COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 OF 2005

IN THE MATTER OF THE RECEIVERSHIP AND MANAGEMENT OF
MARPIN TELECOMS AND BROADCASTING COMPANY LIMITED

and

IN THE MATTER OF SECTION 295 OF THE COMPANIES ACT NO.2 OF 1994

BETWEEN:

NATURE ISLAND INVESTMENT COMPANY LIMITED

Appellant

and

MARPINS TELECOMS AND BROADCASTING LIMITED
(IN RECEIVERSHIP)

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C	Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C.	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Reginald Armour, S.C. with Mr. Lennox Lawrence for Appellant
Mr. Alair Sheppard, Q.C. with Ms. Kareen Cole for the Respondent
Mr. Anthony Astaphan, S.C. with Ms. Daphne Durand for the
Dominica Social Security Board

2005: February 16; 17;
May 23.

JUDGMENT

[1] GORDON J.A.: On the 14th June 2004 Mr. Michael Toney was appointed Receiver of Marpin Telecoms and Broadcasting Company Limited (hereinafter referred to as "Marpin").

[2] The Receiver applied to the Court for its approval of his proposal to sell the assets and business of Marpin as one complete package and, on the 16th July 2004, an Order was made by Clare Wason J. approving and setting out the procedure for such sale. In conformity with the procedure laid out by the Court the Receiver advertised the sale of the assets and business of Marpin as a complete package.

[3] The highest offer received by the Receiver within the time limit set in the advertisements was by the Appellant and was in the sum of $15,250,000.00. Accompanying that offer was a letter from the National Bank of Dominica confirming that the bank held on deposit the sum of $1,525,200.00 irrevocably available to the Receiver by order of the Appellant thus meeting one of the conditions set by the Receiver for the considering of offers. The offer was, however, according to the Receiver, not accompanied by references and evidence of the Appellant's ability to pay the balance of the price offered. Eventually, after extensions of time agreed to by the Receiver, the Appellants provided evidence of its ability to pay only $12,525,200.00 out of the total offered price. In the light of this circumstance the Receiver decided to accept a lower offer received by him from a joint venture comprising WRB Enterprises Inc. (hereafter WRB) and Dominica Social Security Board (hereafter the Board) in the sum of $14,250,000.00 which offer duly met the conditions laid down by the Receiver.

[4] By letter dated 12th November 2004 the Receiver accepted the offer of WRB and the Board, subject to the approval of the Court, which was a condition of the approval for sale given by the Court in July. The Receiver returned to Court to seek that approval, at which time the Appellant by Notice of Application sought an Order of the Court that the Court disapprove the sale to WRB and the Board, the second highest bidder, and a further order that the Receiver be forced to sell to the Appellant. The learned trial Judge in a decision handed down on December 20, 2004, found that the Receiver had followed the procedure laid down by the Court and that the decision the Receiver "made at the material time was a commercially reasonable one".

[5] The Appellant has appealed that decision on essentially two grounds, namely, that the Board was acting ultra vires in making the bid and had no power to do so; and, secondly, that WRB, an external company within the meaning given to that phrase in the Companies Act,[1] was not, but should be, registered as such pursuant to the terms of the Companies Act.

[6] I will deal with the second point first. It is common ground that WRB is an external company and that WRB has not registered itself under the Companies Act as such. Learned Senior Counsel for the Appellant based his argument on this issue on section 340 (1) of the Companies Act which reads:

> "(1) No external company shall begin or carry on business in Dominica until it is registered under this Act"

He prayed in aid of his argument the case of Northwestern Construction Co. v Young[2], a case from the Supreme Court of British Columbia. In that case an unlicensed extra-provincial company carrying on business within the Province of British Columbia sued for a balance on a contract to deliver stone, entered into within the Province. The defence advanced was that by virtue of section 123 of the Companies Act of British Columbia the contract was illegal and void. The British Columbia Companies Act in addition to proscribing the carrying out of business without registration also set out a penalty for so doing, namely $50.00 for every day the company carried on business recoverable upon summary conviction. The British Columbia Court held that the performance of the plaintiff company of the contract sued on was in its every step a carrying on of business in British Columbia without the required license or registration in clear disregard of the statutory prohibition, and, being therefore illegal, could give rise to no cause of action against the defendant.

[1] No. 21 of 1994
[2] [1908] B.C.J No. 3

[7] The Dominica Companies Act, however, in contra-distinction to the British Columbia Act makes specific provision for the consequences of failure to register in Section 357 (1) and (2) of that Act which read:

> "357 (1) An external company that is not registered under this Act may not maintain any action, suit or other proceeding in any court in Dominica in respect of any contract made in whole or in part within Dominica in the course of, or in connection with, the carrying on of any business by the company in Dominica.
> (2) Notwithstanding subsection (1), when an external company described in that subsection becomes registered under this Act or had its registration restored, as the case may be, the company may then maintain an action, suit or other proceeding in respect of the contract described in subsection (1) as though the company had never been disabled under that subsection, whether or not the contract was made or the proceeding instituted by the company before the date the company was registered or had its registration restored."

