ADLS CPD

How to Make Sense of the Latest Confusion about Trusts

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Overview

I want to speak to you today about three doctrines which strip owners of their assets.

I'm not talking solely of Trust assets but about all categories of assets.

The doctrines are:

(a) Constructive Trust.

(b) Quantum Meruit.

(c) "Domestic services claims" and "Childcare services claims."

Constructive Trusts

The Constructive Trust journey starts with the Court of Appeal's decision in *Marshall v Bournville & Another* [2013] NZCA 271. In this case the Court of Appeal approved the imposition of a constructive Trust over the assets of express Trusts. This is what the Court said:

> "we see no reason why... relief by way of a constructive Trust should not be awarded against trust property. It seems to us that such an outcome might reasonably be available to Ms Marshall. On her case, an expectation of an interest in [a family home] arose when it was acquired by [her partner]. We see no reason why that expectation should not survive the transfer of the property to the trustees. [Her partner] as settlor and trustee obviously would have had knowledge of the circumstances giving rise to the expectation. In such circumstances, Ms Marshall could well be able to establish the trust was impressed on the property and the trustee should reasonably expect to yield to her an interest in the property." [39]

Our law of Constructive Trusts in this context derives largely from *Lankow v Rose* [1995] 1 NZLR 277 where the Court of Appeal said that a person who claims that a Constructive Trust exists for his or her benefit must satisfy the following four-stage test.

1. Did he or she make contributions directly or indirectly to the property?
2. Did he or she make the contributions in the expectation that they would create an interest in the property?
3. Were the expectations reasonable?
4. Should the defendant reasonably expect to yield the claimant an interest in the property?

The Trojan Horse in this definition is the use of the words in factor No 1, "*indirect contributions.*"

A wife who washes dishes, which frees her husband to have some time to enhance the value of an asset that is his separate property or which is Trust property, or which is someone else's property, is said to have made an "indirect contribution" to that asset which will probably entitle her to intercept some of the increase in the value of the asset if the contribution was a fraction more than "trivial".

This course of reasoning can convert a spouse's separate property into relationship property. In the notorious case of *Clark v Clark* [2012] NZHC 3159, Mrs Clark persuaded a Court that a Constructive Trust should be imposed over a farm for her husband's benefit. His parents had bought the farm and it was owned by a Trust. This was not a claim that the husband advanced. It was advanced by his estranged wife, and almost certainly against his will.

Having agreed with the wife that a Constructive Trust existed for the benefit of the husband, the Court proceeded to say that the monetary value of the Constructive Trust was his separate property.

As some relationship property had been used to improve the value of the farm, the wife invoked s 9A (1) of the Property (Relationships) Act 1976 (PRA), which says that if a contribution of relationship property that is fractionally greater than "trivial" has improved the value of a spouse's separate property, the whole of the increase in value of the separate property becomes relationship property.

Although the Court didn't identify the amount of relationship property that had been applied to the Trust-owned farm, it appeared that it may have been about $350,000. The farm had increased in value by multiples of that sum and, in accordance with the illogicality and unfairness of s 9A(1), the wife was therefore entitled to half of that sum ($913,000) together with half the value of the homestead on the farm ($300,000).

The law can go down this path when – in relation to Trust assets – the rule that Trustees must act unanimously is ignored. If one Trustee (typically a husband) is aware of the direct or indirect actions that are apparently being applied to a Trust asset, that person (typically the wife) can intercept a significant part of the value even though the other Trustees know nothing about the wife's actions or expectations.

