

THE HIGH COURT

[1999 No. 32 COS]

IN THE MATTER OF

MONEY MARKETS INTERNATIONAL STOCKBROKERS (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 23rd day of May, 2012

1. These proceedings arise by way of an application for directions brought by the liquidator of Money Markets International Stockbrokers Ltd. (in liquidation) (hereinafter referred to as the "Company"). The application relates to the proceeds of sale of shares in Dana Petroleum plc. (hereinafter referred to as "Dana") which were the subject of a series of disputed sales brokered by the Company.

2. The parties to this application are the liquidator, Consulting and Investment Services Inc. (hereinafter referred to as "CIS") who sold the shares, and Mr. Hilary Fanning, purported purchaser of the shares. Books and records of the Company show that the disputed contract for sale was made on 7th September, 1998, recorded in contract note S80907070 and contract note B80907068.

3. On 15th March, 1999, the High Court directed that the Company be wound up. These proceedings concern an application for directions brought by the liquidator pursuant to s. 280 of the Companies Act 1963, or the inherent jurisdiction of the court as to whether the proceeds of sale of the shares "*represent client money or client financial instruments or documents of title relating to such financial instruments*" held on behalf of, *inter alia*, Mr. Hilary Fanning.

4. The determination of whether the proceeds represent client money is relevant for the purposes of the European Communities (Markets and Financial Instruments) Regulations 2007 (S.I. 60/2007) as Regulations 158 and 159 thereof (as amended) provide that a liquidator is not entitled, except as provided therein, to have recourse to client money or client financial instruments for the purposes of meeting the costs and expenses or distributing among the creditors of the company being wound up. The said Regulations replace a prohibition in similar terms contained in s. 52 of the Stock Exchange Act 1995, as amended.

5. The liquidator accepts that if it can be established by Mr. Fanning that he owned the relevant Dana shares, they would have been client financial instruments and, accordingly, the proceeds of sale thereof would be client money. However, the liquidator submits that the said shares were not owned by Mr. Fanning and, due to the passage of time since the contract for sale was allegedly made, they cannot now be claimed by Mr. Fanning.

6. On 5th March, 2012, Finlay Geoghegan J. directed the trial of a preliminary issue as to whether Mr. Fanning's claim is statute-barred, having regard to the provisions of the Statute of Limitations 1957.

7. The evidence establishes that the Company acted as broker in the purported sale of shares by CIS to Mr. Fanning. A curious feature of this case is that while Mr. Fanning now asserts ownership of the shares, he previously denied he had purchased them. When the liquidator wrote to Mr. Fanning seeking payment of sums due to the Company on account of the purchase of the shares from CIS, Mr. Fanning's solicitors replied saying that the document on which the liquidator relied was a forgery, and in a letter of 20th August, 1999, his solicitors denied that he had traded with the Company.

On 9th May, 2000, the solicitors for the liquidator wrote to Mr. Fanning's solicitors stating, *inter alia*:

"As indicated in our client's letter to your client dated 24th January, 2000, it appears from the books and records of MMI that your client has an unsettled contract to purchase 742,000 shares in Dana Petroleum plc. from CIS. The shares in question are in fact held by MMI in the name of CIS and, as you are aware, we have received a request from CIS for the return of those shares."

8. While I am not deciding the issues raised on the motion for directions, the correspondence to which I have referred is of some relevance to the preliminary issue on the Statute of Limitations and gives some context to that issue.

9. The liquidator and CIS both argue that the Company acted as agent in the purported sale of the shares by CIS to Mr. Fanning. As the contract for the purported sale was made on 7th September, 1998, the six-year time limit for Mr. Fanning to assert his claim against CIS in respect of the shares became time-barred on 7th September, 2004. The liquidator and CIS rely on the provisions of s. 11(1)(a) of the Statute of Limitations 1957, as amended.

10. Mr. Fanning relies on the principles enunciated by the Court of Appeal in *Re General Rolling Stock Co. Ltd.* [1872] L.R. 7 Ch. App. 646. In that case, the court held that a claim which was still in time when the winding up commenced, but which was not asserted by way of proof until after the normal period of limitation had expired, was to be admitted to proof, because it was in respect of something which had been a liability at the commencement of the winding up. The Court of Appeal held that so far as the operation of the winding up is concerned, limitation periods cease to run at that date, so long as they have not already expired. At p. 648, Sir W. M. James L.J. said:

"A duty and a trust are thus imposed upon the Court, to take care that the assets of the company shall be applied in discharge of its liabilities. What liabilities? All the liabilities of the company existing at the time when the winding-up order was made which gives the right. It appears to me that it would be most unjust if any other construction were put upon the section."

