

THE HIGH COURT**2000 No. 780 S****BETWEEN****MONEY MARKETS INTERNATIONAL STOCKBROKERS LIMITED
(IN LIQUIDATION)****PLAINTIFF****AND
JOHN BARNES****DEFENDANT
2000 No. 791 S****BETWEEN****MONEY MARKETS INTERNATIONAL STOCKBROKERS LIMITED
(IN LIQUIDATION)****PLAINTIFF****AND
KEVIN BARNES****DEFENDANT****Judgment of Mr. Justice Bryan McMahon delivered the 13th day of June, 2008**

1. In these cases the plaintiff liquidator claims that monies are owed and due to him from the defendants in the amounts specified in the summary summons.

2. The background to the two cases is similar and both cases were heard together. I will first deal with the case of Kevin Barnes. The plaintiff alleges that Kevin Barnes, who is an employee in a University sports complex, is an experienced trader in the stock market and that he had an account with the plaintiff company now in liquidation for many years. The plaintiff alleges that Mr. Barnes dealt with high risk shares and oil shares in particular, and personally communicated with the plaintiff company on a very regular basis, sometimes up to three times a day. Not only did Kevin Barnes deal on his own behalf, but he also introduced many other clients to the company. The plaintiff alleges that Kevin Barnes conveyed instructions to the plaintiff company with regard to purchasing and selling on behalf of these other clients as well as giving instructions in relation to his own account. In effect he, according to Mr. O'Reilly who was responsible for Kevin Barnes's account, in the plaintiff company, acted as agent for these persons in conveying their instructions to Mr. O'Reilly.

3. According to the plaintiff, Kevin Barnes owed the company the sum of €69,750. The sum mentioned in the summons is somewhat larger, but the plaintiffs indicated at the hearing that the real claim was for €69,750 only. This sum is made up of the balance due when the credit in the Irish punt account in Kevin Barnes's name is offset against the debit in his sterling account on the date when the company went into liquidation, that is the 23rd March, 1999. In the case of John Barnes the sum claimed amounts of the equivalent IR£58,764.60 in euro.

4. Mr. Colm O'Reilly, who is a Stock Broker since 1974 and who was primarily responsible for handling both defendants accounts, gave evidence that all the necessary documentation was signed by the defendants when they first opened their accounts. He also identified all the individual contract notes executed in respect of the relevant transactions over the period in question. These were notes which recorded the dates of the purchase and sale of various shares and the prices paid and received in respect of these transactions. Quarterly accounts were also produced for the defendants and these were also proved by Mr. O'Reilly. Kevin Barnes opened his accounts with the plaintiff company as far back as 1990. From then until the date when the company went into liquidation he actively engaged in buying and selling shares.

5. Kevin Barnes's defence to the claim was based on three allegations:

(1) He claimed that he had made a full and final settlement of all monies outstanding at a meeting in August, 1998 at McCluskey's pub where he paid over monies amounting to £100,000.

(2) He claimed that instructions he gave in October, 1997 that all his Dana oil shares were to be sold was not carried out and therefore the plaintiff company was in breach of its obligations to Mr. Barnes in that regard.

(3) He claimed that monies which were owing to him should have been repaid from other accounts into his own account and that he was entitled to claim these monies due to him as a setoff in the present proceedings.

6. I will address each of these defences in turn.

7. In or around August, 1998, Kevin Barnes's account was in arrears and he was being pressed for payment by the plaintiffs. At that time he owed somewhere in the region of IR£130,000. Responding to the pressure Kevin Barnes paid £30,000 and he raised another £100,000 by re-mortgaging his house. He brought this bank draft for £100,000 by appointment to McCluskey's pub and he handed the money over to Mr. O'Reilly and Mr. Fanning for the company. This was not disputed by the plaintiff. Kevin Barnes, however, states that this was an end to the matter as far as he was concerned and he indicated to Mr. O'Reilly and Mr. Fanning that he was "out of it" then. He alleges that these payments were in full and final settlement of what he owed and that his relationship with the plaintiff company was at an end.

