

# Constructive trusts – another “trust busting” tool

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It has become common for people to settle property into trusts in an attempt to keep property outside the provisions of the Property (Relationships) Act 1976 (PRA). This is particularly so in the case of second marriages or de facto relationships later in life. In these cases assets such as the family home can often be owned by a trust established prior to the relationship. While there are some avenues available to separated spouses and partners under the PRA, it has been generally quite difficult for one party to make a claim against trust assets. However, three recent decisions of the Court of Appeal should give trustees cause for concern.

The Court of Appeal in, *Murrell v Hamilton*, *Vervoort v Forrest*, and *Hawke's Bay Trustee Company Limited v Judd*, have made it clear that a constructive trust can be imposed over the assets of an express trust in circumstances where former partners have made contributions to the assets of a trust on the understanding they will benefit. All three judgments apply the well-established principles of *Lankow v Rose* in respect of a constructive trust claim in a relationship context being:

- (a) contributions, direct or indirect to the property in question;
- (b) the expectation of an interest in the property;
- (c) that such expectation is reasonable; and
- (d) that the defendant should reasonably expect to yield the claimant an interest.

In *Murrell v Hamilton* when the parties first met Mr Hamilton was already in the process of building a house on a property owned by his family trust. The house was built and the property landscaped over a period of three years at which time it

was rented and then sold a few years later. Ms Murrell claimed she assisted with the construction of the house, the landscaping and the preparation of the property for sale. She claimed that Mr Murrell led her to believe they were working on the property for their mutual benefit. The High Court found that the *Lankow v Rose* elements (a) to (c) were made out giving Ms Murrell an interest in the property but dismissed Ms Murrell's claim on the basis that interest was not enforceable against the trust. While the High Court judge found it would be unconscionable for Mr Hamilton to deny Ms Murrell an interest in the property, the Judge also found the claim could not succeed because the property was owned by a trust and Mr Hamilton was one of two trustees. The judge held there was no basis for the view that the independent trustee Mr Mirkin had given Ms Murrell an expectation of an interest in the trust's property that would be unconscionable to deny. Effectively Ms Murrell had not satisfied *Lankow v Rose* element (d).

On appeal element (d) was the focus. The Court of Appeal noted the High Court's findings that the independent trustee, Mr Mirkin, was not really involved in the administration of the trust. He had little knowledge of the trusts activities and limited contact with Mr Hamilton. Mr Mirkin gave evidence in the High Court that he allowed Mr Hamilton to make all the decisions in respect to the property. The Court of Appeal found that Mr Mirkin had essentially abjured his trustee responsibility in favour of Mr Hamilton, he allowed Mr Hamilton to bind the trustees to contracts relating to the house and implicitly accepted the trust was liable to pay the

amounts due under those contracts. In those circumstances the Court of Appeal found it would be unconscionable for the trustees to deny Ms Murrell her interest based on the expectation stimulated by Mr Hamilton on behalf of the trust.

The Court of Appeal in *Murrell* went on to find that allowing the claim did not alienate trust property in favour of a third party, rather it meant an unjust enrichment to the trust was avoided. This finding is contrary to traditional trust principles that trustees have no right to allow trust assets to be given to a third party.

The findings in *Murrell* were upheld in the later Court of Appeal decision *Vervoort*.

Ms Vervoort and Mr Duffy had a de facto relationship of 12 years. Mr Duffy had a trust prior to their relationship and that trust held significant assets. During the relationship Mr Duffy's family trust purchased a property in Coatesville, Auckland. Ms Vervoort said that she helped Mr Duffy find the Coatesville property, she decorated it, established a garden, and maintained the property. On separation Ms Vervoort pursued a constructive trust claim in respect of the Coatesville property.

