IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-001969

BETWEEN	TEMARAMA 2004 LIMITED (IN LIQUIDATION) First Plaintiff
AND	HENRY DAVID LEVIN AND VIVIEN JUDITH MADSEN-RIES Second Plaintiffs
AND	DUNCAN MORGAN MCROBIE First Defendant
AND	LISA JOANNE MCROBIE Second Defendant

Hearing: 30 & 31 May 2011
19 & 20 October 2011

Counsel: N H Malarao for Plaintiffs
G D Stringer and A Chestnutt for Defendants

Judgment: 9 November 2011

JUDGMENT OF FOGARTY J

The judgment was delivered on 9 November 2011 at 12.00 noon pursuant to Rule 11.5 of the High Court Rules.

.....
Registrar/Deputy Registrar

[1] This is a claim to recover debts. The liquidators of Temarama 2004 Limited have reconstructed the accounts of the company. In particular they have reconstructed the current account in the name of Mr and Mrs McRobie. They say that the true balance of that account as at the date of liquidation is $663,133.19. They seek separate judgments against each defendant for that sum, and a much smaller sum of $37,311.00 due for non payment of a sale of shares.

[2] On the day the case was first set down for trial Mr McRobie was adjudicated bankrupt. The Court, however, granted an application under s 76(2) of the Insolvency Act 2006 allowing proceedings against the first defendant to continue by way of formal proof.

[3] Mrs McRobie disputed any liability for the debt showing in the current account. The fixture was adjourned to enable her to take separate advice. That adjournment included adjourning the proceedings against Mr McRobie, to ensure that should Mrs McRobie dispute the current account balance she would have an opportunity to do so before there was judgment on the formal proof. As it happens, at the second fixture she agreed the reconstruction of the current account by the liquidators. It is necessary, however, to consider whether the liquidators have proved that sum as against the first defendant.

Claim against the first defendant on the current account for $663,133.19

[4] The first defendant is a builder by trade. He had a flooring business originally called Designwood Floors. It was structured as a limited liability company. Temarama was originally called Designwood Floors Limited. The company had 50,000 shares of which all but two were owned by a family trust of whom the trustees were Mr and Mrs McRobie and their family solicitor. The remaining shares were held one apiece by Mr McRobie and Mrs McRobie. Mr McRobie was the sole director. The company accounts have always shown a current account in the name of Mr and Mrs McRobie.

[5] The company structure was set up and company accounts prepared by a chartered accountant, Mr E W Henning, from 2001 until mid 2004 when Mr McRobie changed accountants, engaging Mr Lockhart. It was at this time that the company name was changed.

[6] The company accounts were examined by an independent forensic accountant, Mr Weir, on behalf of the liquidators. He found that the company accounts had always been prepared by taking the company's own office records and

draft accounts as the source of the data. There is no suggestion that there was anything but complete record of all expenditure and receipts.

[7] The disputed aspects of the accounts coincide with the appointment of Mr Lockhart as the chartered accountant.

[8] As at 31 March 2003 the current account liability of Duncan and Lisa McRobie was stated as $306,828. At that time the statement of financial position of the company showed stock on hand of $665,004.

[9] The draft accounts (ie the draft in-house accounts) as at 31 March 2004 (prepared on 30 November of that year) showed an indicative liability of Duncan and Lisa McRobie of $593,046.02. This was made up by an opening liability of $311,317.82, a capital contribution of about $44,000 and drawings in excess of $300,000. At that time the merchandise inventory was shown in the accounts at $279,887.30.

[10] It is important to keep in mind the context here is of a flooring company. Stock on hand in such companies is usually booked to the accounts at cost price. It is not normally revalued each year. Mr Weir confirmed this was such a company. Accordingly one would assume that the accounts staff of the company would usually get the merchandise inventory sum correct as it is a matter of arithmetic based on the invoices received during the financial year less the stock used. Mr Weir confirmed he understood that there were regular stocktakes.

