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PROPERTY DISPUTES AND THE DEVELOPMENT OF THE CONSTRUCTIVE TRUST IN RECENT NEW ZEALAND LAW

TOWARDS A THEORY?

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In a liberal sense "equity" encompasses a body of principles which have as a common denominator "that which is just and fair".[1] One such principle is that whenever a person holds property which in equity and good conscience they should hold for another, a constructive trust will be imposed to compel them to do so.[2]

An equally important principle of equity is that while justice may underlie many of its principles, justice alone must not be the sole test. Equitable relief must only be granted if the case can be brought into or is analogous with a pre-existing category. That is not to say that equity cannot develop : only that its development must be based upon principles that can be applied with a requisite amount of certainty. Equity has not condoned its use merely because the justice of a case cried out for a remedy.

Yet Lord Denning has been accused of doing exactly what has been forbidden. He started with a "fair and reasonable" test for deserted wives[3] and proceeded to develop a "justice and good conscience" test for de facto spouses. The latter test has been advanced by Lord Denning as a workable test for the imposition of a constructive trust.

The author examines the criticisms lodged against Lord Denning's "new model constructive trust" (the "Denning trust") and questions whether his formulation is really too uncertain for the courts to apply. Assuming that it is, the author advances an alternative to "justice" for the imposition of the constructive trust : UNJUST ENRICHMENT.[4]

An examination of other possible foundations for the constructive trust, such as free acceptance, unconscionability and estoppel will reveal that they are all aimed at preventing unjust enrichment, albeit from different levels.

It is therefore submitted that New Zealand should accept and develop the principle of unjust enrichment as the principal foundation for the constructive trust.

PART I : INTRODUCTION

> I suspect that the different approaches in the cases are largely a matter of words ... I respectfully doubt whether there is any significant difference between the deemed, imputed or inferred common intention spoken of by Lord Reid and Lord Diplock (and now by the English Court of Appeal in Grant v Edwards) and the unjust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Dennings "justice and good conscience" and "in all fairness" : at bottom in this context these are probably different formulae for the same idea. As indicated in Hayward v Giordani, I think we are all driving in the same direction.[5]

In Pasi v Kamana[6] Cooke P used these words to express the view that the constructive trust is merely a remedy for supposed injustice. The importance of these words, however, is that they accurately state the current state of the law on constructive trusts : a number of apparently different foundations which have as their central aim the disbursment of justice. Although many jurisdictions have adopted only one approach, many have expressly rejected Lord Dennings developments.

The main reason for the apparent inadequacy of the traditional constructive trust has been the demands of changing society. By definition a society is a collection of individuals who have chosen to live together and interact with one another. As the relationships in society have become more complex, so too have the problems these relationships generate. It is in this context that the courts have turned to the flexibility of equitable principles to provide a solution where the law provides none. It is in this context that the constructive trust has been seen to provide an answer:

> There seems no good reason why the categories of cases in which the courts have held trusts to exist should be considered to be closed. This branch of the law is not one where policy considerations should inhibit the courts from developing it to meet difficult circumstances and relationships and changing social conditions.[7]

One would expect any developed system of law to keep pace with an evolving society. Where, however, the law has failed to keep up, equity has stepped in and has provided the answers. Yet, while the results reached may have been correct, it should not be assumed that the principles used to reach those results have necessarily been the best. To highlight this in the context of the constructive trust the author will examine de facto spouse property disputes.

The original solution advanced for de facto's was the "common intention constructive trust". Then came the Denning trust. And in New Zealand there have been murmurs of a "reasonable person" test. It is submitted that all these represent a continuation, whether they be proper or not, of the development of the concept of a constructive trust. After all, little progress can be made if alternatives are not explored. With this in mind the author submits that the doctrine of unjust enrichment should now be explored by the courts as a proper concept upon which to base the constructive trust.

As will become apparent, almost all of the concepts that have been accepted in New Zealand and overseas as being the determinant of a constructive trust have as their basis the prevention of unjust enrichment. The great advantage of this concept over the Denning trust is that if it is allowed to properly develop, it will satisfy the courts' thirst for rules and certainty.

Part II : THE CONSTRUCTIVE TRUST IN NEW ZEALAND

A. Conventional Categorization

i. The Categories

Where a person has property or rights which he or she holds or is bound to exercise for or on behalf of another or others,[8] or for the accomplishment of some particular purpose or particular purposes, he or she is said to hold the property or rights in trust for that other or those others, or for the purpose or those purposes, and he or she is called a trustee.

The very elasticity of the trust concept which enables it to adapt to so many areas also presents difficulty when defining and categorising it.[9] For our purposes it will suffice to identify the generally accepted categories. These are, the "express trust" (created by the express words or conduct of the settler)[10], the "resulting trust" (where the settler is presumed to have retained a beneficial interest in the trust property in certain events)[11], and the "constructive trust" (imposed by law independent of any intention).[12]

These categories are not mutually exclusive. For example, while Maxton[13] categorises "implied" trusts as part of resulting trusts, Pettit[14] treats it as a separate category of trust, although conceding that many resulting trusts depend upon the implied intention of the grantor. Others consider the implied trust as synonymous with the constructive trust.

It has been argued that the line of cases developing the Denning trust have further blurred the line between "resulting" and "constructive" trusts. So the traditional yardstick of intention which was used to separate and define each category is no longer able to perform this function completely. This suggests we should look for a new yardstick, particularly in the context of the constructive trust since it has never relied upon intention as a requisite element.

(ii) Accepted Definition

The constructive trust is an equitable remedy which arises by operation of the law. It arises quite independently of the intention, express or implied, of the parties concerned. Thus, where a person has the management of property, either as an express trustee or other person clothed with a fiduciary character, he or she is not permitted to gain any personal benefit by exploiting their position to utilise such property or by exploiting an opportunity arising by reason of the fiduciary relationship.[15] Similarly, a stranger who receives property in circumstances where he or she has actual or constructive notice that it is trust property being transferred to them in breach of trust, they will also be a constructive trustee of that property.

Equity simply says that in certain circumstances the legal owner of property must hold it on trust for others because it would be inequitable to allow him or her to assert full beneficial ownership of the property.[16] Generally, whenever a person holds property which in equity and good conscience they should hold for another then a constructive trust will be imposed to compel them to do so.[17]

It is important at this stage to point out that the concept of constructive trusteeship can be quite similar to, but should not be confused with, concepts such as personal liability to account and tracing. These concepts are all linked to the requirement of a fiduciary duty in relation to specific property whether a specific asset or an identifiable fund. Unfortunately an examination of the case law shows that the courts have usually found it unnecessary to clarify the exact basis upon which a defendant has been found liable.[18]

(iii) Substantive Institution

When a plaintiff seeks a decree that property is held on a constructive trust, or that a particular person is a constructive trustee, he or she is seeking a remedy from the court.[19] This being so, a continuing debate has been whether the constructive trust is a substantive institution, that is, a thing with its own existence, as with private trusts and charitable trusts, or whether it is merely a remedy of the court dependent upon the operation of the law, just as an injunction is a remedy.

The traditional common law view of the constructive trust has been to treat it as a substantive institution,[20] imposing it only in certain defined circumstances. By contrast, in the United States the constructive trust is based upon wider principles, although still maintaining a relatively precise meaning, as stated in the American Restatement of Restitution: [21]

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be <u>unjustly enriched</u> if he were permitted to retain it, a constructive trust arises. (Empasis added).

Thus in the United States the constructive trust is regarded as an equitable remedy of a proprietary nature available to prevent unjust enrichment whenever the personal remedy is inadequate.[22]

It should, however, be noted that the question of the nature of the constructive trust is separate from the question of the circumstances in which a constructive trust will be found to exist. The two are unified under the American doctrine, because the principle of unjust enrichment determines the occasions in which the constructive trust arises, and also the nature of the remedy.[23]

The debate appears more complex when one realises that the notion that a constructive trust is a substantive institution can become mingled with the notion that it is merely a remedy. For example, we may say that if a constructive trust is declared to exist, the plaintiff obtains a remedy and conversely, that it is because the plaintiff ought to have a remedy that the court decrees that a constrictive trust exists.[24] Nevertheless, it is possible to conceptualise that the granting of the remedy is a recognition that a trust existed all along.

In support of the transitional view it is argued that it is because the consequences of the property being trust property are the same, whether the property is held under a constructive trust or an express trust, (the latter being a recongised institutional trust) that renders it correct to regard a constructive trust as a form of trust not merely a form of remedy.[25] Yet the duties of a constructive trustee bear little resemblance to those of an ordinary trustee.

However, mere lack of definition or inability to identify characteristics of the constructive trust does not void its capacity to have autonomous existence. The fact that no complete definition of a thing has ever been given has never been a bar to the recognition by the law that the thing concerned exists.[26]

The debate developed to a stage in the early 1970's when some writers were suggesting that the term "constructive trust" was being used to cover a varying spectrum of constructive trusts, some of which were close to being institutions while others were pure remedies.[27]

It is submitted that although traditionally the constructive trust could properly be regarded as close to an institution, the need to utilise it in new areas has seen it develop into something closer to a pure remedy. In recent times it has been used simply to do justice inter-parties. The importance of this development is that it would not be open now for the courts to reject the principle of unjust enrichment on the basis that unjust enrichment advances a remedial concept of the constructive trust.

B. Established Areas

A constructive trust may be imposed not only in respect of trustees and beneficiaries but also upon other fiduciaries who breach their duty.[28] At first sight the potential situations in which a constructive trust may be found appear to be unlimited. However, until recently the courts have only imposed a constructive trust according to principles firmly established from precedent.

It is not within the scope of this paper to discuss in depth the individual areas where the constructive trust has become established. It is proposed to briefly highlight the situations which have traditionally given rise to a constructive trust.

