

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

27/12

CP 2645/89

BETWEEN BUTTLE & CO FUTURES BROKERS
LIMITED (IN LIQUIDATION)

2494

PLAINTIFF

A N D PETER BUTTLE

DEFENDANT

Hearing: 20 November 1991

Counsel: L. McEntegart & D.G. Collecutt for Plaintiff
A.J. Harding for Defendant

Judgment: 20 November 1991

ORAL JUDGMENT OF ANDERSON J

This proceeding is brought at the suit of a company which went into voluntary winding up on 10 February 1988. Liquidators were appointed on 24 February 1988. In pursuit of their responsibility, the liquidators have caused the plaintiff to sue a former director and shareholder in respect of monies said to be due on the defendant's current account with the company. The alleged deficit in the current account is \$164,532, a figure arrived at by allowing the defendant a credit of \$17,455 against debits of, respectively, \$22,400 and \$159,587. A former contest over the \$22,400 has now been resolved by the defendant acknowledging liability, so that in any event the plaintiff is entitled to judgment against the defendant in the sum of \$4945. That

issue has not occupied much time in the trial of the proceeding today. The real dispute lies in respect of a sum of approximately \$104,000 US, converted to NZ \$159,587, credited against the defendant's current account on 17 December 1987. The background to the receipt and crediting of those funds is somewhat complex but I shall try to indicate the situation as briefly as I can.

The plaintiff was established in about 1985 to trade in futures, apparently for the benefit of investors who would place monies with the plaintiff in terms of an authority which allowed the plaintiff to deal with investment funds as its own general funds. That is, unlike some of the investment companies operating in the few years prior to October 1987, investors' funds were not impressed with a trust upon receipt but were placed in circumstances creating a debt for which the plaintiff would be required to account in due course, and which would properly allow the plaintiff to deal with investment funds as its own general funds.

The original directors of the plaintiff were the defendant, his wife, and two other persons whose identity is not relevant for the purposes of this litigation. In due course the defendant's personal shareholding, which seems to have been a majority of voting shares and a minority, albeit significant, of preferential shares, was transferred to the company called Buttle Investments Ltd. It is plain to my mind that in real terms the defendant remained the operating mind and motivating force of the plaintiff company.

In 1986 a company was established for the purposes of the plaintiff and/or the defendant. This company, Buttle International Futures Fund Ltd, (BIFF) was established in the Cook Islands so as to provide an

off-shore commercial facility for organising international investments on behalf of clients. A further company was established in Hong Kong. This company, Futures Fund Management Ltd, (FFML) was intended to manage the monies invested by clients in BIFF and management fees would be payable just as an establishment fee was payable to FFML. The structure of the management company and an ancillary investment company was by no means novel, but the ultimate involvement of Mr Buttle in these various arrangements is further exemplified by the fact that the shareholders of FFML were two other companies, Cobyne Ltd and Brycon Ltd, which themselves held the FFML shares on trust for an entity called the Morton Trust, the beneficiaries of which were intended to be Mr Buttle, his wife and family, and the trustees of which, according to Mr Buttle's frank but I should say extraordinary admission, seem to have been prepared to exercise no independent will and to have acted as a purported trustee but actual amanuensis of Mr Buttle. One wonders what legitimate justification there could be for the obscurities and obfuscations of these various trust and company devices, although one of course has little difficulty in perceiving illegitimate advantages in relation to the revenue laws of various countries which may have been involved.

One adds to this company/trust schematic another trust called the Buttle Family Trust which became the vehicle for the acquisition of a property in the eastern suburbs of Auckland in 1987. The Buttle Family Trust wished to provide domestic accommodation for Mr Buttle and his family. It sought to assist in the financing of this accommodation by recourse to a management or establishment fee of \$US100,000, at least, which had been paid to FFML. Although one might have thought that arrangements for an orthodox family trust funding of accommodation for

a family could have been achieved in a very direct way, in this case an indirect route was for some reason preferred. A company called Alpha Finance Ltd was engaged to act as an intermediary for the supply of funds from FFML to the Buttle Family Trust. The documents show that some small fee was paid for this accommodation, the adoption of which, as I have said, was at best unnecessary.

