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CONSTRUCTIVE DEVELOPMENTS IN PROPERTY RELATIONSHIP LAW? THE DEVELOPMENT OF THE CONSTRUCTIVE TRUST CONCEPT

Shane Campbell
Wynn Williams
Christchurch

Jeremy Johnson[46]
Wynn Williams
Christchurch

Introduction

In the property relationships sphere, all practitioners know that a reference to *Lankow v Rose* (*Lankow*) is a reference to a claimed interest in property arising from contributions made by a non-owning party to the property of the owning party.[47]

The facts of that case arose out of a failed de facto union before the enactment of the Property (Relationships) Amendment Act 2001. Tipping J set out the following four-part test that the claimant must satisfy in order to establish his or her equitable interest:[48]

- direct or indirect contributions to the property in question;
- an expectation of an interest;
- that such expectation is a reasonable one; and
- the defendant should reasonably expect to yield an interest to the claimant.[49]

The rationale of the fourth requirement, as articulated by Tipping J, is informative as to the application of constructive trust principles in this field:[50]

> The fact that the defendant is not willing to yield an interest or did not expect to have to do so is no bar to [the plaintiff's] claim if [the defendant] should reasonably expect to do so. In that respect the Court stands as his conscience.
>
> … In equity the conscience of the legal owner is required to acknowledge the other party's beneficial interest in the property. A refusal to do so is regarded as unconscionable conduct on the part of the legal owner justifying the intervention of equity.
>
> This, in my judgment, is the most convincing rationale for the intervention of equity in this field. Equity cannot alter or interfere with the defendant's legal estate. However, on the premise that the defendant is acting unconscionably by denying the claimant a beneficial interest, equity treats the defendant as a constructive trustee of the legal estate to the extent of the claimant's assessed interest. By this means equity requires the defendant to account to the claimant for her interest.
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> The constructive trust so imposed can be executed, ie put into practical effect, by such means as the justice of the case requires. …

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46 Jeremy Johnson is a Partner and Shane Campbell a Senior Associate in the Wynn Williams' Dispute Resolution Group.
47 *Lankow v Rose* [1995] 1 NZLR 277 (CA) [*Lankow*].
48 At 294.
49 It does have to be asked whether the last two are actually the same.
50 At 294.

Since that judgment was passed down 23 years ago, how has the law developed in this area? The answer is significantly.

First the 2002 amendments to the Property Relationships Act 2002 reduced the application of the constructive trust concept. In particular for straight-forward cases without trust or company structures the remedy now lies in the Act itself.

Second the concept is increasingly used by judges in cases where there are trust or company structures. Indeed the courts appear to be using the constructive trust concept quite readily to achieve what the court perceives as a "fair" outcome.

This paper will consider first what constructive trusts are before moving on to look at how the concept is being used in relationship property cases today. It will then briefly consider two other types of claims than might be available where constructive trust claims are not.

Types of Constructive Trust

At the outset it is important to remember what a constructive trust is. At its heart it is a proprietary claim that A holds property on trust for B. It is a constructive trust because the trust is not expressly stated.

There are generally considered to be two types of constructive trusts. The first are institutional constructive trusts. The second are remedial constructive trusts.

The former are said to "arise on the happening of the events which bring it into being" and that "its existence is not dependent on any order of the court".[51] Such trusts are therefore a product of circumstance and can include the following:[52]

- a fiduciary makes an improper profit from his or her fiduciary position;
- an intended transfer of property is invalid because of defective formalities;
- a person makes an unconscientious assertion of ownership in respect of property to which another has contributed;
- an agreement has been made to execute mutual wills and after the death of one party the other revokes the will or acts inconsistently with it;
- a vendor has entered into a contract to sell land;
- property has been obtained by fraud; and
- property is acquired by killing.

Such trusts do not depend on the intention of the parties. Rather, such trusts arise by operation of a rule of law.

In contrast a remedial constructive trust arises in exercise of the remedial discretion of the Court.[53] In other words the constructive trust does not exist until the Court orders it into existence.

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51 *Fortex Group v McIntosh* [1998] 3 NZLR 171 (CA).

52 *Mamat v Mamat* [2018] NZHC 639, citing Jessica Palmer "Constructive Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [13.2.1].

53 *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374.