The areas are:

a. Fiduciaries in breach of their duty : where a fiduciary obtains a benefit from a breach of their duty a constructive trust will be imposed. The leading case in this context is Keech v Sandford.[29] This principle has been extended by analogy to purchase of the reversion by fiduciaries,[30] and to company directors[31] and others in fiduciary relationships.

b. Stragers Intermeddling : it is clear that where a bonafide purchaser for value without notice of the trust acquires trust property he or she will take free of any trusts attached to it and will not be made a constructive trustee. However, when a transferee does have notice that the transfer has been effected in breach of trust he or she will be liable as a constructive trustee.[32]

c. Vendors under contracts capable of specific performance : A vendor will be held a constructive trustee of property sold but not transferred, if the court would have ordered specific performance had the remedy been available.[33]

d. Mortgagees : some doubt surrounds the view that a mortgagee in possession is a constructive trustee of the rents and profits of the mortgaged property. [34]

e. Profit gained from killing : A beneficiary who murders a testator or a next of kin who murders an intestate cannot retain the property they acquire.[35]

f. Interests in property acquired by fraud : a constructive trust will be imposed on persons who acquire interests in property by fraud. Mahan J in Avondale Printers & Stationers Ltd v Haggie[36] said a constructive trust arises by operation of the law where it would be a fraud for the legal owner to assert his beneficial interest. Similarly, equity will not allow a statute to be used as a vehicle for fraud.[37]

g. Mutual Wills : although a will cannot be made irrevocable, nevertheless if there is an agreement between testators that neither will revoke their mutual wills and one does having already received benefits under the will of the first to die, then equity will interfere to prevent fraud by the imposition of a trust.[38]

It now becomes incumbent to analyse the new model constructive trust in an attempt to see whether it is legally justifiable as an extension of the established categories or whether it is truly a whole new concept of the constructive trust which encompasses existing categories.

C. Lord Denning Broadens the Scope

> ... Lord Denning throughout his judicial career has engaged in the manufacture of novel equitable doctrines to further his attitude to the merits of particular cases. His Lordship's inspiration is a notion of justice, dim and ever-changing to the eye of the spectator, but to him clear and compulsive of moral fervent and evangelical adherence ... to offer as authority moral precepts from Holy Writ and ones own previous utterances is to provide no substitute. 39

Despite such criticism, Lord Denning has been a debtor to his profession.[40] His "judicial law - reform" has allowed the law to keep pace with modern social problems. His unique quality was succinctly summarised by Ms Meher Master, a member of Lincoln's Inn and a leader of the Parsee Community in India. She had given Lord Denning a delicate model of a silver chariot drawn by seven elephants. One of them was in white alabaster. In her letter with the gift, she said:

> The great white elephant has no tusks for he does not need tusks to do his work in nature. This elephant's mind and thought force power is so highly developed in nature that he can do the work of spreading Justice and maintaining the Divine Law and Order among all souls ... This elephant represents you, Lord Denning, as the greatest force for TRUTH AND JUSTICE tempered with mercy, alive, today. (Emphasis added).[41]

Lord Denning attempted his judicial law - reform for deserted wives and battered wives before turning his attention to de factor spouses. After failing to base a remedy within various statues, Lord Denning turned to the concept of a trust. Any claim by a person to property which they did not legally own could only be based upon the proposition that the person who did have legal title held it as a trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. Yet, while the legal basis to Lord Denning's decisions turned on trust law, the principles upon which he relied were those of fairness and justice. The constructive trust in these cases were being imposed wherever justice and good conscience required, irrespective of any imputed intention or fraud.

The biggest fear expressed about this approach has been that with an all encapsulating category of "justice and good conscience", there is little need for the conventional categories of constructive trust. It was thought that this would make it hard, if not impossible, to advise a client in what cases a constructive trust might exist and that the certainty of "justice" as a test would lead to palm-tree justice. Yet there is little evidence to support these fears since the introduction of the Denning trust.

In all cases where the Denning trust, or a variation, has been used, a common factor has been that the claimant has been deserving of a remedy. Yet neither the common intention constructive trust nor the Denning trust have provided a remedy in these cases without their problems. The former is conceptually narrow and has therefore been stretched to satisfy the facts. That is, a common intention has been found by the courts where there clearly was no consensus between the parties. The latter is said to be too wide and leaves to much discretion to the individual judge. A middle ground may be the principle of unjust enrichment which will be examined later. This concept has identifiable elements that need to be satisfied while being flexible enough to adapt to many situations.

Part III : CONSTRUCTIVE TRUST OF "A NEW MODEL"

A. Introduction

Nearly 2400 years ago Plato asserted that there should be equality between men and women. Since then the idea of equality between the sexes has developed and been advanced in many facets of daily life. Among the promoters of equality has been Lord Denning. In his book entitled The Due Process of Law[42] he gives a wonderful description of the male - female partnership and concludes by saying "neither can do without the other. Neither is above the other or under the other. They are equals". (Emphasis added).

With this attitude in mind, Lord Denning developed and applied to the law of de facto property disputes, the concept of equality. The vision of equality, and with it equity, which Lord Denning has been guided by is not a "dim notion". The problem, however, is that the vigour of Lord Denning's belief prompted an "instant" answer by way of his new model. It would have been more fruitful if he had persued this goal by "developing" a new concept and remedy based upon identifiable theoretical principles.

B. De Facto Property Disputes

i. The Dilemma

The phrase "de Facto relationship" is most commonly used to describe a relationship between one man and one woman who live together as if they were husband and wife on a domestic basis without being legally married.[43] Clearly there are de facto relationships which are

indistinguishable from legal marriages, apart from the lack of formalities. Even with less permanent and committed relationships, problems can arise when the relationship comes to an end.

According to the 1986 Statistics, approximately 5%[44] of the adult population are living together without being married. Despite this, however, at the instigation of one party the Courts and Parliament are increasingly treating the parties as though they were married.[45] Though there are no statistics, any observer of the family scene in this country will note the increasing number of claims being brought in the courts by persons who have been party to such relationships. Thus, while the number of de facto relationships increases, so does the phenomenon of their break-up. Yet our legislature seems content to leave it to the courts to decide the respective rights of de facto spouses when they break-up. The results in these cases have turned not on a reasonably coherent set of principles as we find in the Matrimonial Property Act 1976 but on the vicissitudes of the general law and in particular the law of trusts, contract, restitution and (where one party has died) succession.[46]

While cohabitation subsists, there can often be little outward difference between legal and de facto marriages. Most of the legal differences emerge when the relationship ends by separation or death. In New Zealand there is no statutory jurisdiction having the express purpose of resolving property disputes between parties to a present or former de factor relationship. Fundamentally, the relationship of cohabitation has been ignored and the rights of the parties assessed on the same basis as neighbours at arms length.[47] It has only been due to the resourcefulness of some lawyers and judges that jurisdiction has been found to cope with the equivalent of a family law problem.[48]

(ii) Solutions In the Past

The dominant jurisdiction in establishing property rights between de factor spouses has been informal trusts,[49] that is, express, resulting and constructive trusts.

As mentioned, an express trust can be created by any expression or intention on the part of the owner or owners of the property in question. In the context of cohabitation such trusts can be established more readily than might first be supposed in view of a judicial readiness to interpret conduct as evidence of an implied intention, together with the presumption of equality where it is intended that each de facto spouse was to have a substantial interest but the interests were not precisely defined.[50] Illustrations of express trusts can be found in Gough v Fraser[51] and Hayward v Giordani.[52]

A resulting trust is based upon the assumption that in the absence of evidence to the contrary, a settler is likely to have intended to retain the beneficial ownership in such of his property as was not effectively disposed of to another. The law assumes that where one party has contributed to the purchase price of an asset they retain a beneficial interest in it in proportion to their contribution via a resulting trust : Estratiou v Glantschnig.[53]

Where two spouses contribute to the purchase price of property but the conveyance is taken in the name of one only then, applying general principles, a resulting trust will arise based upon the presumed common intention that the parties are to share beneficially in the property according to their contribution.[54] However, the House of Lords in both Pettit[55] v Pettit and Gissing[56] v Gissing stressed it was fundamental to the imposition of a resulting trust in this contact for

there to be proof or evidence of a "common intention" whether express or inferred. As Lord Diplock said:[57]

> If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or baths the children, I, for my part, find it impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect on the existing proprietary rights. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would enter their heads.

In addition, the claimant must shown that he or she acted to his or her detriment on the basis of that common intention.[58] The cases, however, seem to stand or fall on whether there was a common intention.

The problem with the approaches discussed above is that there will be so many de facto relationships, particularly if there are children, where one spouse will go out and earn money to pay for food and bills while the other will tend to the household chores. Here, the main reason why one spouse (usually the male) can go out to work is because "the cock can feather the nest because he does not have to spend most of his time sitting in it".[59] It will therefore be very difficult, if not impossible, for the spouse who stays at home to contribute financially to the relationship and thereby be left with little materially if the relationship should end (based upon the approaches above).

C. "Justice and Good Conscience"

Discouraged with the need to "fashion phantoms of common intention"[60] to resolve property disputes, Lord Denning and other members of the Court of Appeal used what has been labelled "the new model constructive trust" as a tool to do justice between parties where rigid rules of law could supply no remedy. Lord Denning articulated the foundation of the new model in the following terms in Hussey v Palmer:[61]

> ..... [a constructive or a resulting trust] is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when property is acquired or later on, as the circumstances may require. It is an equitable remedy by which the courts can enable an aggrieved party to obtain restitution. [Emphasis added]

Rules formulated to deal with particular situations may subsequently work unfairly as society develops.[62] Equity is thus a body of rules which has developed and evolved to mitigate this, finding new fields of application as society develops. As Lord Denning said:

> Equity is not past the age of childbearing. One of her progeny is a constructive trust of a new model. Lord Diplock brought it into the world[63] and we have nourished it. 64

As shall be seen, the Court of Appeal in New Zealand seems prepared to follow Lord Dennings line should to occasion arise.

