IN THE COURT OF APPEAL OF NEW ZEALAND

CA31/2014
[2014] NZCA 377

BETWEEN	JANE MAREE MURRELL Appellant
AND	WILLIAM ELLIOT HAMILTON First Respondent
	GEOFFREY MIRKIN Second Respondent
	W E H TRUSTEE LTD Third Respondent

Hearing:	30 July 2014
Court:	O'Regan P, Wild and French JJ
Counsel:	L A Andersen and J L Bates for Appellant D R Tobin for First and Third Respondents No appearance for Second Respondent
Judgment:	7 August 2014 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment of the High Court is set aside. Judgment is entered against the respondents jointly and severally in favour of the appellant in the sum of $37,500.

C The cross-appeal is dismissed.

D The respondents are to pay the appellant's costs as for a standard appeal on a band A basis with usual disbursements.

E The costs orders made by the High Court on 26 June 2014 are quashed. Costs in the High Court are to be re-determined by that Court in light of this judgment.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This appeal and cross-appeal are from a judgment Panckhurst J delivered on 5 December 2013.[1] The main issue is whether the Judge erred in declining to impose a constructive trust on a property owned throughout by a trust.

[2] Three points are taken on the cross-appeal. They challenge, in different respects, the Judge's finding that the appellant had made a valuable contribution to the property in issue and the Judge's quantification of that contribution.

The facts

[3] The appellant, Ms Murrell, and the first respondent, Mr Hamilton, began a relationship in early 2002.

[4] In January 2004 they moved into a house under construction in Devon Street in Arrowtown. The house was being built by the building company operated by Mr Hamilton, who was himself a builder. The property was owned by the W E Hamilton Family Trust (the Trust). This was Mr Hamilton's family trust.

[5] Over the next three years construction of the house was finished and the section landscaped. Based on photographs taken some time after the event, Panckhurst J observed "it is apparent that the property was finished and presented in an attractive manner".[2]

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1 *Murrell v Hamilton* [2013] NZHC 3241 [High Court judgment].
2 At [28].

[6] In February 2007 Ms Murrell and Mr Hamilton moved to Dunedin and the Arrowtown property was rented. It was sold about two years later, in March 2009, for $573,418.

[7] Following her separation from Mr Hamilton in February 2010, Ms Murrell brought the claim determined by Panckhurst J in the judgment under appeal, to which we now turn.

The judgment under appeal

[8] Panckhurst J set out the now well established elements of a constructive trust claim in the relationship property context:[3]

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

[9] The Judge then reviewed the evidence he had heard relating to these elements. In terms of (b), the evidence was sharply conflicting. Ms Murrell accepted she knew the Arrowtown property was owned by the Trust. But she said Mr Hamilton led her to believe they were working together on the property for their mutual benefit. She instanced remarks made by Mr Hamilton to the effect that the benefits from the sacrifice, and hard work, they were putting into the new house would be shared in the future. Ms Murrell said she would have moved to Sydney to be with her family had that not been her understanding.

[10] Panckhurst J accepted that evidence, preferring it to the evidence of Mr Hamilton, who maintained it was "completely untrue" that he had said anything to Ms Murrell indicating she would benefit from the finishing and development of the Arrowtown property. Indeed, Mr Hamilton claimed it was "a source of irritation to Jane [Murrell] that she knew that she had no interest in … Devon St".

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[3] At [15]. The Judge drew these from this Court's decision in *Lankow v Rose* [1995] 1 NZLR 277 (CA) particularly at 294 per Tipping J.

[11] After reviewing the evidence, the Judge concluded:[4]

> … I am satisfied that Ms Murrell made contributions to … Devon Street and that she did so in circumstances where she held a reasonable expectation that she enjoyed an interest in the property. Further, I find that it would be unconscionable of a reasonable person in Mr Hamilton's shoes to deny the existence of such interest. These findings, however, remain subject to my consideration of the third element – whether the property being an asset of the Trust precludes recognition of a constructive trust claim.