This distinction might sound academic; the consequences, however, are very real. For example if the property is disposed of at undervalue or converted prior to the existence of the trust then there will be no effective remedy. If the trust does not exist until the Court orders it then rights are more easily defeated than where there is an institutional constructive trust.

There is no serious argument that constructive trusts of the *Lankow* kind are not institutional in nature. In another context Tipping J has averred that:[54]

> ... The constructive trust which arises in de facto matrimonial property cases is of an institutional, rather than a remedial kind. That is an immediate point of distinction. Furthermore, the constructive trust which arises in such cases is itself conscience based. The party with legal title to the asset or assets in question is required to yield to the claimant party a beneficial interest because it would be unconscionable for the first party to deny the claimant such interest. Hence, equity intervenes: see for example *Lankow v Rose* [1995] 1 NZLR 277 at p 294.
>
> Thus the *Gillies v Keogh* line of cases serves to confirm the need for the conscience of the secured creditors in the present case to be affected. This line of authority certainly does not support the kind of general discretion for which [counsel for the employee contributors] contended to depart from legal title and legal rights on some general ground of fairness.

How are Constructive Trusts Applied Now?

Subsequent interpretations of *Lankow*

In a decision released in June last year, the Court of Appeal had occasion to consider how *Lankow* has been interpreted since the release of the decision.[55] The Court stated:[56]

> In particular, those cases have established that it is necessary for a person who makes such a claim to establish that more than a minor contribution was made to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly; and that in all the circumstances both parties must be taken reasonably to have expected that the claimant would share in the assets as a result. While the contributions do not need to be monetary in nature, there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets; and the contributions that are made must manifestly exceed any benefits that the claimant derives from the arrangement.

It is the statements of principles that must be the guiding beacon for any constructive trust claim, however arising.

The question for us is, given the 2002 Amendments, are there many situations where the constructive trust concept can still apply? The answer is yes in a large number of situations. The unifying theme for them all is that the provisions of the Act are unable to deliver an easy remedy so the Courts will look to vindicate rights through the constructive trust concept.

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54 *Fortex Group Ltd (in rec and liq) v MacIntosh* [1998] 3 NZLR 171 (CA), at 178.

55 *Wakenshaw v Wakenshaw* [2017] NZCA 252.

56 At [25], citing *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807, at [45]—[47]; *Watson v Taylor* [2002] NZFLR 59 (HC), at [41]—[46]; *Glass v Hughey* [2003] NZFLR 865 (HC), at [38]—[43]; *Harvey v Beveridge* [2013] NZHC 1718, [2013] NZAR 1364, at [9]—[13]; *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766, at [27]; *Hunt v Ogle* [2003] NZFLR 1025 (HC), at [23]—[24]; *Stubbs v Holmes* [1999] NZFLR 780 (HC), at 787. See also Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009), at [13.2.4].

De facto relationship ending before 1 February 2002

Traditional constructive principles predicated on *Lankow* will continue to govern claims founded on de facto relationships that ended before 1 February 2002. This point is not pursued further as it is unlikely to arise often.

Relationships of short duration

Self-evidently relationships of short duration are unlikely to found a proprietary interest under the PRA. As such there still exists room for a constructive trust claim where the conditions in *Lankow* are met.

Land owned by third parties

It may be possible to argue a constructive trust over property owned by a third party where relationship property has been applied to that third party property. Such was the case in *Johanson v Johanson* where funds from the sale of relationship property were expended on property owned by a third party.[57]

A claim brought under the Matrimonial Property act 1975 (the predecessor to the Property (Relationships) Act 1976) failed because the Act could not extend to circumstances where the property in question was owned by a third party and the spouse was making a claim against the third party.

Richardson J stated that:

> ... unless and until a constructive trust or other equitable interest is acknowledged or declared it cannot be said that the [third party's] land would be affected by a matrimonial property order.[58]

A similar question arose in *Hau v Hau*, although the decision in *Johanson* was distinguished.[59] In that case a husband (Mr Tevita Hau) owned property as a joint tenant with his brother (Mr Osai Hau). Both of them lived in the property.

After the purchase of the property Mr Tevita Hau married Mrs Hau (the plaintiff) who then all lived in the property from 1993. Mr Tevita Hau died in 2014. As a result of the application of the rules of survivorship Mr Osai Tau took all of Mr Tevita Tau's interest in the property.