D. The Right Result - The Wrong Route?

(i) Merging the Conventional Categories

If there is a common intention of X and Y that Y should have an interest in property the title to which is in X's name and Y does not thereby acquire an interest, either because the common intention is not an effective contract binding X or because there is no provable declaration of trust by X, there is still the possibility that a constructive trust will arise.[65] A constructive trust will arise if Y acts to his or her detriment on the faith of the common intention.[66] This was laid down in the celebrated case of Bannister v Bannister,[67] where a widow acted to her detriment in reliance of the common intention by conveyancing two cottages to her brother-in-law.

Although the so called "common intention" can be express or implied proof is required from the party who seeks to establish a constructive trust that the parties in fact had a common intention,[68] that if each contributed to the acquisition, improvement or maintenance of some item of property they should have such respective interests as their common intention contemplated. The court is not free to impute to the parties a common intention on the basis that they would have been likely to have had that common intention if they had applied their minds to the matter of their respective interests in the item of property.[69]

On one view of the Denning trust the precise meaning attributed to "resulting" and "constructive" trusts may appear to be confused.[70] It is possible that Lord Denning may have over extended himself by saying that wherever two parties by their joint efforts acquire property to be used for their joint benefit the courts may impose or impute a contractive or resulting trust even when a common intention could not be inferred. The author agrees[71] that the absence of any "common intention" is more likely to render these cases as establishing a constructive trust only, and not also a resulting trust. Support for this view is to be found in Burns v Burns[72] where May LJ limited his enquiry to financial contributions to the acquisition of the house in determining whether a "resulting trust" existed.

Lord Dennings formulations may be viewed separately as exactly what he called it : a "NEW MODEL" of the constructive trust. Although established principles would indicate that a court should not impose a trust unless it can be inferred as a necessary consequence of the words or conduct of the parties, there is nothing in established law to stop a court from imposing a trust, notwithstanding the absence of common intention, where it would be unjust for a person to claim property beneficially as their own.

This approach is a realistic recognition that a spouse may not only make direct contributions, that is, payments towards the initial purchase price or subsequent mortgage installments, but may also contribute indirectly, that is, towards family expenses generally:

> ... as where both go out to work, and one pays the housekeeping and the other the mortgage installments ... so long as there is a substantial financial contribution towards the family expenses, it raises the inference of a trust.[73]

Once we recognise that first, Lord Denning should be seen as stating the general foundations of the resulting and constructive trust and secondly, accept that the trusts imposed by him should be viewed as constructive trusts designed to do equity between the parties, then the traditional categories are restored.

(ii) The Value of Certainty

> In any individual case the application of [Pettit v Pettit and Gissing v Gissing] may produce a result which appears unfair. So be it : in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legitimate - by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.[74]

The value of certainty is not disputed. But to believe it exists in any determinable quantity in the field of law is a myth which has been expressed only too eloquently in many cases. The dynamics of equity is such that it can only find expression through the discretion it affords to judges. A constant criticism of the Denning trust has been that while justice is being dispensed it is being done at the expense of CERTAINTY : "the hallmark of any legal system".[75]

Yet, we are rapidly approaching the end of the second decade since the Denning trust first introduced this apparent uncertainty. In that time there is little, if any, evidence to support the concerns expressed, like that lawyers will be unable to advise their clients because of the supposed unfettered discretion offered to the judge by a test of justice and good conscience. It may be that rather than spending time trying to find loopholes or traps in the law to meet their clients instructions, lawyers are finding it necessary to now advise their clients that they can not expect to take the other spouse for all that spouse has got and neither can they expect the same to be done to them.

Judges have often said that it is their primary duty to ensure that the fountain of justice is kept flowing and that its steams are kept pure. Yet where is this fountain to be found? Where does this justice come from and how do we keep if flowing? If anything short of devine belief is worth trusting, it is that our judiciary are competent and capable of determining what is just and what is not. The fact that we have not yet witnessed an array of cases with conflicting outcomes, where the Denning trust has been used, is evidence that Lord Dennings test has proved no threat to certainty in our legal system.

In one of the sixteenth - century tracts a "Serjante at the laws of England" put the uncertainty of using "conscience" (and by analogy "justice") alone as a tool to dispense justice as:

> And what is this "conscience" which avails the chancellor? he asks. It is "a thinge of great uncertaintie; for some men thinke that if they treade upon two straws that lye acrosse, that they offende in conscience and some man thinketh that if he lake money and another hath too muche that he may take parte of his with conscience, that if the kinges subjects be constrayned to be ordered by the discretion and conscience of one man, they should be put to a great uncertainte ... [76]

Yet the Chancellor was an ecclesiastic who exercised the residual discretionary power of the king to do justice among his subjects in circumstances where, for one reason or another, justice could not be obtained in a common law court.[77] It is hoped that equity, along with those who administer it, has matured and developed such that these fears are no longer a natural reaction to the exercise of judicial discretion to reach a just result in any particular case.

(iii) Equitable Remedy

It has been noted that the duties of a constructive trustee bear little relation to those of an ordinary trustee. If so, it may be better to view a constructive trust as a proprietary remedy available whenever it is needed to prevent unjust enrichment.[78] As such, the constructive trust need not be construed as anything beyond a means by which a plaintiff may demand the return of property to which he or she is entitled in equity, and which is wrongfully held by another.

Thus the duty would be to convey to those entitled : not to hold on trust for them. In this sense the constructive trust would be seen as a remedial rather than substantive institution.[79] It becomes one of the equitable proprietary remedies, and the substantive constructive trust of the kind found in Keech v Sandford[80] disappears.[81]

Although there may still be cases where the institutional constructive trust will be more appropriate (for example, where the beneficiary is a minor), it appears that we are moving towards the remedial concept. It has been said that the constructive trust is

> .... now so extensively available as a vehicle for a proprietary remedy that it more closely resembles the American remedial trust than the traditional institutional model created by English law ...[82]

The Canadian Supreme Court in Pettkus v Becker,[83] after some hesitation, developed the concept of the remedial constructive trust expressly based on the prevention of unjust enrichment. As for Australia, Deane J in Muschinski v Dodds[84] considered the practical application of the constructive trust in the following terms:[85]

> Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.

The new model opens up the possibility of finding a constructive trust in any situation in which the established rules lead to a result which would appear inconsistent with equity, justice and good conscience.[86] It represents a move in the direction of the long established principle in the United States. Not surprisingly, the Denning trust has been applied in reaching solutions in cases where satisfactory solutions under established doctrines have proved particularly difficult to find. Illustrations come not only from the plight of the deserted wife and mistress, but also from the licencee of land whose expectations have been disappointed, the bona fide purchaser of registered land and de facto property disputes.

In these situations the courts have now afforded the plaintiff a sort of quasi-legal or equitable right and therefore when a wrong is committed in breach of those rights the court will exercise its powers under the equitable maxim that "equity will not suffer a wrong to be without a remedy".

Part IV : THE NEW MODEL TWO DECADES LATER: HOW HAS IT FARED?

A. Introduction

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee ... A court of equity in decreeing a constructive trust is bound by no yielding formula. The equity of the transaction must shape the measure of relief. [87]

With such a broad statement, like many that Lord Denning made in his career, it is not surprising that many quarters of the legal profession in different jurisdictions have found scope to disagree, critcise and even condemn the Denning trust.

What follows is an analysis of the criticisms of the new model in New Zealand, the United Kingdom, Australia and Canada, and an evaluation of the validity of Lord Denning's progeny.

B. New Zealand

New Zealand courts, like those in other jurisdictions, have been faced with the applicability of the constructive trust to property disputes between de facto spouses. Since the Matrimonial Property Legislation has no application in these cases, the courts have turned to the common law. Where one spouse has held legal title to the property, the other has usually been given an interest under a constructive trust. [88]

In Fraser v Gough[89] the Court utilised the trust to find a beneficial interest in the cohabitant. Once the court had found evidence of a common intention, the English authority of Cooke[90] v Head was followed to impose a constructive or resulting trust. The significance in following Cooke[91] was that there the court upheld the principle that wherever two parties by their joint efforts acquire property, the court may impose a constructive trust to do equity inter-parties.

Perhaps the most forceful judicial dissent from Lord Dennings view was expressed by Mahon J in Carly v Farrelly.[92] After asserting that the doctrine of unjust enrichment does not form part of the law in New Zealand, Mahon J described the Denning trust as "a supposed rule of equity" which was totally void as a principle since it was based upon "the formless void of individual moral opinion".[93] Notwithstanding such criticism, the courts in New Zealand have indicated a general willingness to follow Lord Denning. The least that can be said is that our approach is favourably more liberal than that presently evident in the United Kingdom.

In 1983 our courts were once again faced with a de facto relationship in Hayward v Giordani.[94] The plaintiff lived with the deceased for just over five years in a de facto relationship. The deceased owned the home in which they had lived. The plaintiff, however, had done a considerable amount of work in improving the house and on the deceased's death he claimed an interest in the property on the ground that the evidence warranted a finding of common intention that they would share the property beneficially or on the ground that a constructive trust should be imposed. The court held that there was a sufficient common intention of equal sharing to give rise to a trust and therefore it was strictly unnecessary to consider the constructive trust concept.