[12] Panckhurst J then assessed the profit on the sale of the Arrowtown property at $230,000, to which he added $20,000 being his assessment of the net rental income over the approximately two years the property was let.[5] Upon the evidence he had heard, which included sharply conflicting evidence from Ms Murrell on the one hand and Mr Hamilton on the other, Panckhurst J assessed that "Ms Murrell's contributions warrant recognition of a 15 per cent interest in the property".[6]

[13] Next, Panckhurst J turned to the issue which is the focus of the appeal: is that interest enforceable against the Trust? As Mr Andersen contended the Trust was merely an alter ego of Mr Hamilton, the Judge noted the discussion in one of the leading trust texts on factors that may provide evidence of an alter ego trust:[7]

> The many factors include a lack of trustees' meetings, minute books and resolutions; inadequate or non-existent trust accounts; inadequate documentation pertaining to trust transactions; the rubber stamping of directions given by the controlling party to the trustees; payment of trust expenses by the controlling party; receipt of direct financial benefits from the trust assets by the controlling party; the controlling party being the sole or principal beneficiary of the trust; and conduct of the controlling party which evinces an intention to control the trust assets.

[14] In looking to see which of those factors applied to the Trust here, Panckhurst J noted that Mr Hamilton and the second defendant, Mr Mirkin, had been cross-examined by Mr Andersen at length, with the aim of establishing the Trust was in substance an alter ego of Mr Hamilton. The Judge observed Mr Hamilton, when found wanting in answering questions concerning the affairs of the Trust, deferred to Mr Mirkin.

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4 At [40].
5 At [45] and [46].
6 At [51].
7 At [53]. The Judge referred to Jessica Palmer "Sham Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 393 at [15.6.4].

[15] Mr Mirkin was sued in his capacity as an independent trustee of the Trust during the relevant period. Mr Mirkin is a partner of a firm of solicitors in Dunedin. The Judge noted Mr Mirkin's evidence began with an "authoritative outline of his experience as a professional trustee", including acting for two generations of the Hamilton family. Mr Mirkin told the Judge Mr Hamilton's parents had fostered in their three children an understanding of the advisability of ensuring assets were held in trusts to provide protection "from business creditors and from any unsuccessful relationships". The Judge quoted this part of Mr Mirkin's evidence:[8]

> They [the parents] have always impressed me with their knowledge of the use of trusts and the importance of properly maintaining and running those trusts. Likewise, the children have shown knowledge of the use of trusts, and the care that must be taken with them, from early on.

[16] Panckhurst J then referred to Mr Mirkin's evidence of his involvement with numerous Hamilton family trusts: his multiple appointments as a trustee; documenting trust transactions; participating in dozens of meetings with co-trustees; generating minutes and resolutions; and preparing financial accounts in a form understandable to family members. Mr Mirkin deposed he was a trustee of the Trust from its establishment in 1991 until he resigned in September 2012.[9]

[17] Panckhurst J said: "When the assertion that the W E Hamilton Family Trust had been efficiently administered was put to the test, however, a different picture emerged."[10]

[18] The Judge then set out these features of the operation of the Trust:

(a) The purchase of the Arrowtown land by the Trust, the resulting transfer, the Trust's indebtedness for the purchase price and the trustees' resolution that the "W E Hamilton building account" was the nominated bank account of the Trust were all properly documented, save that the Trust in fact used the William Elliott Hamilton bank account.

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8 At [55].

9 When Mr Mirkin resigned as a trustee of the Trust, he was replaced by W E H Trustee Ltd, a company controlled by Mr Hamilton.

10 At [57].

(b) Beyond that, Mr Mirkin held no Trust records.

(c) There was no Trust file, no file notes, only one trustee resolution and the Trust's financial statements were limited to the two year period the Arrowtown property was let and were for tax purposes. They did not include a statement of the Trust's assets and liabilities.

(d) Contact between the trustees had been limited. Mr Mirkin knew little about the Trust's activities beyond the fact that a house was under construction.

(e) The Trust's supposed bank account was used for non-Trust transactions, in particular to receive Mr Hamilton's salary and pay his living expenses as well as Trust expenses.

(f) A facility from the bank for building costs was not documented in the records of the Trust and Mr Mirkin appeared not to be aware of it.

[19] Under the heading "Is there such a concept as an alter ego trust?", Panckhurst J then reviewed *Prime v Hardie*, *Glass v Hughey*, *Official Assignee v Wilson*, *Clark v Clark* and *Marshall v Bourneville*.[11] He considered those cases demonstrated two things. First, the principles relating to alter ego trusts are not well settled. Secondly, a constructive trust claim in relation to property held in a family trust may succeed where:

(a) The contributions were made, and the reasonable expectation of an interest arose, while the property in question was owned by the claimant's partner and the transfer of the property to a trust occurred subsequently: *Marshall v Bourneville*.