After a few months the house was sold. The original intention, I am satisfied, was to keep it for a number of years and indeed the term of the loan from FFML, delivered by the conduit of Alpha Finance Ltd, was for 10 years, but Mr Buttle explained, and I accept, that changes in family circumstances made it desirable that other accommodation be sought. The loan was repaid to Alpha Finance Ltd and a sum more or less equivalent to the sum repaid was then remitted to a company called South Pacific Trust Corporation, thence to Hill Samuel & Co Ltd, thence to the plaintiff's bankers in New York and from New York to the plaintiff's bankers in Auckland. The explanation for the necessity for requiring the services of South Pacific Trust Corporation, Hill Samuel & Co Ltd, and New York bankers as explained by Mr Buttle, and as I accept, was that off-shore companies were desired to facilitate any off-shore accommodation; that US dollars were involved, and that the established and convenient banking facility for conversion purposes was the plaintiff's bankers in New York.

By December 1987 the plaintiff was perceived by the defendant to be requiring an injection of cash funding. Mr Buttle did not say this but it is a reasonable inference that the disruptions to the commercial scene in New Zealand after October 1987 bore on all companies dealing with investment facilities. All such companies required a cash flow from

investors to provide for overheads where such (as in this case) could lawfully be funded from investments. Mr Buttle had a current account which was significantly in deficit. Since, as is plain, the plaintiff could not generate the desired additional funds from its own resources, the funds would have to come from someone else. Mr Buttle saw himself as a source of funds and it is not in the least surprising, nor warranting the least criticism - quite the reverse - that Mr Buttle should seek to provide funds from his resources but in a way which reduced his current account with the company. In other words, he intended to repay his debt so the company would have liquid funds with which to continue operating. Again someone more disposed to seeing simple arrangements in simple terms would have organised the payment of funds to himself and drawn a cheque on his account to pay the plaintiff, with a suitable covering letter. As learned counsel for the plaintiff candidly stated in submissions, if such a course had been followed the whole of the present litigation might have been completely unnecessary. What happened in fact is that the funds repaid by the Buttle Family Trust to Alpha were directed along the route I have mentioned, received by the plaintiff and dealt with by way of a journal entry in the books of the plaintiff, exonerating the current account deficit of the defendant to the extent of the monies received.

The plaintiff now alleges that such monies were wrongly credited to the defendant so that the true state of accounts as between the plaintiff and the defendant is that the defendant has a current account deficit in the sum of almost \$160,000 and is required, as a debtor of the company, to repay that sum. This approach cannot, nor does, overlook the necessity for considering the basis upon which the former credit should now be reversed. The approach taken by the plaintiff postulates

that the funds which came from Alpha were not the defendant's funds. Whether or not that is so has occupied much of the argument today but it is not the pivotal issue. The pivotal issue is whether the plaintiff was entitled to treat the funds immediately upon receipt as its own general funds, or whether it received the funds upon a trust for which it remains liable. Counsel for the plaintiff did not feel able, in the light of the evidence, to submit that the funds were impressed with a trust at the time of their receipt. I think, with respect, such concession by learned counsel was very properly made.

The plaintiff carries the onus of proof in this case. It has been unavoidably hampered by the obscurities of the trust/personal/company structures established in better times by Mr Buttle, and also by the imprecise basis upon which certain monies were handled between the various trusts and companies in December 1987. Lawyers are able to stand back and view a course of conduct historically and say this conduct fits that jurisprudential concept, or this conduct is not justified according to legal principles. I am satisfied, however, that the realities of the dealings with the money in this case was that people at various points in the chain received directions from Mr Buttle; were unconcerned with the capacity in which he may have been giving directions, and responded to his authority on the basis that whatever capacity he was acting in he had appropriate authority to give the direction. Indeed, I think Mr Buttle himself may have been actuated by such pragmatic but jurisprudentially imprecise motives.

