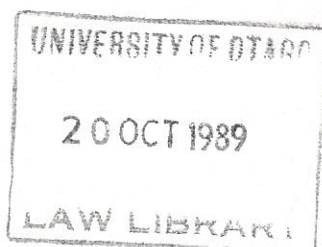


RM

SET 3

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 26/88



BETWEEN

BRONWYN ROSE GILLIES of
Papamoa, Receptionist

Appellant

AND

PATRICK ROBERT KEOGH of
Papamoa, Plumber

Respondent

Coram: Cooke P.
Richardson J.
Casey J.
Bisson J.

Hearing: 17 July 1989

Counsel: L.A. Andersen for Appellant
J.P. Gittos for Respondent

Judgment: 29 September 1989

JUDGMENT OF COOKE P.

This is an appeal from a decision of Gallen J. finding that a partner in a formerly 'stable' but nevertheless now terminated de facto union, the man, had an interest quantified by the Judge at \$10,000 in a house which had been registered in the sole name of the woman. The case is another stage in the evolution of the New Zealand law of constructive trusts and the like. It enables this Court to add expressly one element of certainty in a field where it is sometimes said to be lacking and complaints of 'palm-tree justice' are voiced. The added element has probably been implicit in all, or at least most, of the cases in all the jurisdictions. Put shortly it is that an interest or

monetary right by way of constructive trust or otherwise cannot arise if a reasonable person in the claimant's position would have understood that he or she was not to receive one.

The facts are all-important in this class of case. That is a truism about case law generally, but it has particular application in property disputes arising after the end of matrimonial or de facto unions. While often having in common the feature of indefiniteness in the formation or expression of the intentions of the parties, such unions vary widely and sometimes subtly in history and quality. Unravelling the facts and identifying the salient ones can be a laborious task, but when it is completed a case can answer itself, as I think the present case does. Many complaints of uncertainty really amount to little more than saying that some degree of discretionary evaluation is inescapable in weighing respective contributions and that it is necessary to marshal all the facts of a particular case before deciding it. That can be so no matter whether the jurisdiction being exercised is statutory or derived from common law or equity. The present case, however, does turn on a point of principle and it is appropriate to say something about the principles before going into the facts.

Principles

There is a plethora of contemporary judgments in this field, largely saying much the same thing in different words. I shall try not to add to it unnecessarily and to follow T.S. Eliot's maxim that one should write as little as one can, which seems to be as good advice for Judges as for other professional writers. Moreover later in this judgment I have to deal with the particular facts in considerable detail. So I will not repeat the views that I have expressed generally about constructive trusts in Hayward v. Giordani [1983] N.Z.L.R. 140, Pasi v. Kamana [1986] 1 N.Z.L.R. 603 and Oliver v. Bradley [1987] 1 N.Z.L.R. 586, beyond restating that several of the doctrinal bases used by the courts or proposed judicially for determining whether one party has a valid claim against the other after the union has ended seem ultimately to come to much the same. Normally it makes no practical difference in the result whether one talks of constructive trust, unjust enrichment, imputed common intention or estoppel. In deciding whether any of these are established it is necessary to take into account the same factors.

It is true that if the test were whether there was truly a common intention, in the sense that the parties were subjectively ad idem, many cases could not have been decided as they have been; but it may be doubted whether all the Judges who speak of common intentions go as far as to look

for real common intentions. To do so would seem contrary to the traditional objective approach of the common law.

Whatever legal label or rubric cases in this field are placed under, reasonable expectations in the light of the conduct of the parties are at the heart of the matter. It can be said that a party is unjustly enriched if he or she retains the entire fruits of contributions made by the other, notwithstanding that the other has suffered detriment or made a sacrifice and has reasonably expected from the conduct of the first party and all the circumstances that the contributions will carry rights. Similarly, to retain the sole benefit can be labelled unconscionable or contrary to equity or manifestly unfair. Or the conduct of the first party may be said to give rise to an estoppel, proprietary or otherwise.

These ideas may be seen as but applications in a particular field of the equitable jurisdiction to interfere where the assertion of strict legal rights is found by the court to be unconscionable, underlying inter alia the various categories of estoppel (discussed in this Court in Burbery Mortgage Finance & Savings Ltd v. Hindsbank Holdings Ltd [1989] 1 N.Z.L.R. 357) and the setting aside of agreements for unconscionability or 'equitable fraud' (discussed in this Court in Nichols v. Jessup [1986] 1 N.Z.L.R. 226).

The tide is setting or has set, I think, against the view adhered to by Sir Alexander Turner in the third edition (1977) of Spencer Bower and Turner on Estoppel by Representation, pp.306-9, that proprietary estoppel and promissory estoppel are entirely separate and take their origins from different sources. The textbook remains of course, if one may respectfully say so, an outstanding work of legal scholarship and an enduring reminder of the importance of analysing before deciding. In Attorney-General of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd [1987] A.C. 1114 the Privy Council cite with approval well-known statements by Lord Denning M.R., Scarman L.J. and Oliver J. encapsulating a broader approach to the proprietary and promissory doctrines. This identifies a general principle asserting the unfairness or injustice of resiling from underlying assumptions that have been acted upon. Of course in no branch of the law is unfairness ever a separate or arbitrary concept capable of being invoked in the abstract. In the branch of equity relevant to the present case it is specifically linked with expectations created by conduct. Accordingly in the Hong Kong case it was held fatal to the claim of estoppel that the defendant had not created a belief or expectation; that is a point to which I must return.

Earlier in the Privy Council it was mentioned in Maharaj v. Chand [1986] A.C. 898, 908, that no matter whether or not the facts of a given case go far enough to

establish an equitable interest in land, they may satisfy the requirements for a promissory estoppel. This was said in a case where the claimant could not take Plimmer v. Mayor of Wellington (1884) 9 App.Cas. 699 to the full length of giving her an interest in land, because an Ordinance prohibited dealings in the land. The equity or equitable estoppel has to be moulded to the circumstances of the particular case. It is to be noted that, although the idea on which estoppel rests undoubtedly applies, the results can go beyond estoppel in the ordinary sense. Plimmer's case itself illustrates this. The judgment of the Privy Council does not in fact contain the word 'estoppel'. What was held to exist was an equity being an interest in land binding a third party, at any rate for the purposes of a compensation statute. The present case does not call for any consideration of third party rights. It seems better not to offer any observations on that subject except that certainly a third party dealing without notice, in good faith and for value cannot be affected by a de facto partner's interest.

In the specific field of de facto relationships there are some significant developments in overseas jurisdictions which have occurred or come to notice since Oliver v. Bradley and on which I should say something. In addition counsel made a collection of New Zealand High Court decisions. There are too many for detailed discussion. The general picture that emerges is that the law has been

working reasonably well. Awards, when made, have been moderate and less than would be expected in matrimonial property cases. This is appropriate: a de facto union is not to be treated as the full equivalent of marriage.

In Canada under the leadership of Dickson C.J. the concept of unjust enrichment has continued to be developed. Sorochan v. Sorochan (1986) 29 D.L.R. (4th) 50 in the Supreme Court reaffirms that the requirements for a constructive trust 'include' (p.52) enrichment, corresponding deprivation, and absence of any juristic reason for the enrichment. Reasonable expectation of benefit is treated as part and parcel of the third requirement; I think that this is largely and perhaps entirely a matter of the formal arrangement of the whole proposition. For it is difficult to imagine a case in which a reasonable person in the shoes of the claimant would expect a benefit without having conferred anything in return. The Canadian approach is now that constructive trust is property-related but that the nexus need not be merely in the acquisition of the asset. Further, and even more significantly, as well as or instead of a constructive trust there may be a remedy in Canada for unjust enrichment in the form of a straightforward monetary award.

