

The remedial constructive trust - a fresh way to claim against trusts in a personal relationship context

The Court of Appeal has made it clear that trustees must exercise their trustee powers personally. This means they cannot delegate them to another, even to their co-trustee¹. Additionally, they must decide on the exercise of their powers unanimously².

In practice, professional trustees do not usually make the mistake of delegating their powers, instead what tends to happen is that the non-professional co-trustee simply acts like an 'agent of the trust', that is, they purport to exercise a trustee power for all the trustees *as if* the power had been delegated to them.

Such conduct is unlawful vis-à-vis the trust, but not necessarily ineffective. The Court of Appeal has held that where one trustee breaches the unanimity rule, the co-trustee(s) may cure the breach by subsequent consent to the unilateral exercise of the power³. Subsequent consent can therefore be equivalent to antecedent consent.

In summary, unless all trustees are unanimous in the exercise of a trustee power, which unanimity may occur before or after exercise of the power, then the trust estate is unaffected.

The Court of Appeal's judgment in *Murrell v Hamilton*⁴ seems to provide an exception to these non-delegation and unanimity rules. *Murrell* involved a de facto relationship between M and H who together developed land owned by H's family trust. To begin with and importantly, the Court accepted that a constructive trust claim could succeed against property owned in a trust⁵.

The Court of Appeal considered *Lankow v Rose*⁶, the leading case where a constructive trust arose from an expectation interest, which itself developed principles first highlighted in *Gillies v. Keogh*⁷.

In *Lankow*, Tipping J set out the following four requirements to establish a claim based on reasonable expectations⁸:

¹ *Commissioner of Inland Revenue v Newmarket Trustees Limited* [2012] NZCA 351, para 51. *Niak v MacDonald* [2001] 3 NZLR 334, para.s [16] and [18] line 20. There are exceptions notably in s.31 of the Trust Act or the terms of trust.

² *Phipps v Boardman* [1965] 1 All ER 849, 855, *Luke v South Kensington Hotel Company* [1879] 11 Ch D 121, 125 and *Lewin on Trusts*, 16th ed, page 181. Again, the position may be modified by the terms of trust.

³ *Visini v Cadman* [2012] NZCA 122, paragraph 17

⁴ [2014] NZCA 377

⁵ Judgment para [22]. This affirms the Court's stance in *Marshall v Bourneville* [2013] NZCA 271 (1 July 2013) where constructive trust claims against trusts were discussed in more detail and determined to be tenable.

⁶ [1995] 1 NZLR 277

⁷ [1989] 2 N.Z.L.R. 327

- [a] Contributions, direct or indirect, to the property in question;
- [b] The expectation of an interest therein;
- [c] That such expectation is a reasonable one; and
- [d] That a defendant should reasonably expect to yield the interest.

In regard to [a], the Court of Appeal in *Horsfield v Giltrap*⁹ held that the efforts of one partner in running a household, effectively as a housekeeper and looking after the home and children, constituted an indirect contribution towards the other partner's creation of property sufficient to yield a proprietary interest in that property. *Horsfield* provides a powerful example of how the expectation based constructive trust can provide relief in the context of a personal relationship.

This article does not explore the parameters of these landmark cases nor the nature of M's indirect contributions and how they qualified for relief. Instead, focus is directed to the requirements in [b], [c] and [d] in the context of a trust or, more specifically, whether M could reasonably expect an interest to be yielded by H's trust and whether, in turn, the trustees should be reasonably expected to yield such an interest. This involves closer consideration of the facts.

H's co-trustee was a professional trustee who was held by the Court to have abjured his trustee responsibilities in favour of H. He did this by leaving everything to do with the development of the trust land to H and simply signing off on H's decisions implicitly accepting that the trust would be liable for the expenses and liabilities he incurred¹⁰.

In short, H's actions were treated as the actions of both trustees, or at least as actions binding on both trustees vis-a-vis the contract counterparties¹¹. In law, H's actions breached both the non-delegation and unanimity rules, however such actions were most likely rendered lawful by the professional trustee's subsequent consent to those actions.

The Court of Appeal made no reference to the unanimity or non-delegation rules however, instead it held that because of the way the trustees' proceeded in the development, it would be unconscionable for them to deny M's claim. The Court held that when H stimulated M's expectation of an interest in the trust property, both trustees must be taken to have done so¹².

The effect of the Judgment would seem to be that although:

- The professional trustee cannot delegate his powers to H; and
- H cannot unilaterally exercise his trustee powers to affect the trust property;

⁸ [1995] 1 NZLR 277 at 294

⁹ (2001) 20 FRNZ 404 (COA)

¹⁰ Judgment para.s [27] and [28]

¹¹ There is a similar factual situation in *Lang v Southen* (24 July 2001, HC Chch, per Panckhurst J, AP15/01) where 'active' trustee entered a contract without co-trustee consent or knowledge, yet the creditor successfully enforced the contract against the co-trustee.

