Neutral Citation Number [2006] IEHC 350

THE HIGH COURT

[1999 No 32 COS]

IN THE MATTER OF MONEY MARKETS INTERNATIONAL STOCKBROKERS LIMITED (IN LIQUIDATION) AND IN THE MATTER OF SECTION 150 OF THE COMPANIES ACT, 1990

Judgment of Mr. Justice John MacMenamin delivered on the 27th day of October, 2006

1. By notice of motion dated 16th December 2002, the applicant herein was appointed liquidator of Money Markets International Stockbrokers Limited ('MMI' or the "Company") He initiated proceedings pursuant to s. 150 of the Companies Act 1990, against a total of ten respondents, being it is said, persons to whom Chapter 1 Part VII of the Companies Act 1990 applied. As the Company was insolvent at the date of its winding up, the applicant was obliged, pursuant to the applicable practice direction of this Honourable Court, to seek to have the directors of the Company restricted, pursuant to the provisions of s. 150 of the Act. As the winding up of the Company predated the entry into force of the Company Law Enforcement Act 2001, it was not open to the applicant to seek to be relieved by the Director of Corporate Enforcement from the obligation of bringing such application. Notwithstanding this, various directors of the Company sought a preliminary determination from this Court that they had acted honourably and responsibly at the express invitation of the applicant, and on 12th July 2006, an order was made dismissing the application as against those six respondents.

2. With the exception of Mr. Peter O'Byrne, against whom application was adjourned for personal reasons, the remaining respondents to this application are Mr. Timothy Murphy (the first respondent); Mr. Oisin Fanning (the third respondent) and Mr. Colm O'Reilly (the sixth respondent) who were primarily responsible for the operation of the Company stock broking business, which give rise to matters of concern to the applicant.

3. Mr. Fanning was managing director and chairman of the Company until August 1998. Mr. Murphy was the Company's head of stock broking; and after August 1998, was managing director of the Company; Mr. O'Reilly was the Company senior dealer. Mr. Bill Shipsey SC who appeared on behalf of the applicant has properly pointed out it was his position that no issue are in these proceedings in respect of the honesty of these respondents. However, as matters stood, he was not in a position to state it had been demonstrated to his satisfaction that they had acted responsibly. This therefore was the issue before the court.

Factual Background

4. The Company commenced trading in or about March 1992, when its principals purchased a small stock broking firm, Doak and Company. This Company was a member of the Dublin and London Stock Exchanges. From September 1995, onwards the Central Bank of Ireland ("C.B.I.") regulated and supervised the Company as a member firm of the Dublin Stock Exchange pursuant to s. 25 of the Stock Exchange Act 1995. The purpose of this function, since transferred to the Irish Financial Services Regulatory Authority ("the Financial Regulator"), was to promote the maintenance of proper and orderly regulation and supervision of Stock Exchanges and member firms, the orderly and proper regulation of financial markets, and the protection of investors. One of the issues which arises in this case appertains to the relationship of the Company to the C.B.I. and the degree of communication between the Company and the Central Bank prior to 4th June 1998, in regard to the Company's financial position.

5. Between 1992 and 1998 the Company expanded its client base and staff numbers. The Company traded profitably in the years ended 31st March 1996, 1997 and 1998. The audited financial statements for the years ended 1997 and 1998, showed a profit before tax of €122,047.00 and €417,487.00 respectively. The Company's audited balance sheet as of 31st March 1998, showed a net asset position of €1.225 million. The Company's monthly management accounts also showed significant profits arising in the six months to September 1998, and in the first quarter of that year the Company had made profits in excess of €400,000.

6. The Directors, who were also shareholders in the Company, had seen to the question of adequate capitalisation. The total equity invested in the Company by 2nd December 1998, amounted to approximately €1.5 million. In 1997 and 1998 accounting periods the directors as a whole invested equity of €768,000 in the business.

Context

7. It has been observed that, in law, context is all. Nowhere is this proposition more appositely illustrated than in the relation to the affairs of this Company. Predominantly the business of the Company was investment in oil stocks. This is necessarily speculative. Those who invest in such stocks ought, and should, know that they are taking risks, sometimes substantial ones. Businesses involved in oil exploration are subject to pressures and changes in events which may radically alter their value. A gentle breeze, may in the wrong circumstances, evolve rapidly into what the counsel appositely typified as "a perfect storm" that is a dangerous combination of circumstances of which one or two may be a source or risk, but, when combined with further factors, has the capacity to threaten even the most robust corporate vessel.

