

## THE HIGH COURT

RECORD NO. 32 COS 1999

**IN THE MATTER OF MONEY MARKETS INTERNATIONAL  
STOCKBROKERS LIMITED (IN LIQUIDATION)  
IN THE MATTER OF THE COMPANIES ACTS, 1963-2003**

**BETWEEN****WILLIAM THOMSON AND IRENE THOMSON****APPLICANTS**

**AND  
TOM KAVANAGH**

**RESPONDENT****Judgment of Miss Justice Laffoy delivered on 20th October, 2006.****Factual background**

1. In July 1998 the applicants, who are husband and wife, invested Stg.£145,000 in an equity based product known as "Universal Personal Portfolio Contract" issued by Hansard International Limited (Hansard). The personal fund number ascribed by Hansard to the applicant's personal fund was 90756T. Money Markets International Stockbrokers Limited (the Company) was appointed discretionary manager of the personal fund and cash sums were placed with the Company for the purpose of purchasing shares.

2. The Company maintained a current account with a London branch of NatWest Bank, which was entitled "Client Settlement Account", which, for the sake of clarity, I will refer to as "the NatWest Bank Account". The Bank Account was denominated in sterling. The account was balanced each day to show a zero balance at the end of the day. On 27th August, 1998 a transfer in the sum of Stg.£159,026 from Hansard was credited to the NatWest Bank Account. The NatWest Bank Account, like other accounts maintained by the Company, reflected transactions in relation to monies from various sources, the ultimate sources being primarily clients of the Company.

3. The Company did not maintain a separate bank account for each client of the Company. However, it operated a computerised stock broking system known as Broker Focus, in which financial transactions of individual clients of the Company were reflected against client account monies. One such account, in the name of Hansard, was assigned an account code 5379. I will refer to this account, which was denominated in sterling, as "the Applicants' Client Account". The Applicants' Client Account was opened on 21st August, 1998, the opening entry being a purchase of shares. The second entry is a journal entry on 27th August, 1998 which reflects the transfer of Stg.£159,026 received into the NatWest Bank Account from Hansard on that day. When the company went into liquidation on 15th March, 1999 there was a credit balance of Stg.£107,907.38 on the Applicants' Client Account. In the interim there had been recorded on it three share purchases, two share sales and two dividend receipts, in addition to a journal entry which I am satisfied represented a refund to Hansard of an overpayment in the amount of Stg.£21,513.50.

4. The respondent, who is the official liquidator of the Company, is technically correct in contending that the applicants were not clients of the Company. Hansard was the client of the Company. However, this application is brought by the applicants with the consent of Hansard. An affidavit sworn by the Company Secretary of Hansard on its behalf confirms that the applicants are the beneficial owners, through their interest in the personal fund numbered 90756T, of the cash sums placed with the Company and that, insofar as any payment is made to the applicants by the respondent in respect of those funds, the same will be accepted by Hansard as discharging any liability of the respondent to Hansard in respect thereof. While the Company Secretary did not confirm this, it is clear that the funds in question are those reflected on the Applicants' Client Account.

**The application**

5. On 10th December, 2004 the applicants initiated this application by originating notice of motion claiming, inter alia, an order directing the respondent to pay to the applicants the sum of Stg.£107,907.38, that is to say, the credit balance on the Applicants' Client Account. It emerged in the course of the exchange of affidavits between the parties that the case being made by the applicants is that their position as against the funds in the hands of the respondent is identical to the position of the applicant, Gill Hess, which was the subject of a judgment and order of the court made on 20th July, 1999 (reported as *Re Money Markets International Stockbrokers Limited* [1999] 4 I.R. 267). It has been agreed by the parties that the court should determine, as a preliminary issue, whether the applicants' assertion that they are in an identical position to that of Mr. Hess and that their application should be decided in their favour on the basis of the same principles as the application of Mr. Hess was decided in his favour is correct.

**Analysis of the applicants' claim**

6. The basis of the applicants' claim is that the Applicants' Client Account discloses that monies which were placed with the Company for the purchase of shares were not utilised for that purpose before 19th February, 1999, the date of the suspension of the Company from transacting business on the Irish Stock Exchange and, therefore, the position of the applicants is analogous to the position of Mr. Hess. By adopting that approach the applicants implicitly modified their claim insofar as they argued that they should be treated in the same way as Mr. Hess was treated. They recognised that as of 19th February, 1999 of the balance on the Applicants' Client Account only Stg.£76,268.88 represented what they described as "monies lodged on 27th August, 1998 which had yet to be invested".