8. It is difficult to accept Mr. Barnes's evidence that this was the effect of what happened on that day for two reasons: first, Mr. Barnes had "extended" accounts with the plaintiff company, which in effect gave Mr. Barnes credit for 90 days in respect of certain transactions, but which had to be settled on the 90th day at the latest. On the day when the parties met in McCluskey's pub, Mr. Barnes's liability under these accounts was not quantified and until that was done it could not have been known whether there would be a credit or debit in these accounts on settlement day. Second, after the August meeting, Kevin Barnes was sent further contract notes of transactions entered on his behalf and apparently he did not object. It is true that Kevin Barnes gave evidence that he never got these notes after that date but the records are there and Mr. Barnes has no convincing evidence to disprove these.

9. Kevin Barnes also complained that on one occasion in 1997, he gave instructions to a lady in Money Markets (Mr. O'Reilly with whom he usually dealt was unavailable when he phoned on that day) to sell all the Dana shares in both his and John Barnes's accounts at a profit, which was considerable at that time, and that his instructions were not carried out. Mr. Barnes said that some 10 minutes later he received a phone call from Mr. Fanning who strongly advised him not to sell as some announcements were due

which would send the shares up over 30 pence. He took this advice. In his evidence he said "I could have sold. I didn't". It is clear from this that whatever instructions Kevin Barnes gave to the lady he first spoke to, having spoken with Mr. Fanning, he reversed his decision. In such circumstances he cannot make a claim that there was a failure to execute his order. He has made no argument that he was badly or wrongly advised by Mr. Fanning. It is significant also to note that Kevin Barnes made no complaint about this alleged failure until 1999, that is, until the company had gone into liquidation. There is no evidence in any event that the shares dropped in value after this instruction was given or at what time the defendants eventually disposed of the shares and what if any was his loss. It may even be that the shares increased in value after that date. For these reasons I reject this argument advanced by Mr. Barnes.

10. The third defence advanced by Kevin Barnes, that he was owed money from the plaintiff company, arose in the following circumstances. Mr. Barnes said that, at Mr. O'Reilly's request, he gave authority on the 13th May, 1998 for the transfer of a sum of £62,300 sterling out of his client account with instructions that it was to be paid in different and unspecified sums into the accounts of several other persons, some of whom he had introduced to the firm but others whom he did not know at all. Mr. Barnes said that shortly prior to that date he had a phone call from Mr. O'Reilly who said that the company was having an audit by the Central Bank and that there were some problems with the accounts of persons introduced to the company by Kevin Barnes. Kevin Barnes said that Mr. O'Reilly requested him to allow a deduction of £62,300 sterling from Kevin Barnes's client account to be applied to those other accounts and that it would be repaid to Mr. Barnes shortly thereafter. The implication was that the company was experiencing a temporary problem that needed to be disguised until the audit was over when the money would be repaid. It was intimated that the company might be at risk and that they would all lose out. Kevin Barnes said that he was somewhat mystified by the request and asked what kind of authorizations were being required as he did not quite understand what exactly was required of him. He asked Mr. O'Reilly to draft the letters he wished Mr. Barnes to sign. Mr. O'Reilly then faxed two draft letters to Kevin Barnes which Kevin Barnes must have sent back in his own handwriting after he signed them. The two draft letters are reproduced here.

(1) "Dear Sirs, 13/5/98

This is to confirm that any credit balances on my accounts Client Ref. 956, 4422, 4114 can be used as an offset against debit balances on any of the following Accounts

Norman Johnston

Vincent Pippett

Michael Shanahan

The Marine times

JJ Mc Brearty

Killybegs Acquisition Traders

Catherine McDonald

John Slevin

Michael Keogh

Sign. Kevin Barnes."

(2) "Dear Sirs, 13/5/98.