However, McMullin J[95] recognised that there existed two quite divergent views. Lord Denning's view whereby a constructive trust could be imposed notwithstanding the absence of common intention, wherever this was necessary to avoid injustice,[96] and the other view whereby a constructive trust could only be inferred as a necessary consequence of the words or conduct of the parties.[97] In the end McMullin J showed that the New Zealand Court of Appeal would be prepared to follow Lord Denning if the need arose, by saying that the categories in which a constructive trust may be found should be kept open to meet difficult circumstances and changing social conditions.[98]

Cooke J (as he was then) regarded this approach as being "very helpful in New Zealand".[99] In fact, in the Court of Appeal in Hayward,[100] he was prepared to support an alternative foundation for the constructive trust : unjust enrichment. He was impressed by the opinion of Dickson J in the Canadian case of Pettkus v Becker[101] and of Mahony J.A. in the Australian case of Allen v Snyder.[102] He suggested that even though the doctrine of unjust enrichment was more accepted in Canada than in New Zealand, no reason prevented the law of unjust enrichment[103] from developing New Zealand and being applied to the property rights of cohabitants.[104] Cooke P. thought that a stable de facto union would provide a background in which a court might readily impose a constructive trust based upon unjust enrichment.

Since Hayward[105] there has been further attempts in England to return to the true ratio of Pettit[106] and Gissing,[107] and away from that advanced by Lord Denning. The position was carefully summarised by May L.J. in Burns v Burns[108] :

> I think that the approach which the courts should follow be the couples married or unmarried, is now clear ... the Court is only entitled to look at the financial contributions or their real or substantial equivalent, to the acquisition of the house; that the husband may spend his weekends redecorating or laying a patio is neither here no there, nor is the fact the women has spent so much of her time looking after the house, doing the cooking and bringing up the family.
>
> Finally, when the house is taken in the man's name alone, if the women makes no "real" or "substantial" financial contribution towards either the purchase price, deposit or mortgage instalments by the means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union.

Despite such attempts to over-rule Lord Dennings approach, the courts in New Zealand have taken a much more liberal stance. In doing so they are performing their proper function of developing the law so as to reflect the reasonable dictates of social facts, rather than frustrate them.[109]

The New Zealand Court of Appeal has thus indicated a preference for a much more liberal approach[110] to de facto relationships than that which is conveyed in Burns.[111] Recent formulations from the Court of Appeal confirm this and, indeed, the approach now being adopted by Cooke P in particular represents a radical departure from the language found in the leading English cases.

In Pasi v Kamana[112] the test was stated in general terms by Cooke P, saying:[113]

> ... 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 result in an interest in the property.

On the facts there was no scope for the court to find the existence of a reasonable expectation on the part of the woman that she was to have a share in the property. It remains to be seen how our courts will develop the law in relation to cases where a spouse has not made any real or substantial financial contributions but has worked hard for many years maintaining the home and family.

Cooke P had no difficulty in applying the reasonable person test again a year later in Oliver v Bradley.[114] In the High Court, Bisson J said that the case was one "which cries out for the court to hold that there is a constructive trust in the interests of justice and good conscience". The house in which the couple lived was taken in the women's sole name, however, the man had contributed over $22,000 to the purchase price. In these circumstances the Court of Appeal had no difficulty in awarding the man 70% of the sale proceeds. Cooke P put said that a reasonable person in the shoes of the plaintiff would undoubtedly have understood that his contribution and efforts would result in an interest in the property.

But he added a further limb to the test by asking what a reasonable person in the shoes of the defendant would have expected. It should be noted that the "reasonable person" test can be traced as far back as Pettit v Pettit,[115] in this context. It is interesting to note that this approach by Cooke P is similar to Deane J's approach in Muschinski v Dodds[116] where he saw the constructive trust as a tool to remedy an unconscionable situation. That is, if a reasonable person expected to gain a share in the property from their efforts and the other party could reasonably be expected to have known this, then it would be unconscionable for the title holder to now deny the other party an interest.

An indication of what may lie ahead in this area is to be found in the refreshing judgement of Anderson J in Lanyan v Fuller,[117] a case heard in the High Court at Hamilton. The couple lived together in a de facto relationship for nearly seven years, along with the women's three children, in a house at Ohaupo. Although the house was registered in the sole name of Mr Fuller, who repaid the mortgage alone, Mrs Lanyon claimed a 25% share in the house because of the work she did landscaping, making curtains and supplying furniture, food and groceries. Anderson J in his oral extemporize judgement stressed the importance of keeping to basic principles when deciding this kind of property dispute.

Although numerous decisions had been cited before Anderson J, he echoed Cooke P in Pasi v Kamana[118] : would a reasonable person in the shoes of the plaintiff have understood that her efforts would naturally result in an interest in the property? This very general test "is dictated by the diversity of equitable concepts which may apply to the diverse possibilities of human relationships."[119]

Anderson J said that unjust enrichment may be seen in some cases; in others that court might find unspoken but inherent agreements which "adumbrate legal ownership with equities creating trusts".[120]

The high-water mark of the case was the recognition by Anderson J that when Cooke P in Pasi[121] focussed his attention on direct and indirect contributions as a foundation for proprietary interest, in this case the domestic services of Mrs Lanyon were capable of being regarded as indirect contributions to the purchase of the Ohaupo house.

His honour referred to the legislative recognition of domestic services in the Matrimonial Property Act 1963, and pointed out that those provisions had "influenced the perceptions and values of New Zealanders for some time".[122] He concluded by saying that in evaluating her interest a "broad and instructive" approach was required. He set her share at 10%, being $10,000.

The most recent reported case on the constructive trust is not a de facto dispute, although still in the family context. Nevertheless, the court had no hesitation in applying Pasiv Kamana.[123] The case is Stratulatos v Stratulatos[124] heard by McGechan J in the High Court at Wellington. The mother of one of the spouses owned a residential property which on her son's marriage she was going to give to him. Meanwhile the son and his wife took possession of the property and spent considerable money and effort renovating and improving it, and paid rates, insurance premiums and mortgage payments upon the expectation that the house was to become theirs. The son died intestate and the mother, who had retained ownership of the property throughout, sought to evict the wife. Inter alia, the wife claimed an interest in the house on the basis of a constructive trust in respect of the renovations and improvements.

On the claim of a constructive trust, McGechan J. said:[125]

> I need not be drawn into the question whether the courts may openly impose a constructive trust in the absence of any semblance of intention on the part of those involved, along the lines taken by Lord Denning M.R. in Hussey v Palmer [1972] 3 All ER 744, or should rather search for some imputed intention. On that question I refer to the observations of the Court of Appeal developing through Brown v Stokes (1980) 1 NZCPR 209, Hayward v Giordani [1983] NZLR 140 and Pasi v Kamana [1986] 1 NZLR 603; and I have little doubt that the tide is running strongly in favour of the simple and overt imposition of a constructive trust when such is necessary to do justice, rather than fashioning "phantoms of common intention" in order to resolve the property relationship. [Emphasis added].

After quoting Cooke P from Pasi v Kamana[126], McGechan J proceeded to ask whether standing in the shoes of the plaintiff as claimant (both as successor to the deceased and in her own right), would a reasonable person have understood that their efforts would result in an interest in the property?[127] He had no difficulty in answering this in the affirmative.

Although we in New Zealand have chosen to phrase the test in terms of "the reasonable persons expectations", this is but one manifestation of the Denning trust[128] and indeed, of the unjust enrichment principle. Now that we have decided the direction the law is to go in, we have to decide how we are to achieve a liberal test. It is in this context that the paper advances the concept of unjust enrichment as the best solution.

C. United Kingdom

It has already been noted that the proponent of the new model was Lord Denning. The Denning trust can be seen as moving away from the institutional concept of the constructive trust and towards a model akin to the American formulation.[129] Oakely recognises that the English suiter seeking a constructive trust wants a remedy.[130]

It was in some of the line of cases that started with Pettit[131] and Gissing[132] that Lord Denning made some of his most quoted statements about women and their role in the modern family. For example:[133]

> The plaintiff did quite an unusual amount of work for a women. She used a sledge hammer to demolish some old buildings. She filled the wheelbarrow with rubble and hard core and wheeled it up the bank. She did painting, and so forth. The plaintiff did much more than most women would do ...

Since Lord Denning's retirement, there has continued to be a flow of cases in this area. The Court of Appeal in Burns v Burns[134] and Grant v Edwards[135] rejected Lord Dennings views and made it clear that if there is no express or inferred common intention then the court could not impute or ascribe a common intention to the parties in an attempt to produce a fair and just result. However, it appears in practice, the new model has in fact continued after Lord Dennings departure. In practice, the courts have found it difficult to draw a distinction between an inferred and imputed common intention since both leave great scope for surmise to a lessor or greater extent.[136]

In general, the courts have set the parameters of their inquiry by saying that under the law of constructive trusts, they will recognise a beneficial interest in property in which cohabitants have, expressly or by inference, agreed about the acquisition of property and who have mutually contributed, directly or indirectly, to its acquisition or improvement. It is submitted that in determining whether these elements have been met, the courts are in fact pursuing what is equitable and just based upon the conscience of the court. The courts therefore have found the requisite elements on the slightest of evidence in order to reach the right result.

Lowe and Smith[137] have argued that the courts have imposed the quite artificial requirement of a common intention (even though most parties will not have thought about beneficial interests and the niceties of trust law).[138] It would be more honest to impute agreements to persons, as was suggested by Lord Reid and Lord Diplock in Pettit. Under a concept of unjust enrichment there would be no need to find any form of agreement or common intention, nor any monetary contribution towards the acquisition of the property.[139]

D. Australia

In Australia, a constructive trust will be imposed only in certain defined circumstances: there is no general theory of the constructive trust.[140] A constructive trust may be found to exist without any suggestion that it is the product of the intention of an owner of property. It is therefore said impossible to give a useful definition of a constructive trust.[141] The category of constructive trust is residual and contains trusts which differ in terms of the presence or absence of any dispositive intent.

All that can be usefully done is to say that a constructive trust is a means whereby a liability is imposed in equity on a person to account for certain property as if he or she had been a trustee under an express or resulting trust and then to describe the categories. This idea of the constructive trust has been developed by the courts of equity as a means of making accountable certain persons in certain defined circumstances where justice requires that they be accountable.

