IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP NO 106/94

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| BETWEEN | SPINELLA ELECTRICAL LIMITED |
| | Plaintiff |
| A N D | JONATHON HOLMES |
| | Defendant |

Hearing: 23 May 1994

Counsel: M C Black for the Applicant
D D Schnauer for the Plaintiff
L J Olsen for the Bank of New Zealand

Judgment: 23 May 1994

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**(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT**

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Solicitors for the defendant
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On 18 March 1994 Master Towle granted leave to the plaintiff to issue a charging order nisi before judgment in relation to the amount in an account in the defendant's name at the Bank of New Zealand ("BNZ") Treasury Division Offshore Branch, Head Office, Wellington. The amount involved was A$93,955.76. Master Towle ordered service of the order on the BNZ and on the defendant and gave leave to the defendant to apply within 7 days of the service of the order on him to have the order set aside.

The defendant has taken no steps in the matter. A third party, Ms Glucina, has applied for an order discharging the charging order nisi granted by Master Towle, claiming the beneficial interest in the money in the account.

The evidence on which the order was originally made was evidence of theft or conversion by the defendant of the plaintiff's property, including money, during the period of the defendant's employment by the plaintiff from November 1993 to March 1994, of the existence of the account already mentioned and of instructions by the defendant to the BNZ to transfer the amount in that account out of New Zealand.

Ms Glucina's case is:

(a) That the defendant has no beneficial interest in the money in the account;

(b) That the money in the account is her parents' and that they are prejudicially affected by Master Towle's order.

The evidence advanced by Ms Glucina in her affidavit in support of her application and in her first affidavit in reply (sworn before the service on her of the affidavit by Ms De Kort of the BNZ to which I will refer in a moment) is as follows:

1. The money was lent to her by her mother, Mrs B Glucina, in order to assist in purchasing a property in Australia.
2. The property was purchased by her (Ms Glucina) in or about June 1992 before she had even met the defendant.
3. She first met the defendant in November 1992.
4. The defendant boarded with her in Australia from March 1993 to June 1993 during the week because his home was 200 kilometres away from his place of work, which was in the town where she had her home.
5. During this period they were friends but were not in a de facto relationship.
6. She sold the property in Australia on 24 August 1993.
7. She transferred the funds to New Zealand on 31 August 1993 when she opened the account with the Treasury Division Offshore Branch at the Head Office of the BNZ in Wellington.
8. The defendant came to New Zealand in October 1993 and she and her parents agreed to his boarding with them because he had limited finances and nowhere to stay.
9. During the period he was boarding with her parents the defendant asked her to assist him to obtain a credit rating by opening an account in their joint names.
10. She agreed to do so.
11. She does not know how that account came to be transferred into the defendant's sole name.

Evidence has been given by a bank officer in the employ of the BNZ, a Ms De Kort, as follows:

> *1. I am a Bank Officer employed by Bank of New Zealand ("the Bank") at its Avondale Branch ("the Branch"). I am familiar with*

*the account which is the subject of this proceeding ("the account") and I have read the Affidavit of Marianne Glucina in opposition to the charging order in favour of the Plaintiff and in support of an application to rescind the same. I am authorised by the Bank to make this Affidavit on its behalf.*

2. *On 31 August 1993 Ms Glucina came to the Branch to open the account. The account was opened in her name alone. I was the Bank Officer who dealt with Ms Glucina at this time. Ms Glucina told me that she had sold a property in Australia and wished to deposit the funds in an Offshore account operated through the Treasury Division of the Bank at Head Office in Wellington. Such an account enables a deposit to be maintained in foreign currency without the need to convert to New Zealand dollars. The amount held in this account was AUD93,700.00*

3. *As a later date which I do not now precisely recall Ms Glucina came back to see me at the Branch. She was accompanied by a man she introduced as Mr Holmes. Ms Glucina requested that the account be changed from "Glucina" into the joint names of "Glucina and Holmes". This was then done by me.*