[11] Mr Weir explained that when preparing the final accounts Mr Lockhart had correctly recorded the opening stock at $665,004.00 and the closing balance in the indicative draft accounts at $279,887.30, a drop in value of $385,000. However, he wrongly recorded a variance of $665,004. He should have recorded the reduction of $385,000 so that the total would reflect $279,887 but instead he added the opening balance and the closing balance to get an entirely false number of $994,890 so that when he then introduced that into the draft accounts, instead of $279,887.30, he got a false variance of $665,004.

[12] He then introduced in the suspense account, in order to balance, a figure of $576,694 and then he transferred that suspense account to the capital accounts with the notation "to post suspense to cap intro". Mr Weir said Mr Lockhart had absolutely no justification for doing that. Mr Lockhart then introduced a credit of $583,932 as a cash deposit into the current account of Duncan and Lisa McRobie. Mr Weir said this accounting entry had no semblance in reality. But it had the effect of reducing the end of year liability to $19,965.

[13] This credit of $583,932 was made up of four different sums:

$433,460.70	
7,239	
11,904	Debit
2,622	Credit
107,730	Credit
244.44	Credit

[14] Mr Weir did not take me through the minor numbers.

[15] The nub of Mr Weir's argument was that the final Lockhart figures foundered on a basic arithmetical error, which overstated the value of the stock. The overstatement was placed in suspense, and moved to the capital accounts so that the stock balance at the end stayed correct at $279,887, which was the number that first appeared on the internal in-house accounts against the opening balance of $665,004. But because of the error in preparing the working accounts, the erroneous $576,694 suspense account was needed to balance the error. That balance was achieved not by recognising the error and simply correcting the working papers retrospectively, but by compounding the error, and introducing the sum without any justification into the capital accounts, to the advantage of one of the two current accounts (the other being the current account of Mr McRobie's parents' trust), crediting Duncan and Lisa McRobie and eliminating their personal liability.

[16] Mr Weir's analysis is correct. With the adjustments required by Mr Weir's analysis the true balance of the current account is $592,801.58 as at 31 March 2004. There is no dispute as to the further payments made to the current account after 1 April 2004, which when brought into account established the final balance of that account at the date of liquidation, 15 March 2007, as $663,133.19.

[17] There can be no dispute that Mr McRobie as the sole director and signatory to the accounts proved the establishment of this current account. In the absence of stipulation to the contrary such current account is repayable upon demand. There is a judgment on this cause of action against the estate of Mr McRobie for $663,133.19.

The debt due for the Orange Imports Limited shares

[18] There is a second cause of action against Mr McRobie seeking payment by he and Mrs McRobie for shares of a company called Orange Imports Limited sold by Temarama to the McRobies and a company called Duncan Trust Limited. The consideration for the sale was $37,311. I am satisfied from the evidence that no payment of this sum has been made. The plaintiffs have proved the documentation of the sale which was in writing. Mr McRobie's liability is clear. There is judgment against Mr McRobie in this cause of action in the sum of $37,311, together with interest as per the shareholders' resolution of 15 August 2006.

Claims against second defendant

[19] The plaintiffs' case is that the adjusted company accounts correctly record a joint and several liability by Mrs McRobie for the current account of $663,133.19. As a second cause of action the plaintiffs also pursue her liability for payment of the debt on the purchase of Orange Imports Limited. Essentially she did not defend the second cause of action, that not being possible because she had signed the sale and purchase agreement. She disputes, however, any liability at all under the current account, on the grounds that it is not her debt.

The current account claim

[20] The plaintiffs' pleadings rely on the fact that Temarama had a current account with the first and second defendants. They plead no particulars as to any agreement by Mrs McRobie to borrow money from Temarama by way of current account advance.

[21] Mr Malarao, for the plaintiff, in his opening, submitted that it was well accepted that advances made to shareholders on account of current accounts with the company are debts due to a company repayable on demand, citing three cases: *Re Samarang Developments Limited (In Liquidation); Alt Cit Walker v Campbell*[1]*; National Trade Manuals Limited (In Liquidation) v Watson*[2]; and *Thom Contractors Limited (In Liquidation) v Thom*[3].

[22] He submitted these propositions were based on common practice whereby many small family businesses transaction personal household expenses through the companies and the payments are recognised as being advances to the people concerned and need to be repaid.

