STEP SEMINAR

When Do Reasonable Expectations Become Unreasonable?

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Introduction

This paper will be in three parts. First, an analysis of the constructive trust doctrine and its evolution initially from claims against personal property as between de facto partners to claims against express trusts, businesses, superannuation funds and more recently, estates. Secondly, brief comment on the evidential and jurisdictional challenges confronting parties in dispute. Finally, some practical guidance for individuals and trustees as to how constructive trust claims may be mitigated or avoided.

A. The *Lankow v Rose* doctrine and its evolution to present day

Setting the Scene

The Matrimonial Property Act 1976 applied only to married couples or persons seeking to invoke the provisions of the Act prior to marriage by the completion of a pre-nuptial agreement. Excluded were persons living in de facto relationships – same sex or otherwise. Accordingly, unmarried persons were left unprotected and unprovided for by conventional law absent the completion of a cohabitation agreement which could be enforced under conventional contract law.

Anecdotally, by the late 1980s de facto relationships were on the rise, and marriage was on the decline. Indeed this trend has continued.[1]

Between 1983 and 1989 several cases involving property disputes between de facto couples found their way to the Court of Appeal. They being, *Hayward v Giordani*,[2] *Pasi v Kamana*,[3] *Oliver v Bradley*, [4] and *Gillies v Keogh*.[5] It was the last of these cases - *Gillies v Keogh* - that ultimately adopted the reasonable expectation test, in a Commonwealth where various jurisdictions were struggling with the same issue and the test to apply in each case.[6]

These cases effectively opened the floodgates for claims to be made by de facto couples, culminating in the now seminal decision of the Court of Appeal in *Lankow v Rose.*[7]

Lankow v Rose (1995)

The parties had lived together in a de facto relationship for 10 years before separating. At the beginning of the relationship, Mr Lankow owned two properties, one of which became the family home. He also owned an adjoining section, two vehicles, furniture and the majority shareholding in a company. Conversely, Ms Rose had modest cash savings of little over $2,000, a vehicle and some furniture and effects.

Ms Rose was employed as a secretary/legal executive. In the first year of their relationship, the parties lived substantially on Ms Rose's income. Although Mr Lankow had taken weekly drawings from his business. For the most part, he was able to accumulate cash savings and build the value of his asset base because Ms Rose was meeting the shared fixed and recurring outgoings. She had also provided funds to enable Mr Lankow to reach a final property settlement with his former wife.

At the end of the relationship, Mr Lankow had assets worth about $625,000 whereas Ms Rose had assets worth about $30,000. Ms Rose pleaded among other things, the imposition of a constructive

[1] See Statistics New Zealand "Stats NZ counts Kiwi couples in and out of love" (18 May 2018)
[2] [1983] NZLR 140
[3] [1986] 1 NZLR 603
[4] [1987] 1 NZLR 586
[5] [1989] 2 NZLR 327
[6] Jarrod Walker, "Equitable Remedies in Wills and Estates Litigation" (Legalwise Seminars March 2018)
[7] [1995] 1 NZLR 277

trust in respect of the family home that she occupied with Mr Lankow and in respect of other of his assets.

In the High Court, Ms Rose was awarded a one half share in the family home, a share of the family chattels, but nothing else. She appealed, as did Mr Lankow.

Mr Lankow's appeal was dismissed, and although Ms Rose had some success on her cross-appeal she did not succeed in her claim to a share of other assets. Rather, the Court awarded her interest and made other adjustments in relation to the family chattels.

It is the judgment of Tipping J that is most often cited for its succinct summary of the four principles that had emerged in the period since *Hayward v Giordani*: [8]

> *… I summarise what the de facto claimant must show:*
>
> *1. Contributions, direct or indirect, to the property in question.*
>
> *2. The expectation of an interest therein.*
>
> *3. That such expectation is a reasonable one.*
>
> *4. That the defendant should reasonably expect to yield the claimant an interest.*
>
> *If the claimant can demonstrate each of these four points equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust accordingly.*

A common theme running through the various judgments in the Court of Appeal was the notion that a claimant must have contributed in more than a minor way to the acquisition, preservation or enhancement of the owner partner's assets, whether directly or indirectly. Moreover, the *contributions* must have manifestly exceeded the benefits. Put another way, the contributions must have resulted in an enrichment to the owner partner, which if left unaddressed, would result in an unjust deprivation to the claimant.