[8] It therefore seems to me to be perfectly clear that the disablement referred to in the Companies Act is of the company, rather than anyone dealing with it and that such disablement can be easily rectified, with retrospective effect, by the company registering under the Act as an external company. Just by the way, in the List of Authorities submitted by the learned Senior Counsel, a number of sections of the Companies Act of Dominica were included, but not section 357. I must conclude therefore that this section slipped under the radar of learned Counsel. In the circumstances, I find no impropriety in the Receiver deciding, in respect of this issue, that WRB was a legitimate entity to treat with. Having decided as I have, it becomes unnecessary to decide whether holding shares in another company which WRB and the Board intended to form falls within the definition of "doing business" within the meaning of section 338 of the Companies Act. I find no merit in this ground of appeal.

[9] The main thrust of the argument in favour of the appeal by learned Senior Counsel for the Appellant was that one of the joint venture partners, namely the Board, was acting ultra vires the Social Security Act[3] (hereinafter referred to as the Act). As

[3] Ch. 31:01 of the Laws of Dominica

learned Senior Counsel put it in his argument, the issue is whether the Board, having regard to its statutory purpose, can as a shareholder or otherwise, contribute to the creation of another company over which it has no control consistent with its statutory functions. This appeal centers around the interpretation of certain sections of the Act and it would be convenient at this stage to set them out *in extenso.:*

> "3. (1) There is hereby established a fund to be called the Social Security Fund hereinafter called the Fund into which shall be paid –
>
> (a) all contributions;
>
> (b) all rent, interest or investments or other income derived from the assets of the Fund;
>
> (c) …
>
> (d) …
>
> (e) …
>
> (2) There shall be paid out of the Fund –
>
> (a) all benefits
>
> (b) refunds of contributions
>
> (c) all expenses properly incurred in the administration of this Act…
>
> 4. (1) There is hereby established a Board to be called the Social Security Board in which the Fund shall be vested and which shall, subject to the provisions of this Act, be responsible for administering the Fund, and the provisions of the First Schedule shall apply as respects the constitution of the Board and its proceedings
>
> (2) The Board shall –
>
> (a) be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of suing and being sued and, subject to this Act, of purchasing or otherwise acquiring, holding, charging and alienating real or personal property and of doing or performing such acts as bodies corporate may by law do or perform; and
>
> (b) have power to acquire and import equipment and materials necessary and essential for carrying out the purposes of this Act free of duty or taxes of any kind.
>
> (3) …
>
> (4) …
>
> (5) …
>
> (6) The Board shall render annual reports to the Minister, and the minister shall, as soon as possible after receiving any such report, lay a copy thereof before the House of Assembly. …

7. (1) The Minister shall appoint a fit and proper person to be the chief administrative officer of the Board (in this Act referred as the "Director") on such terms and conditions as he may think fit.

(2) The Director shall, subject to the provisions of this Act and any direction by the minister, be responsible for the direction of the staff of the Board and the management of the Fund and in particular for -

(a) the collection of contributions under this Act;

(b) the payment of benefit under this Act and of the expenditure necessary for the administration of the Fund;

(c) the investment, where not inconsistent with this or any other Act or any specific direction of the Minister, of surplus money in the fund; and

(d) accounting for all money collected, paid or invested under this Act.

13. (1) There is hereby established a committee to be called the Social Security Fund Investment Committee which is to consist of the Director and four members to be appointed by the Minister from persons experienced in business administration, finance, industrial relations and accountancy.

(2) …

(3) …

(4) …

(5) …

(6) The Investment Committee shall have power subject to any direction of the Minister to give general or specific directions from time to time on the investment of moneys in the Fund which are surplus to the current needs and the Director shall give the Investment Committee any information for the proper discharging of its function

14. (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 direction of the Investment Committee."

[10] Learned Counsel for the Appellant concedes that the Board has power to invest funds of the Fund surplus to the current needs of the Fund as stipulated in sections 7 (2) and 14 (2). However, he contends that such investments must be made for the purposes of the Act and within the constraints of the Act. As a statement of principle this cannot be faulted. However, it does not take us very far towards the determination that must be made in this case, which is whether the

Act both contemplates and permits the Board to make the investment through the joint venture with WRB that it proposes to make. Learned Senior Counsel referred to the case of Roberts v Hopwood[4] a House of Lords decision, wherein Atkinson L.J. made the following statement:

> "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others."

I have no doubt that Atkinson LJ has captured elegantly and accurately the responsibilities of the Board, the Investment Committee and the Director in the making of decisions regarding the investment of the surplus moneys of the Fund. What it does not do, however, is to delineate the boundaries beyond which investments may not be made. For that the Act must be examined both for what it says, and if doubt remains, the legislative context within which it finds itself.

[11] I take judicial note of the fact that the Fund represents in Dominica, as do comparable organizations in most, if not all, of the developing territories in the English speaking Caribbean, one of the more significant financial repositories in the country. As such there has been a recognition that not only must it fulfill 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 its primary function).