For an instance of an award of damages alone, see Everson v. Rich (1988) 53 D.L.R. (4th) 470. There the Court of Appeal of Saskatchewan endorse the proposition that 'no

one should expect, in general, spousal services for free'; say that there was no juridical right to retain the benefit without compensation in the absence of any indication to the contrary; find that the benefits received by the appellant did not outweigh the value of services provided so as to deprive her of a cause of action; and measure the damages, not by the market price of domestic services, but by a proportion of the increase in the value of the defendant's assets.

I see no reason why the Canadian approach in awarding monetary compensation cannot be applied in New Zealand in suitable cases. It is in harmony with what has been decided about equitable compensation in a broader field in cases including Day v. Mead [1987] 2 N.Z.L.R. 443.

In Australia there was formerly a school of judicial thought holding that a constructive trust may not be based on a common intention ascribed or imputed to the parties which does not actually exist. For instance Gibbs C.J. said so in Muschinski v. Dodds (1985) 160 C.L.R. 583, 595. Insofar as that kind of thinking rejects the need to strain for proof of common intention, I entirely and respectfully agree with it. Insofar as it may reject grounds for imposing constructive trusts other than the actual subjective intention of the parties, it will be obvious that I am unable to agree; and the law of Australia now appears to be settled on a contrary course by Baumgartner v.

Baumgartner (1987) 164 C.L.R. 137. The High Court there holds that, although there was no common or individual subjective intention to create a trust, general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct. In a case of pooling of resources for the purposes of a joint relationship the Court decided that after the relationship had failed an assertion of sole property in the man amounted to unconscionable conduct justifying the imposition of a constructive trust. Contributions in kind, not merely financial, were treated as relevant. Unjust enrichment was accepted by one member of the Court, Toohey J., to be an alternative basis for the same result. It is heartening that the law on both sides of the Tasman seems to have reached virtually the same point.

In England the imputed common intention favoured by Lord Reid and Lord Diplock did not take root. 'Inferred' common intention has prevailed. But this has been mitigated in two ways. First the test of common intention does not appear to be subjective. In Grant v. Edwards [1986] Ch.638 a common intention was found by the Court of Appeal on the basis of the defendant's representations, although evidently the defendant never had any real intention that the plaintiff should have an interest in the house. Secondly, following the suggestion of Sir Nicolas Browne-Wilkinson V.-C. in that case, the Court of Appeal have latterly made use of the concept of proprietary estoppel. This depends not on the actual intention of the representor but on the effect of

his or her conduct or statements on a reasonable person in the position of the other.

Cases in that line cited to us in argument in the present case are Thomas v. Fuller-Brown [1988] 1 F.L.R. 237 and Stevens v. Stevens (Slade L.J. and Sir Roger Ormrod, 3 March 1989). The latter case is a straightforward application of the estoppel doctrine. The former is helpful here in that it was a case where the trial Judge found that one party was covertly seeking to establish a beneficial title without letting the other understand what he sought to achieve. The other party did nothing to lead the claimant to suppose that by doing certain improvements he would acquire an interest in the house. Rather she seems to have been at pains to avoid treating him as having any interest.

It seems to me that the recent English cases support the reasonable expectation and objective test approach. There are some differences in terminology, but with respect, having regard to the substance and effect of the Court of Appeal decisions, I would not support any suggestion that the English Courts are significantly out of line with the rest of the Commonwealth in this field.

In a careful argument for the appellant in the present case Mr Andersen suggested three 'usual' situations in de facto relationships when the test for a constructive trust will be satisfied, namely:

- (a) Where the parties expressly agree that there is to be shared ownership of the item of property;
- (b) Where the parties regard property as being jointly owned although there is no specific expression of shared ownership or discussion as to ownership;
- (c) Where one party misleads the other (either intentionally or unintentionally) into believing an understanding exists that ownership of an item of property is shared but has no subjective intention of relinquishing any rights of ownership in order to give effect to that understanding.

In the course of debate during his oral argument counsel put it that in today's society if nothing is said there will be in some de facto relationships a reasonable expectation of an interest. I would accept that submission, and also the tenor of (a), (b) and (c), while noting that the word 'usual' does not close any doors.

Whether one speaks in terms of reasonable expectations or unjust enrichment or any other objective test, it is plain that in grey area cases certain factors have to be weighed. The practical position now reached in de facto union cases by all the various routes appears to me to be that the courts have regard to the reasonable expectations of persons in the shoes of the respective parties, giving particular weight to the following factors.

First, a major factor must be the degree of sacrifice by the claimant. This corresponds to the need to show conduct detrimental to the cestui que trust, referred to in the context of an alleged commercial implied trust by the

Privy Council in Austin v. Keele (1987) 72 A.L.R. 578, 588. De facto union cases, however, tend to be in a class of their own. The experience of the courts suggests that they are very often marked by a vagueness of intention not expected and less commonly found in commercial dealings. In the commercial sphere I think that constructive trusts should clearly be much more difficult to establish. It is a truism that certainty is particularly valued in commercial law.

In de facto union cases often, though not always, the degree of sacrifice by one partner will be a guide to the measure of any unjust enrichment of the other. Often, though again not always, it will be related to the length of the union. The epithet 'stable' is ironic in these cases, as for the most part they do not arise unless the reverse has proved to be the outcome. How long the relationship has lasted is a factor not to be used in any arbitrary way. One cannot say that X years is enough for a good claim, or less than X years not enough. Even under the New Zealand matrimonial property legislation the three years taken as a test to determine whether the marriage is of short duration do not produce a hard-and-fast difference. Rather, under that legislation, the period affects the strength of the presumption of equal sharing. That is the broad effect of the well-known statutory provisions; they need not be detailed here.

One has to remember that sacrifice cannot always be measured in dollars and cents. The longer a union, the more likely that one or other partner will have forgone other opportunities in life. This can be highly relevant, I think, in assessing reasonable expectations, unjust enrichment or unconscionability.

Subject to what has just been said, a second and equally obvious major factor to be weighed is the value of the broadly measurable contributions of the claimant by comparison with the value of the broadly measurable benefits received. Contributions to household expenses, or to maintenance, repairs or additions, may amount to no more than fair payment for board and lodging and the advantages of a home for the time being. More than that is commonly needed to justify an award.

Thirdly, the Matrimonial Property Act 1976 provides another analogy and one especially important for the present case, namely the contracting-out provisions of s.21. It is true that the requirements for contracting out are strict and even when they have been complied with the agreement is void if the Court is satisfied that to give effect to it would be unjust. Subject to those safeguards, however, Parliament has accepted that in legal marriage the parties are free to make their own property arrangements. With even stronger reason the same must apply to de facto partnerships.

Although a party to such a partnership may have contributed by services or money to augment the assets owned in law by the other, or there may have been a pooling of resources and efforts, I think that a claimant cannot succeed if a reasonable person in his or her shoes would have understood that throughout the relationship the other party had positively declined to acquiesce in any property-sharing or other right. In principle this follows from the general law of estoppel, as illustrated by the Hong Kong case in the Privy Council previously cited. A specific illustration in the field of de facto relations is Thomas v. Fuller-Brown in the English Court of Appeal. But, as previously mentioned, it seems to me implicit in all or most of the case law.

The principle of freedom to stipulate against any trust or obligation is consistent with all the theories. A constructive trust cannot arise if the conduct of the parties and the circumstances show that a reasonable person in the claimant's position would not expect a benefit. The other side of that coin is that a reasonable person in the defendant's position would not expect to have to concede a benefit. For reasonable expectations on both sides have to be considered. Similarly, 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 his or her freedom to

dispose of resources for purposes not giving rise to a property interest or money claim. Commonly those purposes will be the obtaining of the present benefits of a joint relationship.