After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court, and it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations."

In agreeing, Sir G. Mellish L.J. said at p. 649:

"It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery in an administration suit. In these cases, the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

11. The liquidator and CIS do not take issue with the principles enunciated in that case but argue that the claim asserted by Mr. Fanning in respect of ownership of the shares is not a claim in the liquidation but is, rather, a claim against CIS who were the vendor of the shares. Mr. Fanning does not deny on affidavit the assertion made by the liquidator and CIS that the vendor of the shares was CIS. The Company was merely acting as broker. Counsel for Mr. Fanning accepted that if his claim is against CIS, it would be statute-barred. But he relies on para. 59 of the judgment of Moore-Bick L.J. in *Financial Services Compensation Scheme v. Larnell (Insurances) Ltd.*, [2006] QB 808, when he stated at p. 827:

"The decision of Buckley J. in Cotterell v. Price [1960] 1 W.L.R. 1097, further demonstrates that rights enforceable otherwise than against property held by the liquidator or trustee in bankruptcy are subject to the operation of the Limitation Acts in the ordinary way."

Whether Mr. Fanning can rely on this statement of the law depends on the nature of his claim and what is meant by "property held by the liquidator" and whether the proceeds of sale of the shares represent assets of the Company.

12. Counsel for CIS accepts that if a creditor has a claim against the Company which is not statute-barred at the commencement of the winding up, then that claim continues without being affected by the Statute of Limitations. This applies only to a claim that arises in the liquidation against the assets of the Company. However, if, notwithstanding the liquidation, there is a claim outside the liquidation, the Statute of Limitations continues to run.

13. It was argued on behalf of the liquidator and CIS that Mr. Fanning's claim in respect of the shares is against CIS and not the Company. The Company was merely the vendor's agent and the purported sale of shares is unaffected by the agent (the Company) going into liquidation. While Mr. Fanning may have other claims against the Company as broker in the purported sale, which would not be statute-barred, the purported transaction between the vendor of the shares and Mr. Fanning stands outside the liquidation.

14. Before analysing the caselaw on the Statute of Limitations as it applies to claims in a liquidation, there is one other issue raised by Mr. Fanning which I have to consider. That is a claim in the nature of an estoppel raised against the liquidator.

15. Mr. Fanning states that he was a client of the Company and he availed of its services to purchase two tranches of Dana shares on 7th September, 1998. The transactions were referenced in contract notes 8809070531 and 8809070681. The Company applied a debit to his account in respect of both transactions. A winding up order was made in respect of the Company on 15th March, 1999.

16. The liquidator obtained leave of the court on 29th November, 1999, to sell the first tranche of Mr. Fanning's shares. The liquidator sold the shares between 30th November, 1999, and 3rd December, 1999. The proceeds of sale amounted to €248,180.83 and the liquidator applied the proceeds of sale against Mr. Fanning's debit balance with the Company. Mr. Fanning asserts that this meant that the liquidator accepted that he was the person beneficially entitled to the shares and the proceeds of sale of the shares.

17. The second tranche of Dana shares was also purchased on 7th September, 1998. The liquidator obtained leave of the court on 18th September, 2002, to sell the second tranche of Mr. Fanning's shares. The liquidator sold the second tranche of shares which the Company had also debited to Mr. Fanning's account. He complains that despite the fact that the circumstances in which both tranches were bought are identical, and despite the fact that the liquidator credited Mr. Fanning's account with the proceeds of sale of the first tranche, the liquidator is refusing to acknowledge that Mr. Fanning is the owner of the shares/proceeds of sale of the shares in the second tranche'. While the liquidator and Mr. Fanning reached an agreement in August 2007 regarding ownership of the first tranche of shares, both Mr. Fanning and the liquidator accepted that the agreement did not resolve the question of ownership of the second tranche of shares. Mr. Fanning claims to have understood that the motion filed by the liquidator in this matter was in order to have the issue of ownership determined and he was taken by surprise when the liquidator sought to rely on the Statute of Limitations to extinguish his claim. The receiver relies on a letter of 23rd August, 2007, written by his solicitors to Mr. Fanning's solicitors in which it is made quite clear that the settlement in August 2007 did not resolve the question of ownership of the shares. The evidence establishes clearly that at no time did the liquidator make any representations concerning the second tranche of shares or the proceeds of sale of same which would give rise to an estoppel. In any event, the other Dana shares to which Mr. Fanning refers were sold by a client of the Company other than CIS. This presents a fundamental difficulty for Mr. Fanning as the alleged representation (whether by conduct or by words) on which the estoppel is based, was made either by the official liquidator or by that other vendor. However, for the estoppel argument to be successful against CIS, the encouragement of the belief must have emanated from CIS itself. Therefore, the court can proceed to decide this preliminary issue on the basis of whether or not Mr. Fanning's claim to the shares or the proceeds of sale thereof is a claim within the liquidation or outside the liquidation.