The extent of the Board's discretion

[12] I believe a good starting point for a discussion of the extent of the Board's discretion in making decisions to invest monies of the Board is section 4 (2) (a) which establishes that the Board is a body corporate, which, subject to the

[4] [1925] AC 578

provisions of the Act, shall be capable of acquiring, by whatever means, purchase or otherwise, real or personal property. The section goes further and says that the Board may do and perform all such acts as bodies corporate may by law do or perform. Section 4 (2) of the Act must be read in the context of the Companies Act 1994[5], section 17 of which in part says:

> "17 (1) A company has the capacity, and, subject to this Act, the rights powers and privileges of an individual.
>
> (3) It is not necessary for a by-law to be passed to confer any particular power on a company or its directors.
>
> (4) This section does not authorize any company to carry on any business activity in breach of-
>
> (a) any enactment prohibiting or restricting the carrying on of the business or activity;…"

Thus a company, which is a body corporate, may do any of the things a person may do provided that it is not prohibited by law.

[13] Learned Senior Counsel for the Appellant argued a variety of positions in favour of a restricted interpretation of the wide general language in the Statute. Firstly, he argued that the broad term "investment" contained in section 7 (2) (c) of the Act as empowering the expenditure of surplus funds of the Board must be read and restricted by section 17 (3) (b) of the Act which reads:

> "The Board shall-
> (a)…
> (b) submit annually to the Minister a statement of the securities in which monies forming part of the Fund are for the time being invested." (emphasis added)

As I understood Learned Counsel, he posited that the reading of the two sections together restricted the investment of surplus funds to "securities". On the basis that statutes are presumed to be always speaking, we were invited to regard the definition of "securities" in the Securities Act 2001 of Dominica. In the definition section of that latter Act 'securities' are defined as:

> (a) shares and stock in the share capital of a company;
> (b) any instrument creating or acknowledging indebtedness which is issued or proposed to be issued by a company, including in

[5] Act No. 21 of 1994

particular, debentures, debenture stock, loan stock, bonds and notes;

(c) bonds and other instruments creating or acknowledging indebtedness issued by or on behalf of any participating government;

(d) any right (whether conferred by warrant or otherwise) to subscribe for shares or debt securities;

(e) any option to acquire or dispose of any other security;

(f) …

(g) …

Assuming Senior Counsel to be right, without deciding the issue, that the term 'investment' must be restricted to 'securities', it was argued that the intention of the Board to invest in something other than 'securities', if that were the case, would be *ultra vires* their powers.

[14] Counsel laid great emphasis on the fact of the wording of both the Order of Wason J. dated July 16, 2004 approving and setting the procedure for the sale by the Receiver wherein at paragraph 2 it was stated:

> "The assets and business of Marpin Telecoms and Broadcasting Company Limited be sold as a going concern."

[15] The term 'going concern' is what seemed to be offensive to learned Senior Counsel in the context of the *vires* of the Board. I am of the view that 'going concern' is not a term of art and is to be interpreted as it is used in common parlance. I find support of that view in Reference under Electricity Commission (Balmain Electric Light Co Purchase) Act 1950[6] wherein Sugerman J. stated the following:

> "To describe an undertaking as a 'going concern' imports no more than that, at the point in time to which the description applies, its doors are open for business; that it is then active and operating, and perhaps also that it has all the plant, etc, which is necessary to keep it in operation, as distinct from its being only an inert aggregation of plant"

Learned senior Counsel for the Appellants sought to make a distinction between the offer to buy the assets of the Respondent as a going concern and an

[6] [1957] S.R. (N.S.W.) 100

investment in the shareholding of a company that might do the same. In my view, the letter of offer by WRB and the Board dated 11th October 2004 in which they set out the terms of their offer to purchase, could not be clearer. The first paragraph of that letter reads as follows:

> "WRB Enterprises, Inc. (WRB) and Dominica Social Security Board (DSS) have agreed to form a joint venture entity (the name of which is to be determined at a later date) to make an offer under the terms and conditions of sale of Marpin Telecoms and Broadcasting Company limited –In Receivership assets as set out in the Information Memorandum of August 2004."

It is, to my mind, perfectly clear that the intention on the part of WRB and the Board, in the event of their offer being successful, was to form a new corporate entity which would be the purchasing vehicle. It is further perfectly clear that the new corporate entity would be funded by an injection of equity and/or loan capital provided by the joint venture partners. In other words, it was never contemplated that the joint venture partners would purchase directly in their own names the assets of Marpin from the Receiver but rather that the Board would make an investment in 'securities' in the new corporate entity.

[16] The second restricted interpretation on the broad language of the Act that learned Senior Counsel urged upon the Court was that a statutory corporation, as a public body, does not enjoy unfettered discretion in the making of its decisions. In R. v Somerset County Council, ex parte Fewings et al[7] Laws J quoted with approval the following passage from Administrative Law by Sir William Wade Q.C., 6th edition:

> "The powers of public authorities are … essentially different from those of private persons… A private person has an absolute power to allow whom he likes to use his land… regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest… The whole concept of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."

[7] [1995] 1 All ER 513

[17] In the Fewings' case a local authority which held lands pursuant to section 122 (1) of the Local Government Act, 1972, 'for the benefit, improvement or development' of that area decided to ban fox hunting on the said lands. The resolution banning fox hunting was passed because the majority of councilors voting were deeply opposed to fox hunting and regarded it as morally repulsive. The applicants who regularly hunted on that common applied for judicial review of the Council's decision questioning the legality of the ban, since it had been made purely on moral grounds and without regard to the powers within the Local Government Act. The Court held that on their true construction the words 'benefit, improvement or development' were not wide enough to permit the local authority to take a decision based on free standing moral perceptions.

