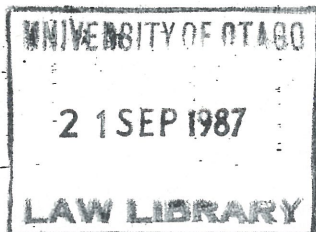


Set 2



BETWEEN GRAEME JOHN OLIVER
of Hamilton, Sales
Manager

Appellant

AND MARILYN RAE BRADLEY
of Hamilton, Married
Woman

Respondent

Coram: Cooke P.
Casey J.
Henry J.

Hearing: 14 July 1987

Counsel: C.M. Earl for Appellant
S.P. Williams for Respondent

Judgment: 24 July 1987

JUDGMENT OF COOKE P.

The primary facts are not in dispute. The plaintiff, then a single man, and the defendant, then a separated married woman, became engaged to be married on 10 April 1980. He paid \$500 for a engagement ring chosen by her. She had two children, each of a different father, and was receiving a domestic purposes benefit and family benefits which could be capitalised. She had been hoping to acquire a property at 36 Enfield Street, Hamilton, but had no cash resources of her own. With the intention that this property should become the matrimonial home, the plaintiff paid the necessary deposit of \$2006. The balance of the total purchase price of \$27,500 was financed by a Housing

Corporation loan of \$20,000, her family benefit capitalisation, \$2532, and a suspensory loan from the Corporation for which she was eligible, \$2500. Title was taken in her name solely. They moved into the house in May or June 1980 and lived there with her children as a family until February 1984, when she broke off the engagement and the de facto relationship. She left with the children. He lived on in the house for a time, finally leaving when she returned to it with another man in August 1984.

During the period of their living together of more than three years the plaintiff earned a total gross income of \$113,000 and the defendant earned a total gross income from part-time work of \$24,400. She used her income to pay for clothes for herself and the children and for some personal expenses. The plaintiff paid her an allowance of \$100 per week throughout for the sustenance of the family. As well he paid for improvements to the property a total of \$13,179, some accounts incurred by the defendant, all the mortgage payments (\$5847), insurance (\$1506), rates and other outgoings. He did work in improving and maintaining the property, with some help from his friends.

The evidence does not throw much light on the quality of the relationship, but it appears that he remained anxious for the marriage to take place, whereas she lost such enthusiasm for it as she may have had. She continued to wear the ring at times but more, she said in evidence, as 'something nice to wear'. The trial Judge,

Bisson J., found that she did not terminate the engagement until February 1984. The following passage in her cross-examination conveys her attitude:

...it was almost as I felt right through he was trying to buy my affection. I kept asking him to leave and I didn't love him and he seemed to feel the more he spent the more I would come around to his way of thinking. It was almost as if he had a hangup about being alone. He had a dire need to get married even after I made my intentions clear, he still stayed and paid and almost as if his way to get me to about face and accept him. For a long long time we were almost leading what I would call separate lives but because I was in a house and I was financially secure and he seemed to be quite happy about putting up with it I felt I was better off for the children's sake anyway to stay.

In May 1985 the plaintiff began an action based on resulting, implied or constructive trust. By an amended statement of claim in November 1985, a claim under the Domestic Actions Act 1975, s.8, was added. The trial Judge gave leave to add this claim after the period of 12 months prescribed by s.8(2); his decision to extend the period has not been questioned. At the time of the High Court hearing in August 1986 the property was valued at \$58,000, with an equity of \$38,890. By agreement we have been informed at the hearing of the appeal that in January 1987 the property was sold for \$67,500. From the proceeds the Housing Corporation loan and the Family Benefit charge and legal costs have been paid, leaving a balance of \$41,730. Out of that, her solicitor has paid \$4296 as a legal aid charge. The plaintiff also has of course incurred legal fees.

Bisson J, referring inter alia to Hayward v. Giordani [1983] N.Z.L.R. 140 and Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276, 300, found that the case was 'one which cries out for the Court to hold that there is a constructive trust in the interests of justice and good conscience' and he so decided in favour of the plaintiff. But he held that the Domestic Actions Act also applied and formally made his order thereunder. He thought that to make an order vesting a share of the property in the plaintiff would give rise to complications because at that stage the house was the home of the defendant and her children. Accordingly under s.8(5)(e) he ordered the payment of a sum of money from the defendant to the plaintiff, namely \$19,500, being on the figures before the High Court about half the equity. The plaintiff appeals.