Counsel for the appellant was on sound ground in submitting that the sole legal owner can protect his or her position simply by making it clear to the other party that, while the use of the property is shared, ownership is not. I would accept that as a short way of putting it. The word 'clear' is important and ownership has to be understood in a realistic sense. For instance, it is not necessarily conclusive that a party has made it known that only his or her name is to go on a legal title.

Counsel's short proposition also needs expanding in other ways. The law of constructive trusts and unjust enrichment is concerned with contributions to assets. But, as with matrimonial property, the contributions may be indirect. For example they may be domestic services or the care of children. Further, the Canadian cases show that on occasion a simple monetary award is the most appropriate way of satisfying the equity or the requirements of conscience in giving effect to reasonable expectations.

Facts

Counsel informed us that the parties are both now in their thirties. The following narrative is taken largely from Gallen J.'s judgment. They met at Christmas 1981. The plaintiff was a single man. The defendant was separated from her husband and in the process of resolving outstanding questions relating to her marriage. The defendant's matrimonial home was retained by her then husband. He bought out her interest for \$15,000. She said and the Judge expressly accepted that she regarded this sum as sacrosanct and to be held for obtaining a replacement house property. That is a finding of some importance. She also had a car and furniture. He had a very modest car but not much money.

Some weeks after the parties met the plaintiff left for Australia for a working holiday. At Easter 1982 he suggested that she join him there, which she did, taking with her \$1000, being the maximum then allowed to be taken out of New Zealand. She joined the plaintiff in Perth. They travelled to Geraldton, where the plaintiff already had a position and the defendant was able to find work immediately. He was earning \$360 a week and she from \$180 to \$200. He asked her whether she wanted to share their resources or keep her earnings and assets separate. She agreed to share. They travelled through Australia living and working together. They would work until they had enough money in their joint account and then travel until they

needed more and had to obtain work again. At times they were very short of money indeed. The defendant said in evidence, and the Judge apparently did not doubt, that she was tempted to call for money from her funds in New Zealand but did not do so as she wanted to keep them intact for buying a house in due course.

Eventually they arrived in Darwin, where they stayed for three and a half months. Then they decided to return to New Zealand by way of Bali. The joint funds were inadequate and the defendant sent to New Zealand for \$1500 from her matrimonial property settlement money, which enabled them to travel to Bali and then home via Sydney and also provided some spending money on the way. She claimed but he denied that she made it clear at the time that the \$1500 was to be repaid to her from the tax monies about to be mentioned. The Judge makes no specific finding on this point.

There was some dispute about how much each contributed to the common pool while in Australia. When they ceased working they were entitled to tax refunds. These were received later, \$1532 for the plaintiff and \$1213 for the defendant. The Judge says and neither counsel has questioned that the similarity of these amounts suggested that in all the plaintiff had earned a little more than the defendant but neither placed much emphasis on this at the time. He thought it more significant that they had developed a pattern of sharing.

On their return to New Zealand each party stayed for a time with his or her parents. A house at 634 Beach Road, Papamoa, near Tauranga was bought later and is the property on which the case centres. The two tax refunds were banked in the plaintiff's Marac Building Society account in December 1982 and January 1983.

The house was bought under an agreement dated 3 December 1982 with possession on 17 December 1982. It was undoubtedly intended that they would live together there, as they did, but the agreement and the title were in the defendant's sole name. The purchase price was \$33,000 found as follows:

- (a) \$12,782 from her matrimonial property money.
- (b) \$10,000 by nominee company mortgage
- (c) \$3000 vendor mortgage
- (d) \$5000 lent by her father
- (e) \$2500 lent by a friend of hers. This loan was repaid from the tax refunds.

It is noteworthy that the sale and purchase agreement, which was prepared by the defendant's solicitor, originally showed the names of both parties as purchasers. Before it was signed, however, the plaintiff's name was struck out on her instructions. She said that this was because it was always intended that the house should be in her name. In cross-examination the plaintiff appears to have said at first that he did not realise this at the time, but that he learnt of it from solicitors' letters and was not concerned. But he then made the significant concession

that he agreed to it being only in her name. He stressed that she dealt with the whole financial side of the house. Again that tells somewhat against the suggestion that he was intended to have an interest. He also agreed that she provided all the furniture, enough to set up the house comfortably, lounge suite and dining suite, pots and pans and cutlery.

The house was small, with only one bedroom, but there was an uncompleted extension which could be finished and improved. This was done mainly by work by the plaintiff and the defendant's father and brother. It may be as well to set out the Judge's account of the remaining facts in full as giving the context and to show that none of it has been overlooked, although in the end a good deal is not important.

Both the plaintiff and the defendant immediately sought work. The plaintiff obtained temporary employment in an hotel, employment which lasted for 3 weeks. He then worked in a country club for a short period, then worked on his own account for approximately a month and then obtained permanent and reasonably well paid employment. They continued to operate a joint account. The plaintiff was paid in cash and handed a proportion of his wages to the defendant who banked it in the joint account. The plaintiff says that he gave the whole of his weekly wages, with the exception of \$10 retained for pocket money, to the defendant. The defendant denies this and says that the amounts which were actually made available by the plaintiff fluctuated. The defendant obtained work and said that she paid the bulk of her wages into the joint account, but she conceded that she too kept funds for other purposes.

I think that looking at the matter as best I can, the true position is that both paid the bulk of their

earnings into the joint account and that this account was used for household expenses decision outgoings in connection with the house.

The parties quickly set about converting the extension on the house into a more liveable area. The defendant's father was able to provide weatherboarding at a very low rate and also gibraltar board for linings. Almost the whole of the house and the extension, had the exterior fibrolite sheathing removed which was replaced with weatherboard. The whole house was substantially improved and the garden developed.

There was a dispute as to who was responsible for this. The plaintiff maintained that he had done the bulk of the work, although he conceded that some work had been done by the defendant's father and brother and acknowledged also that the defendant herself had made a contribution. The defendant conceded that the plaintiff had done some work - indeed she said that he had worked hard, but she considered that the bulk of the work had been done by her father and brother.

I accept the involvement of all those concerned and that it was substantial in each case. It seems to me, however, that it is more likely than not that the greatest contribution was made by the plaintiff. He was living on the spot and it is accepted that he spent at least some of his weekends and not infrequently, his hours after work working on the property.

When the time came for the the extension to be wired for electricity, an arrangement was entered into with a friend who was qualified. A considerable part of the work was done by the plaintiff but the technical parts were done by the qualified friend. In return, the plaintiff carried out some plumbing for the friend. In addition to the extensions to the house, a barbecue area was put down, paths were laid and trellises put up. A substantial job was carried out on the septic tank which involved a considerable amount of hard work on the part of the plaintiff and the defendant's father. The defendant's daughter Leeanne returned home and it is accepted that the plaintiff had a good relationship with her and was kind to her.

About mid-1984 the defendant became free to re-marry. The plaintiff purchased an engagement ring for \$300, money which he borrowed and the plaintiff and the

defendant became formally engaged. During 1984 there were some discussions as to the possible sale of the house. The parties do not agree as to the reason for sale. The plaintiff maintains that the house was too small and that having been improved, it would be possible to sell it making a substantial profit. The defendant says that the plaintiff wanted to sell to buy a bigger, more expensive house with a mortgage on it and that the house would be in the names of the plaintiff and the defendant, being jointly owned. The defendant said that she did not particularly want to sell and that her daughter Leeanne liked the house. The house was put on the market. The land agents consulted suggested prices varying between \$39,000 and \$44,000. The house was put on the market at \$48,000. There seems to have been some considerable interest in the house and the plaintiff said that they realised the price put on it was too cheap. The defendant said that she decided against selling the house. The property was withdrawn from the market. One person who inspected it came around after it had been withdrawn and negotiated for its sale. The defendant says that he was anxious to obtain it because of its situation and the possibility of development of the section. She says that she indicated that she did not wish to sell and would only sell if the price was too tempting to let go. She told him that she would not sell for less than \$55,000. He agreed to purchase at that price and the house was sold.