[18] I do not find the Fewings' case to be of much assistance to the Appellant's cause. Fewings was a case of judicial review wherein the Court was being asked, based on evidence, to rule on whether the Council had applied correct or incorrect criteria in arriving at its decision. In this case there is no evidence before the Court of what processes were used by the Board to arrive at its decision to bid for the assets of Marpin. Thus, the issue before this Court is quite different, in principle, from that before the Court in Fewings. There is before us no allegation that the Board was badly advised commercially or used wrong criteria (assuming that there are right criteria) in coming to its decision to bid. In any event, if such were to be the allegation of the Appellants, then a different procedure would have had to have been used.

[19] The third restriction that learned Senior Counsel for the Appellant sought to place on the broad interpretation of the language of the Act is that what the Board cannot do directly, it may not do through the device of a joint venture. His argument runs thus: the assets of Marpin include buildings, equipment, vehicles etc which the Board would not be able to purchase directly as the Act contained no such power and hence the Courts should not permit the Board to circumvent the Act by the mechanism of a corporate entity. Learned Counsel urged this argument

on the authority of Credit Suisse et al v Waltham Forrest London Borough Council[8]. In that case a local authority had established a company in which it retained a 50% interest for the purpose of purchasing properties which would be leased to the authority on short three year leases. The arrangement was intended to allow the authority to discharge its statutory function of providing housing for homeless persons. To finance the acquisition of the properties the company needed to borrow monies from a bank and an essential part of the securitization of such borrowing was a guarantee issued by the authority. It was intended that upon sale of the properties at the end of the lease period the bank would be paid off with the proceeds. Unfortunately, due to a collapse of the property market, after the sale of the properties there remained a shortfall in respect of the repayment of the lenders. The lenders sued on the guarantee and the authority resisted the claim on the grounds that in giving the guarantee they had acted ultra vires. The Court of Appeal in England held that the guarantee "cannot properly be characterized as calculated to facilitate, or as conducive or incidental to, the discharge of any function of the Council, being too remote therefrom". In the course of the judgment of Hobhouse LJ he made the following statements:

> "The company was thus a separate entity from the Council. The powers of the company were exercised through its board of directors, which included two councilors. But under s. 101 of the 1972 Act, the activities of the company could not and did not amount to a discharge of the functions of the council. Further, the company was not an entity to which the council was entitled to delegate any of its functions or powers under s. 101 nor did it come within the provisions of Pts I and II of the Housing Associations Act 1985 or s. 73 of the Housing Act 1985"

and

> "The council, properly so understood and in accordance with s. 101, did not have control as a council of the activities of the company. Directors of a company are not permissible delegates of a local authority. Once appointed they have the character of individuals with the duties of directors of a company incorporated under the Companies Act. The effect of the scheme and the option which the council purported to grant to the company was unlawfully to delegate to the company the discharge of the council's function in acquiring properties for the purpose of providing housing accommodation under s. 9."

[8] [1996] 4 All ER 176

[20] It was urged that Credit Suisse v Waltham Forrest BC was authority for the proposition stated at the commencement of paragraph 18 hereof. I do not agree. I am of the view that the following quotation from the judgment of Neil LJ is apposite and instructive:

> "Section 101 of the Act [The Housing Act 1985] contains provisions relating to what provisions can be made for the discharge of functions by local authorities. These powers are very limited. They do not entitle a local housing authority to discharge any of their functions by means of a partly-owned company. Can this power or the power to give such a company assistance in the form of a guarantee or an indemnity, be implied by reason of s. 111?
> "I am afraid that I have come to the conclusion… that where Parliament has made detailed provisions as to how certain statutory functions are to be carried out, there is no scope for implying the existence of additional powers which lie wholly outside the statutory code. Section 111(3) makes it clear that the power to enter into financial obligations is subject to any statutory controls which may be imposed."

Clearly, the particular statutory regime affecting the Waltham Forrest BC was quite different from the Act. A comparable circumstance with the Board might arise if the Board delegated its whole purpose to a company and sought to guarantee the obligations of that company.

[21] The fourth restriction that learned Senior Counsel sought to place on the broad scope of investment powers inherent in the language of the Act was that the Act itself contains detailed provisions for accountability and transparency which would be obviated by an investment in the new company to be incorporated in that the overview provisions in the Act apply to the affairs of the Board and could not be applied to the new company. Applying that logic to its conclusion, the Board would then be prevented from investing in any company, new or otherwise, which is clearly against the intent and purpose of the Act.

[22] In my view, therefore, the language of the Act is to be given its plain and ordinary meaning and its full effect without the artificial constraints suggested by learned Senior Counsel for the Appellant. I am fortified in this view when I look at the

legislative landscape in Dominica. If one were to look at the Trustees Act[9], the Trustees and Mortgagees Act[10] or the Insurance Act[11] one would find that the Legislature has addressed its mind to restricting powers of investment in certain circumstances. The failure to do so in the Act is, in my view, not without significance and must be considered deliberate. Whatever the view of a Court, it is in no position to second guess, or, worse, amend the will of Parliament. In the circumstances I would dismiss the appeal and confirm the order of the Court below.