The nominally greater value of the property is due not only to the improvements made by the plaintiff but also to inflation. The difficulty of possible disturbance of the occupation of the defendant and her children, which influenced Bisson J., no longer applies. Rather than attempting to compensate to some extent for inflation by awarding a lump sum with interest from some past date or dates it is now preferable, whether under constructive trust or the statute, to award the plaintiff a proportion of the proceeds of sale. The central issue is what his share should be.

Bisson J.'s finding of constructive trust was not challenged for the respondent on the appeal. Without repeating what I have ventured to say on the subject generally in Hayward v. Giordani and Pasi v. Kamana (C.A. 68/85; judgment 28 October 1986), I merely add that, with respect, the Judge's view appears to me convincing. The parties intended an equal sharing if the marriage eventuated but did not expressly address their minds to their rights if it did not. In that event, however, a reasonable person in the shoes of the plaintiff would undoubtedly have understood that his contribution and efforts would result in an interest in the property. Likewise a reasonable person in the shoes of the defendant would have had to acknowledge such a legitimate expectation - as indeed her counsel accepts. The share is not necessarily one half: it may be greater or less and should represent a fair apportionment of the contributions and efforts on both sides.

While naturally differing in their submissions as to what are the appropriate shares, counsel were agreed in this Court that the result should be the same under the Act as under the constructive trust. Giving the Act a reasonably liberal construction, I accept that counsel are right. The Act implemented a Report of the Torts and General Law Reform Committee to the Minister of Justice in February 1968. The Committee recommended abolition of actions for breach of promise of marriage, taking the view that it is far better for an engagement to be broken off than for a marriage to

take place which one of the parties no longer wants. But they considered that provision should be made for the settlement of disputes arising out of property transactions entered into in anticipation of a marriage which does not take place. They put these disputes under three headings. As to the first they said:

In the first group we would place all disputes concerning the ownership or disposition of property, whether purchased by one or both the parties to the marriage, or given to either or both of them by a third person. The settlement of these disputes does not necessarily involve consideration of the issue of fault, so that the existence of a right to have them dealt with by a Court would not be inconsistent with the lack of any general action for breach of promise. We think it unquestionable that such a right should be provided if the action is abolished and we suggest that this should be in the form of a provision enabling the appropriate Court, on the application of any person affected, to consider any question arising out of the termination of an agreement to marry, and relating to the ownership or disposition of property, and to make such orders as may be necessary for the purpose of restoring the parties to the contract, and third persons, as nearly as possible to the position they would have been in had there been no such agreement, or such orders as appear just in respect of gifts where no claim is made by the donor.

In pursuance of the Committee's recommendations, s.8(1) enables applications to be made for orders 'where the termination of an agreement to marry gives rise to any question between the parties to the agreement ... concerning the title to or possession or disposition of property...' Section 8(3) provides that '...the Court shall make such orders as it thinks necessary to restore each party to the agreement ... as closely as practicable to the position

that party would have occupied if the agreement had never been made'. It is expressly provided by s.8(4) that the Court shall not take into account or attempt to ascertain or apportion responsibility for the termination of the agreement. Section 8(3) expressly preserves the right of any person to bring an action for money had and received.

Where the parties have lived in a de facto relationship before the agreement to marry is terminated, to restore them as closely as practicable to their respective positions as if the agreement had never been made is far from a straightforward exercise. Possibly the law reform committee and the legislature did not have such situations specifically in mind. Casey J. develops this point in his judgment. Even so, I think that the principle of restoration can be applied in a broad way in accordance with the spirit of the Act.

Property in the names of one or both of the parties may represent the fruits of combined contributions in assets or services. Both parties may have enjoyed the use of the property and other benefits from their association in the meantime, and this cannot be undone. But restoration can be effected as closely as practicable by dividing the property built up by their common efforts in broad proportion to their respective contributions of all kinds. Contributions may include housekeeping or looking after children, if the other party has been enabled to earn or acquire assets. In principle I would not exclude anything that has formed part

of the consortium provided by one or other partner. To achieve approximate restoration on a just basis it may be necessary to take all such benefits into account. The statutory jurisdiction is intended to be much wider than that exercised by the Court in an action for money had and received. In circumstances such as those of the present case I agree with counsel, as already mentioned, that it is really immaterial whether the Court exercises jurisdiction under the Act or under the law of constructive trusts as we are coming to apply it in New Zealand.