4. *I remember this occasion very clearly as due to an oversight, Ms Glucina and Mr Holmes left the Branch without Mr Holmes completing a signature card, which is required by the Bank before he would be able to operate the joint account. I had to call at Ms Glucina's parents house at 46 Batkin Road, Avondale to request Mr Holmes to sign a signature card which he duly did.*

5. *I became aware of these proceedings while I was on leave and I am not due to return to the Avondale Branch until 24 May 1994. I understand that a search has been conducted of the office by the Branch but the signature card has not been located. I will not be able personally to search the Bank's records until I return to work.*

6. *I am advised by Mr Drumm a Solicitor employed by the Bank in its Legal Unit that on 20 October 1993 the Treasury Branch at Head Office received a request sent from Henderson Branch to change the name of the account from "Glucina and Holmes" to "Mr & Mrs Holmes". I annex marked "A" a true copy of the said request. Although the signature is not clear I believe it is Ms Glucina's signature.*

7. *On 26 October 1993 Ms Glucina and Mr Holmes came in to see me at the Avondale Branch. Ms Glucina told me that she was concerned that the account would be subject to Resident Withholding Tax and accordingly she and Mr Holmes requested*

*that the account be changed to Mr Holmes' name only as he was not yet a resident of New Zealand. Accordingly, I changed the account to Mr Holmes' name only. No documents were required and I simply amended the computer record as requested.*

8. *I am certain that the woman I met on the two latter occasions at the Branch was the same woman who opened the account and identified herself as "Marianne Glucina".*

9. *On 14 March 1994 I am advised by Mr Drumm that Mr Holmes attempted to transfer the balance of the account being AUD93,955.67 to Australia. As a result of a request from the New Zealand Police to do so the account was frozen before the transfer was effected. The account now remains frozen in terms of an Order of this Honourable Court.*

Ms Glucina has sworn a second affidavit in response to that by Ms De Kort in which she challenges the statements in paragraphs 6 and 7 of Ms De Kort's affidavit. In particular:

(a) In relation to paragraph 6, Ms Glucina denies attending at the Bank on 20 October 1993 and suggests her signature on the document forwarded from the Henderson Branch of the Bank to the Treasury Division Offshore Branch was forged by the defendant;

(b) In relation to paragraph 7, Ms Glucina denies being present or agreeing to change the name of the account for the reasons stated.

Ms Glucina's affidavit is supported by that of her father, who states that he is aware of the circumstances in which his wife lent Ms Glucina money in order to help her eventually to purchase a property in Australia because he and Mrs Glucina intended to emigrate to Australia. He unfortunately then became ill and now unfortunately his wife is ill. He and his wife are intending to emigrate to Australia as soon as she recovers and are prejudiced in their plans by the order.

Counsel are agreed that there are two questions for me to decide:

(a) Does the defendant have a beneficial interest in the money in the account or is it wholly Ms Glucina's or her parents?

(b) Are Ms Glucina's parents prejudicially affected by the order?

There is an argument between counsel as to the party on whom the onus of satisfying the Court rests. Mr Black, for Ms Glucina, submits that it is on the plaintiff, on the analogy of applications for discharge of ex parte interim injunctions. Mr Schnauer, for the plaintiff, submits that the onus is on Ms Glucina because the account is in the defendant's name, from which there is a presumption that the legal interest was in him. In support of this submission, Mr Schnauer relies on the judgment of Fisher J in ***Cossey v Bach*** [1992] 3 NZLR 612, [1992] NZFLR 673.