[23] In the Notice of Appeal the Appellant recognized the Board as a person affected by the Appeal and indeed served it with a copy of the Notice of Appeal. Learned Counsel for the Board appeared before us and in the circumstances is, in my view, entitled to costs. In the event my order as to costs would be that the Appellant shall pay the costs of the Respondent on record and of the Board, such costs to be taxed if not agreed.

Michael Gordon, QC
Justice of Appeal

[24] ALLEYNE, J.A.: I have had the advantage of reading in draft the judgment of Gordon J.A. I adopt the statement of facts and issues therein contained, and agree entirely with his analysis and conclusion on the grounds of appeal concerning the non-registration of WRB under the Companies Act of Dominica. I too would dismiss those grounds of appeal.

[25] The principal ground of the appeal was formulated as follows:

(1) The learned Judge erred in law in approving the purported acceptance/contract letter dated the 12th November 2004 in that the said

[9] Cap 9:50 Laws of Dominica
[10] Cap 9:52 Laws of Dominica
[11] Cap 78:49 Laws of Dominica

acceptance/contract was made by the Dominica Social Security ultra vires the Social Security Act Ch: 31:01 of the Laws of Dominica in that:

(a) Neither the Dominica Social Security nor any competent corporate body under the Act had any power under the Act to enter into the purported joint venture with the entity calling itself WRB Enterprises Inc.

(b) Neither the Dominica Social Security nor any other competent corporate body under the Act had any power under the Act to commit or pledge or contract to commit or pledge the sum of $14,250,000.00 as it purported to do by the said acceptance letter dated the 12th November 2004, either on its own behalf or in respect of the financing of a contract with the Receiver/Manager to purchase the said assets of the said company on behalf of the purported joint venture or at all.

(c) Neither the Dominica Social Security nor any other competent corporate body under the Act had any power under the Act on its own behalf or as part of the contemplated joint venture to enter upon the management of a commercial venture such as that contemplated by the said acceptance letter.

(d) The corporate body created by the Act and/or in accordance with the Interpretation and General Clauses Act Ch. 3:01 of the Laws of Dominica with legal capacity to contract is the Social Security Board and not the Dominica Social Security or the Director.

[26] Stripped to its essentials, the Appellant's case is that the proposed investment by the Dominica Social Security (hereinafter the DSS) would be outside the statutory powers of investment of the Board under the Act, ultra vires and thus null and void. To put it differently, the Appellant's position is that the DSS is not authorized by the legislation governing its operations to enter into an investment of the nature contemplated by the transaction.

[27] Perhaps it is necessary to add a little on background at this stage. It was agreed in the course of the appeal that what was offered for sale was the assets of the company in receivership, including goodwill, but *not* the debts or other liabilities, and excluding the telecommunications licenses, permits and other authorizations under which the company operated.

[28] In his written submissions learned Senior Counsel for the Appellant states the issue for consideration in terms of "whether the Act permits the DSS to embark upon and/or to undertake the management of a (joint venture) business of the nature contemplated by the Letter of Acceptance or at all." This formulation assumes that the intention of the DSS (and the joint venture partner) is that the assets being purchased will require the DSS to undertake management of the enterprise (hereinafter referred to as Marpin) once the transaction has been consummated by the completion of the purchase. This assumption is challenged by the Respondent and by learned Senior Counsel for the DSS.

[29] In support of the assumption that the DSS would in fact be involved in management of the enterprise learned Senior Counsel relied on the proposal of the Receiver that the assets of the business in receivership be sold as a going concern, which proposal resulted in the order of the Court dated 16th July and filed on 27th July 2004 that the assets of the company 'be sold as a going concern.' This order, counsel contends, had the effect of permitting the Receiver to continue the operation of the company as a going concern and to offer it for sale as such. That meant, learned Counsel contends, that all the business of the company, including its customer base and its normal trading and commercial operations, was to be kept open and alive by the Receiver, in order that it be sold in that state to any potential purchaser.

[30] Learned Senior Counsel for the Appellant drew the Court's attention to exhibit S.W.2, the Information Memorandum issued by the Receiver dated August 2004, and in particular to the Executive Summary from which I quote:

> "The assets of MTBC are being sold as a going concern since, in the opinion of the Receiver, they are sufficient to enable the purchaser to carry on the business hitherto operated by MTBC, following completion of the sale. Purchasers should note, however, that the licences held by MTBC for conducting its business in Dominica are not transferable and, consequently, the Purchaser will be responsible for obtaining the relevant licences. The Receiver shall not have any responsibility for securing any such licences on behalf of the Purchaser but will be willing to provide reasonable assistance to the Purchaser as the Receiver considers appropriate.
> 'The assets are being sold as a package and offers for individual items will not be considered."

[31] In the same document, the assets of the company being sold were described as including equipment, land and buildings '*and goodwill as well as the accounts receivable portfolio.'* (Emphasis mine). It is submitted by the Appellant that goodwill can only be a valuable asset if it was intended that the business be continued as a going concern. Appendix 6 to exhibit SW2 includes a list of active subscribers connected with Marpin Telecoms services which would give an indication of the value of the goodwill of the business as a going concern, and at page 11 of the Executive Summary is a historical record of the revenues of the company for the period 2000 to June 2004.