Relying upon its earlier decision in *Phillips v Phillips,* the Court held that contributions need not be merely of a financial nature, they may be in services or in any other respect, but there must be a causal relationship – direct or indirect – between the contributions made and the acquisition, preservation or enhancement of the owner partner's assets. [9]

Lankow v Rose provided much needed certainty to claimants and their advisors in the ensuing six or so years leading up to the passage into law of the Property (Relationships) Act 1976 ("**the PRA**").

Few cases found their way to the Court of Appeal after this time and those that did were mostly contesting findings as to the nature, extent and value of direct and indirect contributions giving rise to a reasonable expectation.[10]

It was during this period that several cases emerged outside of the de facto relationship paradigm which were not in and of themselves so significant at the time, but in later years, would prove to have

[8] At p 294
[9] [1993] 3 NZLR 159
[10] *Nuttall v Heslop* [1995] NZFLR 755; *McMahon v McMahon* [1997] NZFLR 145

some real force in the evolution of the constructive trust doctrine.[11] These cases also brought to the fore the distinction between institutional and remedial constructive trusts, and their application to circumstances outside the traditional *Lankow v Rose* model, including express trusts.

Fortex Group Ltd v MacIntosh (1998)

In *Fortex Group Ltd v MacIntosh* the plaintiffs were members of a staff superannuation scheme of the defendant employer and trustee (Fortex).[12] The scheme was managed by a trust company under a trust deed. Fortex banked certain of the plaintiffs' contributions into its general account, which operated an overdraft at all material times. When Fortex went into receivership, the plaintiffs issued proceedings against it and the trustees of Fortex's secured debenture holders seeking, among other things, a declaration of express, constructive, or remedial trust, to enable them to take priority over secured and unsecured creditors for unpaid employee and employer contributions.

At first instance, Gallen J held there was no express or constructive trust, but recognised a restitutionary remedial trust in favour of the plaintiffs. The receivers appealed and the plaintiffs cross-appealed relying, among other things, on unjust enrichment.

The plaintiffs were unsuccessful, a full bench of the Court of Appeal finding that there was no express and/or constructive trust, nor was there any unjust enrichment for the reason that any benefit was illusory because the Fortex accounts were overdrawn.

The erudite judgment of Tipping J is often referred to. When addressing the argument of counsel for the plaintiffs, (which arguments relied on the *Gillies v Keogh* line of cases culminating in *Lankow v Rose*) he said:[13]

> *The constructive trust which arises in de facto matrimonial 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 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.*

His Honour went on to hold that the plaintiffs' arguments were unpersuasive; that nothing had been shown which affected the conscience of the secured creditors at all, let alone to the extent that they should be deprived of their contractual rights to exercise their security and realise it for their benefit. He said:

> *… we cannot accept the basis upon which Gallen J found at p 721 that the "necessary grounds of conscience" had been satisfied. His conclusion must have been arrived at by focussing on the conscience of the wrong party, ie Fortex, as opposed to the secured creditors.*

[1111] *Fortex Group Ltd in rec & in liq) v MacIntosh* [1998] 3 NZLR 171; *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374; *In Re Motorola Superannuation Fund* [2001] 3 NZLR 50

[12] [1998] 3 NZLR 171

[13] *Ibid* 178

He concluded:

> *It is, therefore, unnecessary to discuss the several other points which were raised in argument, or to consider further the Court's power to impose a remedial constructive trust. Whether such power exists in New Zealand and if so, on what basis and in what circumstances, can await another case in which those issues necessarily arise.*

This case highlights the difference between an institutional constructive trust and a remedial constructive trust. The first arises on the facts, the second by a finding of the Court in order to prevent an unjust enrichment.