In connection with my letter of Offset it is to be understood that no action will be taken on any positions on the accounts mentioned without prior consultation with me.

Kevin Barnes."

11. Mr. O'Reilly's version in his evidence was that in response to Mr. O'Reilly's request, Kevin Barnes authorised the deduction of this money from his account to be applied to the accounts of several people who were in difficulty. He said that Mr. Barnes was to recover this money from the various people afterwards.

12. This transaction was strange to say the least and at one stage appears to have been of some concern to the Liquidator when he was first appointed. There were early proceedings instigated by the Liquidator against some of the directors and the letter dated the 9th September, 1999, of further particulars in those proceedings was exhibited to this court. It sets out the history of this transaction which was not disputed. Again I reproduce this letter hereunder.



9 December 1999

Re: Money Markets International Stockbrokers Limited (In Liquidation) ("MMI")
High Court 1999 No. 10527P
Our Client: Tom Kavanagh, Official Liquidator
Your Client: Oisín Fanning

Dear Sirs,

As solicitors for the Plaintiff in these proceedings, we hereby furnish you with further particulars as follows:-

On or about the end of January 1999 MMI received a letter dated 27th January, 1999 from Cater Allen Nominees Limited raising queries in relation to the nine Sterling cheques totalling STG£551,463.17, already pleaded in the Statement of Claim, which appeared to have been debited from its account with MMI. Bob Holt then chairman of MMI instructed Colm O'Reilly, the fourth named defendant, to investigate the matter. On or about early February 1999, and prior to the liquidation of MMI, Bob Holt had a meeting with Colm O'Reilly. In the course of that meeting, Bob Holt queried the nine Sterling cheques drawn on the client account of MMI totalling STG£551,463.17. Colm O'Reilly stated to Bob Holt that this was fraud. The Plaintiff will adduce oral evidence of this meeting at the trial of the action herein.

Kevin Barnes of Sports Centre, UCD, Belfield, Dublin 4 was at all times a client of MMI. On or about 28th May 1998, the Defendants their servants or agents wrongfully and in breach of their fiduciary duty and/or in breach of trust and in breach of statutory duty, transferred monies out of the client bank account of MMI by drawing cheques on the National Westminster Client Sterling bank account of MMI in favour of MMI in the sum of £15,900.00 and £46,400.00 respectively totalling £62,300.00.

The said cheques were then relodged into the National Westminster Client Sterling bank account of MMI as part of a lodgement in the sum of STG£15,000 on 28th May, 1998 and were credited to the client ledger accounts of the following persons who were also clients of MMI:-

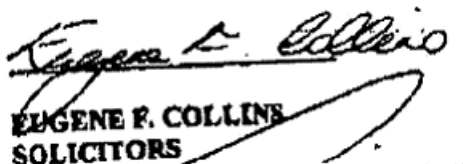
Name	Amount £
Norman Johnston	950.00
Vincent Pippett	5,750.00
Michael Shanahan	6,550.00
Marie Times	17,400.00
J.J. McBreart	8,400.00
C. McDonald	7,600.00
J. Slevin	3,650.00
M. Keogh	12,000.00

The cash receipts books of MMI falsely recorded and/or was permitted to falsely record the aforesaid monies as having been received from the individuals referred to above. The individual client ledger accounts of the said individuals were falsified and were permitted to be falsified to the effect that they received credit for the said monies.

The client ledger account of Kevin Barnes was debited with the aforesaid sums pursuant to representation made by the first and/or fourth defendant s through Kevin Barnes that MMI was losing money and that they needed to use the credit balance on the client ledger account of Kevin Barnes in order to reduce the deficit on ledger accounts of other clients of MMI namely, the clients particularised above who received the benefit of and were credited with having deposited the said sums with MMI. Kevin Barnes agreed to the said arrangement on the basis that the monies would be transferred back into the account by the Defendants. The said monies were never transferred back into his account.