8. During the second half of 1997 it became apparent that some of the Company's clients were in arrears due to their exposure a company called Dana Petroleum and Tullow Oil ("Dana, and Tullow"). The court has been informed that the Company's investors made significant profits out of Tullow. With this experience a considerable amount of the turnover of the Company were in turn invested in Dana. By mid 1998 the Company's clients, a number of whom had exceeded their credit limits, had substantial cumulative exposure to Dana.

The transactions in question

9. The most significant portion of the Company's stock broking business was generated through products known a "rollover" and "give and take back". These functioned in the following manner:

'Rollover'

10. A 'rollover' occurred in certain circumstances where a client wished to take a one month view on a stock without paying for it. The Company purchased the stock in which the client was interested, contacted the market maker specialising in the type of trade to which the stock was related, and obtained a quotation for the purchase of the stock. If, for example a stock was purchased in the market for 10p, the Company sold it on to the market maker for 10p (T2 – a two day settlement). At the same time the Company agreed to repurchase the stock from the market maker in twenty working days at a price of 10½p (T20 – a twenty day settlement). The half penny represented the interest charge of the market maker for the service it provided. At any stage during the T2 – T20, the client could sell the stock and either generate a profit or cut a loss. Stamp duty was refundable on these transactions in respect of Irish listed stock.

'Give and Take Back'

11. 'Give and take back' functioned in the same way as a Rollover except that the period for which the stocks are held by the market maker was three months, and the rate of interest charged by the market maker for their services was higher.

The Market
12. The company's involvement in these procedures was a function of the market in which it operated. The intense competitiveness of the stock broking business in the latter half of the 1990's rendered it extremely difficult for a new venture to break into the general market place, or to attract clients from large, well established stock broking house. In order to attract customers the company was required to position itself in the market. The rollover and give and take back products offered by the company were synonymous with oil exploration stocks. Thus the company was a specialist dealer in a niche in the market and with products associated with investments of that nature. While potentially lucrative, self-evidently the value of stocks may fall as well as rise, sometimes with rapidity.

The Clients
13. From mid 1997 onwards the company had begun to switch clients to Dana from Tullow. The clients involved here have been appositely described as being "sophisticated" in the sense that they well knew and appreciated the risks involved. Sophisticated too, in the event that large profits might accumulate, though less so, if losses were sustained. The company acted as broker to Dana and had an extensive understanding of its business. The respondents held the strong view that investment in Dana represented and excellent opportunity for their clients. There has been no evidence that the interests of the respondents diverged from that of their clients, or that the interests of the company were put before the investors.

MMI and Dana
14. By early 1998 therefore, MMI had built up a very large position of give and take back in Dana though a company known as K. & H. Options Limited (hereinafter known as "K. & H.") – MMI's principal market maker. This was to the value of almost £5 million sterling. K. & H. requested MMI to reduce its exposure in Dana to the region of 16 million shares i.e. to a value of some £3 million sterling, and the company complied with this request. Most of the shares which were reduced from the company's holding with K. & H. were placed with Dana's English brokers S. G. Warburg. MMI were familiar with Warburgs, as they held other options with them, mostly in Tullow Oil, on a rollover basis. Following the placement of a significant Dana shareholding with Warburgs, by way of give and take back, business continued as normal until the May bank holiday weekend of 1998.

15. On the Monday of that weekend, Warburgs advised MMI, apparently without forewarning, that it had decided to stop trading in Dana rollovers. This sudden change of course caused consternation in MMI. It was clear to the respondents that although the share price in Dana was quite strong (approximately 20p per share), the company would be unable to cope with a situation whereby some 52 million Dana shares might be "dumped" on the market, without creating intense disorder resulting in significant losses for any client holding positions in that stock.

16. Mr. Fanning and Mr. O'Reilly flew to London to meet with the Warburgs managers in charge of trading and credit, and requested, the reason for this threatened action. The explanations did not satisfy them. While Warburgs were not represented at these proceedings, this apparently suggested that the adoption of rollover positions was not part of the standard business of Warburgs. In fact the respondents contend that at the time Warburgs held some £6 million sterling pounds worth of shares in Tullow which had been placed with them by the company on a rollover basis.