7. The fundamental flaw in the applicants' approach is that it fails to recognise the distinction between a bank account of the Company, that is to say, an account which the Company maintained at a bank, on the one hand, and a client account in the Company's books which was a record of the dealing of a particular client with the Company, on the other hand. The claim of Mr. Hess was in respect of monies which were reflected in the final credit balance as of 19th February, 1999 on the bank account to which they had been transferred on the previous day. The monies which Hansard transferred to the NatWest Bank Account had left that account by the close of business on the day on which they were transferred to it, 27th August, 1998.

8. The position of the applicants is no different from the position of any other client of the Company whose monies passed through a bank account of the Company and were intermingled with monies of other clients in respect of whom the Company recorded the transactions relative to them in client accounts. It is immaterial that in any such case the build up of the balance on a client account includes monies which were received from the client and were credited to him but had not been expended in the purchase of shares when the Company was wound up. The credit balance on a client account, irrespective of how it was built up, represents the measure of a client's claim against the Company and against client funds held by the Company. The nature of the client's beneficial interest or equity does not vary depending on whether the constituents of the credit balance on the client account are monies

transferred by the client to buy shares which have not been utilised for that purpose or the proceeds of shares sold or dividends from shares held.

9. It was also submitted on behalf of the applicants that the manner in which the court treated the syndicated investors in *Shanahan Stamp Auctions Limited v. Farrelly* [1962] 386 supported the applicants' claim to a better equity than other clients of the Company. The passage from the judgment of Budd J. on which the applicants relied is the following passage which is to be found at p. 443:

"It was part of the contract, as I found, that the stamps being purchased would be allotted to syndicates and then 'treated' as their property. As regards the syndicated investors the contract with them at the time of liquidation had reached a certain stage. As Mr. Matheson says, they had been informed that their money had been used in the purchase of particular stamps, and again applying the principle in Hallett's case [13 Ch.D 696] that a person who does an act which may be rightly performed cannot say that it was done wrongly, it would seem that at least as between the syndicated investors and the company it should be assumed that the act of purchase and allotment was done rightly and that the syndicated owners therefore have a particular equity as regards the syndicated stamps. If so, they would be entitled again prima facie to a charge over these stamps to which their money has been traced in equity and which have been appropriated to them and to a consequent right to have them sold for their benefit. Such prima facie right should not, however, be operated in their favour if it works an injustice."

10. Having examined the position of the unsyndicated investors, Budd J. concluded that making a declaration of charge in favour of the syndicated investors over the syndicated stamps would not work an injustice on the unsyndicated investors. Therefore, he concluded, the sale of the syndicated stamps and rateable distribution of the proceeds amongst the syndicated investors would be the proper relief to grant.

11. It seems to me that, in order to appreciate the significance of what Budd J. was saying in the passage I have quoted, it is necessary to have regard to the case made by the liquidator of Shanahan Stamp Auctions Limited, the plaintiff in the proceedings. As Budd J. disclosed in his judgment (at p. 408), the liquidator made the case that syndicated investors and the unsyndicated investors were mere creditors of the company. That argument was based on the contention that the court for various reasons of a legal and practical nature, in determining the rights of the parties, would be forced to have regard to the way the company had in fact conducted its affairs, which differed from its ostensible way of carrying on its business. The factual position in that case was that the company had only one bank account. Investors' monies were paid into that bank account, as well as other monies of the company. The stamps were purchased with monies from that account. Some of those stamps were allotted to syndicates, some were not. The investors' money had been drawn on to a far greater extent than the value of the stamps which the liquidator took over following his appointment. On the basis that the only proper purpose for which the company could withdraw investors' money from the bank account was for the purchase of stamps, and applying the principle of Hallett's case that the company as a fiduciary agent was precluded from setting up a case inconsistent with the obligations of its fiduciary position, Budd J. held that it must be presumed that it was investors' monies, not the company's monies, which had been used in the purchase of the stamps, so that the investors were entitled to a tracing order or a charge. (cf. p. 439). Later in his judgment, as I have indicated, Budd J. held that the syndicated investors were entitled to a declaration of charge over the syndicated stamps rateably.

12. In my view, the approach adopted by Budd J. is of no assistance to the applicants and it certainly does not recognise any equitable principle by virtue of which the rights of the applicants in relation to the Applicants' Client Account could be "elevated" to a position more favourable than that of other clients of the Company, as was contended on their behalf. In short, I think the argument based on the judgment of Budd J. is misconceived.

## **Conclusion**

13. The applicants are not entitled to an order for payment to them of either the sum of Stg.£107,907.38 or Stg.£76,268.88 by analogy to the decision of the court on the application of Mr. Hess. Their entitlement as against the Company in liquidation and the client funds cannot be determined in isolation and without regard to the totality of the calls on the client funds, including such recourse as the liquidator may have against the client funds by virtue of s. 52(5)(b) of the Stock Exchange Act, 1995.