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[11] *Prime v Hardie* [2003] NZFLR 481 (HC); *Glass v Hughey* [2003] NZFLR 865 (HC); *Official Assignee v Wilson* [2007] NZCA 123, [2008] 3 NZLR 45; *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534; and *Marshall v Bourneville* [2013] NZCA 271, [2013] 3 NZLR 766.

(b) The claimant's contributions to the trust property were made with the knowledge and approval of all the trustees, such that their collective conscience is bound to recognise the validity of the claim.

(c) A constructive trust benefits the partner and the claimant successfully claims against that interest, as in *Clark v Clark*. But then the claimaint's entitlement is defined by reference to the Property (Relationships) Act 1976, not equity.

[20] Panckhurst J then observed those three situations are not examples of an alter ego approach, but rather of "the common theme … that the claimant can assert and establish a constructive trust claim against the trustees of an express trust, at least in the first two examples".[12] The Judge viewed the examples as consistent with this Court's approach in *Official Assignee v Wilson*. He considered the examples did not run foul of the main criticism of the alter ego concept; the control of property alone should not result in its appropriation to the controller, a result antithetical to New Zealand's system of property law.[13]

[21] As Ms Murrell's claim did not come within any of the three situations (those outlined in [19] above), Panckhurst J dismissed the claim. He held:[14]

> [Ms Murrell's] constructive claim is against property that was owned by the Trust throughout. Nor is there a basis for the view that both trustees stimulated her expectations in such circumstances that it would be unconscionable of them to deny her claim.

Our approach

[22] We see no reason in principle why a constructive trust claim should not succeed in respect of a property owned by a trust. Such a claim succeeded in *Prime v Hardie*. The parties had lived in a de facto relationship. The two homes in which they successively lived were owned by the Hardie Trust, which Salmon J held "was

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12 High Court judgment, above n 1, at [80].

13 At [81]. The Judge appeared to be referring to the thrust of the paper: Jessica Palmer, "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81. Panckhurst J had earlier referred to that paper at [74].

14 At [82].

effectively Mr Hardie's alter ego".[15] Mr Hardie had borrowed the money enabling the Trust to purchase the properties and had paid the interest on the mortgages, the rates and the insurance. In his personal tax return Mr Hardie had also included apparently fictitious rental income from one of the properties and claimed deductions for the interest, depreciation and other outgoings resulting in a substantial net loss for which he claimed a tax deduction. Salmon J held:[16]

> In those circumstances I see no reason why a constructive trust should not be imposed upon a property owned by a trust. That too is the view expressed by the authors of *Butterworth's Family Law Service,* Commentary 2 binder at para 7.204.

[23] We do not think Panckhurst J took a different view, although he considered a constructive trust claim could succeed in respect of a property owned by a trust only in confined situations, for example the three set out in [19] above.

[24] On this appeal the focus is on element (d) from *Lankow v Rose*, which we have set out in [8] above. As that element applies here, Ms Murrell must establish that the trustees of the Trust should reasonably expect to yield her an interest in the Trust's property. Although Mr Hamilton and Mr Mirkin were named separately as defendants in the statement of claim, they were sued in their capacity as trustees of the Trust.[17]

[25] Panckhurst J found it would be unconscionable for a reasonable person in Mr Hamilton's shoes to deny that Ms Murrell had a reasonable expectation of an interest in the Arrowtown property because of the contributions she had made to it.[18] As the Judge saw it, the stumbling blocks to Ms Murrell's claim were twofold:[19]

(a) the Arrowtown property was owned by the Trust and not by Mr Hamilton. Put differently, Mr Hamilton was only one of the two trustees of the Trust; and

15 *Prime v Hardie*, above n 11, at [30].
16 At [30].
17 Statement of claim dated 2 November 2012 at [2].
18 High Court judgment, above n 1, at [40].
19 At [82].

(b) there was no basis for the view that the other trustee, Mr Mirkin, had stimulated Ms Murrell's expectations of an interest in the Trust's property such that it would be unconscionable of the two trustees to deny her claim.

[26] As Panckhurst J pointed out, in his evidence in chief Mr Mirkin was forthcoming about his meticulous attention to the affairs of the many trusts he had formed for members of the Hamilton family over many years. Implicit if not explicit was that this meticulous attention applied equally to the Trust in issue.