One of the categories in which the constructive trust has been invoked is in relation to what the Australian courts have labelled "co-habitation" disputes. They have strictly adhered to the requirement of a "common intention" thus calling this category the "common intention" constructive trust[142] : where, although the title holder is not bound by contract, he and another have a common intention that it the other person acts in certain intended ways the other person should have an interest and the other person so acts. A common intention between persons in a family arrangement may be regarded as not being a contract because they are taken to lack an

intention to subject themselves to legal obligations to act[143] and yet it would be unconscionable, where a party has in fact acted, for a title holder to deny conferment of an interest in return.[144]

Although the arrival of the Denning trust in Australia attracted initial enthusiasm from some academics[145] and lower court judges,[146] the authority in Australia on the point must now be Allen v Snyden[147] in which the Court of Appeal of New South Wales disapproved of the Denning trust and of the initiatives of the lower Australian courts. The court held that common intention regarding ownership must be established. Expenditure or services for the benefit of the household, standing alone, would not establish intention to share[148] the property:

> Allen v Snyder ... established at least two rules, one positive, the other negative. The positive is that where the evidence before the court shows common intention in fact held by two parties as to the manner in which the beneficial interest in land, the legal ownership of which is in one of the parties, is to be held, the court will give effect to that common intention by holding that the legal owner holds the land on trust in accordance with the agreement ...
>
> ... The negative rule is that where no common intention of the parties concerning the beneficial interest in the land can be justified on the evidence as a matter of fact, the court is not empowered to impute an intention ... in order to base a trust on the imputed intention. 149

At first sight it appears that the Australian courts have been prepared to keep pace with social trends by providing a remedy to a cohabitee who has contributed to jointly - used property. Yet the requirement that the claimant first prove common intention, then detrimental reliance and finally fraud by the respondent in denying a

beneficial interest,[150] has meant that some judges have had to use their judicial creativity to find things like common intention on the slightest of evidence and thereby provide the claimant with a remedy. The effect has been to put a high premium on skilled professional assistance in the collection and evaluation of evidence rather than on the capacity of a judge to exercise a broad discretion.[151]

It is not surprising that the stance taken in Allen v Snyder[152] has come under heavy criticism. The focus of the criticism has tended to be the "common intention" requirement. Helsham J accurately said that it is "simply unreal" that:[153]

> [t]he court will, so it seems, find that contributions by one family party to the acquisition of family property in the name of the other in a situation where neither has expressed any thought about the matter give rise to a common intention of joint ownership in proportion to their contribution, whereas the court will deny, in similar circumstances, that justice and equity demands the implication of a like trust based merely upon the fact that the same family party has put the same amount into the acquisition of the same property.

It has been suggested that the reason for the approach taken in Allen v Snyder[154] is the "radical conservatism"[155] of higher level Australian judges and of leading Australian texts. The case has been interpreted as reasserting the traditional legal values in Australia by flatly rejecting the Denning trust without even trying to reconcile orthodoxy and the new model.[156]

During the years following Allen v Snyder[157] the courts have reached inconsistent results when applying trust law to cohabitants.[158] The High Court decision in Muschinski v Dodds[159] further revealed the unsettled character of cohabitants property rights. Brennon J held that there was no constructive trust because:[160]

> [t]here is no jurisdiction in an Australian Court of equity to declare an owner of property to be a trustee of that property for another merely on the ground that, having regard to all the circumstances it would be fair to do so to declare ... The flexible remedy of the constructive trust is not so formless as to place property rights in the discretionary disposition of a court acting according to vague notions of what is fair.

In the Court of Appeal the lending judgement was given by Deane J. He skillfully side-stepped the need to decide between "institution" and "remedy". He also rejected the "new model" and "unjust enrichment" as legitimate foundations for the constructive trust. Rather, he saw the constructive trust as remedying an "unconscionable" situation.[161] His proposed definition of the constructive trust was that it was a remedial institution which equity imposed regardless of any type of intention where the retention or assertion of beneficial ownership by the title holder was contrary to equitable principle.[162]

Although Deane J later restricts this formulation by stating that it is not a medium for the indulgence of idiosyncratic notions of fairness and justice,[163] it is difficult to see how in practice this test is any more certain from the Denning trust. Indeed, the same criticisms can be made about the various approaches in Muschuski[164] as have been made about the Denning trust and unjust enrichment.

The Australian courts seem simply unwilling to recognise the new model, rather than recognising the defects in their own approach and without committing themselves to say what direction the law should go in.

Although legislation has been passed in some states,[165] the courts would be better to look at developing a body of jurisprudence in this area that is as realistic as the problem facing them. The uncertainty currently surrounding this area in Australia is certainly no less than that suggested of the Denning trust since its inception.

E. Canada

Like in many other jurisdictions, the Canadian courts have struggled to find a uniform and consistent foundation upon which to base the constructive trust. Although the fact situations in these cases have been simple enough, the traditional categories have been unable to provide problem free solutions. Consequently, the Canadian courts have disengaged themselves from the traditional constraints imported from English law. Dickson J, speaking for then Chief Justice Laskin and Justice Spence, in Rathwell v Rathwell[166], noted that the settlement of matrimonial property disputes ...

> ... has been bedevilled by conflicting doctrine and a continuing struggle between the justice and equity school ... [with] Lord Denning the dominant exponent, and the "intent school", reflected in several of the speeches delivered in the House of Lords in Pettit v Pettit and Gissing v Gissing and in the judgement of this court in Murdoch v Murdoch. The charge raised against the former school is that of dispensing "palm-tree" justice : against the latter school, that of meaningless ritual in searching for a phantom intention. [167]

The "common intention" analysis first appeared in Canada in the dissenting opinion in Murdoch v Murdoch[168]. After a twenty-five year marriage, during which time the couple had developed a farm, the wife claimed an interest in one-half of the property held in her husband's name, on the basis of partnership or trust. Maitland J, with

concurrence of Judson J, Ritchie J and Spence J, found no intent to operate as a partnership, no contribution by the wife to the acquisition of the property, and no common intention that the wife should have a beneficial interest.[169] Hence, he could not apply the doctrine developed in the English cases of Pettit[170] and Gissing.[171]

The next major development was Rathwell v Rathwell[172] where several members of the Supreme Court of Canada approved the constructive trust as an equitable remedy[173] within the Canadian law of restitution. The problem with Rathwell[174] as authority was that it was the product of a badly split court. Nevertheless, it recognised, albeit in the minority, that if no common intention or agreement could be found or if the contribution by the spouse without title consisted of domestic duties only, the court could apply a constructive trust analysis, along the lines of the America understanding of using the constructive trust as a remedial device.[175] In Rathwell,[176] Dickson J. (Laskin C.J. and Spence J concurring) began by observing that acceptance of the notion of restitution and unjust enrichment in Canadian jurisprudence has opened the way to recognition of the constructive trust as an available and useful remedial tool in resolving matrimonial property disputes.[177] He stressed however, that the court must still find a casual connection between the contribution in kind and the disputed asset. If there is no such contribution, there is no ground for finding that the spouse with title would be unjustly enriched if allowed to retain the asset.[178]

> The constructive trust ... comprehends the imposition of the trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. The principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment. Thus, if the parties have agreed that the one holdings legal title is to take beneficially, an action in restitution cannot succeed.[179]

In Pettkus v Becker[180] the Supreme Court of Canada addressed the property rights of de facto's and in doing so it employed the constructive trust analysis that the majority had not applied in Rathwell[181]. The majority in Pettkus viewed the appeal as "an opportunity to clarify the equivocal state in which the law of matrimonial property was left, following Rathwell."[182] The approach adopted by the court in Pettkus[183] represents a liberal approach and a judicial readiness to face the reality of the problems in this area with a realistic solution. In fact, by developing the principle of unjust enrichment the Canadian courts will be able to reach the same results as under the Denning trust but via identifiable principles. In this sense, the analysis adopted in Canada may simply be a reflection and refinement of the Denning trust so that "it would appear that in Canada a new model constructive trust ... is alive and well."[184]

F. Conclusion

An analysis of the law relating to the constructive trust in the various jurisdictions reveals a common thread: tension between existing structures and new problems to which those structures are sought to be applied.

In England the courts have stood staunchly by their "common intention" constructive trust. In Australia the courts have recognised the need for a new foundation but have rejected the Denning trust as the possible answer. In Canada the courts have broken free of traditional constraints and appear to be moving towards a principle of unjust enrichment. While, perhaps the most liberal position can be found in New Zealand. We have not rejected the Denning trust while accepting a notion of the "reasonable person" test - both approaches having the scope for considerable flexibility.

New Zealand has apparently overcome the barrier which still faces English courts, and to a lesser extent Australian courts : recognition of the need to break away from "common intention" and towards a more realistic and flexible approach. Yet we have not decisively taken the next step : what approach to adapt. It is submitted that New Zealand courts should look to the principle of unjust enrichment as the right approach.

Part V : EXTENSIONS OF THE NEW MODEL

BEYOND FAMILY RELATIONSHIPS

A. Introduction

It has repeatedly been recongised that although there are two clear categories of constructive trust, that is, those involving profits made by fiduciaries[185] and those created by the intermeddling of strangers,[186] the categories of constructive trustees are not closed.[187] Indeed, the application of the constructive trust to de factors is proof of this. It is therefore not surprising that not only has the traditional constructive trust been expanding into new areas,[188] but so too has the Denning trust. And with the extension of the traditional constructive trust there must be the possibility of the Denning trust following into the same area. For example, the ramifications of the Denning trust in the commercial law context seem quite threatening. Take the words of Mason J in Hospital Products Limited v United States Surgical Corporation:[189]

> The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formiddable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being a means to that end. If, in order to make relief in specie available in an appropriate case it is necessary to allow equitable doctrine to penetrate commercial transactions, then so be it ...