The parties then looked at other houses. The first they looked at had already been sold. They then found another which both liked. The defendant made an offer which was accepted and the property was purchased by the defendant in her name. The plaintiff says that it was purchased in the defendant's name because it was the hope of the parties that they could ultimately purchase a more expensive house and that if he were not a party to the purchase, his eligibility for finance from the Housing Corporation would not be affected. The defendant denies this and says that the Housing Corporation had already indicated to the plaintiff that he was not eligible for Housing Corporation finance. No evidence was called from the Corporation and the dispute was left unresolved.

There was some discussion over the drawing of a Will. Contemporaneously with the purchase of the second property, the defendant executed a Will prepared by her solicitor. This contained the following clauses:

3. I GIVE AND DEVISE to my trustee the principal residence owned by me at the date of my death UPON TRUST to permit my friend PATRICK ROBERT KEOGH to have the use occupation and enjoyment of it for a period of 18 months from the date of my death he paying all rates and taxes and other outgoings thereon and keeping the same in a good and habitable state of repair fair wear and tear and damage by fire flood earthquake and other inevitable accident excepted and keeping the same insured against fire to the satisfaction of my trustee.
4. I DIRECT that the said PATRICK ROBERT KEOGH shall have the right to purchase my said property within 18 months of the date of my death at a purchase price that is 60% of the value of my property at the date of my death.

The defendant says that the purpose of the Will was to protect Leeanne and that she had made it a condition of drawing the Will that the plaintiff accept that he would provide a home for Leeanne and ultimately leave the house to her. The plaintiff concedes that there was a discussion with regard to looking after Leeanne, but says that he agreed to leave the house to Leeanne on his death provided he had no children of his own. The defendant says that the plaintiff agreed to make a Will and she believed he had done so. The plaintiff does not seem however to have drawn up a Will or a signed a Will to this effect.

The house purchased required a substantial amount of cleaning up, both as to the house and to the grounds. There is no doubt that the plaintiff contributed to this as did the father and brother of the defendant and the defendant herself. A comparatively short time later, the relationship between the plaintiff and the defendant came to an end. The defendant has retained the house property and the plaintiff has initiated these proceedings. He claimed a share of the property, amounting to 40% of the net equity, a declaration that the defendant held 40% of the property in his name and an order for sale of the property with a division of the proceeds. In the alternative, he sought judgment for \$20,000 or such other sum as the Court saw fit, an order for sale with division, interest on the sum together with costs.

The period during which the parties lived together in New Zealand was from 17 December 1982 until January 1985. Thus there was a de facto union of a little over two years in New Zealand and the earlier period in Australia, making a total approaching three years. In awarding the plaintiff \$10,000 Gallen J. found that he had made a comparatively small contribution to the purchase of the first house, very much lower than that of the defendant and her family, but that his contribution to the improvement of the property was probably equal to that of the defendant and her family. Gallen J. thought it unreal to justify intervention in terms of express or implied intention, although he also said that the will 'contains at least an element of acceptance that the plaintiff had an interest in the property'. (It may be respectfully interpolated that the will seems to me neutral in all the circumstances; one cannot safely draw any relevant inference from it.) But it was the pooling regime established by the parties and the plaintiff's contribution to a substantial capital gain, \$22,000 in money terms, which led the Judge to impose a constructive trust as a matter of equity or unjust enrichment.

I think that there is some force in the points made for the appellant that the outgoings on the house were low and probably less than would have been paid to rent a flat; that, whether or not the respondent was to have an interest in the property, working on the extension with the appellant's father and brother was only natural in view of

the respondent's relationship with the appellant and the fact that he was going to live there; and that there is nothing incompatible between the sharing of expenses and use of the house on the one hand and the appellant's sole ownership on the other. It may be added that from the pool \$51 per month was paid out for premiums on the plaintiff's insurance policies.

But what seems to me more important is evidence to which the Judge refers only obliquely. He appears to have accepted this evidence, for he observes:

The actions of the parties therefore might be sufficient in this case to give rise to the kind of common intention to which reference is made in certain of the authorities but I must say that in view of the actual statements of the defendant, this seems to me to be an artificial way of looking at the situation.

No doubt the Judge's reference is to passages in her evidence including the following:

As to ownership of the house, I discussed that with Paddy. The main time was when the papers for the house were drawn up incorrectly into our two names, up until then it had just been taken for granted it was to be my house. I was buying it. When the papers were incorrectly drawn up, it was then discussed and agreed that it was my house and should be in my name only. This document is the agreement for sale and purchase of that residence. I don't know who actually prepared it, it was with Martin Dumbill my solicitor at the time but I don't know who prepared it. I produce the agreement as exhibit 2. Subsequent to the purchase, there were discussions in relation to Paddy as to ownership of the house, there were lots of discussions, a lot of times they were fights concerning the ownership of

the house. He knew it was my house and always admitted it was my house. The purpose of buying the house was because I wanted to own my own home, I had done so once and I wanted to again.

And in cross-examination:

During time you were in the first home, was there ever any discussions between you relating to Paddy's interest in the home...

There was discussions of the nature that it was my home and sometimes it caused fights between us. He always accepted it was my home and admitted it was my home and that he really had not interest in it.

As to 'my house' - did you regard the house as your house because it was registered in your name ...

I regarded it as my house because I paid for it and it was registered in my home and it was my house.

The cross-examination of the respondent had begun with the following passage:

When you first met Bronwyn, she was living with Leeanne, separated from her husband ...

Yes.

At that time she resented somewhat the fact that her husband had a house and she had a flat ...

Yes.

Later when the property was settled, she resented what she considered to be the small amount she received ...

Yes.

She felt she had been done in the eye in relation to property ...

Yes.

Would this be something she talked about quite frequently during the times you were together ...

Very frequently.

She wasn't going to make that mistake again was she

...

No.

When you were in the first house, she always referred to it as 'her house' ...

Perhaps sometimes she may have, yes. I can't recall every occasion.

You can recall her referring to it as 'her house' ...

Yes.

That was both in conversations with you alone and when other people were there ...
Perhaps on occasions, yes.
The same was true of the second house was it not ...
Yes, I suppose, yes.
On occasions when you would have fights, she would say if you didn't like if there you could leave ...
I am sure that happens in every relationship.
In this relationship, the thing that was added was that it was made clear it was her house, you were there, if you wanted to stay there you could stay, if you wanted to leave you could leave ...
Yes.

Later there was this:

While in first house, one of the things you did argue about was the fact that it was her house ...
No, I don't think we ever argued over that specifically. I never said that it was my house - I never argued that point.

The case thus emerges as one in which it is substantially common ground in the evidence that, as well as taking title and making the contractual and financial arrangements in her own name, the appellant made it clear to the respondent at all times that she was asserting that the house was hers and hers alone. He was content not to argue. In these circumstances, applying the principles discussed earlier, in my opinion one cannot say that a reasonable person in his shoes would have understood that he was acquiring an interest; or that there was unjust enrichment; or that it is unconscionable on her part to repudiate his claim; or that she is in any sense estopped.

Consequently I would allow the appeal and direct the entry of judgment for the defendant. The Court being

unanimous, there will be orders accordingly. It was accepted at the hearing that no order for costs would be appropriate.

R3 contra P.