17. The court has been informed that it subsequently transpired that the directors of Dana had taken a decision, without consulting or advising M.M.I., to terminate the brokerage agreement between Dana and Warburgs. It is said that Warburgs, having learned of the imminent termination of their business arrangements with Dana by the time of the May bank holiday weekend, decided to take precipitate action, and that the threat of injunctive proceedings resulted in Warburgs deciding to renew its rollover agreement with MMI in respect of Dana shares for a further two months, in order to allow the shareholding to be placed with an alternative market maker. The imminent crisis and the substantial loss that would have inured to MMI clients if Warburgs rollover options in Dana had been simply dumped on the market was averted. But it was clear that there was a need for MMI to secure the placement of almost 52 million Dana shares within two months. This posed a substantial problem, and MMI took steps to notify the CBI of its change in circumstances.

18. C.B.I. requested that MMI supply it, on a day to day basis, with cash flow projections and details of all developments regarding the business of the company, including information concerning those positions that had been held, those sold, and those remaining open. It has not been suggested that the company failed in this requirement. However, the fact that MMI, or any company complied with requirements of the Central Bank cannot be interpreted as being an imprimatur or nihil obstat for the acts and decisions of the directors.

19. In the aftermath of the dispute, the share price of Dana began to fall. It sank to 18p. In most cases it transpired that Warburgs were sellers of the stock. Shortly after the termination of its relationship, Dana retained the services of the Hong Kong Shanghai Banking Corporation ("H.S.B.C.") to act as its English brokers. Mr. Fanning met with representatives of H.S.B.C. He outlined the difficulties presented by Warburgs actions, H.S.B.C. agreed to take rollover positions in Dana to the extent of some 25 million shares. To induce H.S.B.C. to take such a significant position in Dana it was necessary to provide them with a considerable discount. Thus this stock was sold to H.S.B.C. at a price of 15p per share, at a time when the shares were trading at a value of 17p to 18p. Dana's Chief Executive contacted M.H.R., an American fund, already a large shareholder in Dana, and facilitated contacts between that fund and Mr. Fanning. That respondent then succeeded in placing a further 28 million in shares in Dana with M.H.R. These transactions all took place during the course of July 1998. In the circumstances, largely through the efforts of Mr. Fanning, MMI had by the end of the month succeeded in placing with other market makers all of the shares in Dana previously placed with Warburg.

Further Problems In The Market
20. The success of MMI in this manoeuvre did not put an end to its difficulties. New factors intervened. In late summer of 1998 the value of oil exploration stocks began to decline as a consequence of two principal factors in the market, the price of oil generally, and the crisis in the Russian economy. Neither of these factors had anything to do with the soundness of the businesses in which MMI had invested its clients money. Since that company still maintained the balance of its client's investments in Dana – almost 20 million shares with K. & H.: the falling oil market was likely to cause further problems with the give and take back options due for redemption. The difficulties facing MMI as a result of the fall in share prices in the oil sector therefore had, a general impact on the business of the Company, quite apart from the exposure which had arisen in respect of the Dana shares, because MMI specialised in oil exploration stocks generally. The most substantial investments of clients of MMI, with the exception of Dana, were positioned in Tullow. Consequently, continuing downward pressure on oil exploration stocks now brought further pressure on MMI as rollovers fell due for redemption. To add to these complexities, the price in oil exploration stocks was mirrored by a general fall in the stock market at this time. Consequently the steps which MMI had taken to diversify its holdings into F.T.S.E. 100 shares did not serve to relieve pressure.

A Newsleak
21. While MMI took steps to ensure that the C.B.I. was appraised of the circumstances, in all other respects MMI maintained

discretion, regarding its difficulties. The market place in which it operated was pre-eminently driven by confidence. The Company was concerned that "bad news" might impact adversely on its already precarious position.

22. Unfortunately, in September 1998, a story was carried on R.T.E, television regarding these difficulties. As a consequence of this media report MMI's bankers, Ulster Bank (Ireland) Limited took the unprecedented step of withdrawing its 'CREST' facility. (CREST is the official payment clearing mechanism through which all transactions executed on the London, and Dublin Stock Exchange are settled). This process had involved MMI making a net payment to or from 'CREST' on a daily basis in respect of all bargains settled that day. In circumstances where the bank withdrew this facility (a step said to be in breach of contract), MMI's business was effectively frozen. It was unable to trade.