As one commentator said: [14]

> *… the institutional constructive trust is based on relationships and requires the common intention test, whereas the remedial constructive trust relies on some other equitable foundation such as unjust enrichment or a similar action.*

Commonwealth Reserves I v Chodar (2001)

Justice Tipping's decision in *Fortex* was referred to and relied upon by her Honour, Glazebrook J in *Commonwealth Reserves I v Chodar*.[15] She prefaced her reference to *Fortex* by saying: [16]

> *Constructive trusts are distinct from any other form of trust in that they are not directly dependent on the intention of the parties. Express and implied trusts arise from the actual or inferred intention of the parties, while resulting trusts are based on the presumed intention of a transferor of property. In contrast to this, a constructive trust is imposed by the operation of a rule of law, and possibly through the exercise of the court's remedial discretion.*
>
> *… The object of a constructive trust is generally not to create an ongoing trust relationship, but to force the disgorging of money or property by the constructive trustee. Viewing the constructive trust in this light highlights its remedial aspect.*

Her Honour then referred to Tipping J's judgment in *Fortex* where she said the Court recognised that the distinctions between the institutional constructive trust and the remedial constructive trust was now part of New Zealand law. See pp 172-173. [17]

> *"An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the Order of the Court, no trust of any kind existed.*
>
> *The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial*

[14] Jane Hunter "Lankow v Rose in the 21st Century" (2010) 6 NZFLJ 283; 284
[15] [2001] 2 NZLR 374
[16] At [36] and [37]
[17] At [39]

constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory."

Her Honour went on to say: [18]

> *This statement highlights the two features generally used to distinguish institutional from remedial constructive trusts. It should, however, be recognised at the outset that the nature and significance of these factors are still the subject of considerable debate.*

In re Motorola Superannuation Fund (2001)

In *In re Motorola Superannuation Fund* - like *Fortex* a case involving a claim against a superannuation fund – the trustees sought directions under s 66 of the Trustee Act 1956 as to the proper distribution of windfall gains held in trust by the trustees. [19] Past members (as opposed to existing members who pleaded separately) of the fund claimed an interest by virtue of an institutional constructive trust, in reliance upon *Fortex* and *Lankow v Rose*.

The Property (Relationships) Amendment Act 2001

The introduction of the PRA was a watershed moment in domestic law.

The PRA extended its reach to cover all persons living in a de facto, married or same sex relationship. The principles of equal sharing applied universally, but regrettably Parliament made no change to the application of s 182 of the Family Proceedings Act 1980, which remained available (and still does) only to married couples, upon the dissolution of their marriage.

In a paper which she delivered at the 2018 STEP Conference, Professor Nicola Peart said: [20]

> *In 2001, when the Matrimonial Property Act 1976 was radically amended by the Property (Relationships) Amendment Act, Parliament was well aware of the detrimental effect of trusts on the equal sharing regime. Indeed, it had known about the problem for many years. In 1988, the Ministerial Working Group on Matrimonial Property and Family Protection had identified trusts as defeating the Act's social purpose: substantial amounts of matrimonial property were being diverted away from one of the spouses. The Working Group recommended giving the courts a range of powers to deal with trusts holding property that would otherwise have been matrimonial property and, if necessary, to make orders against the trust capital to ensure matrimonial property was equally shared. Despite a dramatic increase in the number of trusts following the abolition of estate duty in 1993, Parliament declined to implement the Working Group recommendation when it reformed the Act in 2001.*

Professor Peart went on to say: [21]

> *The courts have shown little respect for the Legislature's policy decisions! Disturbed by the detrimental effect of settlor-controlled trusts on relationship property rights,*

[18] At [39]
[19] [2001] 3 NZLR 50
[20] Professor Nicola Peart "When is a Trust a Trust? The validity of trusts and their interface with relationship property law" (STEP Conference, 2018) at p 1
[21] At p 2

