. In participating in selecting these individuals the Investment Committee would no doubt bring to bear the qualities for which they themselves have been chosen under section 13(1) of the 1975 Act. The Investment Committee would not, either in form or in substance, be running the business.

28. Their Lordships do not therefore regard the interposition of the new company as a mere matter of form. They would add (to avoid any misunderstanding) that trustees or other fiduciaries cannot of course use a limited liability company as a means of insulating themselves from responsibility for recklessness in the conduct of a business (see *Bartlett v Barclays Bank Trust Company Ltd* [1980] Ch 515). DSSB, and in particular its Director and its Investment Committee, will have a heavy and continuing responsibility for monitoring the way in which the new company's board of directors carry on its business. So, in a rather more remote way, will the Minister. But in doing so they will be taking care of an investment, not running a business.

Vires, not prudence

29. Their Lordships cannot escape the impression that the majority, while disavowing any intention of judging the prudence of the proposed investment, were unconsciously influenced by that sort of consideration. Alleyne JA cited extensively from *Colman v Eastern Counties Railway Company* (1846) 10 Beav 1, in which Lord Langdale MR referred (at p17) to the company pledging its funds,

> "for the purpose of supporting another company engaged in
> a hazardous speculation."

That was a case from the early days of the railways (and indeed the early days of modern company law) when the court was particularly concerned that investors should be sure that the funds which they subscribed for shares in a company were to be used only for the stated objects of the company. The Master of the Rolls held that it was *ultra vires* for a company authorised to run a railway from London to Manningtree to go into a joint venture running steam-packets from Harwich to the continent. There are no comparable restrictions on DSSB's powers of investment (as Gordon JA pointed out in para 22 of his judgment, drawing a contrast with other statutory powers).

30. It may well be that investing in a telecommunications and broadcasting business operating in Dominica is a relatively high-risk investment, and DSSB is in a position of stewardship for the people of Dominica. But the law recognises that when very large investment funds are available, the degree of risk acceptable to fiduciaries should to some extent be judged by reference to the entirety of the holdings in a diversified portfolio, rather than by reference to individual holdings (see Sir Robert Megarry V-C in *British Museum Trustees v Attorney-General* [1984] 1 WLR 418, 425 and the extra-curial observations of Lord Nicholls of Birkenhead in (1995) 9 Tru LI 71, quoted in Lewin on Trusts, 18th ed. (2008) p1285). Those are all matters which the DSSB, and in particular its Investment Committee, must be supposed to have taken into account in deciding on the joint venture with WRB; and they go to prudence, not to *vires*.

31. For these reasons their Lordships allow the appeal and the order of Wason J is to be restored. The parties may make written submissions as to costs within 14 days.