The result is that one cannot show a continuing fiduciary cast to funds after the original repayment at least by the Buttle Family Trust to Alpha. The evidence does not show whether Alpha received such

repayment as trustee for Futures Fund Management Ltd, or received it on terms requiring it to account as a debtor in due course. A distinction between such possibilities is important in this case because if the latter situation applied then Alpha Finance Ltd could direct the money wherever it wished. We do not know whether South Pacific Trust Corporation received the monies as a debtor of Alpha, or on a trust basis. Probably the latter given Mr Buttle's evidence that South Pacific Trust Corporation and Hill Samuel & Co Ltd were investment vehicles for the purpose of obtaining maximum benefit from overseas funding.

Unless the plaintiff can show that it had a duty of accountability as a trustee to someone along the chain of payment from the Buttle Family Trust, or unless it can show that it received the funds as general funds for its own purposes, it cannot succeed in the present case. I think that proposition must be self evident. It is of no use to the plaintiff to say the defendant was not entitled to these monies unless it can show that such alleged absence of entitlement on the part of the defendant has created a liability or a loss on the part of the plaintiff, such that the crediting of the monies against the current account deficit should not have been made.

Looking at the matter on the basis that the funds may have been general funds, one is driven rhetorically to ask how could they become so? The evidence of Mr Bearsley is that there was no authority in this case as there was in the case of investors. On the balance of probabilities therefore the money did not come to the plaintiff as an investment. There is nothing to show any consideration whatever by the plaintiff for the receipt of those funds such as would entitle it to the funds in its own right.

Given the onus of proof resting on the plaintiff and looking at the whole of the evidence, I think the plaintiff utterly fails to show that it had an entitlement to the funds at the time of receipt as its own funds. It has been conceded, and as I have said properly, that the evidence does not show that the funds were impressed with a trust which leaves the plaintiff accountable to some as yet unidentified and certainly uncomplaining *cestui qui trust*. This company has been in liquidation for three and a half, almost four years. No-one has said "account to me for the \$US104,000 you received in December 1987". Counsel for the plaintiff points out that if the monies were in fact monies belonging to FFML it is not surprising that demand has not been made given the continuing control of FFML by Mr Buttle through the various trust company arrangements hereinbefore mentioned, and the status of Mr Buttle as the present sole director of FFML. I cannot assume a breach of trust by Mr Buttle simply because he is effectively a trustee and a beneficiary, or may be. There is nothing to persuade me that the fact that FFML has not made a demand on the plaintiff should lead me to assume breaches of trust by him or dereliction of duty. It is at least equally possible that demand has not been made because, looking at the matter conscientiously. Mr Buttle cannot assert on behalf of FFML that the plaintiff stands as a constructive trustee of FFML in respect of the funds which went from the Buttle Family Trust to Alpha Finance Ltd upon the sale of the former family home.

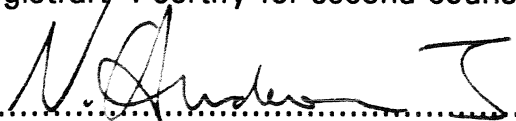
The money involved in this case is not, of course, small. The case has been presented and argued with succinctness and competence by counsel for each party, but in the end the issues are limited, indeed fine. They amount to those propositions I mentioned earlier in this judgment, namely:-

- (a) On the balance of probabilities was the money received by the plaintiff as its own money? **OR**
- (b) On the balance of probabilities was the money received by the plaintiff subject to a trust for which the plaintiff has remained and remains accountable since the time of receipt?

The onus of proof is on the plaintiff. In relation to each of those pivotal issues the onus has not been discharged. It follows that however the plaintiff's claim is framed, the result must be judgment for the defendant on that part of the claim.

Accordingly there will be judgment for the plaintiff against the defendant in the sum of \$4945, together with interest thereon at 11% per annum from 10 December 1987 down to today.

In dealing with the matter of costs, I think it right formally to record that the claim was properly brought by the liquidators who have a duty to the company, who were faced with evidence of unusual transactions which, without the evidence of Mr Buttle, would show prima facie at least suspicion about the accountability of the defendant, so as to put the defendant in the position of answering in the course of trial the apparent basis of liability. In the result the plaintiff failed to discharge the onus of proof, but that is not to say that the proceeding should not have been brought. Therefore I do not restrict the plaintiff to costs on the District Court scale. I allow costs on the normal basis of scale and disbursements as fixed by the Registrar. I certify for second counsel.


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N.C. Anderson, J.

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