

Dr Juliet Chevalier-Watts

Senior Lecturer in Law, Co-Director Waikato Public Law and Policy Unit, Te Piringa –
Faculty of Law, University of Waikato
PhD, PGCLT, LLM (distinction), LLB (Hons), BA (Hons)

Introduction

This case came about by appeal from the District Court, which dismissed the appellant's claim. The appellant, Grant Parkins (Grant) declared 25% interest by way of institutional constructive trust over a property in the Marlborough Sounds (the property), which is opposed by his brothers, Steven Parkins (Steven) and Reece Parkins (Reece). Grant states that his interest arises because of his substantial contributions to the property after it was bought by his late father, Morris Parkins (Morris). The property was substantively developed after its purchase. The property had been left in equal shares to the three brothers by Morris in his will. Of note is that the terms of Morris' will were not challenged in any way by any of the brothers. Whilst this case does not challenge the law of institutional constructive trusts, it provides a useful and instructive summary of the established law and thus adds to the institutional constructive trust narrative. Prior to considering the law, we will first provide an overview of the facts.

The Facts

In brief, the property was purchased by Morris in 1990. At the time of the purchase, the property was said to be on a remote piece of land. Morris devoted substantial hours renovating the property over the years. The three sons also assisted extensively with the renovations as they each had practical skills that were valuable to renovating but the work was mainly carried out at weekends because Morris and his sons all had full time employment during that period. The property was completed in January 1999. Whilst the brothers did assist with the renovations, they also enjoyed recreational activities that were offered by the property, including fishing and hunting. In 2008, Morris became unwell and entered residential care, from which he did not return. When Morris went in to care, Reece assumed responsibility administering his father's affairs and the costs of the property were divided equally between the 3 sons, and the equal sharing of the property costs has not changed.

Institutional Constructive Trusts – the Law

As confirmed by Gendall J, the law on “institutional constructive trust[s] ... is well settled” (*Parkins v Parkins* at [27]) and as much as that is true, it is meritorious to set out the key principles because of their value in affirming the law. As Gendall J noted (at [28]), the leading case on this doctrine is the Court of Appeal case of *Lankow v Rose* ([1995] 1 NZLR 277). In that case, Hardie Boys J stated that there were two requirements for a constructive trust were as follows:

“that the plaintiff contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant's assets, and that the parties must be taken to have expected that the plaintiff will share in them as a result”

In adding to these requirements, Tipping J in *Nuthall v Heslop* stated the requirement for (at [29], citing *Nuthall v Heslop* [1995] NZFLR 755):

- “(a) Contributions, direct or indirect, to the property in question;
- (b) An expectation of an interest;
- (c) A reasonable interest; and
- (d) The defendant to reasonably expect to yield the claimant and interest.”

In addition, the Court in *Blumenthall v Stewart* stated that the requirements were as follows (at [30], citing *Blumenthall v Stewart* [2017] NZCA 181):

- “(a) Contributions, direct or indirect, to the property in question;
- (b) A reasonable expectation, sourced in those contributions, of an interest in the property; and
- (c) It must be reasonable to expect the legal owner to yield an interest in the property.

Further to this, Gendall J stated (at [31]) that those specific contributions must clearly surpass or go beyond the benefit that the plaintiff obtains from the arrangement in question, and additionally, those contributions must exceed that which would be anticipated within a family unit. It is also important to note, as Gendall J confirmed, that where a court determines that such a constructive trust should be recognised, then that court should grant relief so that equity is met to ensure “a just and fair result” (at [32]). Gendall J further observed, which does assist in likely adding to the clarity of the constructive trust narrative, that it appears that a straightforward consideration of the contributions exceeding benefits in isolation is insufficient to determine the recognition of the constructive trust. Consequently, what is important to understand is the context in which the plaintiff has made those contributions. Thus for example, it is evident that courts have been more prepared to intervene where relationships have entailed marriage, or the equivalent. The courts appear less likely to intervene where other relationships have been in evidence, such as might arise between families or indeed, strangers. In those types of latter relationships, courts have not been as prepared to find an intention to yield part of the defendant’s legal interest to anyone else. (Footnote 11, referring to *Basile v Basile*, HC Wellington CIV-2006-485-425, 1 September 2008.) Indeed, as evidence of this, since the case of *Lankow v Rose*, generally speaking, the circumstances in which constructive trusts have been recognised have been in relation to de facto relationships (at [33], referring to Andrew Butler (ed) *Equity and Trusts in New Zealand*, 2nd edition, (Brookers NZ, Wellington 2013) at [13.2.4]).

Application of Institutional Constructive Trust Principles

Gendall J was clear that in order for such a constructive trust to arise, Grant must establish more than merely contributing to the property, and indeed, what is required is a series of related circumstances where it would be reasonable to anticipate that the legal owner of the property would relinquish some of their interest in that property. That would mean that it would not be conscionable for the legal owner to continue to maintain their interest when the plaintiff asserts an interest in the property (at [34]). This helpful summary of the requirements of institutional constructive trusts is instructive in that there are clear demarcations in the type of contributions required; the circumstances relating to the expectations of the legal owner; and the equity of the legal owner retaining their interest in the property. As a result, without all these factors being established, there are merely contributions to an asset without the recognition of an institutional constructive trust (at [34]).