Mrs Hau sought a means to undo the effects of survivorship. Mr Osai Tau resisted the claim on the grounds that the Court had no jurisdiction to make orders against someone in his position (as a third party to the relationship).

Ultimately Duffy J resolved this issue by holding that the property was held in equity as a tenancy in common and that Mr Osai Ha had not rebutted that presumption. Her Honour also did not view the fact that Mr Osai Hau was a third party to be a jurisdictional bar, distinguishing *Johanson*.

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57 *Johanson v Johanson* (1993) 10 FRNZ 578 (CA), at 581.
58 At 580-581.
59 *Hau v Hau* [2018] NZHC 881.

The cautionary tale is this. Where property is owned by a third party, orders cannot be made against that third party directly under the PRA unless there is a sound legal basis for doing so.

In *Johanson* a constructive trust was required to be pleaded (and maybe established) before that could be the case. In *Hau* the principle was distinguished on the basis of a presumption in equity that parties held property as tenants in common and, therefore, an order could be made directly against the relationship property even though it had notionally been transferred to the third party.

In *Parmer v Govind* Hetal Parmer sought a declaration that her former husband's parents, Mr and Mrs Govind, held part of their house on constructive trust for the benefit of her and her former husband, Mr Roopesh Govind.[60] Interestingly, despite Ms Parmer and Ms Govind being married for seven and a half years, for the vast majority of that time they lived with Mr Govind's parents in the house the subject of the declaration of constructive trust.

The Court was satisfied that the constructive trust had been made out and made an order that one third of the property was held on constructive trust. The defendants were required to pay $433,333.33 to discharge the constructive trust.

Non-qualifying mistress or "man-tress"?

There are many cases coming before the courts where there has been a long-standing affair between two parties, although the affair itself lacks the necessary characteristic of living together as a couple and therefore there is no de facto relationship. In cases such as this it is of course possible for traditional *Lankow* principles to apply where the factual circumstances permit.

Constructive trust claim available when there is an express trust

The application of *Lankow* has developed most in relation to circumstances where property that would otherwise relationship property is in fact held on terms of an express trust. Some of the more recent cases are discussed below.

Marshall v Bourneville

Marshall v Bourneville was an appeal against a caveat lapsing decision where Associate Judge Osborne had made an order in the High Court that a caveat (lodged on the basis of a constructive trust) was to lapse.[61]

Mr Bourneville and Ms Marshall began living in a de facto relationship in 1996. Ms Marshall sold her house and began living with Mr Marshall in his Auckland property. Three sections were then purchased in the Coromandel. Some of this property was eventually transferred into Mr Bourneville's own name and then sold. The proceeds were in turn used to purchase a property that was transferred into Mr Bourneville's family trust.

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60 *Parmar v Govind* [2017] NZHC 1432.

61 *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766.

The Court of Appeal states that: "[t]here is … no case in which a court in New Zealand has declined to grant relief against assets owned by a trust in which an expectation of an interest had been demonstrated".[62]

Indeed the following cases supported the jurisdiction:[63]

- *Miller v Stewart*:[64] An unsuccessful application for a declaration that there was a constructive trust over trust assets. While the claim was unsuccessful, the Court of Appeal noted that

> William Young J seems to have accepted that Ms Miller could have maintained a claim against trust properties had she been able to establish an expectation of an interest and that such expectation was reasonable.[65]

- *Prime v Hardie*:[66] The Property here had been used as the family home. Here Salmon J accepted that the constructive trust principle could apply.
- *Rea v Rea*:[67] A full bench of the High Court upheld a claim against the former husband's parents for contributions made by her and her partner to the parents. This was even though the ex-husband's mother's interest was held in a trust.
- *Clark v Clark*:[68] Asher J upheld a claim based on constructive trust to a farm property held by a family trust. The claimant had made significant contributions to the property.

Because the type of constructive claim was jurisdictionally possible, the Court of Appeal held that the case was reasonably arguable.

Independent trustee → won't be saved by this

Murrell v Hamilton

Trustee didn't know about contributions. I would be unjustly enriched (trustee) if didn't impose constructive trust.