[23] In that respect the arrangements of Temarama were that a regular monthly, and sometimes more than monthly, payment of $1,800 was paid out of the company's bank account into a joint bank account of Mr and Mrs McRobie. Mrs McRobie operated this account with an EFTPOS card. There is no sign that cheques were ever drawn on this account.

[24] In addition the company bank account was used to pay for numerous household expenses including rent, medical expenses, holidays, insurance etc. The evidence was that Mr McRobie handled the cheque book for that account and made these payments.

[25] Secondly, Mr Malarao relied upon what he called the principle in *Seldon v Davidson*[4], that payment of money prima facie imports an obligation to repay it upon demand, followed in New Zealand in *Ohnuma v Jiang*[5].

[26] Finally, he relied on a Court of Appeal decision in the UK: *Fielding v Royal Bank of Scotland*[6] for the proposition that the fact that Mrs McRobie may not have known of or monitored the account is not a defence.

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1 HC Christchurch CIV 2003-409-2094, 30 September 2004, John Hansen J, para [55]
2 HC Auckland CIV 2005-404-007335, 20 September 2006, Venning J, para [37]
3 HC Auckland CIV 2008-404-006829, 29 April 2009, Keane J, para [16]
4 [1968] 2 All ER 755 (CA)
5 HC Auckland, CP301/96, 29 October 1997, Salmon J
6 [2004] All ER (D) 183

[27] In the course of the opening I questioned Mr Malarao as to whether the law was as straightforward as that and pressed him to say whether he was pleading a cause of action in contract or one of money had and received/unjust enrichment. Mr Malarao kept his options open, against a procedural objection by Mr Stringer that the claim had not pleaded unjust enrichment.

[28] In closing submissions the dialogue continued, enhanced by Mr Stringer's address where, with reluctance, Mr Stringer outlined in his closing address the classic defence to an unjust enrichment argument, namely reliance on change of position by his client. He argued she had benefited from the drawings without realising they did not represent repayable drawings.

[29] In the end, Mr Malarao closed on the basis that he was pleading in contract, and more particularly in implied contract. He was unequivocal that he was not relying on causes of action of money had and received (unjust enrichment). I perceive he judged that the facts were in the defendants' favour as to change of position.

[30] Accordingly, I analyse the evidence and make findings of fact against a claim by the plaintiffs in contract.

[31] It was the evidence of Mr Henning, all of which I accept, that he was engaged by Mr McRobie in 2001. Temarama (then known, of course, as Designwood Floors Limited) had been set up by Mr McRobie's solicitors with Mr McRobie as the sole director and all the shares held by the Family Trust. In 2002 he recommended to Mr McRobie that one share each be transferred to him and Lisa for tax planning purposes. This was the usual industry way of setting up closely held companies at the time.

[32] Mr Henning said it was also industry practice that a current account in the name of the two individual shareholders be set up. It was simply a matter of common usage and practice to call such a current account a shareholders' current account. He ran the proposed structure passed Mr McRobie. Mr McRobie agreed that this was the way it should be done.

[33] Mr Henning was quite clear that these financial accounting arrangements were set up without any involvement of Mrs McRobie, on his part. He never discussed any of these issues with her and certainly not that she would have a current account with the company. Mr Henning is not aware of any agreement by Mrs McRobie to hold a current account with the company. In his dealings with the company there was nothing to suggest she even knew about it. Mr McRobie did not tell him that she had agreed, or that he had discussed matters with her in any way, or that he was agreeing on her behalf. The current account was set up like this simply because:

> This was the way it was usually done, and Duncan went along with what was proposed, it was not discussed in any detail at all.

[34] Mr Henning advised that once the structure was in place other documents, such as to the Inland Revenue, also noted the current account details, again without any involvement by Mrs McRobie in the preparation or filing of these documents, let alone signing of them.

[35] There is no doubt that the relationship between Mr McRobie and the limited liability company can be framed in contract. Plainly, he agreed to a current account whereby drawings that he made from the company for non business purposes would be booked as a debit to his current account and the practice was that his annual salary, and the salary also allocated to Mrs McRobie would be credited to that account and this is what happened.