18. In *F.S. Compensation Scheme Ltd. v. Larnell (Insurances) Ltd.* (see above), Moore-Bick L.J., having referred to *Cotterell v. Price*, said, at p. 827 (para. 60):

"These authorities were followed and applied by Mr. John Jarvis Q.C. in Anglo Manx Group Ltd. v. Aitken [2002] BPIR 215. They support the conclusion that a distinction is to be drawn between rights to obtain satisfaction of claims from property of the company through the process of the liquidation, which are determined as at the date of the commencement of the winding up, and rights that may be enforceable outside the liquidation, for example, by recourse to security. In the case of the former time does not run after the date of the winding up so that a proof may be submitted at any time, although without disturbing any previous distributions. In the case of the latter, time runs in the ordinary way."

19. In the same case, Lloyd L.J. considered the operation of limitation periods in an insolvent administration in the light of in *Re General Rolling Stock Co.* At p. 814 (para. 13), he said:

"I must describe next the position in an insolvency as regards the debtor's liabilities. In a voluntary winding up, the liquidator's duty is to apply the company's property 'in satisfaction of the company's liabilities pari passu': see section 107 of the Insolvency Act 1986. Similar provisions apply in a compulsory winding up and in bankruptcy. An obligation

which, at the relevant date, is barred by limitation, so that no action can be brought to enforce it, is not a 'liability' for the purposes of the insolvency legislation. See *In re Art Reproduction Co Ltd* [1952] Ch. 89. In that case, Wynn-Parry J relied on the decision of the Court of Appeal in Chancery in *In Re General Rolling Stock Co.* [1872] LR 7 Ch App 646. The court held that a claim which was still in time at the date when the winding up commenced but which was not asserted by way of proof until after the normal period of limitation had expired was to be admitted to proof, because it was in respect of something which had been a liability at the commencement of the winding up. In effect, so far as the operation of the winding up is concerned, limitation periods cease to run at that date so long as they have not already expired.

That case has been followed ever since, whatever the type of insolvency, and whether the claim is disputed or not: see, for example, *In re Cases of Taffs Well Ltd.* [1992] Ch 179, and *In re Mixhurst Ltd.* [1994] 2 BCLC 19.

In the first of those cases, Judge Paul Baker Q.C. said at p. 189:

'As I have indicated, I accept that the period of limitation does not cease to run when the petition to wind up is presented, save as regards the petitioning creditor. It is, however, an over-simplification to say that the period ceases to run on the making up of the winding up order or the passing of a resolution to wind up. The true question, as I see it, is whether the original contracts of the creditors were discharged by operation of law and replaced by other rights before time had run out, by which actions would have had to be brought to enforce them. It is not simply that time has stopped running against the creditor; the cause of action itself is destroyed and replaced by other rights'.

Having considered in *Re General Rolling Stock Co.* and other cases, he answered his question as follows, at p. 191:

'One may conclude that the effect of an order to wind up is to convert the contractual rights of the creditors into proprietary rights under a trust. It may still be necessary and appropriate for a creditor to bring an action after the liquidation for the purpose of elucidating his original contractual rights, for which purpose he would have to get leave; but it is not necessary for the purpose of stopping time running against him in relation to his erstwhile contractual rights'."

20. Lloyd L.J. then went on to consider the limits to the application of the general *Rolling Stock* principle. He made reference to a number of cases including *In re Benzon* [1914] 2 Ch. 68, *Cotterell v. Price* [1960] 1 WLR 1097, and *Anglo Manx Group Ltd. v. Aitken* [2002] BPIR 215. In *Anglo Manx Group Ltd. v. Aitken*, Mr. John Jarvis Q.C. sitting as deputy judge of the Chancery Division, referring to *Re Benzon*, said at para 60:

"There was considerable argument before me as to what is meant by the words 'in the bankruptcy' as distinct from the words 'outside the bankruptcy'. Mr. Adair [for the defendant] submitted that the question can be formulated in this way. Is the claim being directed at property within the statutory trust, or does it relate to property outside of the trust: for example, after acquired property, or property which cannot form part of the estate. It seems to me that that is the correct formulation and is consistent with the analysis of Buckley J. in Cotterell v. Price."