Pru-Bach

23. Even this did not end the misfortunes. On 23rd September 1998, stock traders named Prudential Bach Securities (U.K.) Incorporated, (hereinafter "Pru-Bach"), learned of the difficulties facing MMI and demanded immediate repayment of that company's margin account held with them. Pru-Bach threatened that unless the entire balance of the margin account was discharged before close of business on that day, it would dispose of the positions which it held on behalf of MMI in reduction of the balance on the margin account. This conduct of Pru-Bach came as a surprise to the respondents. First, because Pru-Bach proposed to remove MMI's margin trading facility with immediate effect in the absence of the any prior warning. Second the positions which Pru-Bach proposed to sell in order to reduce the indebtedness on the margin account were shares held by Pru-Bach on behalf of MMI by way of safe custody, (i.e. wholly secured and fully paid for) rather than shares held in margin accounts, where had contracted that it would not exercise any lien set off sale. This was a further factor that again came to trouble the respondents.

24. Not one, but a combination of factors resulted in the Company ceasing to trade at the end of September 1998. By the time the C.B.I. authorised the Company to recommence trading, a fresh injection of capital, and a change in management were required. Mr. Fanning, along with the other directors engaged in negotiations with K. & H. with a view to arranging a takeover of MMI.

25. In advance of completing the agreement to allow for the purchase of MMI by a company named by Factoralter Limited – a corporate vehicle incorporated by K. & H. – a due diligence report in respect of the business of MMI was conducted by Ernst and Young, Chartered Accountants. The investigations of Ernst and Young, confirmed the accuracy of the books and records of MMI. On foot of the report Factoralter Limited determined to purchase MMI, endeavouring to ensure that the trading business of the Company was salvaged and that the position of the Company's clients and other creditors was secured. The directors took the decision to sell its business to Factoralter for the nominal consideration of £1.

26. I am satisfied that each of the respondents entered into personal commitments to ensure the survival of the company and to minimise any losses to its creditors. By way of illustration, Mr. Fanning, undertook

> (a) To resign as a director of the company,
>
> (b) To waive all fees, expenses, bonuses and severance payments due from the company with the exception of gross salary up until the date of completion of the agreement,
>
> (c) To waive his entitlement to any share options in respect of the company,
>
> (d) To ensure the continued maintenance of the securities which he had previously procured or provided for a period of fifteen months after the date of completion of the agreement. In this regard Mr. Fanning agreed to maintain some £5,250,000 Irish in personal letters of guarantee for the benefit of the company.
>
> (e) To refrain from setting up or otherwise being engaged in any stock broking business in the Republic of Ireland other than as an employee or a director holding not more than 5 percent of the share capital of such business.

27. In accordance with the terms of the agreement the other respondents too, took appropriate steps to their financial detriment in the interests of clients. Mr. Fanning resigned as a director on 2nd December 1998. He thus had no further involvement in the business, save that personal letters of guarantee which he had provided for the benefit of MMI were enforced by Ulster Bank on 23rd February 1999, in the sum of £77,000 sterling.

28. After further funding difficulties MMI was ultimately wound up on 15th March 1999.

29. The due diligence carried out by Ernst and Young did not stand alone. In the course of its travails the affairs of the Company were also examined by K.P.M.G. Chartered Accountants, (who at the request of the Irish Stock Exchange undertook a CREST stock audit), and Messrs Farrell Grant and Sparks, Chartered Accountants for the purposes of a client money audit. In addition the respondent Colm Murphy also had to deal with and provide information to Mees Pearson Bank; Factoralter Limited; K & H Options Limited, City of London Options Limited, and others who were called on to carry out checks into the company's affairs.

The Issues

30. Mr. Shipsey S.C. for the applicant presented the evidence fully, and comprehensively. The liquidator was carrying out his statutory function. But no single factor has been identified which (to use a colloquialism) constitutes a "smoking gun" or indicates misconduct. This judgment will deal with issues only insofar as now relevant.

31. It is accepted first there is no imputation as to dishonesty by these respondents. Second, the liquidator, properly, did not resist earlier applications in relation to a number of other directors where the court, (effectively on consent) refused the relief sought. One turns then to the issues, as agreed.

> 1. Was it irresponsible of the respondents to permit clients of the company to have an exposure in relation to Dana and to provide credit to such clients to the extent that they did?
>
> 2. Was it irresponsible of the respondents to permit there to be a deficit in the clients funds held by the company as of September 1998?
>
> 3. Was it irresponsible of the respondents not to have been aware of the transfer by Pru-Bach in April 1998 of securities held by Pru-Bach on behalf of the company for the company's clients from a "fully paid for" to "margin" status with the consequent loss of client assets.