Solicitors:

Osborne Gray & Partners, Whakatane, for Appellant
Sharp Tudhope, Tauranga, for Respondent

BETWEEN BRONWYN ROSE GILLIES

Appellant

A N D PATRICK ROBERT KEOGH

Respondent

Coram Cooke P
Richardson J
Casey J
Bisson J

Hearing 17 July 1989

Counsel L.A. Andersen for appellant
J.P. Gittos for respondent

Judgment 29 September 1989

JUDGMENT OF RICHARDSON J

The setting

The 1986 Census records that over 115,000 New Zealanders said they were then living in de facto relationships. That was a 30% increase on the 1981 Census figures, and in the under 35 age brackets the ratio of legally married to de facto relations was only 4.8:1. For most social welfare benefit purposes and accident compensation purposes de facto relationships are largely equated with marriage. Questions concerning the children of a relationship can be treated in much the same way as if the parties were legally married. And various statutes accord recognition to those relationships

(see, for example, Social Security Act 1964 s.63 and Accident Compensation Act 1982 s.65).

It is not surprising in a climate of substantial community acceptance of de facto relationships, and of presumed equality of sharing under the matrimonial property legislation, that on breakdown of de facto arrangements questions have increasingly arisen as to the respective interests in the family home and other property. The traditional response of the law, and one that has been advanced in some cases in various jurisdictions, is that property rights can arise only if there is an actual intention expressed or implied to create them. In recent years courts have explored various approaches in an effort to achieve socially just results in accordance with legal principle. I shall review the current position in various jurisdictions quite briefly before expressing my own views.

England

In Pettit v. Pettitt [1970] AC 777 and Gissing v. Gissing [1971] AC 886 it was held that, in that common situation where the parties had not applied their minds at all to the question of how the beneficial interest in a family asset should be held at the time when it was acquired, the Court was not entitled to impute to them an intention which they would have formed as reasonable persons if they had actually thought about it at that time (see Lord Diplock at p.904 in Gissing). But, in what is widely accepted in England as the

now classic statement of the position, (see Maharaj v. Chand [1986] 3 All ER 107, 112) Lord Diplock emphasised in Gissing that a resulting, implied or constructive trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And the trustee will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land (p.905). Then, Lord Diplock went on to say (p.906):

As in so many branches of English law in which legal rights and obligations depend on the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.

In Maharaj v. Chand at p.112 the Privy Council put some emphasis in this class of case on two further considerations. One is that, in the absence of evidence to the contrary, the

right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection. The other is that a constructive trust may be established by an inferred common intention subsequently acted on by the making of contributions or other action to the detriment of the claimant party. And in Austin v. Keele [1987] ALJR 605, 609 the Privy Council went an additional step and held that, although it may be more difficult to prove the requisite intention in relation to property already held beneficially by the trustee, there is no reason in principle why the doctrine should be limited to an intention formed at the time of acquisition of the property.

Canada

In both Canada and Australia the highest courts have taken the matter further by invoking, in Canada, the doctrine of unjust enrichment and, in Australia, the principle of unconscionability. The leading Canadian authorities are Pettkus v. Becker (1980) 117 DLR (3d) 257 and Sorochan v. Sorochan (1986) 29 DLR (4th) 1. In Pettkus v. Becker Dickson J, who delivered the leading judgment, said at p.273:

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan (1760), 2 Burr. 1005 at p.1012, 97 E.R. 676, put the matter in these words: "... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable and indeed impossible, to attempt to define all the

circumstances in which an unjust enrichment might arise. The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury.

The three requirements to be satisfied before an unjust enrichment can be said to exist were stated as being, an enrichment, a corresponding deprivation, and absence of any juristic reason for the enrichment. The performance of normal spousal services is sufficient to constitute a benefit and thus an enrichment, and the detriment to the plaintiff is tied simply to the use of his or her time and energy. Thus on this approach, and as accepted in Everson v. Rich (1988) 53 DLR (4th) 470, 474, it follows that no-one should expect any general spousal services for free: in the absence of an indication to the contrary they are given with the expectation of something in return and should be received as such, so that, in terms of the third requirement, in the absence of any indication to the contrary there is no juridical right to retain the benefit without compensation. In Pettkus v. Becker Dickson J expressed the reasoning somewhat more fully in this way (p.274):

As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

And he emphasised that a reasonable expectation of a benefit

is part and parcel of the third precondition of unjust enrichment.

Australia

The earlier Australian cases showed a diversity of judicial thinking, but in Muschinski v. Dodds (1985) 160 CLR 583, and particularly in Baumgartner v. Baumgartner (1987) 164 CLR 137, the High Court of Australia has, it seems, adopted the principle that in appropriate circumstances equity will impose a constructive trust to circumvent the unconscionable conduct of the legal owner in refusing to recognise the existence of the equitable interest (Baumgartner per Mason CJ, Wilson and Deane JJ at p.148). The joint judgment in Baumgartner recognised that the remedy will be available regardless of actual or presumed agreement or intention, but implicitly rejected the notion that a constructive trust will be imposed in accordance with idiosyncratic notions of what is just and fair (p.148), while emphasising that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, including the constructive trust. In terms of that approach they then characterised the case in this way (p.149):

The case is accordingly one in which the parties have pooled their earnings for the purposes of their joint relationship, one of the purposes of that relationship being to secure accommodation for themselves and their child. Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that

joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.

It seems that the crucial feature was that there had been a pooling of resources. In such a case the Court considered it appropriate to apply the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them (p.148). And in Hibberson v. George (1989) 12 FLR 725, 742, Hope J concluded:

... it is not necessary that there should be a physical pooling. It is probably enough that by mutual arrangement the parties have each spent moneys for the purpose of their joint relationship knowing that part of it was to be spent in financing the purchase of the home.

Returning to Baumgartner, Toohey J sought to marry the two concepts of unconscionable conduct and unjust enrichment in this way (pp.152-153):

Nevertheless the question may still be asked - is the imposition of a constructive trust as a remedy for unconscionable conduct any more "principled" than the imposition of such a trust in order to prevent unjust enrichment? Each approach rejects Lord Denning MR's notion of "a constructive trust of a new model" (Eves v. Eves [1975] 1 WLR 1338 at 1341; 3 All ER 768 at 771), imposed "whenever justice and good conscience require it" (Hussey v. Palmer [1972] 1 WLR 1286 at 1290; 3 All ER 744 at 747). Each looks to and builds upon particular situations. Each must come to grips with a

variety of situations in which a person unconscionably retains property or is unjustly enriched by the retention of property.

....

In a situation such as the present one, where two people have lived together for a time and made contributions towards the purchase of land or the building of a home on it, an approach based on unconscionable conduct or one based on unjust enrichment will inevitably bring about the same result. Neither approach necessarily calls for a precise accounting of the contributions of the parties. Equally, the Court cannot ignore disproportionate contributions, especially where one of the parties makes available the proceeds of the sale of a property which he or she had acquired before the relationship began.

To the same effect is the judgment of Barker J in Fitness v. Berridge (1986) 4 NZFLR 243, 251.

New Zealand

A different strand has come through in the judgments delivered in this Court in Hayward v. Giordani [1983] NZLR 140, Pasi v. Kamana [1986] 1 NZLR 603 and Oliver v. Bradley [1987] 1 NZLR 586. In Hayward v. Giordani we upheld the submission that the couple had evinced a common intention that the property in question should be beneficially owned by them in equal shares. Accordingly it was not necessary for the disposition of the case to consider the alternative argument that a constructive trust should be imputed. However, all members of the Court leaned towards the availability of an equitable remedy in such a case. Cooke J (p.148) observed that it would seem to be only a small step to eliminate the need to strain for proof of common intention. He would have been disposed to hold that a constructive trust

arose there flowing from the joint efforts of the parties and reasonable expectations, even if they had not applied their minds to the precise question. McMullin J (p.153) considered that, as an exercise in realism, the view of Dickson J in Rathwell v. Rathwell (1978) 83 DLR (3d) 289 (and Lord Reid in Gissing v. Gissing at p.897) that trusts are not to be limited to those situations where a common intention can be inferred when as a matter of plain fact in matrimonial property there rarely is an agreement of that kind because the parties do not turn their minds to the eventuality of separation or divorce, had much to commend it, and that this was probably as true of de facto relationships. I thought that there was considerable force in the argument that given the realities of contemporary family life the property interests of parties who have been cohabiting together outside of marriage should not turn on an elusive and often vain search for indications of a common intention in relation to the property; and that there should be room in the evolution of equitable principles for the imposition of a constructive trust to reflect the direct and indirect contributions of the parties to the property which they have when they cease to live together.