[27] The reality was quite different. On the Judge's findings, which we have summarised in [18] above, Mr Mirkin essentially abjured his trustee responsibilities in favour of Mr Hamilton. He essentially left everything to do with the construction of the house and the development of the section at Arrowtown to Mr Hamilton. In his evidence in chief Mr Mirkin stated:[20]

> 25 I did not require Bill [Mr Hamilton] to consult with me as his co-Trustee on every decision and payment for the building project. Instead, we agreed that Bill, as the builder with hands-on control, would make the decisions relating to building on the basis that I would get to view any accounting information, and if any further advances or decisions had to be made that had not previously been broadly agreed upon, then we would do so by way of a meeting with appropriate resolutions.

This exchange took place in the course of Mr Andersen's cross-examination of Mr Mirkin:[21]

> Q And essentially, with matters relating to the house, Mr Hamilton was free to do what he wanted wasn't he?
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> A That's correct.

[28] Thus, Mr Mirkin allowed Mr Hamilton to bind the trustees to contracts relating to the construction of the house and implicitly accepted the Trust was liable to pay the amounts owing under the contracts. So Mr Hamilton's actions were treated as the actions of both trustees, or at least as actions binding on both trustees vis-à-vis the contract counterparties. In that unusual factual situation, we consider it

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20 Statement of evidence of Geoffrey Mirkin dated 13 June 2013.
21 Notes of evidence at 109/25–27.

would be unconscionable for the trustees to deny Ms Murrell's claim based on the expectation stimulated by Mr Hamilton on behalf of the Trust. We therefore disagree with Panckhurst J's view:[22]

> Nor is there a basis for the view that both trustees stimulated her expectations in such circumstances that it would be unconscionable of them to deny her claim.

[29] On Panckhurst J's findings, Ms Murrell's 15 per cent contribution equates to $37,500 (that is 15 per cent of $250,000, that figure comprising the $230,000 profit upon the sale of the property plus the $20,000 net rental income). As both trustees must be taken to have stimulated Ms Murrell's reasonable expectation that her contribution would be recognised by way of an interest in the Trust's property, it would be unconscionable for the two trustees to deny Ms Murrell's claim.

[30] We emphasise that allowing Ms Murrell'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 a part of the value of the Trust's property which should not accrue to the Trust does not accrue to it. Allowing Ms Murrell's claim averts the unjust enrichment which would otherwise result to the Trust – essentially the Trust getting $37,500 for nothing – a windfall.

[31] We see our decision as involving a straightforward application of *Lankow v Rose* principles to the somewhat peculiar facts of this case. As Panckhurst J noted, Mr Andersen was careful to eschew any suggestion that the Trust was a sham as clearly (despite all the shortcomings in its administration) it was not. Our decision involves no excursion into the contentious area of alter ego trusts.

The cross-appeal

[32] Two of the three points on the cross-appeal can be taken together. In different respects both challenge Panckhurst J's finding that Ms Murrell's contributions warranted recognition of a 15 per cent interest in the property. The first point is essentially a pleading point. In her statement of claim Ms Murrell pleaded she had "worked hard to complete the Devon St house so it was ready for

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[22] High Court judgment, above n 1, at [82].

sale".[23] Particulars filed subsequently listed the work Ms Murrell claimed she had performed. To take two examples:[24]

> …
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> (ii) She put the T&G on the hallway walls;
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> …
>
> (viii) She helped with the landscaping of the section, creating and planting new gardens including a small herb and vegetable garden by the kitchen doors;

[33] By contrast, the Judge found Ms Murrell made "a valuable contribution, essentially as a homemaker …".[25] Mr Tobin submitted the pleaded claim did not correspond with the contribution the Judge found Ms Murrell had made. We accept this is so if "homemaker" is accorded its dictionary meaning of "the member of a household who takes the chief responsibility for its housekeeping".[26] But we are satisfied Panckhurst J described Ms Murrell as "a homemaker" because she had made a valuable contribution toward transforming "the shell of an unfinished house" into a finished house and section presented in an attractive manner. This is clear if the paragraph in which Panckhurst J used the expression "homemaker" is read as a whole:

> [28] I am satisfied that Ms Murrell did make a valuable contribution, essentially as a homemaker, in relation to the Devon Street property. A number of factors prompt that conclusion. Ms Murrell, I think, was an honest witness. She impressed me as straight-forward in giving evidence, and importantly, in cross-examination. Logically, it makes sense that someone in her position, after moving into the shell of an unfinished house, was in a position to bring her touch to bear in transforming the property into a home. Photographs of the property, although taken some time after the event, show the house and section in a finished state. It is apparent that the property was finished and presented in an attractive manner.