4. The effect if any on a consideration of the responsibility of any of the respondents to the degree of communication between the company and the Central Bank prior to 4th June, 1998 in relation to the company's difficulties.

5. The effect if any on a consideration of the responsibility of the respondents of the manner in which the books and records of the company were maintained, in particular;

(a) the manner in which certain specified transactions on the client account of Cater Allen Nominees Limited (Cater Allen) are recorded in the books and records;

(b) the manner in which the account of Mr. Patrick Lumley is recorded in the books and records,

(c) the manner in which the authorisation of set offs between different client accounts on the company is recorded

6. The effect, if any, on a consideration of responsibility of Mr. Oisin Fanning and on whether it will be just and equitable to restrict him of his level of co-operation with the applicant, in particular;

(a) his level of co-operation in relation to proceedings brought by Mr. Hilary Fanning;

(b) his level of co-operation in relation to the collection of a debt due by Mr. Enda Fanning;

(c) his level of co-operation in relation to a debt which appeared to be due by Mr. Denis Flannelly to the company.

The Law

32. In considering those issues the court must, briefly refer to the law applicable.

33. The law in this area is now well established. The seminal judgment is that of Shanley J. in La Moselle Clothing Limited v. Soualhi [1998] 2 ILRM 345 who proposed that in determining "the responsibility of the director for the purposes of s. 150(2)(a) of the Companies Act 1990 as amended the court should have regard to the following matters, inter alia:

(a) the extent to which the director has or has not complied with any obligation imposed on him by the Companies Act 1963 – 1990;

(b) the extent to which his good could be regarded as so incompetent as to amount to irresponsibility;

(c) the extent of the director's responsibility for the insolvency of the company,

(d) the extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding or thereafter;

(e) the extent to which the director in his conduct of the affairs of the company has displayed a lack of commercial probity or want of proper standards.

34. Murphy J. in *Business Communications v. Baxter and Parsons* (The High Court, Unreported, 21st July, 1995) he observed that:

"The most important feature of the legislation is that it effectively imposes a burden on the directors to establish that the insolvency occurred in circumstances in which no blame attached to them as a result of either dishonesty or responsibility"

35. In *USIT plc* (the High Court Unrecorded 10th August, 2005) Peart J. having referred to *Business Communications* identified a further test when he said:

"It follows in my view that the burden on a director in seeking to satisfy the court as to his/her behaviour in relation to conduct in the affairs of the company for the purposes of escaping from an order under the section includes if necessary, establishing that where there are matters about which there can be rightly the subject of criticism, there is in reality no causal link between those culpable matters and the insolvency. This would certainly apply in my view in relation to irresponsibility, since irresponsibility can be a matter of degree …" Thus it follows one must ask here whether the acts of the respondents were responsible for the insolvency; in effect a 'causation test'.

36. The conduct of the respondents must be viewed in the context of the time and circumstances in which it occurred and not with the benefit of hindsight (see *Business Communications Limited*). While, in other circumstances it might be necessary to have regard to the area of management in the company for which a director was personally responsible, this is unnecessary here (see *Re Gasco Limited* (*In Liquidation*) Unreported, High Court, 5 February, 2001, McCracken J.). On the evidence the issue does not arise.

37. Commercial errors or misjudgement per se do not constitute irresponsible conduct. McGuinness J. in *Re Squash Ireland* [2001] 3 I.R. 35 put the matter thus in the judgment of the Supreme Court:

"Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this".

38. The court must have regard to the fact that each of the respondents took steps to protect the interest of investors at risk of detriment to themselves. But this was a high risk business in which all involved, including MMI's clients were aware of the fact. The evidence does not demonstrate that the relationship between broker and client was such as to create a fiduciary relationship. No reference has been made to any vulnerable or impecunious investors. That was not the situation. The fact that MMI had invested deeply in Dana would not, per se, constitute irresponsibility particularly in the light of the company's previous profitable experience with Tullow, and in the light of what can only be described as a concatenation of unfortunate events which were neither singly nor collectively foreseeable. It has not been shown that the respondents in investing heavily in Dana were, per se, irresponsible in the sense of engaging in conduct which no reasonable stockbroker would undertake. The precipitating factors, even taken individually, were difficult to anticipate. Together, and in close sequence they constituted misfortune of an unforeseeable dimensions and scale.