Then in Pasi v. Kamana Cooke P suggested at p.605 that at bottom in this context unconscionability, constructive or equitable fraud, Lord Denning's "justice and good conscience" and "in all fairness" are probably different formulae for the same idea, and concluded that one way of putting the test is to ask whether a reasonable person in the shoes of

the claimant would have understood that his or her efforts would naturally result in an interest in the property. If, but only if, the answer is Yes, the Court should decide on an appropriate interest - not necessarily a half - by way of constructive trust, as indicated in Gissing v. Gissing.

McMullin J said at p.607:

The unconscionable bargain in which Courts of equity will intervene is not capable of more precise definition. But it is well recognised. There is therefore little purpose in endeavouring to lay down the metes and bounds of the constructive trust any more than there is in pursuing the parameters of the unconscionable bargain except to say that it must arise in respect of some specific item of property.

In Oliver v. Bradley the finding by Bisson J in the High Court of a constructive trust was not challenged on appeal and so the matter did not call for particular consideration in this Court - but it is interesting to note the broad approach adopted by Bisson J reminiscent of Lord Denning's "justice and good conscience". In Bisson J's view 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".

Oliver v. Bradley is also important for the indication by Cooke P at p.589 that it is the reasonable expectations of both parties, not just those of the claimant, which should be taken into account.

A principled approach

I confess I am less than comfortable with treating

fairness in the round as the ultimate test and with some of the judicial attempts to structure a framework within which it is to operate. The crucial question is in what circumstances, and on what principled basis in law, are the Courts entitled to find an equitable interest in property to exist where the parties did not have a common intention as to how beneficial interests in a family asset should be held? The first part of the question I would answer in this way. Has there been a direct or indirect contribution by the claimant in relation to the property in circumstances such that it should be inferred that the claimant would have understood that those efforts would naturally result in an interest in the property? If so, and this is the second part of the question, I would be inclined to answer in terms of the well settled principles of estoppel which preclude the legal owner from denying the existence of an equitable interest in the property.

Estoppel cases

In Pettitt v. Pettitt Lord Upjohn at p.818 noted that the land owner might be estopped from denying the existence of a beneficial interest in the land and referred to Plimmer v. Wellington City (1884) 9 App Cas 699. In that case a wharf and jetty had been erected on provincial government land by Mr Plimmer. In 1856, at the request of the government he incurred substantial expenditure for the extension of the jetty and the erection of a warehouse. The government used the land and works and, with his consent, improved the works.

When the land became vested in the City by statute the appellants sought compensation claiming that they had an estate or interest in the land for the purposes of the Public Works Act 1887. The Privy Council held that the transactions of 1856 were sufficient to create in Mr Plimmer's mind a reasonable expectation that his occupation would not be disturbed and those dealings and the subsequent dealings of the parties could not be reasonably explained except on the supposition that he was to have a perpetual licence. In reaching that conclusion the Privy Council cited with approval the following passage from the judgment of Lord Kingsdown in Ramsden v. Dyson (1866) LR 1 HL 129, 170:

If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation.

In its classical form five elements were considered necessary for the creation of such an estoppel. The classic statement is that of Sir Edward Fry in Willmot v. Barber (1880) 15 Ch D 96 where he set out what he described as the five probanda in this way (pp.105-106):

In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right

claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

In recent years, and as noted in our judgment in Wham-O Manufacturing Co v. Lincoln Industries Ltd [1984] 1 NZLR 641, 671, there has been a trend away from the strict application of those five probanda to a more flexible test of unconscionability. That is reflected, too, in the discussion in the Privy Council in Attorney General of Hong Kong v. Humphreys Estate (Queens Gardens) Ltd [1987] AC 114. The judgment of Lord Templeman in that case approved the conclusion reached by Oliver J following his review of all the authorities in Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co Ltd [1982] QB 133, 151 that:

the more recent cases indicate, in my judgment, that the application of the Ramsden v. Dyson LR 1 HL principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

The judgment in the Attorney General of Hong Kong case also approved the statement of principle by Lord Denning in

Crabb v. Arun District Council [1976] Ch 179, 188 that if a person:

by his words or conduct so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied.

But, significantly for present purposes, the Privy Council held that all three elements of estoppel had to be satisfied. While the Hong Kong Government had acted to its detriment the other two essential elements were not present: the creation or encouragement of a belief or expectation by the company and a reliance on that by the Government. The case was not approached as a question of unfairness or unconscionability in the round.

Estoppel and de facto relationships

There are several English decisions in the context of property rights of parties to de facto relationships where estoppel has been invoked. In Greasley & Ors v. Cooke [1980] 3 All ER 710, assurances by the appellant's de facto husband, and later his brother who succeeded to his legal interest in the house, that she could remain in the house for as long as she wished, raised an equity in her favour. It was to be presumed, in the absence of proof to the contrary, that she acted on the faith of that assurance to her detriment. Then in Grant v. Edwards [1986] 2 All ER 426, where a common intention that the woman concerned should

have a beneficial interest in the house was upheld, Sir Nicholas Browne-Wilkinson VC, while not resting his judgment on proprietary estoppel, observed (p.439):

If proprietary estoppel is established, the court gives effect to it by giving effect to the common intention so far as may fairly be done between the parties. For that purpose, equity is displayed at its most flexible: see Crabb v. Arun. Identifiable contributions to the purchase of the house will of course be an important factor in many cases. But, in other cases, contributions by way of the labour or other unquantifiable actions of the claimant will also be relevant.

And subsequent unreported judgments in both England and New Zealand to which we were referred demonstrate the utility of such an approach to the determination of beneficial interests in family assets which is grounded in estoppel. That involves determining whether the elements of encouragement (of a belief or expectation), reliance on that, and detriment were present. In that assessment domestic services may be as significant as or more significant than any financial contributions. In many cases, if not in the ordinary course, they are likely to have been induced by reasonable expectations of security of the family environment and of sharing the family assets on which the de facto relationship is based. And, when it comes to the nature and quantification of the relief to be provided, there is no presumption that a direct contribution of a monetary nature to particular property is of greater value to the relationship than any other contribution to the relationship and its property base.

With some diffidence I suggest that much of the difficulty

in this branch of the law arises from two features influencing the approach of the Courts to the problem. One stems from the reality that the parties in many de facto relationships never turn their minds to the eventuality of breakdown and consequential division of family assets so, it is said, they cannot have had any intention, let alone common intention, to recognise beneficial interests in the property. Of course, that is not the end of the inquiry. The next step is to focus on their attitudes to the family property while the relationship endured, and for that purpose draw appropriate inferences from the way they led their lives together. It is then a matter of determining whether to allow the legal title to rule when that relationship has ended is in breach of any legal principle.

The other is that in a period of social change, and particularly where change tends to begin largely with the young and then to seep through to older sections of society including the judiciary, the assumptions which are drawn from the living and sharing arrangements of the young (and now not so young) are likely, at least in the early cases before the Courts, to be somewhat variable and unpredictable. Whatever legal route is taken to resolve the property conflicts arising on breakdown of the arrangements - common intention, unjust enrichment, unconscionability, estoppel - it is crucial that the conduct of those concerned be assessed against contemporary standards, and recognising that individual expectations within relationships must be affected by changing attitudes in society.