> *they have pursued alterative avenues in an attempt to give effect to the PRA's social aims. Where they have not been able to use s 182 Family Proceedings Act 1980 to achieve a just outcome for the parties, the courts have drawn on general principles of trust law, such as the three certainties for creating a trust and the irreducible core of trustee obligations to review the terms of the trust and the conduct of the trustees.*

Shortcomings in settlor/trustee control – an increasingly fertile ground for claims

Settlor powers have been under judicial scrutiny for years, the focus being principally whether these powers or any of them are in the nature of general powers of appointment or powers constrained by fiduciary duties and responsibilities.[22]

Settlor/trustee control has also been at the heart of cases where third parties, usually the settlor's spouse or partner, have successfully brought constructive trust claims against an express trust on *Lankow v Rose* principles. In those cases, the focus has not been on the settlor's powers, but rather the conduct of the settlor and trustees in administering their powers of control. As Professor Peart said in her 2018 paper: [23]

> *In essence, [these cases] are about sloppy administration and a disregard for the duties of trusteeship.*

In *Re Motorola Superannuation Fund*, McGechan J was perhaps somewhat ahead of his time when he said: [24]

> *I do not accept there is some absolute rule or principle under which rights and obligations under an express trust can never be subjected to a constructive trust. 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 or 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.*

Arguably, cases such as *Fortex*, and *In re Motorola Superannuation Fund* sowed the seeds for the later expansion of the *Lankow v Rose* doctrine into other areas, including that of express trusts.

Prime v Hardie (2003)

Prime v Hardie involved a claim brought by Ms Prime for a one half share in properties owned by Mr Hardie and the Trustees of the Hardie Trust. [25]

The parties had been in a de facto relationship for some nine years before separating. They had one child of their own and Ms Prime had a child of a previous relationship. Mr Hardie bought what was to become the family home one year after the commencement of the relationship and within a matter of months, had transferred it to the Trustees of the Hardie Trust. The home was sold several years

[22] *Walker v Walker* [2007] 2 NZLR 261 (CA); *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch)
[23] At p 8
[24] *Ibid* [63]
[25] [2003] NZFLR 481

later inside the Trust and a replacement property bought inside the Trust, which became the family home. The Trust also acquired two rental properties, one of which was sold during the course of the relationship.

Following their separation, Ms Prime sought an order that the properties owned by the Trust were held by it - in part at least - as to a one half share in her favour. She claimed that she had made various direct and indirect contributions to the relationship.

Applying *Lankow v Rose*, the Court held that Ms Prime had a reasonable expectation that she would receive an interest in the family home, which interest had to be offset against the benefits she had received during her occupation of the home. The Court also found that the Hardie Trust was effectively Mr Hardie's alter ego; that he was the principal (although not the only) beneficiary.

In recognising that all the properties in question were owned by the Trust, his Honour Salmon J held:[26]

> *… I see no reason why a constructive trust should not be imposed upon a property owned by a trust.*

His Honour went on to draw a distinction between the family home and other assets of the Trust. He considered that expectations in relation to the family home would be different to other assets. He found that Ms Prime used her income to meet various of the fixed and recurring outgoings on the family home, but he was unable to identify any contributions that she had made in relation to the rental properties and therefore rejected her claim to a constructive trust in respect of them. In the event, he awarded Ms Prime 12.5% of the market value of the family home excluding its chattels. Interestingly, he also accepted a counter claim by Mr Hardie and the Trustees for occupation rental for the post-separation period when Ms Prime had exclusive use of the family home.

Glass v Hughey (2003)

In the same year Priestley J decided *Glass v Hughey.*[27]

In this case the parties had lived together in a de facto relationship for four and a half years, during which time they had bought a property which became their family home. On separation, it was sold and the proceeds divided. Their dispute was in relation to Mr Hughey's business assets. Because the parties had separated prior to the PRA becoming law, Ms Glass was forced to bring her claim under *Lankow v Rose* principles.