[36] It is another question whether Mrs McRobie entered into a contract with Temarama. Mrs McRobie's evidence was consistent with that of Mr Henning. In fact, Mr Henning's function was to corroborate her evidence. Her evidence was that she had no knowledge whatsoever as to the internal arrangements of the company. She did not open business mail. She did sign papers from time to time presented to her by her husband. She trusted her husband in business matters. She assumed that their lifestyle was funded by money earned by her husband in the business. She called that money "income".

[37] She was challenged on that in cross-examination. For example, she was questioned as to whether or not her husband gave her a cheque which he had drawn in order to meet a family liability, such as an orthodontist's account for one of their daughters. She accepted that she may well have received such cheques to make payments of accounts from time to time. But she said she never studied them. Such cheques would have been, in all probability, drawn on the company's account and would therefore show the company's account name as the drawer. As I have said there is no positive proof that there was not a cheque account on the family joint account but there is no evidence that any cheques were presented against that account. Mrs McRobie admitted the occasional handling of cheques. She said payments on household expenses other than via her EFTPOS card were made directly by her husband. This does not take the matter very far. Seeing her husband writing cheques for household expenses on the company account does not give her notice that there is a joint current account liability. Nor, in my view, does it put her on any notice that there was anything wrong.

[38] Mrs McRobie's evidence was that she thought the business was successful. Her husband was hard working. The business had a showroom and staff in Remuera. She was not aware of any financial difficulties. It was not until she attended a meeting with her husband, his parents, and their family solicitor, when there was discussion of selling the holiday home at Omaha that she had any inkling of any financial difficulties. Even then she was told by her husband that they would buy a house in Auckland instead, which she believed and indeed, as she said, made a fool of herself going around Auckland with a real estate agent looking for houses to buy.

[39] The family arrangements were that they lived in rental accommodation in Remuera. Their two daughters went to a private school. They had a holiday home at Omaha, and a boat. She drove an Audi and her husband drove a utility vehicle. They went on holidays. Their children had extra care such as orthodontist work.

[40] The shareholders' current account to year end 31 March 2002 showed drawings in excess of a salary provision of $90,000 of $48,191. For the year ended 31 March 2003, however, the cash drawings (before allowing for salary) had increased from approximately $138,000 to $369,000. The drawings in the year

ended 2004 were at a similar level reducing by approximately $40,000 (before provision for salary). Accordingly, in the years 2003 and 2004 the family standard of living jumped significantly to spending of the order of about $300,000 per annum each year.

[41] The picture that emerged to me is that they were living a lifestyle typically provided by a self-employed husband with a successful business, in the wealthy end of town. It was not an extravagant lifestyle which might put her on notice. It was, of course, extravagant measured against the profitability of the business, but one had to know the profitability of the business in order to make that judgment.

[42] It was not the plaintiffs' case that Mrs McRobie ever expressly agreed to the current account being in her name or knew about it sufficiently to impliedly agree. She certainly knew that the family expenditure was coming from the company, but she thought from earnings of the company available to the family.

[43] Mr Malarao's response to that was this submission:

> Mrs McRobie has claimed that she did not realise that the money paid was a loan. However, a party's subjective view about the nature of the obligation is irrelevant. An objective assessment is required, with the test being what a reasonable and properly informed third party would understand the obligations to be in given circumstances.

[44] Mr Malarao relied on the basic proposition that the task of ascertaining the common intention of parties must be approached objectively.

[45] The principle of objective ascertainment of the common intention of parties is a principle brought to bear to identify the terms of agreements, and to some extent to identify whether or not a party has made an offer or accepted one. Mr Malarao also relied upon the Court of Appeal decision in *Paper Reclaim Ltd v Aotearoa International Ltd*[7], relying particularly on para [52]:

> [52] It is only proper, however, that we make clear that, even if we had not been prepared to uphold the finding that the joint venture agreement was *probably* made at the agreement meeting, we would nonetheless have entertained an amendment to the pleadings to recognise that, at some point

[7] [2006] 3 NZLR 188 (CA) at [52]