[32] Learned Senior Counsel also referred to the affidavit of the Receiver filed on 17th November 2004 (Vol. 2 Tab 10 of record) in which, at paragraph 3, the Receiver asserted that the intended sale was 'of the assets *and business* of the company as a complete package'.

[33] Learned Senior Counsel drew attention to the letter of October 11th, 2004 at page 79 to 81 (80) of volume 3 of the record. This letter, on Dominica Social Security letterhead, is the offer by the proposed joint venture entity to be formed between Dominica Social Security and WRB Enterprises, to purchase the assets of Marpin in response to the Information Memorandum referred to in the foregoing paragraphs of this judgment. The letter refers to the joint venture's 'offering price' of $14,250,000.00 for the said assets.

[34] Learned Counsel referred extensively to the text of the letter, and I think it useful to quote paragraphs 3 to 9 of the letter:

> 'WRB has a 30 year history in the Caribbean region including the ownership and management of the 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.
>
> WRB has demonstrated a clear understanding of the operational challenges in these sectors resulting in a high service quality level enjoyed by all our customers. It is our belief that with the expertise we bring, together with the synergies that will be created between our associated Companies, MARPIN can once again be profitable and offer a level of service and opportunity that all Dominicans can be proud of.
>
> WRB and DSS have individually the financial and other resources to ensure that 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.
>
> It will be our intent, once we have achieved a satisfactory level of profitability to offer shares in the new entity to the public either through a listing on the Eastern Caribbean Securities Exchange or a more localized offering.
>
> Our preliminary evaluation of Marpin's potential lead us to commit ourselves as potential owners to a long-term strategy that would see significant investment in both the cable and telephony departments. We believe that the synergies to be derived from our relationship with Domlec (and the physical assets) will redound to Marpin's financial benefit.
>
> Both DSS and WRB wish to reiterate our commitment to provide whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the operation of Marpin."

[35] Learned Senior Counsel for the Appellant submitted that this letter read in the context of the offer clearly establishes the intention on the part of Dominica Social Security and its proposed joint venture partner to operate the business as a going concern. Learned Senior Counsel for the Dominica Social Security challenges this conclusion, but I, for myself, can discern no other interpretation of the letter, read

in context. I am forced to agree with counsel for the Appellant that the only conclusion that can reasonably be drawn is that the parties to the joint venture intended, if their offer were accepted, to operate the business as a going concern and render it 'once again profitable'.

[36] It seems to me that the inescapable inference from this conclusion is, as contended by learned Counsel for the Appellant, that the Dominica Social Security and its joint venture partner intend to form a new entity to undertake the 'ongoing partnership in governance and management' of the business carried on by Marpin Telecoms, and, together with the joint venture partner, 'to provide whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the operation of Marpin'.

[37] In my view, the question that arises from this conclusion is whether such activities on the part of the Dominica Social Security are authorized 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.

[38] The Dominica Social Security was established by an Act of Parliament, (hereinafter referred to as the Act)[12]. The long title to the Act describes it as 'AN ACT to establish a Social Security Fund and for purposes connected therewith.' Section 3 of the Act, under Part 1 dealing with Administration and Finance, establishes the Fund and provides in subsection (1) for the payment into the Fund of contributions, rent, interest on investments, other income derived from the assets of the Fund, sums recovered under the Act as fines, fees, penalties or costs, other sums properly accruing to the Fund under the Act, including the repayment of benefit, and such other sums as may be provided by the House of Assembly for the purposes of the Act or as may be received and accepted by the

[12] The Social Security Act, Chapter 31:01, Laws of Dominica Revised Edition 1991.

Board on behalf of the Fund. It is apparent that under the Act interest on investments, and income derived from its assets, are legitimate sources of revenue required for the operations and sustainability of the Fund.

[39] Subsection (2) of the same section provides for payment out of the Fund of all benefits, refunds of contributions, and all expenses properly incurred in the administration of the Act, including the grant of special credits under section 59. Section 59 makes provision for the transition from the former National Provident Fund, and for special credits and benefits in respect of contributions made to that Fund prior to the introduction of the Dominica Social Security Fund as a successor to the National Provident Fund. It seems to me clear that this subsection would not authorize any investment of the Fund's financial resources, but is limited strictly to operational and administrative expenses of the Fund.

[40] Subsection (1) of section 14 of the Act authorizes the use of moneys in the Fund, subject to the approval of the Minister, in the purchase of any land or building deemed to be *necessary for the proper administration of the Act.* It is not argued, I think, nor do I think it could be successfully argued, that this section authorizes the proposed transaction. The proposed purchase of the assets of Marpin is not held to be necessary for the administration of the Act in the sense intended by the section, but as an investment from which revenues are expected to flow and contribute to the sustainability and viability of the Fund in the long term.

[41] Under section 7(2) of the Act, the Director is responsible for the management of the Fund and in particular for, among other things,

(c) the investment, where not inconsistent with this or any other Act, or any specific direction of the Minister, of surplus moneys in the Fund.