It was common ground that during the relationship, Mr Hughey's business was sold to a company, the shares in which, were owned by a family trust over which he had effective control. Ms Glass claimed that she had made both direct and indirect contributions to the business such that she had an expectation that she would share in the business and its assets. Mr Hughey disputed the nature and extent of contributions alleged. Justice Priestley held that there was a mutual expectation that Ms Glass would have an equitable interest in the business; that for all intents and purposes Mr Hughey had disregarded the trust (as legal owner) as far as the operation of the company was concerned. Justice Priestley went on to find that the Trust was Mr Hughey's alter ego – in much the same way that Salmon J found in *Prime v Hardie* some months before – but in neither case, did finding impact the outcome, namely the existence of a constructive trust.

[26] At [30]
[27] [2003] NZFLR 965

These were the first cases that I have been able to find where the *Lankow v Rose* principles were successfully applied against an express trust.

But for some years later pickings were slim in relation to the evolution of *Lankow v Rose,* at least until *Clark v Clark.*[28]

Clark v Clark (2012)

In this case, Ms Clark succeeded in her claim for a constructive trust against an express trust established by her husband's parents during the course of their marriage.

For approximately four years of their marriage, Mr and Mrs Clark farmed a block of land owned by the Trust. During that time they improved the land through a tree planting programme and made other improvements as well. Following the death of Mr Clark's parents, the Trustees of the Trust engaged in litigation against their (the parents') estates. Mr Clark was a party to those proceedings. Ultimately, a settlement was reached whereby the farm block was to be transferred to Mr Clark or settled on a trust for the benefit of his children. Shortly after, Mrs Clark filed proceedings against Mr Clark in the Family Court under the PRA, which proceedings were transferred to the High Court.

Applying *Lankow v Rose* principles, Asher J found that the Trustees of the family trust held the farm on a constructive trust for Mr Clark; that contributions had been made with a reasonable expectation that in so doing, Mr Clark would receive an interest in the property; that this amounted to a beneficial interest which was "property" under s 2 of the PRA, to be shared equally between the parties. In reaching his decision, his Honour referred to and relied upon *Fortex* and *Prime v Hardie*.

Marshall v Bourneville (2013)

In the year following, the Court of Appeal handed down its decision in *Marshall v Bourneville.*[29] The parties had been living in a de facto relationship for four years before separating for a brief time. They reconciled shortly after and were married in the same month as the PRA became law. Their marriage continued until 2005 when they separated.

During the period of their de facto relationship, the parties bought a number of properties, one of which was a residential property at Symonds Street in Auckland, which property was transferred into a trust established by Mr Bourneville during the course of their de facto relationship.

Following their separation, Ms Marshall lodged a caveat against the Symonds Street property – challenged by Mr Bourneville. The High Court found that Ms Marshall had no arguable case for an interest in the Symonds Street property, particularly because the transfer of the property to the trust eliminated the possibility of a proprietary constructive trust claim.[30] With that, her caveat lapsed. Ms Marshall appealed. The Court of Appeal upheld the appeal, applying *Lankow v Rose*. In so doing it referred to with approval, and relied upon, the decisions in *Prime v Hardie* and *Clark v Clark*. Put simply, the Court did not accept that the transfer to the Trust eliminated Ms Marshall's claim. The Court saw no reason why Ms Marshall's reasonable expectations of an interest should not survive the transfer of the property to the trust, and held accordingly.

[28] [2013] NZFLR 534
[29] [2013] 3 NZLR 766
[30] In earlier proceedings, the Court of Appeal had determined that in the circumstances of this case, the transitional provisions contained in the PRA did not apply although there may be equitable claims arising.

It can be difficult to establish the fourth limb of the test summarised by Tipping J in *Lankow v Rose*, more particularly so when the claimant's partner is one of two or more trustees. Justice Tipping's expressed the fourth limb of the test as follows: [31]

> *That the defendant should reasonably expect to yield the claimant an interest.*

Typically, the claimant's expectation will arise from his or her partner's conduct. Professor Peart touches on this in her 2018 paper when she says (in relation to the duties and responsibilities of the partner /trustee): [32]

> *As trustee, that partner is bound by the non-delegation and unanimity rules of trust law. Conventional trust law principles do not allow one trustee to bind the other trustees unless the co-trustees agree or ratify the decision.*[33] *That argument was raised by the defendant trustees in three recent cases, but the Court of Appeal rejected it because the co-trustees had effectively abandoned their responsibilities as trustees to the partner trustee.*

This issue is well illustrated in *Vervoort v Forrest*.