39. Can it then be said that the respondents were irresponsible in not foreseeing or allowing for what befell the company? I am not so persuaded. As Finlay Geoghegan J. stated in *Colm O'Neill Engineering Services Limited (In Liquidation)* (The High Court, Finlay Geoghegan J., 13th February 2004)

> " … simply bad commercial judgment does not and will not be considered by the court to amount to a lack of responsibility by directors".

40. In truth I am not convinced that even this observation is necessarily *á propos* in that it has not been shown there was bad judgment at all. The series of misfortunes described would be difficult for even the most perspicacious of directors to anticipate.

41. Thus, reverting to the '*La Moselle*' tests I do not consider that there is evidence that the conduct of the respondents could be regarded as so incompetent as to amount to irresponsibility. The conduct of the directors was not the causative factor in the insolvency of the company or for any deficiency in assets which, in any case, ultimately occurred after the respondents had resigned, and the company had been taken over and administered by others. Having regard to the facts as found, and essentially not in dispute, I consider that the respondents have satisfactorily responded to each of the queries which arise in the list of issues cited earlier.

42. To deal briefly with each issue.

Issues 1 and 2
43. It has not been established that the respondents acted irresponsibly with the regard to the exposure of Dana and in the provision of credit. The company's position with regard to Dana may have been vulnerable, in retrospect it may have been imprudent to have extended credit to clients. To attribute irresponsibility to such activities runs counter to the evidence and would in any case be an exercise in hindsight wisdom. It was not irresponsible of the respondents to permit a deficit in clients funds held by the company in September 1998.

Issue 3
44. The actions of Pru-Bach were apparently taken in April 1998. The directors of the company did not become aware of Pru-Bach's action until September 1998. This was not shown to be due to incompetence. It has certainly not been shown that this is due to culpable actions on the part of the directors of the company. *Prima facie* the actions of Pru-Bach, may have been unlawful in transferring the securities held on behalf of the company from "fully paid" to "margin" status.

4.
45. The evidence does not show unsatisfactory communication with the Central Bank of Ireland prior to the 4th June, 1998. In fact it demonstrates that the company apprised the bank of its problems in a timely manner and in accordance with its regulatory obligations.

5. (a)(b)(c)
46. One turns then to the issue of the books and records of MMI and in particular certain transactions regarding Cater Allen Nominees Limited, a client, Patrick Lumley and the authorisation of set-offs between different client accounts raised here are concerns regarding specific issues, that is the records available in respect of two specific accounts and the provisions of set-offs. There is no allegation of wholesale failure to maintain books and records. The courts have long regarded the obligation of directors to ensure the maintenance of adequate books and records as a general duty. In the course of his judgment in *Business Communications* Murphy J. stated that ordinarily the obligation and responsibility imposed on a director would entail *inter alia*:

> " … the maintenance of the records required by the (the Companies) Acts. The records may be basic in form and modest in appearance but they must exist in such form as to enable the directors to make reasonable commercial decisions and auditors (or liquidators) to understand and follow the transactions in which the company was engaged."

47. Thus consideration of the adequacy of the records must be seen in the light of the fact that the applicant did not raise objection to the refusal of a direction by this court when the earlier preliminary application was made by the six other respondents. In the course of these proceedings matters were brought to the attention of the court from which it might have been inferred that there existed irregularities in relation to the maintenance of the books and records in particular to certain accounts known as the "Cater Allen Nominees Limited accounts". Here it is necessary only to recollect that the liquidator has accepted that there was no impropriety on the part of any of the directors, nor in particular Mr. Fanning.

48. Proceedings brought by the liquidator alleging fraud breach of trust and conversion were discontinued, the matter having being considered by Kelly J. on 10th March, 2000.

49. Cater Allen has accepted that neither Mr. Fanning, nor any other respondent did not misapply or misappropriate any of the funds standing to the credit of its accounts. None of the transactions detailed had the effect of removing moneys from the bank account of the company. No allegation against Mr. Fanning or any of the other respondents has been made by the trustees of Cater Allen.

50. No proceedings were issued by these trustees. Mr. Fanning was authorised to operate the account of Cater Allen on the basis of a sole discretion on basis of a mandate. It has been accepted by the trustees of that company that there was no fraud or impropriety in the conduct of these accounts reflected in the records. In the circumstances therefore I do not consider any basis is established for an adverse finding here against Mr. Fanning, or, for that matter any of the other respondents.

