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IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 139/90

**LOW
PRIORITY**

1344

BETWEEN PETER BUTTLE of
Warkworth, Farmer

Appellant

A N D BUTTLE & CO. FUTURES
BROKERS LIMITED (IN
LIQUIDATION) a duly
incorporated company
having its registered
office at Auckland

Respondent

Coram: Somers J (presiding)
Bisson J
Williamson J

Hearing: 16 July 1990

Counsel: S. Barker for Appellant
L. McEntegart for Respondent

Judgment: 27 July 1990

JUDGMENT OF THE COURT DELIVERED BY WILLIAMSON J.

Summary judgment for \$164,532 plus interest, costs, and disbursements was entered against the appellant in the High Court at Auckland on the 8th March 1990. The liquidator of the respondent had claimed this sum as the debit balance of the appellant's account with the respondent. At the date of liquidation, the 24th February 1988, the appellant's accounts, according to the statement of affairs, showed a credit balance of \$17,455. Subsequently the liquidator amended this account in respect of two sums, one of \$22,400 and another of \$159,587,

upon the basis that those amounts had been wrongly credited to the appellant's account.

In his notice of opposition to summary judgment, the appellant raised a counterclaim to his liability for the first sum of \$22,400 and also contended that there was insufficient evidence to support the liquidator's amendment in relation to the sum of \$159,587. On appeal the argument for counterclaim was not continued. In respect of the sum of \$22,400 the appellant claimed a set off against the balance shown in his ledger account at the date of liquidation, namely \$17,455. It was accepted that on the case presented by the appellant there would be a residual liability requiring the appellant to pay the respondent the sum of \$4,945.

There was no dispute between the parties that the respondent had received the sum of \$159,587 and that that sum had been credited to the appellant's account with the respondent.

The basis of the liquidator's reversal of the second entry in the appellant's account was his conclusion that the sum of \$159,587 had not been the appellant's funds and did not represent a loan to him. The appellant in his affidavit, however, claimed that the sum had been borrowed from Futures Fund Management Limited and that it had been properly credited to his account on his instructions. In the High Court the

Master determined that the evidence did not establish that the appellant had a right to the credit or personally had any entitlement to the funds. This conclusion was reached primarily on the evidence of the appellant himself. To understand this conclusion it is necessary to recount the sources of the relevant funds as described in the appellant's affidavit.

Towards the end of 1986 an establishment fee of US\$100,000 was paid by Buttles International Futures Fund to Futures Fund Management Limited. The appellant was a director of the latter company and the shareholding of the company was owned by the Morton Trust, of which the appellant and members of his family were beneficiaries. In January 1987, because the appellant and his wife wished to purchase a house at St Heliers, Auckland, the sum of US\$100,000 was advanced from Futures Fund Management Limited to Alpha Finance Limited, which in turn advanced the same funds to the Buttle Family Trust to enable that Trust to purchase the house. When the house was sold shortly afterwards, the funds were repaid to Alpha Finance Limited. They were not, however, repaid to Futures Fund Management Limited but rather transferred to Alpha Finance Limited's parent company, namely South Pacific Trust Corporation Limited.

In September 1987 the sum US\$103,000 was placed by South Pacific Trust Corporation Limited with Hill Samuel & Co.

Ltd, Hong Kong. This action was taken on the appellant's instructions with the object of having the funds placed on the money market. On the 9th December 1987, as a result of instructions given by the appellant, South Pacific Trust Corporation Limited then arranged for the sum which had grown to US\$104,306.44 to be transferred to the Bank of New Zealand, New York, and then to the Bank of New Zealand at Auckland. The same amount, represented by NZ\$159,587 was paid to the respondent. Again on the appellant's instructions it was credited to the appellant's account with the respondent on the 23rd December 1987.

The evidence indicates that the appellant was in a position to direct South Pacific Trust Corporation Limited in relation to these funds. The letter which he sent to them by fax on the 9th December 1987 was written on a letterhead of Buttle Investments Limited but stated:

"TO: Trevor Brown
South Pacific Trust Corporation
Rarotonga
COOK ISLANDS

Dear Trevor,

RE: Funds held on Deposit.

Please transfer the funds held by you on my account to the account of Buttle & Co. Futures Brokers Ltd, the details of which are as follows.

A/C BUTTLE & COMPANY
Bank of New Zealand
New York Branch
299 Park Avenue, N.Y.

A/C No. 026009412 - 110903 - 000

Please confirm that this can be done today or if not actual date of transfer.

Many thanks"

The foregoing description of the manner in which these funds reached the respondent company relies upon the affidavit made by the appellant. It is the only evidence concerning these matters. A number of questions remain unanswered in relation to the capacity in which the appellant directed movement of the funds and the rights of respective parties to them.

Although the respondent has been in liquidation for over two years, there is no evidence that the liquidator has received a claim to the funds by any other person. It is to be noted that there is also no evidence that the respondent company had an entitlement to these funds on any basis other than as a payment made to reduce the appellant's account with them. The liquidator's position is that he is not satisfied that the appellant had any entitlement to the funds at the time when they were paid to the respondent. Such a conclusion, even if correct, may not be decisive, however, since a third party may discharge another's debt provided that the debtor authorised or subsequently ratified the payment (see Smith v Cox 1942 KB 558 and Goff and Jones "Law of Restitution" Sweet and Maxwell 1986 page 17.

In this case the appellant clearly had power over the funds since on the 9th December 1987 he was able to direct what steps should be taken in relation to them. The appellant's affidavit does not clearly state the exact nature of the previous dealings with these funds. Ultimately the onus of establishing that a debt is still owing by the appellant to the respondent must rest upon the respondent even though the appellant may be in a better position to know the full facts concerning the ownership and source of the funds. We have concluded that the evidence that the appellant gave instructions for the transfer of the funds to the respondent and directed that the funds be credited to his account with the respondent provides a prima facie basis for a fairly arguable defence to this claim.

Accordingly the appeal is allowed. The application for summary judgment is dismissed and a direction is given that the appellant file a statement of defence to the claim within 21 days. Normally costs and all reasonable disbursements, including any costs of travel of Counsel, as well as costs in the High Court, are left to abide the outcome of the action. In the event that the respondent does not proceed with its action we fix the costs in this Court at \$1,500.



Solicitors:

Buddle Findlay, Auckland, for Appellant

Simpson Grierson Butler White, Auckland, for Respondent