Vervoort v Forrest (2016)

In this case the Court of Appeal reviewed *Lankow v Rose* and its application since it was first decided.[34] The Court referred to *In re Motorola Superannuation Fund* and cited with approval the dicta of McGechan J, summarised in full above on pages 5 and 6.

At [51] the Court said:

> *This issue of a constructive trust claim against an express trust has arisen in a number of High Court decisions, where it has been accepted that, in a family context, there could be a constructive trust arising in relation to property owned by an express trust.*

The Court discussed *Prime v Hardie*, *Glass v Hughey, Clark v Clark, Marshall v Bourneville* and *Murrell v Hamilton.* Their Honours also referred to *Judd v Hawke's Bay Trustee Company Ltd*, which at that time, had been decided by the High Court awaiting a second appeal hearing in the Court of Appeal. [35]

The Court noted that in the High Court, Williams J had found in favour of the claimant wife who had sued the trustees of her husband's trust for a 40% share of the property they occupied (owned by the trust) based on *Lankow v Rose* principles. His Honour found that the corporate trustee in this case was far more "hands on" then the independent trustee had been in *Murrell* but had nonetheless left all matters of maintenance and upkeep of the family home entirely to the husband trustee, and had delegated the trust decision making in that area. His Honour found that that claimant wife was entitled to expect a modest share in the house and it was reasonable for the trust to yield such a share.

At [64] of their judgment, the Court of Appeal said:

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[31] At 294

[32] *Murrell v Hamilton* [2014] NZCA 377; *Vervoort v Forrest* [2016] NZCA 375, (2016) 4 NZTR 26-017 and *Hawke's Bay Trustee Company Ltd v Judd* [2016] NZCA 397

[33] *Hansard v Hansard* [2014] NZCA 433

[34] At [43] to [72]

[35] [2014] NZHC 2198

> *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 in 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.*

The Court went on to say at [68]:

> *The alternative of allowing the trustees to take advantage of trust principles to deny those who have enriched the trust is not acceptable.*

And then at [70]:

> *It is acknowledging the reality of the New Zealand trust landscape as it has developed that has justified the recognition of the constructive trust beneficiary's claim. It is a further reality of that landscape that the trustees of family discretionary trusts are more often than not the beneficiaries of those trusts and in control of them. It is common in many trusts in New Zealand "for the settlor to retain some extent of control or to vest that control in someone other than the trustee". The effect is that the reality of a trustee's ability to give a third party expectations (in return for that third party's contributions) over trust property, which that trustee deals with as if their own, must be recognised. There is no misappropriation of property in that the beneficiaries of the express trust have no claim in conscience to the increase in value resulting from the contributions. Beneficiaries cannot expect trustees to retain for them an unearned benefit, extracted by expectations engendered by the trustees. The express trust beneficiaries should reasonably expect to yield the third parties an interest.*

Professor Peart referred to these cases in her 2018 paper noting that while they had paved the way for claims to be brought against express trusts, the claimant in each case carried a considerable burden of proof in establishing all the elements of the *Lankow v Rose* doctrine. She concluded by saying, however, that in the absence of reform, notwithstanding the extension of the doctrine to express trusts, they (express trusts) "*still provide considerable protection from constructive trust claims*".[36]

In recent times the *Lankow v Rose* doctrine has been applied in estate litigation.

Blumenthal v Stewart (2017)

In *Blumenthal v Stewart*[37] the Court of Appeal dismissed an appeal from a decision of Ellis J where her Honour had declined to find a constructive trust in respect of a trust and deceased estate. The claims were premised on the basis of alleged tasks performed and in assistance given to the deceased by the claimant during a period of hospitalisation. The claimant also alleged the deceased had promised him an inheritance.