Applying estoppel principles

Approaching the general issue with those two caveats in mind I consider that, with some limitations, the doctrine of estoppel provides an appropriately principled approach, short of legislation, to the resolution of property disputes arising on breakdown of de facto relationships in cases where the parties have not dealt expressly with the matter, and an actual common intention cannot be discerned. The three elements, encouragement (of a belief or expectation), reliance and detriment have to be considered in the light of the actual relationship of the parties, the way they lived their lives. The existence of a sexual relationship standing alone is obviously not enough; nor is mixed flatting even though it may involve a degree of pooling of resources to meet current living needs; and those living together may have investments or other assets which they clearly wish to exclude from the pool. But where there is a de facto relationship of substantial duration in which, as in marriage, the parties contribute to their lives together in their different and agreed ways, through financial contributions and through other services, and family assets are acquired or improved for the purposes of that relationship, but with title to an item of property being taken or retained in the name of one alone for reasons not inconsistent with a sharing of property, those circumstances, without more, may lead to the ready inference that contributions made in those circumstances were made in reliance on an expectation of sharing and constitute a detriment to the other party.

Whatever the position in other countries, it seems to me that social attitudes in New Zealand readily lead to expectations, by those within apparently stable and enduring de facto relationships, that family assets are ordinarily shared, not the exclusive property of one or the other, unless it is agreed otherwise or made plain. The understanding of each as to why legal ownership was vested in one is obviously important. It is not enough that one spouse has benefitted from the contributions of the other either generally or in relation to the asset in dispute. If one party has insisted throughout that a particular item of property in that party's name is his (or hers) to the exclusion of the other, he (or she) cannot be said to have encouraged the other to a belief or expectation that it would be shared, nor that the other party relied on that even though the performance of spousal services and financial contributions constituted a detriment.

That philosophy is also reflected in unjust enrichment: a person who confers a benefit on another is not entitled to restitution unless it is justified by the circumstances under which it takes place, and ordinarily a person is not required to become an obligor unless he or she so desires (Restatement: Restitution para 2 pp.15-16).

The result in this case

That is in essence what happened in this case. The facts are set out and analysed in the judgment of Cooke P. and I agree with his conclusion that the appellant made it

clear to the respondent at all times that she was asserting that the house was hers and hers alone. I would allow the appeal.

The future

The intractable difficulty facing the Courts in considering property interests of those in de facto relationships which have soured is that there is no particular legal status attached to de facto relations. For the Courts to equate it to the status of marriage and apply matrimonial property principles would involve unwarranted judicial legislation. This gives rise to serious practical problems. One is the uncertainty created by the existence of various judicial approaches (and in various jurisdictions) to the same social policy concerns. Another is that the mere existence of a de facto relationship (however defined) does not raise a presumed entitlement to share. A further difficulty is that the equitable principles invoked by the Courts provide a limited basis on which complex questions in this area can be readily resolved by reference to clearly stated and well understood laws. Those principles do not provide obvious answers to the range and kinds of issues dealt with specifically under matrimonial property legislation. And it is not as if the public policy answers are self-evident - the Report of the Working Group on Matrimonial Property and Family Protection (1988) identifies five different options for reform.

In an area of family relations which is now so basic to

the functioning of society there is, I believe, much force in the argument that a statutory code enacted after appropriate consideration of all the public policy interests involved, and providing a clear statement of the principles to be applied, would be a better basis for allocating property interests than continued reliance on the innovative skills of the judiciary in developing and adapting equitable principles.

Robert L. J.

Solicitors

Osborne Gray & Partners, Whakatane, for appellant
Sharp Tudhope, Tauranga, for respondent

BETWEEN BRONWYN ROSE GILLIES of
Papamoa, Receptionist

Appellant

A N D PATRICK ROBERT KEOGH of
Papamoa, Plumber

Respondent

Coram: Cooke P
Richardson J
Casey J
Bisson J

Hearing: 17 July 1989

Counsel: L A Andersen for Appellant
J P Gittos for Respondent

Judgment: 29 September 1989

JUDGMENT OF CASEY J

The analysis undertaken by the President and Richardson J highlights the problems encountered by the Courts when coming to terms with current expectations of fair treatment for those cohabiting outside marriage when their relationship comes to an end. Attempts to solve property disputes after marriage breakdown were firmly based on the law of trusts after the notion of a special regime of 'family assets' had been rejected by the House of Lords in Pettit v Pettit [1969] 2 All E.R. 385. Thereafter the

detection of the spouses' common intention seen as necessary for the imposition of a trust became increasingly artificial. The reality was (and still is) that most partners gave little or no consideration to the way they owned or shared their assets until they separated. With married couples the problem of a fair division has been dealt with by the matrimonial property legislation, but the parties in other broken relationships are still left with a search for some rational basis of equitable division. The problem is that those relationships cannot be simply brought within a single publicly recognised status such as that of marriage. The general term 'de facto' is not specific enough to justify a unified sharing regime for the differing domestic situations which may exist. They may range from casual associations (not necessarily sexual), to lasting family partnerships with children, amounting to a marriage relationship in everything but name.

The search for a credible basis on which to found a constructive trust has led to the adoption by Commonwealth Courts of a number of expedients, ranging among inferred or imputed common intention, estoppel, and an expansive doctrine of unjust enrichment. Whether intervention against unconscionable conduct to the extent now undertaken would have been allowed under more orthodox Chancery rules is beside the point: the fact is that in matrimonial and other relationships of a similar nature, old remedies have been

moulded on a case-by-case basis to achieve a result which, as the President has noted, now seems to be working with reasonable success in dealing with contributions to property in what I would call conventional de facto situations. However, I have reservations about the extension beyond this area of a concept of unconscionability based on the frustration of the parties' reasonable expectations, or on unjust enrichment.

There is a wide gap between the extent of the remedies under the Matrimonial Property Act regime and those available to former parties in other relationships. The report of the Working Group on Matrimonial Property and Family Protection (October 1988) recognised this and was unanimous in finding that the present law relating to de facto relationships is unsatisfactory and should be reformed. It noted and discussed provisions in the New South Wales De Facto Relationship Act 1984 and the South Australian Family Relationships Act 1975. Of particular concern was the position of those partners who make no contributions to property, but in all other respects fulfil the same family functions as legal spouses, often in a lengthy relationship. The extension of proprietary interests to recognise services of that nature raises questions of definition and social policy which are generally beyond the Courts' experience to assess or deal with adequately under existing law in this field.

Moreover, as the implications of recent decisions become more widely known, the Court's assistance is likely to be sought in the resolution of property disputes arising from relationships which are not as clear-cut as the family type de facto situations which have usually come before them. What constitutes unconscionability based on reasonable expectations in other circumstances may well pose very difficult problems, and in all these areas the parties as well as the Courts would benefit from the certainty of legislation which at least defines socially acceptable boundaries and general principles for the exercise of jurisdiction.

Returning to the present case, I am content to adopt the general approach taken by the President and Richardson J in determining whether conduct in this area of domestic relationship is to be regarded as unconscionable. The appellant made it clear that she intended to retain sole ownership of the house, prompted by considerations which cannot be regarded as unreasonable in the context of their relationship, having regard to her past experience and the obligations to her daughter. In these circumstances the respondent could not reasonably have expected to share in the house, and I do not regard her conduct in refusing to acknowledge such an obligation as unconscionable. I would allow the appeal.

M. G. Casey J.

BETWEEN: BRONWYN ROSE GILLIES

Appellant

AND: PATRICK ROBERT KEOGH

Respondent

Coram: Cooke P
Richardson J
Casey J
Bisson J

Hearing: 17 July 1989

Counsel: L A Andersen for appellant
J P Gittos for respondent

Judgment: 29 September 1989

JUDGMENT OF BISSON J

This is an appeal from the judgment of Gallen J which opened with these words,

"This is an unusual case which raises in an acute form, problems which current social relationships are likely to ensure come more and more frequently before the Courts."