The type of constructive trust Mason J envisaged was the traditional one based upon settled principles. Yet in the same case, Deane J was

of the view that there was no need for a fiduciary relationship to exist before a constructive trust could be imposed. He held that although there was no fiduciary duty on the broad equitable principle that:[190]

> ... a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another. [Emphasis added]

Deane J declined to elaborate on the precise circumstances in which such relief was appropriate. Although none of the other judges relied on the same reasoning, Deane J expressed a willingness to expand upon this reasoning in future cases should it be raised by counsel.[191]

The law has not developed that for yet. However, areas that have seen the Denning trust emerge are those concerning licences, insolvency/bankruptcy and registered land. What follows is a brief account of these areas as they have been affected by the Denning trust.

B. Licences

The new model constructive trust has been most active in the context of licences.[192] A licencee is a person who is physically present on land whether in occupation or not, but without any proprietary interest in the land.

Problems arise where the licencee has give consideration for the licence, or where the licencee has been encouraged to act to his or her detriment in reliance on promises by the licensor, in such a way to raise an estoppel against the licensor. In this context the constructive trust has been called in to aid the licencee. Thus a mother-in-law who contributed 607 pounds to her son-in-law for the construction of an extension to the house for her accommodation was held entitled under a resulting or constructive trust, to an interest in the house to that value, on the joint and equitable ground.[193]

In Binions v Evans[194] the Tedger Estate entered into an agreement with the defendant, the widow of a former employee, that she should be permitted to reside in a specified cottage rent free for the remainder of her life or until she determined the arrangement by four weeks notice. The Estate subsequently sold the cottage to the plaintiffs expressively subject to the agreement and, because of that provision, was made for a reduced price. Some months later the plaintiffs brought proceedings for possession against the defendant. Her interest was protected as a beneficiary under a constructive trust which was imposed according to Lord Denning[195]:

> ... for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation to which they took the premises

The imposition of such a trust was agreed to by the other members of the Court of Appeal[196] but on the ground that persons who acquire interests in property by fraud will be prevented by means of a constructive trust, from keeping those interests for themselves.[197]

In Lord Denning's opinion a constructive trust will be imposed not only where the purchaser takes expressly "subject" to the rights of the licencee, but also where he does so impliedly, as must be the case where the licencee is in actual occupation of the land. The imposition of a constructive trust in these circumstances has been criticised as "hardly justified" by precedents which Lord Denning cites and as hard to reconcile with established rules of property law in relation to both positive and restrictive covenants.[198]

Despite the criticism, Binions v Evans[199] has since been applied in DHN Food Distributors Ltd v Tower Hamlet LBC[200], where a holding Company purchased land, the title to which was put in the name of a subsidiary company. By contract between them, the holding company remained in possession of the land and traded there. Upon a compulsory purchase order being made, the subsidiary was compensated for the value of the land. The question was whether the holding company was entitled to compensation for disturbance. One of the three reasons for holding that it was, was that the holding company had an irrevocable licence which by way of a constructive trust, gave to the holding company a sufficient interest to entitle the holding company to compensation for disturbance.[201]

C. Bankruptcy and Insolvency

In R Sharpe (a bankrupt)[202] an aunt lent 12,000 pounds to her nephew to enable him to purchase a house where she was to live with him and his wife. The nephew became bankrupt, and it was held that the trustee in bankruptcy was bound by her interest, holding the house on

constructive trust to give effect to her contractual licence (following DHN Food Distributors Ltd v Tower Hamlet LBC)[203] or to her interest by virtue of equitable proprietary estoppel.

The trustee had in fact contracted to a sell the property to bona fide purchaser. By a procedural oversight, the purchaser was not a party to the proceedings, and no decision was made on the question of her right, if any, against the purchaser.

In Lyus v Prowsa Developments Ltd,[204] developers mortgaged land to a bank, then contracted to build a house on part of the land and to sell it to the plaintiff, and then because insolvent leaving the house unfinished. The bank although not subject to the contract, sold the mortgaged land to the first defendants "subject to and with the benefit of" the plaintiffs contract, and the first defendant on-sold to the second defendant subject to the contract so far as it might be enforceable, if at all. The registered title did not refer to the contract. It was held that the first defendant, on taking the land subject to the bank's positive stipulation in favour of the plaintiffs contract, became subject to a constructive trust to complete the contract, and the second defendant, accordingly, was similarly bound, following the dicta of Lord Denning in Binions v Evans.[205]

D. Transfer of Land

Lyus v Prowsa Developments Ltd[206] also illustrates the principle that a statue must not be used as an instrument of fraud. Here, land was brought expressly subject to the plaintiffs contractual rights, but the defendants sought to defeat them by relying on the Land Registration Act 1925.[207]

A constructive trust was therefore imposed upon the defendants to prevent fraud. It has, however, been argued that a constructive trust should not have been imposed here given the authority of Midland Bank Trust Co Ltd v Green[208] where the defendants had gone further by reneging on a positive stipulation in favour of the plaintiffs. There the court said that it was not fraud to rely on legal rights conferred by an Act of Parliament.[209]

Notwithstanding this view, a constructive trust was also held in Peffer v Rigg[210] where a purchaser with notice of an interest under a trust for sale was held to take subject to it, applying general equitable principles. It has since been affirmed by the House of Lords in Williams & Glynis Bank Ltd v Boland,[211] although admits criticism.

E. Conclusion

It should be noted that in nearly all of the cases discussed above, in which the Denning trust has been applied the court has only advanced the new model as one reason among a number to find for the plaintiff. Also to be borne in mind is the level of criticism that has been directed at either the decision or the reasoning in these cases.

The problem appears to be those which were originally voiced against the Denning trust, that is, the concept of justice alone is too vague to be used as the basis for determining property rights;[212] that the constructive trust is being treated as a magic formula to reach a just result between the parties;[213] and that the use of the constructive trust in this form goes far beyond that envisaged by the American model.

The author submits that a proper development of the concept of unjust enrichment would settle these fears. The attributes of this concept over the Denning trust has been recognised by Hanbury and Mandsley:[214]

> The provision of a remedy of unjust enrichment does not require an unlimited free-wheeling discretion as the imposition of a constructive trust. There must at least be general guidelines for the exercise of the discretion. Unjust enrichment has often been regarded in England as a principle too vague to be of any practical value.[215] This is no longer so.[216] The law of unjust enrichment lays down with reasonable clarity when an action will lie.

Part VI : ALTERNATIVE FOUNDATIONS FOR THE CONSTRUCTIVE TRUST : TOWARDS A THEORY

> English law provides no clear or all embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. [217]

> It is, I know, tempting to say "equity shall hence forth be able to do justice where there is no justice before! But there is, I venture to think, great danger in practice in what is, in truth, palm street justice ... Even in the early days the general principal had this somewhat qualified and negative characteristic; it was not so much to <u>do</u> justice, as to <u>restrain injustice</u>, i.e. to stop the unconscionable conduct of the person against whom equity proceeded.[218] [Emphasis added]

The developments by Lord Denning in this area have taken the words in the fist passage above to their literal extreme, that is, by promoting unfettered judicial discretion to enable justice to be done in any particular case. This, however, can not be permitted in a legal system in pursuit of certainty in the law. And so the second passage above serves to restrict a judges ability to "do equity" by stating that the courts function is to prevent injustice rather than, for example, to relieve the harshness to one party of an arms length bargain.

It has been noted that the main objection to the new model is its lack of a definable foundation. The following parts of this paper examines alternative foundations for the constructive trust. The primary foundation advanced is "unjust enrichment".

The other areas examined include a foundation which is already used ("equitable estoppel"), one which has been suggested as possible ("unconscionability") and are which may be used in the future ("free acceptance"). It will be seen that in reality, all these different alternative to unjust enrichment are really different levels of the concept of unjust enrichment.

That is, these alternatives all aim to prevent unjust enrichment. What differs is the principle behind and reason for preventing the unjust enrichment. The view that these alternatives are shades of unjust enrichment becomes clear by the fact that in explaining each alternative, language from the other foundations cannot be avoided. For example, if a person freely accepts something, it can be said they had become unjustly enriched and therefore it would be unconscionable for them to deny payment to the other party. For this reason, it is logical to refine the principle of unjust enrichment as a cause of action in itself rather than develop numerous individual categories and concepts which overlap and which have as their basis unjust enrichment.

Again, analysis of the working of the alternative concepts is limited to de facto property disputes. However, it should be borne in mind that these principles are advanced as a general theory for the constructive trust and therefore may be applied in any context where the constructive trust has been invoked in the past. Not all principles, however, will be equally applicable in all contexts. For example, family relationships pose different problems to commercial relationships.

It should also be noted that the same facts will more than often support more than one theory. The essential feature of all these concepts is that they are invoked to produce a just and far result. Yet unlike Lord Dennings attempts, the conscience of the court is not the test but rather a common thread tying all the concepts together.

Part VII : FREE ACCEPTANCE

A. Introduction : The Concept and the Test

Free acceptance is a branch of restitution. As such, an important, part of unjust enrichment is the restitutionary concept identified and labelled "free acceptance". Introduced by Goff and Jones[219] over 22 years ago, writers such as Peter Birks[220] have added refinement to the concept. Indeed, Birks has made free acceptance a central pillar in his exposition of restitutions theoretical structure.[221] However, the concept of free acceptance has not been without its critics either.[222]

Goff and Jones originally explained the principle in these words:[223]

> ... the defendant will not usually be regarded as having been benefited by the receipt of services or goods unless he has accepted them (or, in the case of goods, retained them) with an opportunity of rejection and with actual or presumed knowledge that they were to be paid for. For convenience we shall refer to a person who has so acted as having freely accepted the services or goods in question.

Birks has recently offered a more concise definition:[224]

> A free acceptance occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects of accept.

To illustrate the justice of restitution for free acceptance Birks gives the following hypothetical example. Suppose A sees a window cleaner, B, beginning to clean the windows of A's house. A knows that B will expect to be paid so hangs back unseen until B has finished his job. Then, A emerges and maintains that he will not pay for the work which he never ordered.