Murrell v Hamilton involved a relationship between the parties that commenced in early 2002.[69] In January 2004 they moved into a house under construction in Arrowtown. The property was owned by Mr Hamilton's family trust. The Court of Appeal endorsed the jurisdiction to make orders of constructive trust over property held on express trust, allowed the appeal, and granted a 15 percent interest quantified in monetary terms.

Vervoort v Forrest

The next decision of moment is *Vervoot v Forrest*.[70] This involved a 12 year relationship which terminated. Ms Vervoot then launched a number of claims against assets held in Mr Duffy's family trust.

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62 At [34].
63 At [35]-[38].
64 *Miller v Stewart* [2000] NZFLR 433 (HC).
65 *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766, at [35].
66 *Prime v Hardie* [2003] NZFLR 481 (HC).
67 *Rea v Rea* (2004) 23 FRNZ 449 (HC).
68 *Clark v Clark* [2012] NZHC 3159.
69 *Murrell v Hamilton* [2014] NZCA 377, (2014) 3 NZTR 24-012.
70 *Vervoot v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807.

This case contains considerable discourse on the ability to claim a constructive trust over assets held legally by trustees of an express trust. The Court commented:[71]

> [48] *Lankow v Rose* and the other decisions that developed the constructive trust in this area do not discuss a situation where the home or other asset that was the subject of the constructive trust was itself owned by an express family trust. That issue has arisen on occasions in New Zealand over the last 15 years, as family homes are owned with increasing frequency by a family trust, which may be immune from direct attack under the Act. Where one partner has de facto control of the trust and *Lankow v Rose* contributions and expectations have arisen the non-controlling partner may be forced to claim against the trust itself if any share of the assets is to be obtained.
>
> [49] In *Re The Motorola New Zealand Superannuation Fund* (which was not a de facto relationship case) McGechan J did not accept there was an absolute rule or principle under which rights and obligations under an express trust can never be subjected to a constructive trust. He observed:
>
> > Equity operates on conscience. Traditionally, equity operated to mitigate the rigour of absolute rights and obligations at common law. At least equally, equity should operate to mitigate the rigour of any absolute rights and obligations arising under equitable creations such as express trusts, and where necessary, as may be so in the absence of other applicable equitable doctrines, by the imposition of a constructive trust. More usually perhaps, other equitable rules will suffice, but there is no reason to exclude in principle the constructive trust tool.
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> ...
>
> [61] Because Mr Duffy has not appeared at this hearing we have not had the benefit of submissions challenging the constructive trust claim. However, it is necessary to consider two objections that can be raised to a finding there is a constructive trust on an express trust. The first is, as Ellis J commented, that there is no unanimity of trustees, given the lack of involvement of Mr Forrest and then Mr Spears, and the prohibition on trustee delegation. Ellis J did not feel able to find unanimity of trustees sufficient to make it equitable the Trust was obliged to Ms Vervoort. She stated:
>
> > To do so would be to conflate the evidence that the trust is the alter ego of Mr Duffy with evidence that there was unanimity between trustees. That equation is untenable. In my view, any determination that it would be unconscionable for the trustees not to yield Ms Vervoort an interest in property held by the trust would squarely violate orthodox trust principles of unanimity and non-delegation, the importance of which have been reiterated on numerous occasions by the Court of Appeal.
>
> [62] We are respectfully unable to agree with this reasoning. The Judge was quite right in acknowledging the traditional trust principles of unanimity and non-delegation, but those principles must bend to the practical realities when one trustee is in absolute control of all trust activities and the other trustees have effectively abdicated their trustee responsibilities. Any other conclusion would mean settlors, who appointed themselves as trustees, would be able to take advantage of their own wrong in failing to ensure the trust is properly administered by all trustees. The trust would get a windfall, not available but for the use of the trust format.
>
> [63] While traditional trust principles require unanimity and non-delegation, the Court's approach to trusts must, as the recent cases show, meet the reality of how property is owned in New Zealand. In 2013 there were estimated to be between 300,000—500,000 private trusts in New Zealand. It seems likely a good portion of New Zealand's real estate is now held in discretionary family trusts of the same type as the trust created in this case.

[71] Citations omitted.