¹² Judgment para [29]

H may nevertheless bind the professional trustee in stimulating M's 'reasonable' expectation of an interest in the trust's property.

At this point, it is worth considering why the rules about unanimity and non-delegation exist. Arguably, they are there to protect and promote the wishes and purposes of the settlor and interests of the beneficiaries. Unanimity ensures each trustee turns his or her mind to the business of the trust and the benefits of a consensus are secured, and the rule against delegation ensures that only those who were appointed as trustees, rather than anyone else, are the ones whose minds are so engaged.

Perhaps it was these considerations that prompted the Court to emphasise that M's claim did not alienate trust property, that is it did not take away something to which the beneficiaries were entitled¹³. The emphasis suggests that H's actions should not be taken as constituting an exercise of a trustee power which affects trust property, nor the incurring of an expense or liability as against trust property. This side-steps consideration of the non-delegation and unanimity rules.

But what if H had made it clear to M that she should not and could not expect an interest in the property, then any contrary expectation she may have had ought to be rendered unreasonable¹⁴. And if that was the case, M's contributions could not have resulted in an interest in the property, with the effect that all the developed property would benefit the beneficiaries. Put this way, there was an alienation of trust property which occurred when H failed to disabuse M of her expectation of an interest in the property.

The professional trustee believed H was developing the trust property for the trust. The professional trustee neither consented nor knew that H was stimulating M's expectations of an interest in the development. Presumably, if he had been aware of the possibility that M might claim an interest, he would have taken steps to avoid or preclude the claim before it became too late to do so.

Clearly, the professional trustees' expectations as to the legal effect of his trustee decisions and consents in respect to the development have been thwarted by the unilateral actions of his co-trustee at the direct expense of the beneficiaries. These outcomes do not sit comfortably with the rules on delegation and unanimity.

The effect of the judgment is that by dint of his history of subsequently consenting to H's unilateral decisions in the development, the professional trustee has, in effect, clothed H with an actual, apparent or ostensible authority to stimulate M's reasonable expectations, and by so doing, convey a proprietary interest in property that, save for such stimulation, would have been trust property.

Of course, agency concepts are inappropriate, since H cannot act as the professional trustee's agent – that would offend the non-delegation rule. Additionally, there was no

¹³ Judgment para [30]

¹⁴ In *Gillies Cooke P* at page 334 accepted that that a legal owner can protect their position by making it clear to the other party that, while the use of the property is shared, ownership is not. The principle of freedom to stipulate against any trust or obligation is consistent with all the theories. And a party cannot normally be said to act unconscionably if there is no objectively reasonable expectation of other action. Nor will any enrichment be unjust. Again, there is juristic reason for it in that the other party has simply exercised their freedom to dispose of resources for purposes not giving rise to a property interest or money claim.

finding that M relied on any 'holding out' by the professional trustee that H had his authority to 'stimulate' M's expectations.

One must reflect on the fact that the Court was exercising its equitable jurisdiction in deciding the claim. At the heart of M's claim is an unjust enrichment of the trust's estate at M's expense coupled with unconscionability by the defendants who sought to deny M an interest for the enrichment she supplied.

As Tipping J stated in *Lankow*, the Court stands as a defendant's conscience in such claims¹⁵. That a defendant did not expect to have to yield an interest is no bar to a claim if they should reasonably expect to yield one. This is precisely when equity intervenes.

In the writer's view, it was necessary on some basis to impute to the professional trustee H's knowing acceptance of M's contributions and generation of the expectation interest otherwise it is difficult to see the legal basis upon which that trustee should yield an interest. The legal jurisprudential basis for such imputation is not explained in the Judgment, perhaps it was simply the Court exercising its equitable jurisdiction as the 'conscience of the defendants'.

At a practical level, the writer doubts that the result would have been different even if H had dutifully taken every decision in respect to the development back to the professional trustee for antecedent consent. The reality of the situation was that H and M were living in the home being developed. H supplied building services and M's supplied other valuable direct and indirect assistance. Realistically, a professional trustee would rarely have insight into these day-to-day circumstances. The Court's determination that when H's stimulated M's expectation of an interest in the trust property he did so for both trustees could well have been irresistible.

If these observations are sound, then the professional trustee in *Murrell* would most likely have been obliged to yield an interest in the trust property whether or not he had abjured his trustee responsibilities in favour of H.

The Court of Appeal considered the facts in *Murrell* to be unusual¹⁶ and peculiar¹⁷. The writer is not so sure. Given the wide judicial view of what constitutes as a qualifying indirect contribution, the factual situation whereby one spouse may have a valid expectation based claim against trust property where their partner-in-life is a trustee may be relatively common.



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¹⁵ [1995] 1 NZLR 277 at 294

¹⁶ Judgment para [28]

¹⁷ Judgment para [31]