(d) accounting for all moneys collected, paid or invested under this Act.

[42] Section 4(2) establishes the Board as a body corporate with power,

'(a) … subject to the provisions of this Act, of purchasing or otherwise acquiring, holding, charging and alienating real or personal property, and of doing or performing *such acts as bodies corporate may by law do or perform'.*

[43] Section 17 of the Companies Act[13] provides that

'(1) A company has the capacity, and, subject to this Act, the rights, powers and privileges of an individual.'

Subsection (3) of the section provides that 'it is not necessary for a by-law to be passed to confer any particular power on a company or its directors.'

[44] Learned Senior Counsel for the Dominica Social Security contends that the Board and its Directors are empowered by the Act, read together with the Companies Act, with very wide and general powers to acquire property and/or to invest moneys of the Fund, and that those powers are not limited to any particular type or manner of investment. Learned counsel cited sections 3(1)(b), 4(1) and (2)(a), 7(2)(c) and (d) and 14(1)and (2) of the Act, already referred to in this judgment, and Regulations 20 and 33 of the Social Security (Financial and Accounting) Regulations[14], in support of this contention.

[45] Regulation 20 provides for the annual allocation and apportionment of the income from investments to the separate branch reserves. Regulation 33 provides as follows:

"'33. 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.*"

[13] Act No. 21 of 1994.
[14] Chap. 31:01 (Subsidiary), Laws of Dominica Revised edition, 1991.

[46] It seems to me necessary, in the context of those Regulations, to examine the nature and purpose of the separate reserves. To do this, I have looked at the provisions of Regulations 25 to 28, which are in the following terms:

> '25. A short-term benefit contingency reserve shall be constituted by transferring thereto annually the excess of income over expenditure of the short-term benefit account.
>
> 26. A long-term benefit reserve shall be constituted by transferring thereto annually the excess of income over expenditure of the long term benefit account.
>
> 27. A disablement and death benefits reserve shall be constituted in the following manner:
>
> > The capital values of periodically payable disablement and death benefits awarded in a year shall be charged against the year's income in the income and expenditure account of the employment injury benefit branch and shall be credited to a current account which shall be further credited with the income from investment of the said reserve and debited with the actual payments of current periodical disablement and death benefits payable during the year, the balance thereof being transferred at the end of the year to the said reserve.
>
> 28. Subject to Regulation 25 above, an employment injury benefit (short-term) reserve shall be constituted by transferring thereto annually the excess of income over expenditure of the employment injury benefits branch."

[47] It is evident from the above that the funds (including the revenue from investments) of the Dominica Social Security are to be separated (in an accounting sense) and accounted for in very specific ways, and for distinct purposes. The various benefit branches have distinct functions and needs, and are likely to be called upon to pay benefits at different intervals and in different amounts. In short, each branch is *sui generis,* having its own distinct '*nature and purpose*' as adumbrated in Regulation 33. The reserves are to be invested separately, and due regard must be had to the nature and purpose of the separate reserves, *and the probable period at which it may be necessary to realise the individual investment to meet the particular needs of the individual benefit branch*[15], in making investment decisions in relation to the particular reserve.

[15] Social Security (Financial and Accounting) Regulations, Chap. 31:01 (Subsidiary), Laws of Dominica Revised edition 1991, Regulation 33.

[48] It seems to me that this principle clearly distinguishes the Dominica Social Security from bodies corporate incorporated under the Companies Act, in terms of the freedom which such bodies corporate can exercise in their investment policies, practices and decisions. The powers of the Board are limited by the Regulations in terms of the issues to which Regulation 33 requires regard to be had. Section 4(2)(a) of the Act itself subjects the plenitude of power which bodies corporate may have, in relation to the Dominica Social Security, to the provisions of the Act, and thus to the provisions of Regulations made under the Act. The DSS clearly, in my view, does not enjoy the complete freedom to act, and the unrestricted powers, of a modern company incorporated under the Companies Act, notwithstanding the provisions of section 4(2)(a) of the Act.

[49] The DSS clearly fits within the category of a 'public authority' as defined in Halsbury's Laws of England[16]. It is entrusted with functions to perform for the benefit of the public and not for private profit. Halsbury's *supra* at paragraph 20, page 22 – 23, says:

> "A public body with limited statutory powers must not exercise authority not conferred upon it. Thus, a local authority empowered to establish washhouses must not set up a municipal laundry[17], nor may it engage in other ventures in public enterprise in competition with private enterprise without the necessary statutory authorization. … Powers expressly conferred will, however, be so interpreted as to authorize by implication the performance of acts reasonably incidental to those explicitly granted."

[50] The general power under section 4(2)(a) of purchasing, acquiring, etc. real or personal property or performing such acts as bodies corporate may by law do or perform does not, in the context of the stated purpose of the legislation, alter the nature of the DSS as a public authority, nor expand its powers, as submitted by learned Counsel for the Respondent, to embrace and include all the powers of an individual. Indeed section 7(2) of the Act itself limits the investment power of the Director to the power to invest 'surplus moneys', and only to the extent that such

[16] Fourth edition Reissue, volume 1(1), para. 6, page 5.
[17] A-G v Fulham Corp. [1921] 1 Ch. 440.

investment is 'not inconsistent with the Act or any other Act or specific direction of the Minister'.