[64] *Prime v Hardie*, *Glass v Hughey*, *Marshall v Bourneville* and now *Murrell v Hamilton* can be seen as the application of established *Lankow v Rose* principles to this reality. In a case like this, where one relationship partner is in control of the trust, under the present state of New Zealand law there is a valid trust. However, that controlling partner cannot avoid equitable constructive trust obligations by relying on the prohibition on delegation and the lack of consent from the other trustee, whom that controlling partner has deliberately isolated from trustee functions. To allow that would be to allow a trust principle to operate as a weapon for inequity. The deliberate exclusion of other trustees from a role in managing the trust cannot be invoked to create an injustice.

[65] It was stated in *Lankow v Rose* that in equity the conscience of the legal owner is required to acknowledge the other party's beneficial interest in the property. In this case not only is the conscience of Mr Duffy affected but in a different sense so is the conscience of the other trustee, Mr Forrest, and then Mr Spears, who both gave Mr Duffy carte blanche to do as he wished with the assets of the trust. While they have no knowledge of the situation arising that puts claims on the Trust, the consciences of Messrs Forrest and Spears are 'activated' by their practical surrender of their trustee role to Mr Duffy.

Hawkes Bay Trustee Company Ltd v Judd

The decision in *Hawkes Bay Trustee Company Ltd v Judd* involved a marriage of six and a half years between Richard Hodgkinson and Michelle Judd.[72] They lived in a property that was owned by the trustees of the Richard Hodgkinson Trust.

After separation Ms Judd made a claim that a share in the property was held on constructive trust for her, recognizing her contributions to the property. Ultimately the appeal was dismissed and the order awarding $65,000 to Ms Judd was upheld.

Of interest in this decision is the discussion of the principle that a trustee cannot delegate their powers. This has application because of the requirement that the claimant has an expectation in the trust property and who is required to encourage or foster that expectation.

As a matter of practicality it will often not be the trustees (legal owners) who do so, but could be one or more discretionary beneficiaries. It is worth repeating verbatim aspects of the judgment:[73]

[43] … similar criticisms of Murrell were discussed by this Court in its recent decision in *Vervoort v Forrest*. The Court in *Vervoort* observed that the question of the application of a constructive trust to an asset, like the Lane Road property, itself owned by an express trust had arisen in a number of other cases. After discussion of that line of authority the Court observed that the Judge at first instance in *Vervoort* was correct to acknowledge the 'traditional trust principles of unanimity and non-delegation' but said 'those principles must bend to the practical realities when one trustee is in absolute control of all trust activities and the other trustees have effectively abdicated their trustee responsibilities'.

[44] The Court saw *Prime v Hardie*, *Glass v Hughey*, *Marshall v Bourneville* and *Murrell v Hamilton* as the 'application of established *Lankow v Rose* principles' to the reality of the New Zealand trust landscape where it is likely a good proportion of property is held in discretionary family trusts and trustees are more often than not the beneficiaries of those trusts and in control of them. We agree.

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72 *Hawkes Bay Trustee Company Ltd v Judd* [2016] NZCA 397, (2016) 4 NZTR 26-019.

73 Citations omitted.

> [45] Reflecting the reality recognised in *Vervoort*, Mr Hodgkinson treated the property as his own. He was the controlling trustee and as one among a number of family beneficiaries he enjoyed the benefit of an apparently indefinite right to occupy the trust property rent-free. This arrangement was inconsistent with a conventional arm's-length transaction between trustees and a third party to invest or rent trust property to secure an economic return for the beneficiaries. The trustees owned and operated the property for Mr Hodgkinson's primary benefit.
>
> [46] We consider it can be said that in the present case the conscience of both trustees is affected. Mr Hodgkinson obviously had direct knowledge of the contributions being made by Ms Judd but, as the Judge found, Mr Dine had effectively given Mr Hodgkinson 'carte blanche' to do as he wished with the assets of the Trust. The requirement for unanimity cannot be used as a shield in this situation where one trustee has abdicated responsibility and so enabled trust property to be improved without first resolving the basis of receipt. Further, although Mr Dine may not have known of these contributions earlier, he did at the time of trial. In all these circumstances, it would be unconscionable not to recognise the benefits freely accepted by the Trust.
>
> [47] The concern about the impact of this approach on the property rights that form a key part of the trust concept is understandable. We make three points on this aspect. First, we agree with Mr Bates' submission that Ms Judd's successful claim simply reverses or disgorges the benefit of the defendants' enrichment. This Court in *Murrell* made the same point. As the Court put it, the claim means 'a part of the value of the Trust's property which should not accrue to the Trust does not accrue to it'.
>
> [48] Secondly, it was open to the trustees to take steps to preserve the position they now seek to maintain. They could have taken advice on the issue at the time of the marriage. Further, Mr Hodgkinson could have entered into a relationship property agreement with Ms Judd. Absent such an adjustment of her expectations, where the contributions are to the matrimonial home and the trustees have encouraged or permitted these contributions, it would be wrong to treat a contributor like Ms Judd as a volunteer.
>
> [49] Finally, as Mr Bates also submits, the question is not whether a party's action is in breach of their trustee duties but, rather, the focus is on the reasonableness of a third party's expectation of an interest in the property and the reasonableness of requiring the legal owners to yield an interest or to pay compensation in lieu.