In the present case in the High Court no claim was made in respect of the \$100 a week, which was treated as balanced by the housekeeping services. The Judge also disregarded the ring, although it has been sold by the defendant. He treated the remaining cash contributions by the plaintiff as totalling \$19,557 - a figure which seems to be conservative - and pointed out that it was very similar to a half share in the equity on the valuation then before the Court. The Judge intended the award of \$19,500 as restoration. The difficulty, however, is that repayment in depreciated currency is not truly restoration. Putting it another way, the order leaves the defendant with the 'benefit' of inflation. She would receive about \$19,500 or, on the later sale price, \$22,230, although beyond question by far the greater contribution to the equity came from the plaintiff. It seems likely that Bisson J., who dealt with the case in an oral judgment, would have made some

adjustment in his award if he had had the advantage of further comparison of the figures, particularly the ultimate sale price.

Notwithstanding the limitations on the defendant's commitment to the relationship, the plaintiff evidently valued it and benefited from it. In my view a reasonably generous allowance for her services and consortium is fair and should not be treated as cancelled by the \$100 a week. In all the circumstances, however, I do not think that one could possibly assess her comparative contributions as entitling her to retain more than 30 per cent of the net proceeds of the sale. With some hesitation as to whether on the particular facts this does full justice to the plaintiff, I would allow his appeal and order that the net proceeds be divided in the proportions of seven to the plaintiff and three to the defendant.

The defendant being legally aided in the High Court, Bisson J. acted under the second proviso in s.17(2)(e) of the Legal Aid Act 1969, specifying that an order for costs of \$2820 and disbursements as fixed by the Registrar would have been made against the aided person if the paragraph had not excluded liability. As a secondary ground of appeal Mr Earl contended that the case should be treated as one of 'exceptional circumstances' within the first proviso in the paragraph and an order made against the defendant. The plaintiff, who is now married, has very limited means. Without overlooking his position, I do not think that we

should interfere with the Judge's discretionary decision about costs. The plaintiff will be at liberty to apply for those High Court costs to the District Committee, under s.33 of the Legal Aid Act 1969.

In this Court neither party was legally aided and the appellant should have against the respondent an order for costs in the sum of \$500 with disbursements, including the cost of reproducing the case and the reasonable travelling expenses of counsel, to be settled by the Registrar.

The Court being unanimous, the case will be disposed of accordingly.

R.B. Cuthie P.

Solicitors:

McCaw Lewis Chapman, Hamilton, for Appellant
S.P. Williams, Hamilton, for Respondent

BETWEEN GRAEME JOHN OLIVER
 of Hamilton, Sales
 Manager

Appellant

A N D MARILYN RAE BRADLEY
 of Hamilton, Married
 Woman

Respondent

Coram: Cooke P
 Casey J
 Henry J

Hearing: 14 July 1987

Counsel: C M Earl for Appellant
 S P Williams for Respondent

Judgment: 24 July 1987

JUDGMENT OF CASEY J

The President and Henry J have dealt with the circumstances giving rise to this appeal and I agree with its disposal in the way they suggest. However, although the point was not argued before us, I wish to express my reservations about the use of s.8 of the Domestic Actions Act 1975 to resolve this property dispute. The jurisdiction is conferred by sub-section 1 which reads as follows :

"Where the termination of an agreement to marry gives rise to any question between the parties to the agreement, or between one or both of the parties to the agreement and a third party, concerning the title to or possession or disposition of any property, any such party

may, in the course of any proceedings or on application made for the purpose, apply to the Court for an order under this section."

Under sub-section 3 the Court is required to make such orders as it thinks necessary to restore each party to the agreement "as closely as practicable to the position that party would have occupied if the agreement had never been made." To achieve this object various ancilliary powers for the sale and division of property are conferred by sub-section 5 and sub-section 8 preserves the right of any person to bring an action for any money had and received. The history of the section in replacing the old action for breach of promise to marry has been recorded by the President.