So we see no mismatch between the pleaded claim and the contribution the Judge found proved.

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[23] Statement of claim dated 2 November 2012 at [8].

[24] Further particulars of claim filed by the plaintiff dated 12 March 2013.

[25] High Court judgment, above n 1, at [28].

[26] Robert Allen (ed) *The Penguin Dictionary* (2nd ed, Penguin Books, London, 2004).

[34] The second, closely related, point is really disposed of by what we have just said. Mr Tobin referred to the passages in the judgments of this Court in *Lankow v Rose* emphasising that a valuable contribution to the *property* in issue must be established, not one that is only to the relationship between the parties. For example, Tipping J said "it is not enough for a claimant to show a contribution to the relationship".[27] And Hardie Boys J explained:[28]

> ... by contributions to assets one is not referring to those contributions to a common household that are adequately compensated by the benefits the relationship itself confers. The contribution must manifestly exceed the benefits …

[35] We reiterate we are satisfied Panckhurst J did not confuse and conflate Ms Murrell's contribution to the relationship with the valuable contribution he found she had made to the Trust's Arrowtown property. Significantly, earlier in his judgment, Panckhurst J had set out the passage from the judgment of Hardie Boys J in *Lankow v Rose*, to which we have just referred.

[36] Mr Tobin's third point challenged Panckhurst J's assessment of Ms Murrell's contribution, in particular because it did not manifestly exceed the benefits Ms Murrell had obtained from her relationship with Mr Hamilton. This point is founded on the passage from the judgment of Hardie Boys J in *Lankow v Rose* set out in [34] above.

[37] We accept Mr Tobin's submission that there is not, in Panckhurst J's judgment, an explicit finding that Ms Murrell's contributions well exceeded the benefits she received. But we think such a finding is implicit. As we have pointed out, earlier in his judgment Panckhurst J had cited that very passage from the judgment of Hardie Boys J. As a result of hearing the evidence over two days, in particular that given by Ms Murrell and Mr Hamilton, Panckhurst J would have been well aware that Ms Murrell lived with Mr Hamilton in the property for about three years rent free. Consequently, we have no doubt the Judge appreciated he needed to find that the contributions manifestly exceeded the benefits.

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[27] *Lankow v Rose*, above n 3, at 294.
[28] At 282.

[38] In any event, Mr Tobin readily accepted there was no evidence as to the value of Ms Murrell's "tenancy" of the house over those three years – a period during which the house was transformed from an unfinished "shell" into an attractive, finished property.

[39] Mr Tobin also mounted a challenge to Panckhurst J's assessment that Ms Murrell's contribution warranted recognition of a 15 per cent interest in the Trust's property. He suggested it should be 10 per cent.

[40] The Judge's 15 per cent figure was obviously his best estimate – perhaps even his best guesstimate. The Judge had reminded himself "arithmetical precision is neither attainable, nor necessary. The assessment is necessarily fact specific."[29] That draws on Tipping J's judgment in *Lankow v Rose*,[30] which Panckhurst J had cited earlier in his judgment.[31] When pressed, Mr Tobin accepted that his 10 per cent was but a lower estimate or guesstimate. We see no error in the Judge's approach to assessing Ms Murrell's contribution, nor in the figure he arrived at.

[41] It follows that none of the points taken on the cross-appeal is successful.

Result

[42] The appeal is allowed. The judgment of the High Court is set aside. We enter judgment against the respondents, jointly and severally, in favour of the appellant in the sum of $37,500.

[43] The cross-appeal is dismissed.

[44] The respondents are to pay the appellant's costs as for a standard appeal on a band A basis with usual disbursements.

[45] We note that costs in the High Court were fixed by Panckhurst J in favour of Mr Hamilton, with an award of $1,500 also to Mr Mirkin, in a separate judgment he

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[29] At [47].
[30] *Lankow v Rose*, above n 3 at 295.
[31] At [15].

delivered on 26 June 2014.[32] We quash those orders and direct that costs in the High Court are to be re-determined by that Court in light of this judgment.

Solicitors:
Staley Cardoza, Dunedin for Appellant
Rodgers Law, Dunedin for First and Third Respondents
Parker Cowan, Queenstown for Second Respondent

[32] *Murrell v Hamilton* [2014] NZHC 1459.