Later, he said at para. 66, that the result of the Court of Appeal decision in *In Re Benzon* is:

"... that the Statue of Limitations, having begun to run against the claimant before the commencement of the bankruptcy, continues to run, notwithstanding the bankruptcy, in respect of a claim in relation to a fund pursued outside of the bankruptcy."

21. In *FS. Compensation Scheme Ltd. v. Larnell (Insurances) Ltd.*, Moore-Bick L.J. said at p. 827:

"59. The decision of Buckley J. in Cotterell v. Price [1960] 1 WLR 1097, further demonstrates that rights enforceable otherwise than against property held by the liquidator or trustee in bankruptcy are subject to the operation of the Limitation Acts in the ordinary way.

60. These authorities were followed and applied by Mr. John Jarvis Q.C. in Anglo Manx Group Ltd v. Aitken [2002] BPIR 215. They support the conclusion that a distinction is to be drawn between rights to obtain satisfaction of claims from the property of the company through the process of the liquidation, which are determined as at the date of commencement of the winding up, and rights that may be enforceable outside the liquidation, for example, by recourse to security. In the case of the former, time does not run after the date of the winding up so that a proof may be submitted at any time, although without disturbing any previous distribution. In the case of the latter, time runs in the ordinary way."

22. It seems to me that these authorities are persuasive and I feel that it is proper and reasonable to follow them. What then is the effect of these legal principles on the facts before the court on this preliminary issue?

23. The following is the preliminary issue directed to be tried by order of Finlay Geoghegan J.:

"Whether the claim by Kevin Barnes, Hilary Fanning, Brian Horgan and Kieran Gallagher that the shares in Dana Petroleum and/or the proceeds of sale thereof held by MMI represent client money or client financial instruments or documents of title relating to such financial instruments are statute-barred having regard to the provisions of the Statute of Limitations, 1957 as amended and extended."

Since the issue was framed, Messrs. Barnes, Horgan and Gallagher have ceased their involvement in the issue, leaving Mr. Hilary Fanning as the only remaining claimant.

24. Any claim which Mr. Fanning has against the shares in Dana or the proceeds of sale thereof can only derive from his purchase of them from CIS in circumstances where the evidence shows that the Company purported to act as broker. In other words, the foundation of any claim he has derives from the contract for the sale of the shares between CIS and Mr. Fanning. The official liquidator's evidence is that no payment was received by the Company from Mr. Fanning and CIS has also given evidence that it has never received payment for the shares in question. The purported contract for the sale of the shares on 7th September, 1998, has never been completed.

As the shares have been sold by the liquidator, no question of a specific performance claim can arise. If Mr. Fanning has a claim against CIS, it is a claim in contract. The cause of action (if any) arose on 7th September, 1998, and was a contract outside the liquidation. Following the line of authorities I have referred to in this judgment, a distinction is to be drawn between any claim that Mr. Fanning had against CIS from a claim he may have against the Company in liquidation. Mr. Fanning is not contending that he should come into the winding up and prove for a debt in the same manner as an unsecured creditor. Rather, he is saying that he had a contract with CIS to purchase the disputed Dana shares and that CIS has failed to transfer those shares to him. On the other hand, CIS maintains that the shares are its property. It seems clear that the shares are not owned by the Company. The directions sought by the official liquidator are brought for the purpose of establishing that the shares are not the property of Mr. Fanning (among others) in order that he might be satisfied that they are the property of CIS. Even if Mr. Fanning were to argue that he was not aware that the contract he contends for was concluded on 7th September, 1998, he clearly knew, from 9th May, 2000, that CIS was the counterparty to the relevant contracts as he was notified of that fact by the official liquidator's solicitor on that date. So if there was ever any doubt about the matter, Mr. Fanning knew from that date that the vendor of the shares was CIS.

25. The question is whether CIS or Mr. Fanning is the owner of the disputed shares or the proceeds of sale thereof. Mr. Fanning's claim, if he has one, is against CIS and it is a claim outside the winding up of the Company. Accordingly, I hold that his claim in respect of the shares of Dana Petroleum or the proceeds of sale thereof is statute-barred, having regard to the provisions of the Statute of Limitations 1957, as amended and extended.