The social relationship between the appellant and the respondent is generally known as a de facto marriage. The facts are fully stated in the judgment of Cooke P which I have had the advantage of seeing in draft. For the purposes of this judgment I need state only a brief outline.

The parties met in 1981 and went to Australia where they spent a working holiday, travelling about, living and working together, and sharing their earnings in a joint account. It was not until they returned to New Zealand that a house was purchased. It was purchased by the appellant in her sole name in December 1982. She also provided the furniture. Both found work and paid the bulk of their earnings into a joint account which was used for household expenses and outgoings in connection with the house. These did not include any repayments of principal under the mortgages. The house was extended, substantially improved and the garden developed. Although the appellant, her father and brother all participated substantially in this work, probably the greatest physical contribution was made by the respondent.

About mid-1984 the appellant became free to re-marry. The parties became formally engaged to marry. Later in that year the house was sold and from the proceeds, with some loan monies, another house was purchased in the sole name of the appellant. Again the appellant, her father and brother, and the respondent all helped in cleaning up the house and grounds. Shortly after, in January 1985, the parties separated. Only two monthly repayments of principal of \$118.55 each had been made from the joint account.

The respondent initiated this proceeding claiming a 40% share in the net equity of the property or judgment for

\$20,000. His claim was based on an express or implied agreement or a constructive trust. No claim was made under s.8 of the Domestic Actions Act 1975 in respect of a property dispute arising out of an agreement to marry (cf Oliver v Bradley [1987] 1 NZLR 586).

Gallen J did not find in favour of an express or implied agreement that the respondent had any beneficial interest in either house property owned by the appellant. However, he had made a contribution to those properties to a limited extent financially but more particularly by his labour in improvements to them and accordingly Gallen J applied equitable principles to hold that a constructive trust existed to reflect the direct and indirect contributions of the parties and that,

"In the overall context of this matter, if the defendant (appellant) were to retain the whole of the fruits of the activities of the parties during the time they were together, there would be unjust enrichment as that concept has been considered from Lord Mansfield on.

I accept that in the context of this case, it might be considered unreal to justify intervention in terms of expressed or implied intention, but I think that there is ample justification to consider that the circumstances are appropriate to impose a trust as contemplated by the authorities. I accept that there are conceptual difficulties in selecting a recognised category of trust which might be considered as appropriate, but I think it follows from the comments made in Hayward v Giordanni and other similar decisions, that the circumstances which will justify the intervention of equity, are not to be confined by a rigid categorisation of those circumstances in terms of particular kinds of trust developed to meet other situations. In my view the plaintiff has established an interest which may properly be recognised in the equitable jurisdiction of the Court."

For these reasons Gallen J awarded the respondent the sum of \$10,000 being approximately half of the capital gain in respect of the first property, his contribution to the improvements to that property being about equal to that of the appellant and her family.

In the absence of any express or implied intention that the respondent, by dint of his contributions to the property in question, should have a beneficial interest in it, the issue is whether the appellant should retain the benefit of those contributions, in the absence of any beneficial interest of the respondent, without paying compensation. The answer does not depend on variously expressed legal principles whether classified under headings of constructive trust, unjust enrichment, unconscionable conduct or estoppel applied on a theoretical basis, but on those principles applied to the facts of the particular case.

I turn to an aspect of the facts of this case not already mentioned. The sum of \$12,500 contributed by the appellant to the purchase price of the first property, being the whole of the price not borrowed at the time, came from a fund derived from her share from her former matrimonial home after she and her husband separated. The respondent later contributed a comparatively small amount variously calculated at \$500 or \$750 when a temporary loan from a friend was repaid. The appellant's fund retained for the purchase of a home had been acquired when her husband had

purchased her interest in the matrimonial home for \$15,000 at what she thought was an under-value. The following passage from the cross-examination of the respondent is significant,

"She felt she had been done in the eye in relation to property ... yes.
Would this be something she talked about quite frequently during the times you were together ... very frequently.
She wasn't going to make that mistake again was she ... no."

Gallen J accepted the appellant's evidence that she regarded the amount she received as sacrosanct and to be held for the purpose of obtaining a replacement home of her own. The appellant said in evidence,

"He (the respondent) knew it was my house and always admitted it was my house. The purpose of buying the house was because I wanted to own my own home, I had done so once and I wanted to again...

"He always accepted it was my home and admitted it was my home and that he really had no interest in it."

Consistent with the appellant's evidence is that of the respondent who said,

"I never said that it was my house - I never argued that point."

Also relevant is the following passage from the cross-examination of the respondent regarding his attitude to working on the improvements to the house at that time,

"The alterations done to the house made it more comfortable for you to live in it ... yes.
You did the work because you were living there and

because of your affection for Bronwyn ... to some extent, yes...

You were living in the house, had relationship with her, thought you should do that (work) ... yes. It would have been quite contrary to relationship you then had for you to suggest you get paid for the work you did ... yes.

You had no thought of payment at the time ... no."

What distinguishes this case is that the acquisition of the home was not a joint endeavour. It was very much the endeavour of the appellant alone using a fund entirely of her own to acquire a home of her own. She also had some financial assistance from her father who provided \$5,000 towards the purchase of both houses and did not require interest to be paid. The respondent was not involved as a guarantor of either the first or second mortgages. Admittedly there was some joint endeavour in physical work improving the property and financially from the pooled earnings in their joint account. But that must be looked at in the context of the appellant's determination to own her own home because of her unhappy experience with her former home. She had owned her own home once and wanted to do so again. In this context it would be unreal to find in favour of any implied or imputed intention that the respondent should have an interest in the appellant's home. The evidence is to the contrary. There was no indication by words or conduct of the appellant such as would lead the respondent to believe the appellant would not insist on her strict legal rights.

The application by Gallen J of the principle of unjust enrichment appears to turn on two factors. First that there was some detriment to, by way of contribution by, the respondent, with a benefit to the appellant. But, with respect, those two factors alone are not enough to justify a finding that the enrichment of the appellant is unjust if she retains all that benefit without the respondent having a share in the property or receiving compensation. A vital third factor is missing. There is no finding, as the evidence would not support such a finding, that there was any creation or encouragement of a belief or expectation by the respondent or reliance by the respondent on a belief or expectation that he would acquire an interest in the property or be compensated if the relationship came to an end. Without that third factor the Court is not free to take from one party and give to another as if the relationship itself and services rendered alone justified some reward beyond benefits enjoyed throughout the relationship. To make such an adjustment is to interfere without juristic reason with the property arrangements which the parties were free to make for themselves.

In this case, after their working holiday in Australia, the appellant and the respondent resided together in the two homes acquired by the appellant for a period of only two years. During that time the work he did on the first house in particular was done with no thought of payment, to some

extent because of affection for the appellant and was done in conjunction with the work the appellant and her family carried out at the same time." One is left with the impression that the respondent's work and financial contribution was no more than his due for the relationship he enjoyed with the appellant in the home she provided. The facts are in striking contrast to those in Oliver v Bradley (supra). In that case the de facto husband paid the deposit of \$2,006 on the purchase of the home in the wife's name and spent \$13,179 on improvements over a period of between three and four years.

In Pasi v Kamana [1986] 1 NZLR 603, 605 Cooke P said one way of putting the test for a constructive trust in a de facto relationship was as follows,

"...the test is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property."

This test has been followed in a number of High Court judgments and I see no occasion to apply any different test in this case.

In the absence of specific findings by the trial Judge, I would draw the conclusion that a reasonable person in the respondent's position would not expect a benefit, nor would a reasonable person in the appellant's position expect to have to concede a benefit, whether by way of an interest in