The claim was put forward both on the grounds of a Constructive Trust and under s.8. Bisson J had no difficulty in finding liability under each heading; in respect of the latter the only dispute (apart from quantum) appears to have been over the existence of an agreement to marry. He arrived at a one-half share in the equity of the house, amounting to \$19,500, as appropriate for the Appellant's beneficial interest under the Trust, or for his entitlement under s.8(3) of the Act. In this Court the contest was simply over the proper amount and Counsel were agreed that it would be the same, whether under a Constructive Trust or under the Act.

My reservation about applying the latter to these circumstances arises from the opening words of sub-section 1 - "Where the termination of an agreement to marry gives rise to any question between the parties etc." These parties not only agreed to get married, but they also agreed to live in a 'de facto' domestic and sexual relationship, and it was their decision to embark on that which can be seen as leading to the acquisition of the house property and to its maintenance as their family home. Similarly, it was the termination of that relationship which led to the dispute about dividing their property. The concurrent agreement to marry appears to be no more than a facet of that more fundamental association. It seems quite artificial to regard this question about the property as being merely the result of their broken engagement. This is borne out by the difficulties experienced in trying to restore the parties to the position they would have been in if the agreement to marry had never been made, as enjoined by s.8(3).

Rather than introduce into the arena of domestic property disputes a new category of "engaged de factos", I would prefer to see s.8 confined to what I think is its real purpose - namely, the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship. I do not think the legislation was ever

intended to apply to the de facto situation in this case, and, with respect, even less to the "engagement" of some 18 years in Young v New Zealand Insurance Co. Ltd. [1982] 2 NZLR 684. However, in the absence of any argument about the application of the Act, I content myself only with the expression of these reservations. The parties having accepted that the same results can be achieved under a Constructive Trust, I agree that the appeal should be allowed to the extent of a 70/30 percent division of the property in favour of the Appellant.

M. L. Casey

IN THE COURT OF APPEAL OF NEW ZEALAND

CA.51/87

BETWEEN:

GRAEME JOHN OLIVER
of Hamilton

Appellant

A N D:

MARILYN RAE BRADLEY
of Hamilton

Respondent

CORAM: Cooke P
Casey J
Henry J

Hearing: 14 July 1987

Counsel: C M Earl for Appellant
S P Williams for Respondent

Judgment: 24 July 1987

JUDGMENT OF HENRY J.

This appeal concerns the respective entitlement of the parties to a property in which they resided during the currency of their agreement to marry, being one which terminated before fulfilment. The history of their relationship has been set out in the judgment of Cooke P, which I have had the benefit of reading in draft and need not be repeated.

The property in question was purchased and remained in the sole name of the respondent until its sale

in February 1987 (subsequent to judgment being delivered in the High Court), which yielded a net equity of \$41,730.34. The proceedings were instituted by the Appellant and were based on a constructive trust and alternatively on s.8 of the Domestic Actions Act 1975. In his judgment in the High Court, Bisson J. found that the constructive trust had been established on the evidence, and then went on to consider the claim under the Domestic Actions Act 1975 under which he made an award of \$19,500.00 in favour of the Appellant, the amount of the judgment to be charged against the property.

In this Court both counsel accepted the correctness of the finding of a constructive trust and both also accepted that an approximately identical result would be achieved whether the Appellant's entitlement was assessed under the 1975 Act or on a constructive trust basis. They did of course vary significantly as to the actual assessment. I turn first to the Act.

The important provisions for the purposes of this case are contained in s.8 and are :

- "8. (1) Where the termination of an agreement to marry gives rise to any question between the parties to the agreement, or between one or both of the parties to the agreement and a third party, concerning the title to or possession or disposition of any property, any such party may, in the course of any proceedings or on application made for the purpose, apply to the Court for an order under this section.
- ...

- (3) Subject to subsection (6) of this section, on any such application the Court shall make such orders as it thinks necessary to restore each party to the agreement, and any third party, as closely as practicable to the position that party would have occupied if the agreement had never been made.
- (4) In determining the orders to be made on any such application, the Court shall not take into account or attempt to ascertain or apportion responsibility for the termination of the agreement.
- ...
(8) Nothing in this section shall limit or affect the right of any person to bring an action for money had and received."