This line of authority expanded with the decision of the Court of Appeal in *Murrell v Hamilton* [2014] NZCA 377. In this case, the Court of Appeal held that a Constructive Trust could be imposed over the assets of an express Trust. This is the critical paragraph of the Court's decision:

> "We emphasise that allowing Ms Morrell's claim... does not alienate Trust property, that is, it does not take away from the beneficiaries of the Trust something to which they are entitled. Rather, it means that a part of the value of the Trust's property which should not accrue to the Trust does not accrue to it." [30]

The next case is *Judd v Hawke's Bay Trustee Company Limited* [2014] NZHC 3298. A man who had had two previous marriages got together with a woman. He and the woman each had children from prior relationships. The marriage lasted for six and a half years and when they separated, she claimed that a Constructive Trust existing in her favour to the value of 40% of the Trust-owned property in which she had lived. She claimed that she had made both direct and indirect contributions to the property. They included *"gardening and landscaping"*, *"maintenance of the house (albeit to a minor degree)"*, *"caring for him [and his sons]"*. The indirect contributions included the freeing up of his time which had enabled him *"to pursue his business interests"*. Did these actions – both direct and indirect – enhance the value of the property?

No they didn't. The property had actually *fallen* in value but that didn't matter:

> "...[C]ontributions that directly or indirectly maintain property value will also generate entitlements... This means that even in a falling market and even in respect of an over-capitalised property, contributions can have proprietary effects."

The Judge held that the wife should be awarded $10,000 for each of the years that she spent with him with the consequence that an award of $65,000 was made in her favour.

The case went on appeal and the Court of Appeal upheld the High Court decision saying that that the house was *"large"* (it had four bedrooms) and the garden was *"substantial"*.

The Court of Appeal said that the sum of $65,000 is equivalent to *"$200 a week for the course of the marriage"* and that by living rent-free in the house the wife had been saved the expense of an additional sum of $200 per week. The benefit to the wife of $400 per week for each week of the marriage was considered to be *"reasonable"*.

On the basis of this decision, most spouses who live in a Trust-owned house will be seeking a constructive Trust of not less than $400 per week for each week of their relationship.

Did the Judges in the High Court and Court of Appeal who reached this decision understand what they were doing? The answer appears to be "No". They all appear to have believed that the moneys they were awarding to the wife would be hers alone.

But they were probably wrong because they didn't know enough about the PRA.

The moneys would probably not be the wife's moneys. By virtue of s 8(1)(e) of the PRA they would be relationship property to which the wife would be entitled to half. (Section 8(1)(e) of the PRA says that *"all property acquired by [a spouse] is relationship property"*, and it is obviously arguable that the money that was captured by the Constructive Trust in the *Judd* case fell within this definition.)

This is how our law of Trusts is being created; by non-specialist Judges who sometimes appear not to understand the significance of what they are doing.

I now come to the infamous *Vervoort* decision.[1]

It is a fundamental premise of the law of Trusts that Trustees must act unanimously unless the terms of a Trust permit them to act by a majority. (Acting by a majority is problematic and I do not recommend it since a Trustee who dissents from a majority decision is personally liable to pay for all of the financial consequences that may arise from it even though he/she disagreed with it.)

If you think our law is diverging from what the law of Equity is supposed to be, you would be right. In England, a Chancery Judge Sir William Blackburne recently confirmed in *Fielden v Christie-Miller & Others* [2015] EWHC 87 (Ch) that there can be no proprietary estoppel where a representation had been made by one Trustee only. All the Trustees must know of and acquiesce in the actions that are being made by the person who is making a direct or indirect contribution to a Trust asset.

But this is no longer the law in New Zealand.

Our law of Trusts now allows the actions of one Trustee to bind all the other Trustees even though the other Trustees know nothing about what the one Trustee has done and even though, when they learn of it, they disown it.

People who regularly attend the Cradle to Grave Conference tend to be practical lawyers who are not interested in academic debates about the law. You want to know what the law is, and what you can do to help your clients avoid the problems that Parliament and the Courts are creating.

So what can you do about the encroachment of the Constructive Trust doctrine?

I'll come to that in a minute but first I need to tell you about the two other doctrines that work in tandem with the Constructive Trust doctrine.

Quantum Meruit

The second doctrine which achieves much the same thing as the Constructive Trust doctrine is the law concerning "quantum meruit".