As in *Murrell* the Court of Appeal accepted the High Court's findings that Mr Duffy was in de facto control of his family trust and that the independent trustee had left the management of the trust to Mr Duffy. While the High Court found no constructive trust, the Court of Appeal held it would be inequitable to allow a controlling partner to avoid equitable obligations by relying on the prohibition of delegation or lack of consent from the other trustee. Since previous and current independent trustees had given Mr Duffy “carte blanche” to do as he wished with the trust assets, the Court of Appeal found the conscience of the trustees was activated by their surrender of trustee duties to Mr Duffy. The Court of Appeal acknowledged that trustees hold property on behalf of beneficiaries and traditional trust principles require trustees not to yield trust property *Continued on next page...*

## CAN GEORGE (AGED 12) TELL THE COURT HIS STORY?, *Continued ...*

Children should not be encouraged to give evidence in the Family Court. Children giving evidence in the Family Court are just as involved in the case and as mindful of the consequences as children who are witnesses against an adult in a criminal case, or who are the subject of custody or

access proceedings in the Family Court. It can be easily argued that children should have more of an opportunity to participate in Family Court proceedings which concern them.

1 R v Tanner [2007]NZCA 391; R v Jellyman

[2009] NZCA 532 R v M [2012] NZCA 270; and N (CA19/2013) v R [2014] NZCA 167.  
2 Re W (Children)(Abuse: Oral Evidence) [2010] UKSC 12. [2010] 1 FLR 1485; Re D (Children)[2015] EWCA Civ 409; and Re E (A child)[2016], EWCA Civ 473.  
3 Re W (Children)(Abuse: Oral Evidence) [2010] UKSC 12, [2010] 1 FLR 1485.



## CONSTRUCTIVE TRUSTS - ANOTHER "TRUST BUSTING" TOOL, *Continued ...*

to a third party. However, following the reasoning in *Murrell* the court of Appeal found the trust's assets would reflect the value of Ms Vervoort's contributions and therefore existing beneficiaries would not be deprived of assets they would otherwise have enjoyed. The court says at paragraph [68] of the judgment "*The alternative of allowing the trustees to take advantage of trust principles to deny those who have enriched the trust is not acceptable*".

*Vervoort* was closely followed by *Hawke's Bay Trustee Company Limited v Judd*, an appeal against a High Court decision upholding a constructive trust claim by Ms Judd. In Ms Judd's case her contributions had been to the family home owned by a trust settled by her former husband prior to their marriage. The trust appealed the High Court's findings and made arguments similar to those run in *Vervoort*.

In dismissing the appeal the Court of Appeal applied the reasoning from *Murrell* and *Vervoort* that unanimity cannot be used as a shield where one trustee has abdicated responsibility to a controlling party, and imposing the constructive trust simply avoids an unjust enrichment accruing to the trust.

*Murrell*, *Vervoort* and *Hawke's Bay* highlight the importance of proper trust administration and the active involvement of all trustees in transactions that may affect trust property. Trust principles of unanimity and non-delegation will not prohibit a claim for constructive trust in circumstances where one of a number of trustees control the operation of the trust. The exclusion of other trustees from trust management is not able to be invoked to create an injustice and the courts will impose a constructive trust on an express trust. The alternative is to allow

trustees to rely on express trust principles in order to deny those who have enriched the trust, which the Court of Appeal in *Murrell*, *Vervoort* and *Hawke's Bay* has found to be unconscionable.

- 1 *Murrell v Hamilton* [2014] NZCA 377.
- 2 *Vervoort v Forrest* [2016] NZCA 375.
- 3 *Hawke's Bay Trustee Company Limited v Judd* [2016] NZCA 397.
- 4 *Lankow v Rose* [1995] 1 NZLR 277 at 277.
- 5 *Murrell v Hamilton* [2014] NZCA 377 at [27] to [28].
- 6 At [28].
- 7 At [30].
- 8 *Vervoort v Forrest* [2016] NZCA 375 at [28] and [39].
- 9 At [64].
- 10 At [67].
- 11 *Hawke's Bay Trustee Company Limited v Judd* [2016] NZCA 397 at [46] and [47].