51. Insofar as a question is raised with regard to records regarding transactions with a client Patrick Lumley the evidence demonstrates that none of the respondents were involved personally in the conduct of the company's business with Mr. Lumley. The late Mr. Lumley was a client of John Lord deceased and not a client of any of the respondents herein. The dealings transacted in respect of individual accounts was not a matter scrutinised by the directors of the company in normal course. The board of the company did receive reports dealing with the overall position adopted by brokers in respect of their client lists. They did not enquire into the nature of individual transactions conducted by a broker unless it appeared that the positions adopted had come under pressure. If there had appeared anything unusual about a transaction – (or series of transactions) the Board generally might reasonably expect that such issue be brought to its attention by those charged with compliance. This is not to say either that there was wrongdoing or ? by the company's compliance officer or financial controller as it has not been shown that they could have known of the actions taken by Pru-Bach.

52. One turns then to the question of the recording of set-offs where the liquidator raised alleged unavailability of documentation evidencing authority from client creditors permitting set-off or alleged inadequacy of documentation in order to record a valid

contractual set-off. The maintenance of set-offs in respect of clients accounts was a normal and regular part of the operation of the business. A number of the clients of the company were referred to MMI by existing customers. It was not apparently unusual for clients to instruct the company to put in place a set-off arrangement whereby credit which had built up on one account could be set off against the losses which had accrued on another account. However, (critically important) it has not been possible for the liquidator to identify any number of set-offs, allegedly inadequately documented, nor the manner in which such set-offs were inadequately recorded in the books of the company. No sufficient detail has emerged as to why there may be invalidity in the recording of the set-offs, or in their form. The applicant may have been forced to devote resources in the liquidation to considering the question of set-offs on a case by case basis. This does not establish that there has been irresponsibility. As outlined earlier the books and records of the company were considered by a number of different experts and auditors. No substantive issues have arisen. Accordingly I consider that there is insufficient evidence to provide a basis for any finding against the respondents.

6 (a)(b)(c)
53. One turns finally to questions raised regarding co-operation by Mr. Oisin Fanning with the liquidator in collection of certain debts. The applicant was approached by Mr. Fanning with an offer to engage in the recovering the indebtedness of the company in return for a payment of 5% commission on such debts collected. This offer was made on 28th June, 1999 and was rejected by the liquidator, who assumed sole responsibility for the recovery of the company's indebtedness. It is unclear whether have been any debt collection proceedings successfully resolved in favour of MMI.

54. Furthermore the general conduct of Mr. Fanning is not put in question. Instead three specific issues were raised, that is the accounts of Hilary Fanning, Enda Fanning and Denis Flannelly. Mr. Hilary Fanning was an uncle of Oisin Fanning. It is the position of the respondent Oisin Fanning that Hilary Fanning was not in fact a creditor of the company at all, and is due a payment from the liquidation. Thus the respondent was not in a position to assist the liquidator in recovering a debt which he believed did not exist. With regard to Enda Fanning (Oisin Fanning's father) it is the respondent's view that the liquidator has yet to satisfactorily establish the extent of any indebtedness on the part of Enda Fanning. The liquidator may still have in his power stocks and shares formerly held by Mr. Fanning. The respondent says it has not been established that the stocks and shares do not outweigh the value of any debt. Thus similar considerations arise as in the previous instance of Hilary Fanning.

55. Denis Flannelly, was listed as a debtor of the company. The respondent Mr. Fanning again relies on his offer to assist in recovering debts. He further draws attention to the fact that the liquidator issued proceedings against Mr. Flannelly on 26th July, 2004, approximately five years after he was appointed as liquidator and did not serve the same on Mr. Flannelly until 18th May, 2005. The respondent points out that if there had been further contact between himself and the liquidator he would have been in position to advise Mr. Flannelly had settled his account for the sum of IR £100,000. I accept that the conduct of Mr. Fanning has been shown to be expiable, and not irresponsible.

56. For a number of reasons, legal proceedings, (which culminated in a judgment in the central office against Mr. Flannelly were set aside and it is now, accepted, that no indebtedness exists against Mr. Flannelly.

Conclusion
57. Having regard to the evidence and the background circumstances already outlined the court does not consider that the evidence outlined constitutes a sufficient basis for making the orders or declarations sought against these respondents. Accordingly this court will decline to make the declarations sought.