> from the mid- to late 1980s, a contractual relationship to the effect of the joint venture agreement had been concluded. We do not consider that any prejudice to Paper Reclaim would have arisen from such an amendment to the pleadings, as the parties' relationship from the mid-1980s was investigated in meticulous detail at trial. In the end, it does not particularly matter whether the parties' understanding was reached at one meeting, two meetings, or over time. What we are clearly satisfied about is that, at least by the 1990s, the parties' dealings, when viewed objectively from the point of view of reasonable persons on both sides, allow only for a finding that a concluded bargain had been reached between Paper Reclaim and Aotearoa (*Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560 (CA) and *Meates v Attorney-General* [1983] NZLR 308 (CA) at p 377). It is well accepted that the Courts are entitled to look at the whole context of the parties' relationship in reaching a view as to whether a bargain was concluded and as to its terms (*Canterbury FM Broadcasting Ltd v Daniels* (1988) 2 NZBLC 103,535 at p 103,541 and see further Burrows, Finn and Todd (eds), *Law of Contract in New Zealand* (2nd ed, 2000), para [3.3.1]).

[46] When potential parties to a bargain deal with each other the law of contract applies an objective standard to assess whether or not a bargain has been reached. This is because the law of contract would not work unless one party can take another's words or conduct at face value. If there was an actual contract between Mrs McRobie and Temarama it would have to be made between herself and her husband as director of the company. The objective analysis is whether or not Mr McRobie as director of Temarama would have understood Mrs McRobie, by her conduct and dealings with him on financial matters, when viewed objectively, to have entered into an agreement with him as director of the company to be liable on the current account along with himself as shareholder.

[47] When pressed as to the nature of the contract that Mr Malarao was arguing for, he said it was implied contract. He was reluctant to categorise his argument.

[48] I deal briefly with the concept of an implied contract. Contract can be implied from contract, but only by implication of agreement:

> These cases may be said to decide no more than that whether a contract is to be implied is a question of fact and that a contract will only be implied where it is necessary to do so ... Whether on such facts ... a contract may be implied must be considered in the light of ordinary contractual principles.
>
> ...
>
> ... It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another

> way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.[8]

[49] There is simply no evidence in support of a contract. Mrs McRobie never directly handled the company's assets. To be sure, she enjoyed, as the wife of her husband, the benefits of the expenditure he was drawing out of the company by writing cheques on the company's account. But that is a huge step from an appearance of mutual agreement between her and the company such that she was liable thereby on current account with the company to repay on demand the cheques that were being written to support the family's expenditure. Mrs McRobie was quite candid in saying that she entrusted her husband on all business matters. But she drew a line. She instanced that that would not include buying a house on their behalf.

[50] It was her evidence that she had no true understanding of the financial mess that her husband had got into until, on my urging, she stayed to hear the formal proof of evidence of the cause of actions against her husband at the first hearing.

[51] Mr Malarao argued in support of the objective approach by making this submission:

> The call for an objective approach is underscored by making a comparison with what would have happened under the same facts, but assuming that a resolution had been passed, just before Temarama's liquidation, that declared the current account balance to be a distribution to the McRobies. In that case, the liquidators would have been able to recoup the funds from Mrs McRobie under s56(1) of the Companies Act 1993 as an insolvent distribution. Her subjective belief about the nature of the funds and benefits she had earlier received would not have mattered, except perhaps under the defences available under s56(1). There again, her defence would not have been able to be made out because, at the very least, she would not have been able to make out that she has altered her position. As noted in *Brookers Company Law* at CA56.03.

[52] I do not think that is persuasive at all. Section 56(1) of the Companies Act 1993 provides:

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[8] *The Aramis* [1989] 1 Lloyd's Rep 213, CA (Bingham LJ) cited in G McMeel,'*The Construction of Contracts*' (2nd ed Oxford University Press 2010) at 14.27

56 Recovery of distributions

(1) A distribution made to a shareholder at a time when the company did not, immediately after the distribution, satisfy the solvency test may be recovered by the company from the shareholder unless—

(a) The shareholder received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test; and

(b) The shareholder has altered the shareholder's position in reliance on the validity of the distribution; and

(c) It would be unfair to require repayment in full or at all.