The fourth named Defendants, Colm O'Reilly, furnished Kevin Barnes with a draft letter dated 13 May 1998 which Colm O'Reilly had handwritten himself. This was a draft letter addressed to MMI which Colm O'Reilly indicated should be signed by Kevin Barnes should instruct the company to transfer monies out of his account into the accounts of other clients which were showing a deficit. The wrongful transfers of money made pursuant to the advice and/or instructions and/or representations made by Colm O'Reilly and Oisín Fanning have resulted in loss and damage to Kevin Barnes and/or the clients of MMI.

Yours faithfully,


EUGENE F. COLLINS
SOLICITORS

9 December 1999

13. Having heard the witnesses and having reviewed the relevant documents I have come to the conclusion that on the balance of probability, the defendant, Kevin Barnes, never gave absolute instructions as claimed by Mr. O'Reilly in respect of these transactions. Kevin Barnes was not in a position to give sums of this magnitude to other people. Moreover, although it was true that Kevin Barnes did introduce some of these persons to the firm, he gave evidence that there were others on this list who were total strangers to him. Furthermore, there was no documentary evidence of any sort before the court to suggest that Mr. Barnes was responsible for the dealings of the people whom he introduced to the firm or that he was their agent. Significantly too, was the fact that persons whom Kevin Barnes admitted he acted for as agent, for example, his brother John Barnes and his aunt and his uncle were not on the list. In the view of the court it is more plausible that he gave Money Markets permission only to use his money as a temporary measure to get Money Markets out of a difficulty, but on the understanding that it was to be repaid to Mr. Barnes at a later date by Money Markets. The draft letters proposed by Mr. O'Reilly, for Kevin Barnes signature, were not in terms that one would expect if Money Markets was requesting Kevin Barnes to pay because he had an obligation to do so. Moreover, the way the transactions were recorded as can be seen from the letter of the 9th September, 1999 indicates an irregularity which is not consistent with Mr. O'Reilly's version of events.

14. It is also surprising that the Liquidator who had initiated proceedings shortly after his appointment against several directors and who discontinued these proceedings because the main complainant against the company later withdrew the allegations, never investigated with the persons on the list the circumstances of these credits. It was mentioned in evidence that none of these people on the list complained about these irregularities at any time. Why would they? Their accounts benefited; they had no reason to complain.

15. I find that Mr. Kevin Barnes's version of this transaction is true on the balance of probability for these reasons.

16. When I allow a setoff in this amount in favour of Mr. Kevin Barnes the claim of the plaintiff is reduced to virtually nothing. In fact, Mr. Barnes said that it results in a small credit in his favour which he is now prepared to waive. I dismiss the case brought by the plaintiff against Kevin Barnes.

17. I now turn to the case of John Barnes.

18. The plaintiff was a stock-broking firm and a member of the Irish Stock Exchange that went into liquidation on the 19th March, 1999. The defendant was a client of the company before it went into liquidation. In these proceedings the company claims that it purchased and/or sold shares on behalf of the defendant and as a result of various transactions it is owed £58,764.60 by the defendant.

19. John Barnes's position was very different to that of his brother Kevin. In the early 1990s the defendant John Barnes returned from the United Kingdom to Donegal to care for his mother who was dying. As this took up all of his time he was not in paid employment. His only assets were a small amount of shares he held in United Kingdom Blue Chip Companies. On the advice of his brother Kevin Barnes, he placed these shares with the plaintiff company as collateral for other share purchases it was going to make on his behalf. According to Kevin Barnes it was made clear to the company that these shares were the only assets the defendant had, that he was not earning any money and that if the value of these shares was lost then the company should not buy any more shares on his behalf. It is strange if this was the case that for several years before 1998, it is clear from the contract notes, that Kevin Barnes was dealing in large sums of money in high-risk oil shares such as Dana Oil and Tullow Oil for and on behalf of his brother. The records do not show conservative trading on behalf of John Barnes.