What was not in doubt was that Grant had contributed substantively to the development of the property with his labour up to around 1999 when his mother died but it was the events subsequent to that that are debated by Steven and Reece whereby they signal that their later involvement in the property development actually surpassed Grant's involvement (at [35]). However, Steven and Reece question Grant's claims relating to his financial contributions to the property, and indeed, Grant was not able to substantiate those claims, and further, the evidence presented to the District Court actually suggests some of Grant's claims on this point were not correct (at [36]). Nevertheless, regardless of some of these discrepancies in the labour, it is possible that Grant may have been able to establish that he provided sufficient direct or indirect contributions to the property to establish a prima facie institutional constructive trust, and that he had a reasonable expectation that he would have an interest in the property as a result (at [37]-[38]). However, Grant must also demonstrate that the legal owners of the property were clear that Grant would obtain the interest that he claims. In relation to this latter requirement, evidence points to the fact that it was only after 5 years subsequent to Morris' death that Grant stated to his brothers that he was due a 25% constructive trust interest in the property. Of note is that Grant did not discuss this with Morris or his mother and indeed, he himself confirmed that one of the key reasons for accompanying his father to the property to assist with the renovations was because he enjoyed going there so much and working with Morris. Thus in Gendall J's view, this evidence seriously undermined Grant's claim that he was entitled to a 25% share of the property (at [40]-[41] and footnotes 13 and 14).

Helpfully, Gendall J set out assistance as to how this requirement should be addressed in relation to establishing a constructive trust, or not, and stated that there needed to be some related circumstances that contextualised that it would be reasonable to expect the property owner, that being Morris' estate, to yield the interest in question to Grant as a result of his contributions. Not only that, it must also be determined if not yielding that interest would be unconscionable for the property owner, and that must be established even if Grant could successfully establish that he contributed sufficiently to the property, and that there was an expectation that he would receive the interest, and that the expectation was reasonable (at [42]).

In considering the reasonableness of Grant's expectation, and the reasonableness of the expectation to yield by the owners, there were a number of aspects that his Honour was of the view that did not assist Grant in his application, and they will be set out summarily for clarity purposes, and thus perhaps to aid in the decision-making of other cases (at [44]):

- a) When the property was bought, Reece and Grant lived with their parents;
- b) Early after the property was purchased, all the brothers would travel to the property at the weekends to help their father although Grant did spend more time there than his brothers. However, from circa 2000 Reece and Steven spent more time at the property than Grant;
- c) All the brothers appreciated the lifestyle the property provided for them;
- d) The renovations of the property occurred generally at weekends as all parties worked full time and each contributed different skills at various times. From 2000, much of the work was undertaken by Morris to the second home on the property.
- e) There was no family pressure to work on the property and nor was it a business nor commercial undertaking.

- f) Grant was given substantive support by his parents to set up his engineering business, both in terms of financial support, as well as being able to live at home.
- g) Grant did confirm that he enjoyed carrying out the work he did on the property but at all material times the property appeared to be Morris' emotionally as opposed to the brothers thus suggesting that there was no expectation that Grant would be favoured with any additional interest in the property. Indeed, Grant noted that he was unsurprised that the three brothers were to receive equal shares in the property.
- h) Of note is that Reece suggested to Grant that Grant may wish to obtain formal acknowledgment from their father relating to the additional contributions that Grant had made to the property but Reece also stated that he did not expect his father to do this, and it would appear that Grant also did not expect his father to provide this, hence Grant failing to follow up this suggestion further with Morris.

One can clearly see the surrounding circumstances, to which Gendall J made reference earlier, as being important in ascertaining the recognition of an institutional constructive trust, and indeed, it was all those circumstances that have been noted that led the District Court to conclude that conceding additional interest in the property, nor that such conceding would be reasonably intended, and nor that it could be reasonably be expected. Overall, therefore, Gendall J confirmed that it is important to bear in mind in cases such as these the underlying principle set out by Tipping J in *Lankow v Rose* (at [48] citing *Lankow v Rose* at [293]) where by "[t]he [constructive] trust is imposed because equity will not allow the legal owner to deny the claimant a beneficial interest". Consequently, and in application, Gendall J could not conceive that Grant's assistance in renovating the property was greater than the raft of assistance he received as part of the family so much that it would not be conscionable for the estate to retain the legal interest that Grant sought. Indeed, because the property was deemed to be the family bach, and very much Morris' pride and joy, it would be inequitable to permit Grant a 25% share in the property instead of the one third share for each of the sons, as Morris had decreed in his unchanged will of 30 years. Indeed, it seemed likely, in Gendall J's view, that Morris had an expectation that his sons would assist him to renovate the property because that was part of being the family and a reflection of Morris' strong work ethic, much as Morris and his wife assisted their sons where they were able, thus all the family members reaped rewards for engaging fully within that family unit (at [48] – [49]). As a result, and in application fully of all the institutional constructive trust principles, it is clear that Grant was not able to establish that the estate should reasonably cede 25% of the property interest to Grant.

This case usefully, therefore, demonstrates the importance of considering all the relevant circumstances surrounding contributions made to a property to understand fully the context in which those contributions were made, as ably set out by Gendall J, and whilst each case circumstances will be different, this indepth analysis is illustrative of the relevance of such circumstances. Thus, it appears the context of the contributions is key, not just that contributions were made, regardless likely of the substance of those contributions. Such context will assist in gauging then whether those contributions led to a reasonable expectation of an interest in the property, and that it would be reasonable that the legal owner would cede that interest in the property. All the circumstances surrounding the contributions in the case in question led to the failure to establish the existence of an institutional constructive trust in Grant's favour.