...

It contains therein a variant of the defence of change of position to be found in ss 94A and B of the Judicature Act 1908 and at common law.

[53] Alternatively, Mr Malarao argued that if Mrs McRobie is not liable on a direct basis (which I understand to be a direct contract between herself on the one part and the company on the other) that she will be liable under the agency law concept of apparent authority.

[54] In that regard Mr Malarao argued:

The plaintiffs say that Lisa McRobie either:

(a) Gave Duncan McRobie authority to represent her interests in relation to Temarama (actual authority). This authority can be given expressly[9] or may be implied[10].

(b) Led Temarama to believe that she had authorised Duncan McRobie to represent her interests in relation to Temarama (apparent authority)[11].

[55] In this respect Mr Malarao argued as follows:

From the cross-examination of Mrs McRobie, it is clear that she fully entrusted her financial affairs to her husband. She looked after their household and he looked after the household finances. She was content with this arrangement. Everything undertaken was viewed as being "joint".

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9 H G Beale (Gen Ed,) *Chitty on Contracts* (30th Ed, Thomson Reuters, London, 2008) at 31-021

10 Supra at 31-025

11 Supra at 31-057

That last proposition came in answer to a question in cross-examination:

> Q. And it'll be fair to say that both you and your husband are equally liable for paying the rent.
>
> A. No. We – well, I suppose when you're married the home you live in... We – when you're married – Duncan and I didn't look at it like that. I wasn't liable for this and for that, I was his wife. He paid the rent. My father paid in – provided a house and education for us all. My mother didn't work or provide for that. In saying so now, I am working hard and providing, but back then that was not the way we...
>
> Q. Everything was joint?
>
> A. Yes. And I had no income to contribute to the rent at that time.

[56] There are two deficiencies with this argument. Firstly, the evidence is that she fully entrusted their financial affairs to her husband. That is a far cry from authorising him to bind her in contract to third parties. Secondly, her agreement that "*Everything was joint*" has to be taken in the context of all of her evidence, as fairly acknowledging the nature of their family arrangements.

[57] Mr Malarao had to agree that he had no case, on all fours, on his material facts. Significantly in *Fielding v Royal Bank of Scotland* the joint account was with a bank. The wife had signed a separate "mandate", an authority to the bank, agreeing to be a party to a current account liability.

[58] It is inconceivable to the Court that any bank in New Zealand would open a current account with a husband and wife on the say so simply of the husband, in reliance on the husband and wife being in a happy trusting relationship.

[59] There is no established principle of law whereby husbands have ostensible authority to bind their wives in contract.

[60] As Mr Stringer pointed out in his submissions the law is all the other way. So much so that the classic text of Bowstead now omits the passages previously discussing a presumption of authority from co-habitation. The learned editors state that social habits have changed and there is no longer need for any such presumption. The 17th edition of the text had Article 33 saying:

> (1) Where a husband and wife live together and maintain a household establishment, a presumption arises that the wife has authority to pledge the husband's credit for necessaries suitable to the style in which they live, in respect of those matters usually entrusted to the management of the wife.
>
> (2) The presumption is one of fact only and is rebutted by evidence
>
> (a) that he has forbidden her to pledge his credit, or
>
> (b) that she was already adequately provided with necessaries, or
>
> (c) that her husband has already made her a sufficient and agreed allowance for such necessaries. [12]

[61] There has never been, so far as I am aware, any presumption the other way. It is always hard to find authority for the obvious, but in *R J Bowling Motors v Kerr*[13], McGechan J found that a husband had no apparent authority to sell a jointly owned car on behalf of his wife simply because he said he had authority or because he was in possession of the registration papers.

[62] In *Samarang Developments Limited* the liquidator was seeking repayment of two distributions made to the defendants as shareholders. The case was also advanced in the alternative that the drawings be treated as advances from the company to the shareholders. There was no issue concerning the absence of knowledge by any one of the shareholders as to the payments, be they distributions or advances.