[36] *Ibid* at p 10
[37] [2017] NZFLR 307

The Court of Appeal found that the claimant's contributions to the property in question did not manifestly exceed the benefits he obtained (applying the criteria of Hardie-Boys J in *Lankow v Rose*). The Court was encouraged to adopt an approach similar to that which was adopted in *Murrell,* namely that the independent trustee in this case had abdicated his functions as trustee. On this, the Court said: [38]

> *… As was discussed in Vervoort, difficulties can arise in these circumstances for a claimant because of the rules that trustee functions cannot be delegated and trustees must act unanimously. It was not suggested here that Mr Stewart was a knowing party to creating any expectation on Mr Blumenthal's part to an interest in the property. Accordingly it could be argued that it would not be reasonable to require him as the legal owner to yield an interest to Mr Blumenthal.*
>
> *The Court in Vervoort overcame this difficulty by ruling the normal trustee 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 responsibilities."*

The Court was invited to accept that such was the position here. Namely, that Mr Stewart had abdicated his responsibilities as trustee. However, it rejected that submission, mostly on grounds that the substantive issue had already been determined and it did not consider it necessary to explore the abdication issue further.

The *Lankow v Rose* doctrine was recently applied in relation to a family dispute involving the purchase of a property by a sibling for the benefit of herself and her mother.

Almond v Read (2019)

The appellant, Ms Almond, was the sole registered proprietor of a rural property in South Auckland. The respondents, her mother and siblings, alleged that they helped to pay for the property; that their contributions were made pursuant to an agreement that each of them would have a beneficial interest in the property proportionate to their respective financial contributions.

Ms Almond maintained that she provided all the funding for the property; that while her siblings may have made contributions to the costs and maintenance of the property, those contributions were in recognition of her (Ms Almond's) oversight and care of their elderly parents.

In the High Court Thomas J rejected Ms Almond's claim. She found that there was an agreement between all parties that the property was to be owned proportionate to respective financial contributions, and that Ms Almond held the property on that basis as a constructive trustee.

On appeal, Ms Almond adopted a somewhat different approach to that which she had adopted in the High Court. Specifically, that even if Thomas J was right to recognise a constructive trust, her Honour incorrectly applied the principles.

The Court of Appeal recognised the difference between an institutional constructive trust and a remedial constructive trust by reference to Tipping J's decision in *Fortex*. Justice Thomas had found an institutional constructive trust existed. The Court of Appeal reviewed *Lankow v Rose* and in the event, found that Thomas J was correct in her assessment of the evidence, her application of the principles, and in her conclusion that an institutional constructive trust existed on the facts.

[38] At [55] and [56]

Blumenthal and *Almond* are somewhat of a departure from the other cases mentioned in this paper relating to personal claims as between couples and claims against express trusts. They illustrate, however, the way in which *Lankow v Rose* is being adapted in appropriate circumstances where equity can provide a remedy. In this regard, it is instructive to reflect on the dicta of McGechan J in *Re Motorola Superannuation Fund*, when he said in 2001 that "*equity acts on conscience … to mitigate the rigour of absolute rights and obligations at common law*".

B. Jurisdictional challenges

Trite as the expression may be, every case will be determined on its own unique facts. The orthodox *Lankow v Rose* principles are clear enough. For a claimant, he, she or they will need to provide good evidence as to direct and/or indirect contributions that have given rise to a reasonable expectation. For the property owner defending or resisting a claim, he, she or they will need to provide good evidence to rebut both contributions alleged to have been made and reasonable expectations arising. Importantly, a claimant must be mindful of the fact that benefits received must be taken into account, and to succeed, will need to be of lesser value than the contributions asserted.[39]

If the evidence passes muster, and settlement negotiations have failed to produce an outcome, the next important question is in which Court should a claim be brought? In the District Court there is a jurisdictional cap of $350,000 in respect of civil matters.[40] There is no difficulty in bringing a constructive trust claim in the District Court so long as it is within the jurisdictional cap, or if it exceeds the cap, that all parties are agreed to the matter proceeding in that Court.[41] The position is not so straightforward when claims arise both in equity and under general law in the Family Court. The Family Court is a division of the District Court and in respect of equitable claims it is also restricted by the jurisdictional cap. Ironically and conversely, there is no monetary bar to claims brought under the PRA or s 182 the Family Proceedings Act 1980.