I hold that the onus is on the plaintiff but that it is discharged on the evidence because:

(a) The account is in the defendant's name, however that came about;

(b) There is evidence from an independent officer of the BNZ, Ms De Kort, to the effect that the account is in the defendant's name with Ms Glucina's consent. I accept that Ms Glucina contests Ms De Kort's evidence but I see no reason to prefer Ms Glucina's evidence to that of Ms De Kort. There is less reason, even allowing for the possibility that the bank be negligent, for Ms De Kort to mislead the Court than for Ms Glucina;

(c) There is other evidence which, if accepted, clearly contradicts Ms Glucina's evidence that there was no close relationship between her and the defendant. I refer to Mr Berger's evidence (paragraphs 3 and 4) and to Mr Maingay's evidence (in relation to which it should be noted that Ms Glucina admits that there were discussions). There

were discussions, there was an intention, at least for a short period, to buy a house in the joint names of the defendant and herself;

(d) Ms Glucina does not deny the second stage in the transactions relating to the account. The first stage was the opening of the account in her name alone. The second stage was the changing of the name of the account to Glucina and Holmes. It is only in relation to the third and fourth stages, which occurred on 20 October 1993 and 26 October 1993, that Ms Glucina contests Ms De Kort's affidavit. It follows from this that she accepts that she went at least as far as changing the name of the account to Glucina and Holmes;

(e) The evidence of the loan by her parents is not supported by any document showing that the payment was in fact a loan or the terms on which it was made. Even accepting that a payment was made, it is not clear that it was a loan or a gift. It is therefore not clear, on the evidence before me at present, whether the money in the account originated from Mr and Mrs Glucina or from Ms Glucina;

(f) The deposit form relied on by Ms Glucina as evidence of the advance from her parents, exhibit "D" to her affidavit in support sworn on 28 March 1994 (which was in fact omitted from the affidavit filed in Court but has been provided by Mr Black with Mr Schnauer's consent):

(i) Records a transfer from M Glucina to B Glucina, not the other way round as one would have expected if it were an advance by the parents to Ms Glucina;

(ii) Is dated 27 January 1988, four years before the purchase of the property in Australia to which I have already referred.

(g) Even accepting Ms Glucina's evidence the amount advanced by her parents was just under NZ$70,000. The house that was bought with these funds (accepting her evidence) was sold in August 1993 for some A$93,000, which equates roughly to NZ$110,000-120,000.

> There has therefore been an increase in the fund of some NZ$40,000-$50,000. There is no evidence before me as to whose money that is, whether it was for the benefit of the parents (assuming the money for the initial purchase to have been advanced by them) or for the benefit of Ms Glucina. The position is unclear. If the increase in the value of the property benefits Ms Glucina as opposed to her parents, then she did have ownership of part of the money that was deposited to the Treasury Division Offshore Branch account at the Wellington Head Office of the BNZ in August 1993 and therefore had the right to transfer those funds into the defendant's name. She would not have had the right to do that in respect of money that belonged to her parents. She would have had the right to do it, however foolish she may have been to do it on her story, if it was her own. The very fact that there were funds available is a factor which, in my view, ought to be taken into account by me in assessing whether or not the plaintiff has discharged the onus as I have held it to do.

In the light of all these findings I hold that the beneficial interest in the amount of the account is in the defendant by reason of the inference from the fact that the account is in his name and the fact that that inference is not excluded by the other evidence.

Having made this finding it is, strictly speaking, unnecessary for me to consider the question of prejudice. However, I do consider that. The prejudice relied on Ms Glucina is the fact that this money represents the means for her parents to purchase a home in Australia to which they can emigrate. The present position is that they are not in a position to do so. Mrs Glucina, as I mentioned already, is in hospital. It is expected that she will come out of hospital this week. It will be two months before she can travel. I

do not consider that prejudice has been shown at this stage. No steps have been taken, no steps in the circumstances of Mrs Glucina's serious illness could have been taken, to emigrate to Australia at this stage. I therefore find there is no present prejudice.

I accordingly dismiss the application for an order discharging the charging order nisi.

I fix the costs of the application for an order discharging the charging order nisi at $750.00 and order them to be paid by Ms Glucina to the plaintiff together with any disbursements that may be fixed by the Registrar.

MASTER T KENNEDY-GRANT