Blumenthal v Stewart

In *Blumenthal v Stewart* a stepson made a claim against the estate of his stepfather for a constructive trust.[74] While this is not directly on point, it does highlight the breadth of claims that can be made in the family context. On the facts, the constructive trust claim was not made out.

Nelson v Gibson

The facts of *Nelson v Gibson* (and application for particular discovery) involved the break-down of a de facto relationship in circumstances where property and other assets were held by trusts and companies.[75] Ms Nelson was making constructive trust claims over interests said to arise in those properties.

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74 *Blumenthal v Stewart* [2017] NZCA 181, [2017] NZFLR 307.
75 *Nelson v Gibson* [2017] NZHC 2715.

Constructive trusts on trusts moving forward

It is likely that cases running arguments of this nature will continue to proliferate. What is important is that counsel continues to focus on the essential elements of this kind of claim as articulated in *Lankow* and clarified further in *Wakenshaw v Wakenshaw*. The action will fail if the elements cannot be borne out on the evidence.

Of particular importance in these types of claims will be who made representations to the person expecting an interest that they should reasonably expect an interest? One would expect on orthodox principles that it would need to be the trustees in relation to the legal title or a fixed beneficiary vis a vis the beneficial title.

If a discretionary beneficiary makes the representations, then that is more difficult because they have nothing to give. Another avenue might be delegation of authority but that would need to be pleaded and proved, and encounters the hurdle of the principle of non-delegation (although this has been tortured into submission in the cases).

The other issue is that the contributions must manifestly exceed the benefits received from the property. This is a factual issue that must be addressed.

The line of authorities seems another intrusion into orthodox trust principles, such as the principle against non-delegation. The judiciary appears intent on doing justice no matter how contrived or unorthodox the reasoning, and no matter the extent to which orthodox principles are eroded.

There is no discussion about how findings in judgments of this nature affect rights of indemnity an exoneration as between trustees and trust assets/beneficiaries. This is a similar issue that arose in *Clayton v Clayton* – carving out exceptions in the limited sphere of relationship property, without regard for the wider impacts the decisions may have, or their interplay with other areas of law.

Other Claims: Resulting Trusts and Unjust Enrichment

Application of a resulting trust?

Like a constructive trust, a resulting trust is relational in that it comes into being upon the occurrence of certain facts; it is not dependent on the remedial jurisdiction of the Court.

The classic description of such a trust is that of Lord Browne-Wilkinson:[76]

> Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B; the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption or by direct evidence of A's intention to make an outright transfer …
>
> …

[76] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), at 708.

> ... resulting trust[s] are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. ... If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is ... no resulting trust ...

Chang v Lee is an interesting case.[77] This arose in a family context, but was not following a relationship breakdown. Mr Chang advanced $275,000 to his niece, Ms Lee, to buy a house in Auckland. This was 48.6 per cent of the purchase price. Ms Lee took title in her sole name and thereafter denied Mr Chang a right of repayment, or an interest in the property. After referring to the above passages from the judgment of Lord Browne-Wilkinson the Court of Appeal stated:

> [20] The rationale for a resulting trust is that, absent evidence to the contrary, the law presumes a person intends to retain the beneficial ownership of funds which he or she advances towards the purchase price of a property. The legal owner holds title to the property subject to the payer's equitable interest. In this way a trust results to the payer to the extent of his or her contribution. Evidence which might contradict or rebut the presumption is traditionally of an intention to gift or of consideration in the nature of satisfaction of independent indebtedness, both of which Fogarty J rejected here.