20. It is clear from the evidence that John Barnes was not an experienced investor in the stock market and had little understanding of how the market worked. He relied totally on his brother Kevin for guidance and in the circumstances of this case Kevin Barnes was at all times John Barnes's agent in these matters. John Barnes gave evidence that when he received contract notes of sales and purchases, and quarterly reports over the years, he did not understand their significance. He said he relied entirely on Kevin to look after his affairs. He denied that he ever signed any initial documentation authorising the company to buy and sell on his behalf and gave evidence that in the initial documentation of authority, the signature purporting to be his was not in fact made by him.

21. Kevin Barnes acknowledged that he acted for his brother from the beginning but he said that in or about mid 1998 he received a phone-call from the plaintiff company to say that John Barnes's collateral was gone and that he now owed £300 to the plaintiff. The defendant's brother informed the company that it should contact his brother directly and that he was not giving it any further instructions on that account. John Barnes's case is that in breach of contract the company ignored that instruction and continued to deal on his behalf. Mr. O'Reilly who was the main contact point in Money Markets for Kevin Barnes denies that any such instructions were issued.

22. Even if I accept that this conversation took place between Kevin Barnes and the plaintiff company sometime in the middle of 1998, I must further pose the question as to what the effect of such a conversation would have on the legal relations between the plaintiff and the defendant John Barnes. It is true that the plaintiff company knew from the beginning that Kevin Barnes acted as John Barnes's agent. The plaintiff company also knew that John Barnes had very limited collateral which had been used up by mid 1998 and that John Barnes had no income. Mr. O'Reilly for the plaintiff company also gave uncontradicted evidence that none of the accounts for people introduced by Kevin Barnes were "discretionary accounts", which meant that Money Markets could only buy and sell on specific authority and instructions of its clients or their agents. Once Money Markets was on notice that Kevin Barnes was no longer acting for John Barnes, if that is what happened, Money Markets would have had no authority to act for John Barnes and so should not have entered any share deals on his behalf without first seeking direct authority from him after that date. The plaintiffs do not allege that they ever sought such authority.

23. From the documentary evidence before the court, the company continued after that date to deal in shares for John Barnes apparently with Kevin Barnes's consent. Notes of these transactions continued to be sent to John Barnes for many months after Kevin Barnes's alleged instructions to the plaintiff company and these were neither rejected nor denied by Kevin Barnes or John Barnes.

Kevin Barnes gave no evidence that he ever wrote afterwards to the plaintiff company to clarify his instructions explicitly. Furthermore, objections and protests from the defendant or from his agent, only first surfaced after the company went into liquidation, some nine months later.

24. Even if Kevin Barnes's evidence was true, and Mr. O'Reilly said he never got such instructions, Kevin Barnes's subsequent conduct, in these circumstances, would have the effect of negating these earlier oral instructions. In such a case Kevin Barnes's position as John Barnes's agent in these matters would have resumed as far as the plaintiff company was concerned. This would render John Barnes liable for the losses incurred during the relevant period.

25. I find it difficult in any event, given the level of the dependency that existed between Kevin Barnes and his less sophisticated brother, and the long history of reliance John Barnes placed on Kevin Barnes in the management of his investments, that Kevin Barnes would have lacked the courage to inform his brother of the losses, knowing that failure to do so would expose him to further possible losses and further share dealings.

26. The above comments are based on the assumption that Kevin Barnes did say something to Mr. O'Reilly around mid-1998 to the effect that he was no longer acting as his brother's agent. For clarity, however, I find that there was no convincing evidence before the court that Kevin Barnes had signalled unequivocally to the company that he was no longer acting as agent for John Barnes from mid-1998 as he alleges.

27. For these reasons, I hold that debts incurred by the plaintiff company during the relevant period were incurred on the instructions of Kevin Barnes who at the time was still acting as agent for John Barnes as he had done for several years previously.

28. I make an award in the amount of the equivalent IR£58,764.60 in euro.