In practical terms, if a constructive trust claim is available to a party who also has legitimate claims under the PRA, the former may be brought in either the District Court or the High Court, notwithstanding the jurisdictional cap. That said, it would not likely be economic to bring a claim for $350,000 or less in the High Court and invariably pressure would be brought to bear to have such a claim remitted to the Family Court. However, if a constructive trust claim is available and logically would sit alongside a PRA claim, then ideally both claims should be lodged in the same Court simultaneously. However, it is not uncommon for PRA proceedings to issue before constructive trust claims (if any) have been formulated. Typically these claims are identified only after there has been a process of full disclosure. It follows then, that confronted with a proceeding under the PRA in the Family Court, with an emerging constructive trust claim following, consideration needs to be given as to whether these proceedings should be dealt with in the Family Court or in the High Court. If the constructive trust claim exceeds the jurisdictional cap, then it should be filed in the High Court with an application to the Family Court for a transfer of the PRA proceedings to follow suit.

Typically the Family Court is reluctant to transfer proceedings up to the High Court given that it is a specialist jurisdiction – something the High Court frequently acknowledges when hearing appeals from a refusal in the Family Court to transfer a proceeding. The issue is not one dimensional however, and can be complex regarding a number of factors including litigation risk and cost. That said, it is more likely than not that the Family Court would transfer a PRA proceeding up to the High Court to be heard

[39] See *Prime v Hardie* at [36] and [37]
[40] District Court Act 2016 s 76
[41] *Ibid* s 81

in conjunction with a constructive trust claim in that Court, provided the proceedings have been filed and served in advance of the transfer application being made.

C. Practical considerations – How to mitigate or avoid claims

In domestic relationships where property is owned separately or by third party entities, the most effective foil to a potential claim would be an agreement in writing. In the case of a couple, that could be in the nature of an agreement under s 21 of the PRA. In the case of a couple using trust property, a s 21 agreement could also be used with the trustees included as parties. This is not an uncommon practice and although the PRA is a code and relates to the property of married couples, civil union couples and couples who have lived in a de facto relationship, the agreement is nonetheless a contract in the usual way as between the trustees and other parties to it and could be readily enforced as such.

In circumstances where a trust is involved which owns property to be occupied or used by a couple, one of which is a non-beneficiary, it would be prudent for the trustees to record, by resolution or licence, the terms of occupation or use. Commonly, use of trust property is in consideration of the occupants meeting all of the fixed and recurring outgoings. Although difficulties might arise where improvements are made over and above. This is where the trustees have to be vigilant. There will always be a risk that independent trustees will abdicate their responsibilities and knowledge to a partner trustee, but that would be a most unwise thing to do having regard to cases like *Murrell, Vervoort* and *Judd*.

In circumstances where occupiers may meet the costs of improvements, there should be a clear understanding that the costs involved are to be deemed a debt owing by the trust to the occupants which under no circumstances, gives rise to an interest or expectation in the property.

D. Conclusion

Although the terms of reference of the Law Commission's review of the PRA are extensive, it is difficult to predict what, if any reforms might be proposed in relation to the use of constructive trust claims on the breakdown of a domestic relationship. Certainly there is unlikely to be any substantive changes arising out of the Trusts Bill, which is awaiting its second reading.

The most that can be taken from this presentation is that there has been a resurgence of claims against express trusts and more recently, estates. Whether this has happened because of shortcomings under the PRA or is merely symptomatic of a country that is considered to have more trusts per head of population than any other in the developed world – remains to be seen. It is a complex area, but as the cases illustrate – particularly those against express trusts – lack of oversight and/or attention to detail can be problematic for trustees, who should be reminded of their responsibilities to protect trust assets, and importantly to abide the unanimity and non-delegation rules.