The evidence disclosed, and it was not in dispute, that the Appellant had made substantial cash contributions to the purchase of the property and its subsequent improvement, as well as meeting rates, insurance and mortgage liabilities. The property was purchased about May 1980 at a price of \$27,500.00; being provided as follows :

Cash (appellant)	\$2006.00
Housing Corporation loan (respondent)	\$20,000.00
Family Benefit capitalisation (respondent)	2,532.00
Suspensory loan (respondent)	2,500.00

The parties lived together in the property with the two children of the Respondent's marriage until August 1984. During that time the Appellant paid all rates, insurance premiums, and Housing Corporation instalments. He also expended just over \$13,000.00 on improvements to the

property as well as physically carrying out the work involved in that. It is also common ground that he was in full-time employment and provided all normal household living requirements. The Respondent worked part-time, her earnings principally being used for clothing for herself and the two children.

In the High Court, Bisson J. noted that the expenditure by the Appellant on the property as having been \$19,557.00, taking into account one half of the payments made in respect of the mortgage, rates and insurance. He also noted that on a valuation of \$58,000.00 the property at hearing had an equity of \$38,890.00 of which one half would be \$19,445.00. He then concluded that an award of \$19,500.00 would equate a one-half share on the basis of a constructive trust, and would be similar to an award restoring the Appellant to his original position. Judgment in the sum of \$19,500.00 accordingly resulted.

Section 8 (3) requires the Court to restore each party to the agreement as closely as practicable to the position that party would have occupied if the agreement to marry had never been made. Practical difficulties in implementing that direction will frequently arise perhaps inevitably so where as here the parties have lived in a de facto relationship for a period of years and there has been an intermingling of finances and a sharing of the household. This is recognized by the legislature in the reference in subs. (3) to "as closely as practicable".

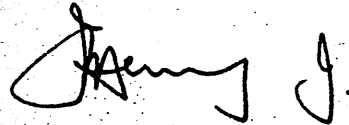
The aim of the Court must be to achieve a just result within that framework. In the High Court, Bisson J. held that the payment to the Appellant of portion of his cash contributions as earlier referred to would achieve a result in accord with s.8 (3). With respect, I think that conclusion overlooks one important matter. The restoration must be in respect of both parties. Applying the same criterion to the Respondent, her entitlement would appear to consist of something approaching \$2000.00 being the family benefit capitalization and expended on the property prior to August 1984. She apparently made no other cash contributions to the property. It cannot, as I see it, be right then to leave her with the balance of the equity in the property because that must result in her not being restored to but placed in a better position than that she would otherwise have occupied.

Any approach in a situation such as the present must be pragmatic. Here the question of restoration can perhaps best be considered in the following way. The Appellant has contributed in cash to the property and its improvement, being capital expenditure, approximately \$21,000.00 comprising the deposit, Housing Corporation repayments, and the cost of additions. The Respondent has contributed the sum of say \$2000.00 from her family benefit capitalisation. If each is repaid those respective sums, they are to an extent at least restored to their positions, allowing that other matters such as servicing the property, serving the household, and

providing for all the family household needs in the various aspects are really matters peripheral to the property dispute and may have been incurred in one way or another had there been no agreement to marry. That will leave a balance of the equity of some \$18,000.00 which clearly requires division between the parties, and which very largely represents the effects of inflation over the years. The purchase was made possible by the cash provided by the Appellant and by the availability of finance because of the Respondent's position as a mother. The continued possession of the property and its enjoyment was due to the financial contributions of the Appellant, and to the general household contributions by the Respondent as well as the continuing availability of the advances made to her. It seems to me impossible to make a distinction between them other than on a basis of equality. The result of that would be to give the Appellant an interest in the equity of approximately \$30,000.00, and the Respondent approximately \$11,000.00, the percentage being of the order of 73% and 27%.

The finding of a constructive trust is well based and in accord with the principles now applied to such cases as this I am in agreement with the assessment made by Cooke P that 30% represents the maximum but fair entitlement of the Respondent when the comparative contributions are weighed, and this is close to my "restoration" conclusion.

Accordingly I agree that the appeal should be allowed and concur in the making of orders referred to by Cooke P.

A handwritten signature in cursive script, appearing to read "Henry J.", is written in dark ink.

Solicitors:

McCaw Lewis Chapman, Hamilton, for Appellant
S P Williams Esq., Hamilton, for Respondent