In resolving the issue the Court stated that the uncontested findings in the High Court (Fogarty J) were that "Mr Change did not advance the funds for Ms Lee's beneficial ownership, whether as an outright gift or to settle related familial indebtedness" and nor did he "intend to part with ownership of the advance".[78]

As a result, it "followed that the classical terms of a resulting trust existed".[79] The Court rejected the submission that the advance should be treated as a form of equitable loan. In doing so the Court averred:[80]

> [26] We accept that those statements of principle would apply if, for example, Mr Chang's advance was made pursuant to a loan agreement and the parties' intentions were clear. That is because a lender cannot lever off the contractual arrangement to acquire an additional proprietary interest beyond any security pledged by the borrower. But this case is different. While Mr Chang may have proceeded on the unilateral intention of lending the money, the parties never agreed to that effect and there is no finding that Ms Lee received the funds on that condition. Equity cannot create consensus. If viewed through the lens of orthodox contract law, there was no consideration for the advance and that crucial element cannot be satisfied retrospectively by judicial construction of terms and conditions on which the parties never agreed. As the Judge himself found, neither party was able "to reduce what happened to a bargain enforceable under the law of contract".
>
> [27] All that is required, where the terms of the advance are not agreed, is to apply the presumption of equitable ownership in the acquired property. The settled principle applies that where the money to purchase a property has been provided by two persons for that very purpose the property is held in proportion to the funds provided. The principle does not require a further gloss in the circumstances of this case by refining the purpose of advancing the money to acquisition of a proprietorial interest. We repeat that a resulting trust takes effect once it is established that the settlor did not intend to part with beneficial ownership of the contribution. By using as its reference point the property acquired with that contribution (to which the funds can be traced directly and without controversy) equity recognises that any benefits attaching to its acquisition should be shared according to the parties' respective contributions.

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77 *Chang v Lee* [2017] NZCA 308.
78 At [24].
79 At [24].
80 Citations omitted.

> Whether conceptualised as a presumption of non-beneficial transfer or as a response to an absence of consideration, the law of resulting trusts provides an equitable remedy where an injustice would otherwise result.

It must be borne in mind of course that the resulting trust can be undone where the presumption of advancement applies and cannot be rebutted.[81] Such a remedy will nonetheless be useful where one party has made a financial contribution to the purchase of property owned by a company or trust and is seeking an interest in the property purchased.

Quantum meruit and quantum valebat?

Another remedy that might be available exist as an aspect of the law of unjust enrichment. Constructive trust claims are proprietary claims; just because you are not entitled to a share of the property does not mean that you are not entitled to some form of compensation.

The standard form of claim for a contribution to property would be one in quantum meruit or quantum valebat for payment for services rendered or goods supplied. In that case the claimant becomes entitled to a fair and reasonable sum for the services rendered or goods supplied.

How does that entitlement arise? The critical question to ask is whether the recipient has received a benefit as a result of the services or goods and, if so, whether it would be unjust for that to be retained without compensation?[82]

In the relationship property context this is the obvious next claim where a constructive trust claim fails. Say, for example, a de facto partner spent considerable time and money on renovating trust property owned via a company but the circumstances were such that no interest in the property should necessarily be yielded. That would not therefore mean that some compensation was not due and should not be paid.

Conclusion

For over 25 years the constructive trust concept has been used by the Courts to deliver a more just outcome in relationship property cases. Notwithstanding the amendments to the Act in 2002 it can still be used in situations that fall outside the scope of the Act provided that there has been direct or indirect contributions to the property, an expectation of an interest in the property as a result, that expectation is reasonable and the defendant should reasonably expect to yield an interest.

Where those criteria are not made out then other claims also remain – for example resulting trust or quantum meruit/quantum valebat claims.

As it did 25 years ago the point remains the same: the courts will not leave a worthy plaintiff without a remedy. The question, rather, is what that remedy is.

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[81] See Jessica Palmer "Resulting Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 307, at [12.5.4].

[82] See, for example, *Goss v Chilcott* [1996] 3 NZLR 385 (PC) or *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).