This was the subject of *Buysers v Dean.*[2] In this case, a woman stayed at home and looked after two young children. She appears to have believed that she had no right to make a claim against the assets that had been created during a relationship, and decided instead to make a financial claim against the man on the basis of quantum meruit.

In paras 48, 49 and 50 of her evidence, she set out the work that she said she had done and for which she should be rewarded:

> ***48 While living with Jon between March 1993 up to when I left the house at 3/8 Wahanui Road on 14th May 2000, I carried out the following domestic housekeeping chores for Jon:***
>
> (a) *Daily washing of clothing, folding the clean washing, and putting them away.*

1 *Vervoort v Forrest & Others* [2016] NZCA 375.

2 (2001) 21 FRNZ 431.

(b) *Daily washing, drying, and putting away dishes.*

(c) *The cleaning of two showers, two toilets, two hand basins, and one bath on a weekly basis.*

(d) *Cleaning of the kitchen sink, kitchen benches, and cooking elements.*

(e) *Mending of clothing as and when required.*

(f) *Ironing.*

(g) *Weekly vacuum cleaning of all carpeted areas and other tiled floor areas. Although I would vacuum the lounge and kitchen floors every second day.*

(h) *Grocery shopping, although I would often be accompanied by Jon and the children.*

(i) *Washing and cleaning the car as and when required.*

(j) *Feeding and brushing the cat for the 2 years that we had it.*

(k) *I carried out the alterations to the curtains for the kitchen windows at the Wahanui Road house. I also thoroughly cleaned the houses before moving into a rented townhouse in Melbourne in 1994, 3/8 Wahanui Road in 1995 and in 1998, also when Jon rented the house in Wellington in 1997 (59 Winston St, Chartwell). In addition, I cleaned the windows a few times a year.*

(l) *Gardening, that is creating and maintaining flowerbeds/border and growing plants in pots. Weeding and planting new plants, sweeping up leaves and, in Melbourne, mowing lawn.*

49 The homes where I carried out the housekeeping duties were:

(a) *24b Tawera Road, Greenlane, Auckland. This house was approximately 75 square metres and comprised two double bedrooms; bathroom includes bath, shower, and vanity; separate toilet; kitchen; and combined lounge/dining.*

(b) *2/19 Lee Ave, Mount Waverley, Melbourne. This house was approximately 130 square metres and comprised one double bedroom with walk-in wardrobe; one double bedroom and one single bedroom; ensuite including vanity, shower, and toilet; bathroom includes vanity, shower, and bath; separate toilet; laundry; open plan family room/dining/kitchen; and separate lounge.*

(c) *3/8 Wahanui Road, One Tree Hill, Auckland. This house was approximately 110 square metres and comprised three double bedrooms; ensuite including vanity, shower, and toilet; bathroom includes vanity, shower, and bath; separate toilet; and open plan lounge/dining/kitchen.*

(d) *59 Winston Street, Chartwell, Wellington. This house was approximately 85 square metres and comprised one double bedroom and two single bedrooms, bathroom includes vanity, shower, and bath; separate toilet; kitchen; laundry; and combined lounge/dining.*

(e) *3/8 Wahanui Road, One Tree Hill, Auckland. This house was approximately 110 square metres and comprised three double bedrooms; ensuite including vanity, shower, and toilet; bathroom includes vanity, shower, and bath; separate toilet; and open plan lounge/dining/kitchen.*

Childcare work carried out

50 From the time Chantelle and Sebastian were born, I have provided to Jon the following childcare services (in no particular order):

(a) *I would attend to all the baby needs of the children when they were very small, including bathing, feeding, and changing them. As the children became older, but were still young, they would eat before the adults and I would prepare their dinners.*

(b) *Supervise the children during bath time, meal times, and playing outside. Getting the children dressed in the mornings and in pyjamas at night, plus cleaning teeth, brushing hair etc. When the children became ill, I would attend to them day or night.*