[63] In *National Trade Manuals* the plaintiff was seeking summary judgment against one defendant, the former sole director and shareholder of the plaintiff. It is not a joint current account case. He had clearly opened his own current account. *Thom Contractors Limited* was another case where the liquidators were making a claim against the sole shareholder and director to repay shareholder advances.

[64] In *Seldon v Davidson* it was a claim by a widow that she had lent money to a man. It was not a current account case, let alone a joint one.

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12 F Reynolds, *Bowstead & Reynolds on Agency*, (17th ed, London, Sweet and Maxwell, 2001)

13 (1988) 2 NZBLC 103, 341 per McGechan J

[65] *Fielding v Royal Bank of Scotland* was a case involving holders of a joint account. The bank had obtained judgment against the overdrawn balance in the account in the joint names of Mr and Mrs Fielding. Mrs Fielding contended the overdrawn balance represented borrowings she neither knew about nor authorised and for which she was not liable. Originally she contended she had not signed a mandate relating to the joint account. This contention foundered when the document was produced. The case proceeded on a finding of fact that upon the opening of the joint account Mr and Mrs Fielding (separately) signed a mandate on the bank's then standard form. Mrs Fielding's argument was then reduced to an argument as to the true construction of the mandate. Relevantly Parker LJ delivering the judgment for the Court of Appeal said:

> 101. ... In the case of a joint account as between husband and wife there is no necessary limit on the purposes for which the joint account may be used: it is for the account-holders themselves to decide what, if any, limitation to impose. Absent some such self-imposed limitation, of which the bank is on notice, it is in my judgment no concern of the bank how a husband and wife choose to operate the joint account, provided that such operation is in accordance with the express terms of the mandate. ...
>
> 102. In any event, it seems to me wholly unrealistic to suggest that where a husband and wife open a joint account there is, without more, some implication that their use of the account is to be restricted in some way: ... .

[66] It was an overriding submission of Mr Malarao that commercial affairs in New Zealand would be in some disarray if wives could escape liability on joint accounts such as this on the grounds that they had no personal knowledge of the existence of the accounts or the way they were being used. I do not see any difficulty in that regard at all. No commercial party operating at arm's length would conceive of relying on the ostensible or implied authority of a husband to bind a wife when documenting a loan to a husband and wife.

[67] Here, of course, we are in what is essentially a family situation. Mr Henning explained that he followed the template of the chartered accountants in taking instructions from the sole director for approval of the structure.

[68] Inasmuch as banks or other parties might rely on accounts of closely held family companies as indicating a liability of the wife on a current account, where the wife is not a director, and where there is no documentation whereby she agrees to the

opening of the account, I would expect such third parties, knowing the law, such as banks (who always take their own precautions), to check whether or not the wife is in fact a party to the opening of the current account. It is not a question of the law foundering on personal presumptions as to what is going on. It is simply an examination as to whether or not a person has in fact become party to a joint liability.

[69] For the law to be written the other way, so that a husband can simply make the wife liable on a current account by instructing his accountant to draw up the accounts that way, would be contrary, in my view, to the common law, well established for centuries, unless justified by some statutory provision. No-one has suggested there is any statutory provision to that effect.

[70] Accordingly, the plaintiffs' cause of action in respect of the current account fails. There is judgment for the defendant.

[71] Mrs McRobie has no defence to the second cause of action relating to the non payment for the Orange shares. This is because she signed a written agreement for sale and purchase. She has no recollection of signing it but acknowledges her signature. She is caught by the doctrine that she cannot now deny the content and consequences of the document she signed. Sensibly her counsel did not attempt to argue otherwise. There is judgment for the plaintiff on the second cause of action in the sum of $37,311. There is no award of interest prior to judgment. Mrs McRobie signed only the Share Transfer. That recorded the consideration as $37,311. It did not record the interest accruing, as per the shareholders' resolution which was signed only by Mr McRobie.

[72] The second cause of action was not really defended. Accordingly, the second defendant is entitled to costs in the first cause of action against her on a 2B basis. I certify for second counsel.

Solicitors:
Meredith Connell, Auckland, for Plaintiffs
Inder Lynch, Papakura, for Second Defendant