[51] To my mind, the question which arises in this appeal is whether or not the investment in the joint enterprise to acquire the assets of Marpin as a going concern, with the intention to continue to operate the business as such and to render it ultimately a profitable enterprise (paragraph 34 of this judgment), is consistent with the Act.

[52] The purpose of the Act, as set out in the long title, is 'to establish a social security fund and for purposes connected therewith.' The Act recognizes that this purpose cannot be realised on the basis of contributions to the fund only, and by section 14, authorizes the investment of the moneys in the Fund not otherwise required, in accordance with any directions of the Investment Committee. Section 17(3)(b) of the Act requires the Board to submit annually to the Minister a statement of the *securities* in which monies of the Fund are for the time being invested.

[53] It is argued for the Appellant that the foregoing are the considerations to which regard must be had in determining the question of consistency with the Act. Particular emphasis is laid by learned counsel for the Appellant on the definition of the word 'securities' in the Securities Act 2001, which includes 'shares and stock in the share capital of a company'.

[54] Learned Counsel for the Appellant, while conceding that the moneys of the Fund can properly be invested in shares in a company, argues that this power cannot properly be extended as to authorize investment in such a speculative venture as that contemplated by the proposed joint venture, which, counsel points out, involves a commitment by the DSS of the whole or an unspecified part of the initial sum of $14,250,000.00, together with 'whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the

operation of Marpin.'[18] Learned Counsel contends that this open-ended commitment goes beyond the powers of investment authorized by the Act, or necessarily and properly required for carrying into effect the purposes of the Act or incidental to and consequential on the things which the legislature has authorized.

[55] Learned Counsel relies on the case of Colman v Eastern Counties Railway Company[19]. I find the words of Lord Langdale, M.R. at page 486 apposite to the issues in this appeal. His Lordship had this to say:

> "Joint stock companies have funds so extremely large, and exercise powers so extensive and so affecting the rights and interests of other persons and the rights which the public or the subjects of Her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public, but with the private rights of all individuals in this realm. We are to look upon those powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several Acts, those powers must always be carefully looked to; and I am clearly of opinion that the powers which are given by an Act of Parliament, like that now in question, extend no further than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned."

[56] His Lordship acknowledged that it is very often a subject of great difficulty to ascertain how far those powers extend. It is true that his Lordship stated that 'it has nowhere been stated that a railway company as such has power to enter into all sorts of other transactions.' It is argued on behalf of the Respondent that section 4(2)(a) gives the DSS the power 'of doing or performing such acts as bodies corporate may by law do or perform', and that in that respect it is distinguishable from the railway company in the Colman case. It seems to me,

[18] Letter of offer dated October 11, 2004, exhibit SW2 to affidavit of Samuel Wyke. Volume 3, Tab 2 of record.
[19] Volume L, E.R. 481

however, that read in the context of the purposes of the Act as a whole, this general power ought not to be so generously interpreted as to alter in effect the nature and purpose of the Dominica Social Security. As in Colman, 'it has been contended that (the Board of the DSS has) a right to pledge, without limit, the funds of the (company) for the encouragement of other transactions, however various and extensive, provided the object of that liability is to … Increase the profit' to the organization[20]. I cannot support that proposition, however formulated to facilitate the proposed investment.

[57] As in Colman, what the Board is proposing is to pledge the funds of the DSS to support the proposed joint venture's investment in the Marpin assets, to the extent of an initial sum of $14,250,000.00 (or an unspecified and possibly undetermined proportion thereof), together with '*whatever additional financial resources which would be required to ensure the efficiency and effectiveness of the operation of Marpin.*'[21] I would quote further, and rely on the words of the Master of the Rolls in Colman:

> But I must say that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation (the proposed joint venture), is a thing which, according to the terms of this Act of Parliament, they have not a right to do. Surely there is nothing in the powers given by this Act of Parliament which can authorize that?[22]
>
> ... but this may be observed, that if there is any one thing more desirable than another, … it is this, that the property of (the company) should be itself safe.[23]

I must not, from the above, be taken to be making a value judgment that the proposed investment is hazardous. As indicated earlier in this judgment I do not consider this to be any part of this Court's function.

[20] *Supra* at page 486.
[21] Letter of offer dated October 11, 2004, exhibit SW2 to affidavit of Samuel Wyke. Volume 3, Tab 2 of record.
[22] *Supra*, at page 487.
[23] at page 488.

[58] It is my view 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.

[59] I would therefore allow the appeal with costs here and below. Costs calculated on the basis of Part 65.5(2)(iii) in the sum of $14,000.00 in the Court below and $9,333.00 on appeal are to be paid to the Appellant by the Dominica Social Security.

Brian Alleyne, SC
Justice of Appeal

[60] RAWLINS, J.A.[AG.]: I have read in draft the judgments of Alleyne, JA and Gordon, JA. I concur with the judgment of Alleyne, J.A. The appeal is therefore allowed with costs to the Appellant in the appeal and in the Court below.

Hugh Rawlins
Justice of Appeal [Ag.]