(c) *Preparation of school lunches (weekdays). Preparing morning tea and lunch for Sebastian and afternoon tea for both children on weekdays.*

(d) *Washing school uniforms (two to three times per week). Doing the washing and all repairs and alterations of children's clothing.*

(e) *Changing the children's clothes. Sometimes this meant three to four changes of clothes in one day.*

(f) *Supervising homework, reading 5 days per week, poetry in the weekend for 2 school years.*

(g) *Driving to and from school (most weekdays since Chantelle started school on 27 April 1998).*

(h) *Supervising Chantelle's recorder practise (weekly). Recorder lessons were given at school by a teacher. Driving to and from swimming lessons at Lagoon Swim School in Panmure (Sebastian 20+ lessons, Chantelle 35+ lessons on separate days).*

(i) *Driving to and from, and participating in, children's creative dancing classes in Wellington (2 children 10 lessons each).*

(j) *Weekly trips to Auckland Museum with Chantelle for approximately 3 months (after we returned from Melbourne).*

(k) *Library pre-school story times for Chantelle. In Melbourne two to three times weekly. In Auckland one or two times weekly, in Wellington three times weekly. Library story times for Sebastian: In Wellington three times, in Auckland one to two times per month (between May 1998 and June 1999).*

(l) *Walks and plays in the park or playground. Usually we would try and make this into a significant outing, and take some snacks along. Reading and discussing stories. Often we would find lots of books on a particular topic and do drawings or activities on the theme (I did this when Chantelle was a pre-schooler and later with Sebastian).*

(m) *Organising play sessions with friends for the children at our house or taking the children to friend's places. Taking the children over to spend time with relatives after school (for Chantelle) or early morning (for Sebastian).*

(n) *Coming along on and helping with all but two school trips for Chantelle. Taking the children along to organised school holiday activities like shows or performances at shopping malls, children's programme at the Auckland Art Gallery, trips to Auckland Museum, and special story-telling sessions.*

(o) *Collect reference material for topics at school for Chantelle, eg books on fibre and fabrics, volcanoes, Helen Keller, topics in religious education etc. Arts and crafts: for eg, paper-making, making collage from nature finds like autumn leaves, painting, baking etc.*

(p) *I would help and encourage the children to make decorations for Christmas, help Chantelle to write Christmas cards to her school friends, and help them decorate the Christmas tree.*

THE JUDGE THEN SAID:

12. In respect of a number of the items, especially cooking (which the defendant apparently enjoys) and care and supervision of the children, the defendant claimed to have made the same contribution or, alternatively, tended to downgrade the significance of what the plaintiff had done.

13. Nonetheless, I accept the plaintiff's evidence that she did carry out the domestic work recorded in paras (48) and (49) of her prepared statement of evidence and the childcare work in para (50). Furthermore, despite the defendant's criticism of her performance in these areas, I accept that she did the work conscientiously and well. **I am left with the firm conviction that care and upbringing of the children in their infancy by this devoted and intelligent mother has been far more beneficial to them than if she had gone out to work.** In that sense, the plaintiff's

> contribution was a real benefit to the defendant who, despite the break-up of the relationship, obviously has a deep and abiding affection for the children.[3] (Emphasis added)

The Judge held that:

> In circumstances where a spouse has no "overt expectations" that he/she will gain "an interest in the property itself" but who has nevertheless made "a contribution in services thereto and (perhaps in other ways)"[4] the Court can make an award of compensation.

The *Buysers* case involved a de facto union. It was held that:

(a) If she had been married to Mr Dean, Ms Buysers would have been entitled to compensation on the basis of quantum meruit for these services.

(b) The principle of quantum meruit does not extend to people in a de facto union. A person in a de facto relationship is nevertheless entitled to make a "domestic services claim" and a claim for "childcare services".