It is too late. A has freely accepted the service. A had the opportunity to send B away. A chose instead to let B go on and so must pay the reasonable value of B's work.[225]

It is apparent from Birk's formulation that three elements must be satisfied to successfully invoke free acceptance.[226] First, the defendant must have had the opportunity reject the benefit provided by the plaintiff. This is not essential, however, if it can be shown that the defendant has benefited from a non-voluntary enrichment. Goff and Jones[227] point out that exceptionally, restitution should be granted though the defendant never had the opportunity of rejecting the services. The sort of case warranting this would be where the defendant has gained a financial benefit readily realisable, without detriment to himself or herself, or has been saved an inevitable expense, for he or she was then "incontrovertibly" benefited from the services rendered.[228]

A second requirement is knowledge on the part of the defendant that what was given was not intended as a gift.

Thirdly, the defendant must have had the opportunity to reject but decided to accept the benefit. Their decision to accept requires some element of neglect sufficient to draw them into responsibility for the transfer of value to them.[229]

Accordingly to Birk's structure, free acceptance is unique in showing both that there is an enrichment and that it is unjust. Central to his formulation is that the "injustice" is on the defendants side. The injustice is that of refusing restitution to a disappointed risk-taker, who has conferred a benefit on the free acceptor.[230]

As Birks puts it "he (the defendant) has only himself to blame for the resulting situation." [231]

Let us now turn our focus to the particular criticisms of free acceptance and see how this fits with de facto property disputes. Essentially, it will be seen that Birks formulation here is a reflection of his general belief that restitution has a general category that is "the reasonable person in the shoes of the defendant" test. It should be noted that the "reasonable person" test was also laid down by Cooke P in Pasi v Kamana [232] although there he was focussing on the plaintiff. It would follow therefore that there is nothing to stop an analysis of de facto property disputes in the context of restitution, whether or not we accept Birk's categories. Indeed, it may even be said that both Birk's category and Cook's test are merely reflections of what is fair and reasonable.

It may be reasonable to view free acceptance within a general concept of unjust enrichment since the elements of each are similar. That is, both are aimed at preventing an injustice which would exist if the defendant was allowed to retain the benefit or enrichment he or she received at the plaintiffs expense. The view that free acceptance is a sub-set of unjust enrichment may be seen in a variation to Birk's hypothetical example. If A had paid B something for cleaning the windows, then it is arguable that it is no longer a "free" acceptance case. If B perceived A's payment as inadequate, it would be more accurate to say that because A received a greater benefit from the transaction than B, A was unjustly enriched and therefore B would have to rely on unjust enrichment, as opposed to free acceptance.

However, the value of free acceptance as a principle is provided by the fact that it is a concept within the broad principle of unjust enrichment.

It is submitted that the value of looking at and determining free acceptance is that the three elements which make up the test for free acceptance could be applied to determine what is meant by "unjust" in the unjust enrichment principle. The unjust enrichment cases simply define "unjust" as "no juristic reason for the enrichment" and leave it at that. Given that the courts in New Zealand and England have rejected unjust enrichment because of its perceived vagueness, a considerable amount of certainty could be added to the concept by developing each element of unjust enrichment in this way. An alternative could be to make free acceptance on element of the unjust enrichment test. In either case, we need to examine the validity of free acceptance as a legal concept.

B. Is it a Valid Concept?

The most prominent attack has been by Burrows.[233] The thesis of his article "Free Acceptance and the Law of Restitution" is that Goff and Jones, and Birks, are mistaken and that neither on principle nor authority could free acceptance have a place within the law of restitution.

Birks states that an essential point to his thesis is volunteers who are disappointed risk - takers can get restitution on the basis of free acceptance.[234] Borrows questions how a person acting merely in the hope (as opposed to non-voluntarily) of getting paid for services rendered could on common sense claim to have suffered an injustice :

they merely took a risk that did not pay off.[235] The author submits that Borrows has interpreted the phrase "risk-taker" in its absolute widest sense, that is, like a person who has placed a bet on a horse.

Yet there are lesser degrees of risk which we all run in everyday life. The de facto spouse who stays in the home to look after the children and be a good home maker does not request payment but runs the risk that should the relationship end, she may get nothing for all her years of hard work. The risk here is the presumption that she (as it usually is the women) is doing her part for "the both of them", that is, for the relationship and therefore it is not unreasonable for her to run the risk of thinking that the male is also working for the both of them. The alternative to running this risk would be to specify property rights before entering the relationship, yet the essence of "de facto" relationships is the absence of any such legal restrictions or impositions.

The next problem is directed at the concept of "enrichment", and within it, what the term "benefit" covers. The author agrees with Burrows[236] that as a matter of fact a person may be benefited either negatively - that is by being saved an expense - or positively - that is by making a gain - and that as a matter of policy one may judge the issue on a range from total subjectivity (solely through the defendants own eyes), through to total objectivity (solely through the eyes of the reasonable man, which in this context means the market). The test to be applied, and which lies somewhere along the line of total subjectivity to total objectivity is what Goff and Jones label the concept of "incontrovertible benefit"[237], which Birks amplifies as resting on a "no reasonable man" test[238]: no reasonable man would say that the defendant was not enriched.

Such a test recognises that there are things besides money which are or can be of value to the holder. In terms of the test, the receipt of a sum of money by a defendant is regarded as a benefit because no reasonable man would deny that a sum of money benefits him. The test seems to counter any agreements by the defendant that to him, subjectively, the conferment is of no value. This agruement is known as "subjective devaluation" and the test is designed so that any recourse to subjective devaluation would be so absolutely unreasonable that no reasonable man would try it.[239]

Financial contributions by a de facto would certainly come within this test. The question is whether by performing domestic duties, that spouse has thereby conferred a benefit upon the other spouse. The author suggests it can, in the sense that the recipient has been saved an expense. If the spouse who goes out to work has children, he or she has been saved the expense of a baby sitter while at work, and in the absence of children, has been saved the expense of a housekeeper. In addition, even if a babysitter or housekeeper would not have been hired, a reasonable person would view the domestic services as a real benefit.

Goff and Jones', and Birks' view supports this argument. They advance that free acceptance shows that the defendant regards himself as benefited, and therefore ordering him or her to pay does not undermine respect for individuality of values. Borrows disagrees. He says that there is no reason why we should assume that a freely accepting defendant actually regards himself as being benefited by what the plaintiff has conferred.[240] In this sense, the defendant may be indifferent as to weather or not the plaintiff should perform the services or deliver the goods.[241]

The fundamental problem with this view is that it seems to return to a purely subjective test of how the defendant perceived what was conferred. Yet earlier Burrows argues that the test can not purely be subjective or objective.[242] It is submitted that the "no reasonable man test" is better because if the defendant was indifferent as to what was being conferred, he or she would nevertheless be reasonably expected to know that if they accepted what was being conferred then they may have to pay for it. Given this, they should reject the conferment rather than attempt to freely accept it.

Again, in the de facto context, the spouse who has title to the property and who goes out to work cannot reasonably expect that after being a good homemaker for many years, his or her defacto spouse is not entitled to a share in the property or monetary compensation.

C. Conclusion

Although there is no reported English case in which the term "free acceptance" has been used and relied on it is not inconceivable that the concept, along with restitution in general, may be recognised in the future.[243] If it was recognised, perhaps the biggest hurdle in de facto cases would be proof of a non-gratuitous intent by the claimant for this may be seen as linked with the considerations of common intention.

More specifically, it is submitted that the concept of free acceptance could be used by the courts to determine what is "unjust" in an unjust enrichment case. Free acceptance could provide a starting foundation for the development of a test for this limb of unjust enrichment. Free acceptance would provide a workable test and one which could be refined by the courts.

It may be thought that principles such as failure of consideration[244] or estoppel[245] could be used to define what is unjust. The advantage, however, of free acceptance is that it is not bound by traditional definition. The courts are free to mould it to their specific requirements from a fresh, untainted base.

Part VIII : UNCONSCIONABILITY

A. Introduction

Equity imposes a constructive trust upon property where it is fraudulent or unconscionable for a party with legal title to deny an interest to the other party.[246] From this board statement it follows that a court will have to decide when in fact it would be "fraudulent" or "unconscionable" for a party to rely on their legal title. Here we are concerned with the latter.

There are many types of conduct that can be viewed as unconscionable in the general sense. There are also many concepts that can be viewed as akin to unconscionability, such as "inequitable", "unfair" and "unjust". One might therefore be forgiven for concluding that a concept of unconscionability as a legal test would be of no more use than a test of "justice". Indeed, unconscionability has been described as an "elusive and mercurial concept which mean[s] different things to different people".[247] Therefore, if a concept of unconscionability is to be of use, it must not be taken to be a panacea for adjusting contract or understandings between competent persons when it transpires that one party has gained a greater benefit than the other.[248]

In the common intention cases, the courts laid down that where a common intention was expressed or could be implied, and where the claimant had suffered some detriment , it was unconscionable for the legal title holder to resile from the common intention that an interest was conferred. But this approach does not recognise that:[249]

> ... it may be difficult for a claimant to show a link between contributions to housekeeping expenses, work on a farm or the performance of domestic services and the common intention that an interest has been or would be obtained in the property.

The problem with the approach to unconscionability taken above is that it is directly tied in with the need to show a common intention. In the majority of cases the parties will not even have directed their minds to questions of ownership of the property they have enjoyed in common.[250]

A better view would be to view unconscionability as a principle in itself, as in the celebrated cases of O'Connor v Hart[251] and Nichols v Jessup[252]. This would mean the cases could no longer use the term "unconscionability" as a type of catchphrase whenever a judge wanted to do justice. This has tended to be the practice in the past. Rather, if a case warranted a defendants actions being described as unconscionable, the facts would have to satisfy a requisite test.

