

The Eastern Caribbean Supreme Court

In the High Court of Justice

Commonwealth of Dominica

DOM HCV 2009/0379

In the matter of Marpin Telecoms and Broadcasting Company Ltd, in liquidation

In the matter of the Companies Act 1994

Between: KIERON PINARD BRYNE Applicant
 As liquidator of Marpin Telecoms & Broadcasting Company Ltd
 and
 RONALD B.M ABRAHAM Respondent

Before the Hon. Justice Brian Cottle

Appearances:

Mrs. Heather Felix Evans Counsel for the Applicant
No appearance of Respondent or Counsel

2012: 13th February
2nd March

Judgment

- [1] COTTLE J: The Applicant has brought the present action under the Companies Act 1994 of Dominica. The Respondent is the former Managing Director of Marpin Telecoms and Broadcasting Company Limited (the Company). He served as Chairman of the Board of Directors. He was at all material times the sole Executive Director.
- [2] By Order of 22nd May 2009 this court ordered that the Company be wound up. The Applicant was appointed liquidator by the Court. The Liquidator has filed the present action seeking relief under the Companies Act. The application is supported by affidavits from other Directors of the Company and the former Corporate Secretary.

[3] The application was served on the Respondent in England. The Respondent did not retain local attorneys to represent him. He did not provide any address for service in Dominica. He did not file any documents in this matter. Instead he faxed a document intituled "Response to originating application" in which he set out his position. He was served with all the Case Management orders made in this matter. Specifically, he was ordered to file his affidavit evidence in response by 29th November 2010. The Respondent has failed to file any affidavit. He did not attend at the trial.

THE LAW

Section 469 (1) and section 470 of the Companies Act reads as follows:

Section 469 (1)

"If in the course of the winding up of a company it appears that any business of the company has been carried on-

- a) With intent to defraud creditors of the company or the creditors of any other person or for any fraudulent purpose;*
- b) With reckless disregard of the company's obligation to pay its debts and liabilities; or*
- c) With reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities*

The court, on the application of the Official Receiver or the liquidator or any creditor or contributory of the company may, if it thinks proper to do so, declare that any of the officers whether past or present, of the company or any other persons who were knowingly parties to the carrying on of the business in that manner are personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company, as far as the Court may direct."

Section 470

"If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer or liquidator of the company, has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, liquidator or officer, and compel him to repay or restore the money or property of any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just"

The Evidence

- [4] Apart from the Claimant, the court received affidavits from Clifton Shillingford, Patricia Garraway-Ingles and Anthony Burnette- Biscombe. Mr. Shillingford and Mrs. Garraway-Ingles are former Directors of the Company. Mr. Burnette-Biscombe was Company Secretary. Mr. Shillingford swore that the Defendant, during his tenure as Managing Director, received brokerage fees from the Company. These fees were expressed to have been due to the Defendant/Respondent because he had deposited the Certificates of Title to two of his properties to secure the debts of the Company.
- [5] It was later determined that no certificates of title of the Respondent had been pledged to secure the debts of the Company. The Respondent received \$493,942.00 in this regard between 1995 - 2002. Mr. Shillingford also revealed that between 1993 - 2003, without the sanction of the Board of Directors, the Respondent caused the Company to pay his personal income taxes to the tune of \$419,721.00. There was also a sum of \$65,827 in insurance premiums paid on the life of Respondent for the benefit of his Dependents.
- [6] Mr. Shillingford swore of another transaction where the Respondent purchased a vehicle from the Company for \$45,000 when he had in his possession a valuation of \$85,000 for that vehicle, without disclosing the higher valuation to the Company.
- [7] In her affidavit, Mrs. Garraway- Ingles detailed certain irregularities in the affairs of the company which occurred during the tenure of the Respondent as managing director. As a result, the Company retained Mr. Jno. Baptiste, a Public Accountant. Mr. Jno. Baptiste prepared a statement of accounts in which he outlined the sums due to the company from the Respondent.
- [8] Mr. Burnette-Biscombe's affidavit speaks of the autocratic management style of the Respondent. He describes it as "made up of arrogance, deceit and exclusion." He too reiterated the instances of the Respondent acting to the financial detriment of the Company without the sanction of the Board of Directors in the purchase from the Company of the vehicle at an undervalue and the payment of income taxes on behalf of the Respondent.
- [9] The Court appointed Liquidator swore two affidavits. He deposed that the Respondent has personally benefitted from breach of fiduciary duty or breach of trust in the amount of \$971,918.65. Under the management of the Respondent the Company amassed debts of \$16,261,810.76. The true level of the company's indebtedness was not apparent to the Board of Directors. It was the responsibility of the Respondent to maintain the integrity of the Company's internal financial records and controls. The Liquidator in his affidavit, swears that Respondent "misrepresented the financial position and viability of the company" to such an extent that the Auditor's report to the Shareholders indicated that the financial statements "did not present fairly the financial position of the Company as at December 31st 2000."

[10] Because of the failure of the Respondent to participate meaningfully at the trial, all the evidence of the Liquidator and the other witnesses on his behalf remained unchallenged. In the circumstances this Court finds for the Liquidator and makes the following orders

1. It is declared that the Respondent has been party to knowingly carrying on the business of Marpin Telecoms and Broadcasting Company Ltd with reckless disregard of the Company's obligation to pay its debts and is personally responsible for the debts and other liabilities of the Company amounting to \$16,261,810.76
2. The Respondent is ordered to pay the sum of \$16,261,810.76 to the Liquidator.
3. The personal liability of the Respondent is a charge on any debt or other obligation which may be due to the Respondent from the Company
4. The Respondent is guilty of breach of trust in relation to the Company by applying to his own use the sum of \$971,918.65 being the property of the Company.
5. The Respondent is ordered to repay to the company the said sum of \$971,918.65
6. The Respondent shall pay the cost of this application in the sum of \$10,000.00

Brian Cottle

High Court Judge