A "Domestic services claim" and a "Childcare services claim"

The law of New Zealand appears to allow a cause of action based upon a "domestic services claim" and a cause of action based upon a "childcare services claim." In the Buysers case, Ms Buysers was awarded $8,000 for domestic housekeeping (the sum was reduced because the services "were rendered as much, if not more, for herself, and the children as for the [man]"[5]). So far as childcare services were concerned, it was held that a claim for $130,000 was appropriate but that "this should be halved... to allow for a figure of $65,000" and that some allowance "must also be made... for those periods of time when the [man] was off work and at home and for his contribution for childcare during the week...". This reduced the figure that the woman was to receive to $50,000.

Evidence was given by the woman of the cost of employing someone to do the work that she had performed, and the awards that were made in her favour were based upon the evidence of the cost of employing a person to do the work that Ms Buysers had performed.

You may ask with incredulity, "Where did this law come from?" The answer is "Canada." Justice Hammond gave a judgment in *Daly v Gilbert* [1993] 3 NZLR 731 where he had referred to Canadian law dealing with claims of quantum meruit in domestic situations.

What is particularly significant about this case is that the woman conceded that she had no right to make any claim in relation to property. Her claim was confined to a claim of monetary compensation for domestic services and childcare services and it was not contended that these services had enhanced the value of any relationship property or other property.

If the Buysers' decision was good law in 2001, there is no reason to believe that it should not be good law today.

A spouse/partner can therefore elect between a claim for a Constructive Trust for domestic services that directly or indirectly enhance the value of an asset – or maintain part of its value; or (if there is an agreement that there is no entitlement to make a claim for a Constructive Trust) the person can make a claim for monetary compensation for "domestic services" and "childcare services."

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3 Paragraphs 12 and 13.

4 Paragraph 25.

5 Paragraph 38.

Is this good law?

My answer is "No".

So far as the law of Constructive Trusts is concerned, evidence that indirect actions have enhanced the value of an asset will in many cases be speculative. If actions – whether direct or indirect – do not add significant value then there should be no Constructive Trust, since the notion of a Constructive Trust is based upon a principle that a person's actions have enhanced the value of an asset and that the person should be compensated accordingly.

So far as claims of quantum meruit are concerned, the law is based upon an assumption that services have been performed when payment is expected to be received for those services.

In a domestic situation, a typical New Zealand wife who in 2017 looks after a child at home will not undertake the work in the expectation that she will receive a salary which is commensurate with that of a nanny and/or housekeeper and/or any other domestic staff who might have otherwise been involved. A claim based on quantum meruit ought therefore to fail.

The same principle applies to the so called entitlement to payment for "domestic services" and "childcare services." People who perform these services within the context of a marriage or an ongoing relationship do not typically in New Zealand at present do so in the expectation that they will be paid a salary at such rates as HR consultants determine would apply to nannies and domestic staff.

What can you do about this?

You should be firm in your advice to people who propose to enter into a relationship that they must enter into an s 21 Agreement in which they will:

(a) Secure a commitment that the other spouse will not make a claim of a Constructive Trust in respect of any direct or indirect actions that may enhance the value of an asset or maintain its value to some degree; and

(b) Agree not to make a claim on the basis of quantum merit for any work that is done during the course of the relationship that relates to domestic services or childcare services; and

(c) Agree not to make a claim for domestic services and childcare services that have been performed during the course of the relationship.

If you act for Trustees, you could arrange for them to instruct a Trustee who may be likely to encourage a beneficiary to work on a Trust asset or work on a person's separate property asset, to enter into an enforceable commitment which is to the effect that any work that that person chooses to do to that asset and which may preserve the value of, or enhance the value of, that asset, will not entitle that person to any reward, whether on the basis of a Constructive Trust or any other doctrine.

You should inform any client who has any asset of consequence that he or she should not allow anyone to have the belief that any direct or indirect actions which that person takes may entitle that person to intercept any of the value of that asset.

For couples who did not enter into pre-nuptial agreements before they get together you can suggest that they should do so but this will almost invariably be impossible since most people in an ongoing relationship will refuse to forego awards of compensation for historical services.