The concept of unconscionability can look more to the conscience of the parties (through the conscience of the court). It may be that in reality one party has contributed more to a de facto partnership. But that is as far as the unjust enrichment analysis looks before attributing shares. Unconscionability can examine why one party has been able to contribute more.

It should be noted that there are important differences between free acceptance and unconscionability that justify recognition of the latter irrespective of whether we also accept unjust enrichment as a general principle. First, unconscionability has long been recognised and accepted as a valid independent principle with its own characteristics and parameters.

Secondly, a bargain or agreement will be held unconscionable for the primary reason that it strikes against the Courts conscience. By condemning the act the court is showing it will not tolerate certain behaviour.

Generally, the type of behaviour that is struck down is where are party seeks, whether at the beginning or end of the relationship or partnership to take advantage of the other. It follows that if the defendant seeks to take advantage of the plaintiff, then the court will also be preventing the defendant from becoming unjustly enriched at the expense of the plaintiff. But this is a secondary function of unconscionability that is, the prevention of unjust enrichment. The third reason for accepting unconscionability as a general principle is that it is better suited to certain areas then unjust enrichment. For example, in a purely commercial transaction it may be more appropriate to use unjust enrichment while in personal relationship disputes a defendants actions could more readily be analysed in terms of unconscionability. Unjust enrichment is more suited to balancing up the exchanges between the parties and to enquire, if the exchange is not similar, whether there exists a valid reason for allowing one party to gain a greater benefit than the other. Unconscionability looks more to the conscience of the parties.

B. <u>The ""Unconscionable Bargain" Test</u>

The test for unconscionable bargains presupposes that a bargain has been struck where the bargain is usually represented in a contract between the disputing parties.

Although there is no bargain in the sense of a common law contract between de facto spouses, it is submitted (for reasons given later) that the unconscionability concept has equal application to the relationships that could traditionally give rise to a constructive trust.

The lack of certainty as to the scope of the courts' jurisdiction to strike down unconscionable bargains has often been noted. Sheridan concluded that:[253]

> ... probably the only safe generalisation is that the court considers each case on its individual merits to see whether one party has taken advantage of the weakness or necessity of the other to an extent which strikes the Judge as being a greater advantage than the current morality of the ordinary run of business allows

Although this statement was made over 30 years ago,[254] it has recently been endorsed by Lord Scarman in National Westminister Bank v Morgan,[255] who observed that:[256]

> Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable : that is a question which depends upon the particular facts of the case

It was only in 1986 that the decision of the Court of Appeal in Nichols v Jessup[257] helped to clarify the approach which New Zealand courts should take to unconscionability cases in light of the Privy Council decision in O'Connor v Hart.[258]

First,[259] the traditional test for unconscionability contemplates that there must be serious inequality of bargaining power as shown through poverty, ignorance or other disabilities.

This element has been variously described as the weaker party being at a "special disadvantage"[260] or "serious disadvantage"[261] to the other or the weaker party operating under a "special disability"[262] or not being "equal to protecting himself"[263]. The inequality of bargaining power is usually reflected in the disparity of consideration moving between the parties. Alternatively, the court will move to strike down the bargain if it runs counter to the "conscience" of the court, irrespective of what the respective bargaining powers were. This element is therefore usually implicit in or follows from the following two factors. Indeed, since equality of bargaining power has never been a pre-requisite for contracting, the lack thereof is legally irrelevant.[264]

Secondly, there is the element of "inadequacy of consideration" or "considerable undervalue".[265] Sheridan identifies[266] this element as a necessary part of finding unconscionability:[267]

> ... the resulting bargain must be unfair; that is, the inequality of the parties must be reflected in the inequality of the exchange

Goff and Jones support[268] this requirement. It has also been noted[269] in various commentaries on these cases that they establish a requirement of "marked inadequacy of consideration" to establish unconscionability. This interpretation has obviously come from the following words of Cooke P:[270]

> I do not think there is anything in O'Connor v Hart or any other high authority to encourage the idea that a modern court of equity shall disregard a very marked imbalance of benefits in determining whether to set aside as unconscionable a contract with a grantor or vendor whom the grantee or purchaser knew or ought to have known to have been a significant disadvantage in appreciating the relative consequences of the bargain.

In Nichols v Jessup[271], however, the key lay in the gross contractual imbalance which existed between the parties.

When a disparity in exchange is serious enough to offend the courts sence of justice, it is easy for them to reason that something must have gone wrong in the bargaining process and to search among the facts of the case for the elements necessary to give relief.[272] Thus, in terms of results the particular legal scheme applied may not make a difference.

The concept of "unfairness" embraces two concepts.[273] The first is "procedural unfairness", which refers to the unfair manner by which the contract or agreement is brought into existence. The second is "contractual imbalance", which refers to the terms of a contract being more valuable to one party that another. In the context of unconscionability the requirements of inequality of bargaining power and "taking advantage" relate to procedural unfairness.[274] Contractual imbalance is the same as the inequality of consideration element. This distinction is central to the authors arguement in light of the following comment from Lord Brightman. After drawing the distinction between procedural unfairness and contractual imbalance he said:[275]

> The two concepts may overlap. Contractual imbalance may be so extreme as to raise a presumption of procedural unfairness such as undue influence or some other form of victimisation.

This passage can be interpreted as laying down a general rule in the area of equitable fraud that procedural unfairness alone will be enough to establish unconscionability, that is, irrespective of any contractual imbalance.

Conversely, contractual imbalance will not, alone, provide grounds for setting aside the contract unless it is so extreme as to raise a presumption of procedural unfairness. The effect of this conclusion is: [276]

> **Application of this general rule to unconscionability would mean the jurisdiction could be exercised without proof of inadequacy of consideration provided that requisite procedural unfairness was shown.**

This element represents a scale[277] or continuum : at one extreme contractual formation abuses (procedural abuse) may be so severe as to warrant a finding of unconscionability without proof of contractual imbalance; at the other extreme substantive abuses (contractual imbalance) is enough in itself to set aside a contract for unconscionability, if it raises a presumption of procedural unfairness.[278] Between these extremes a combination of the two elements will be necessary to support a finding of unconscionability.

Since procedural unfairness will be enough to support unconscionability, what is meant by the phrase "procedural unfairness"? The Privy Council in O'Connor v Hart[279] appeared to analyse this concept within the framework of "taking advantage". That is, the stronger party must take advantage of the weaker party's position. Goff and Jones express this element as one party's weakness being "exploited by the other in some morally culpable manner".[280] In Commercial Bank of Australia v Amadio[281] Mason J merely required that the stronger party know or ought to have known of the weaker party's special disadvantage.[282] O'Connor v Hart[283] added to this by requiring some degree of moral fraud or unscrupulousness on the part of the stranger party, before it can be held voidable as an unconscionable bargain. Lord Brighten expanded on this by saying there had to be some form of

equitable fraud, talking advantage, over reaching or other description of unconscionable doings which might justify the intervention of equity.[284]

If the stronger party has "cause to suspect" that the other party is at a disadvantage,[285] or that they "knew" or "ought to have known" this, then unconscionability may be invoked. In the words of Somers J[286]:

> [A]t least in its antipodean statement, a party may be regarded as unconscientious not only when he knew at the time the bargain was entered into that the other party suffered from a material disability or disadvantage and of its effect in that other, but also when he ought to have known of that circumstance : when a reasonable man would have averted to the possibility of its existence.

The author has set out above in some detail exactly what the courts have laid down as the test for unconscionability for one reason : to show that the test will vary in its necessity from case to case. That is, in its most complex form, all the elements will have to be proved. In its simplest form, it is submitted that the test reduces itself to this:[287]

> ... it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties...

Stated more simply, whether the stronger party has actually behaved in a manner inconsistent with good conscience. The court will usually have decided this before applying any test. In this sense the various factors are subsumed under the general test. The closer to the borderline the case, the more use one can expect the court to make of the various elements in order for the court to have to justify its decision on a rational basis. This approach is not knew.

Some forms of estoppel[288] are based upon this very notion of unconscionability which has posed no problems in respect to "uncertainty" in the application of the principle.

Let us apply this to the common de facto situation where the male has taken title to the property and has gone out to work while the woman has stayed in the home.

The courts have often found a common intention, or an "agreement" or "understanding" that both are to share in the fruits of their joint efforts. The courts have said to do otherwise would be unconscionable. Yet we have also seen that there is usually no such common intention. Rather, the courts have tended to either manufacture it or base it upon a single statement which may have passed between the parties years before the break-up. Now let us apply the test for unconscionability.

1. Although there is no express contract, there is little difficulty in implying or finding implicit in the relationship on agreement or understanding that they are contributing towards the "relationship" or "partnership" rather than building up their individual resources. In this relationship they have divided the labour yet whether the return on the labour is money or an efficient home, both are equally important to the relationship.

2. When the relationship ends and there is a dispute as to each party's property, they are likely to consult a lawyer. The male will soon discover that having title in his sole name raises the presumption of sole ownership at law and can therefore be seen as the stronger party. Indeed, the male may have known at the outset the legal benefits of keeping title in his sole name.

In this context the male may have refrained at the outset or during the relationship from transferring title into their joint names knowing well that this would "legally" mean he would loose a share of his equity in the home.

3. Since each had been happy with the other's contributions during the relationship, it is reasonable to think that neither felt they were necessarily doing more or less for the relationship than the other. So why should the property owning spouse now be allowed to raise such a presumption? It is submitted that this strikes against the conscience of the court as discussed above.

The idea that the male is now wanting to assert legal title can surely be seen as "taking advantage" of the other spouses position.

That is, he has been able to increase his capital assets mainly because she has looked after the other end of things, that is, the home. As the courts apply this principle of unconscionability to particular areas, they will no doubt extract and develop particular elements that will need to be satisfied or that will identify unconscionability. The strength and vitality of this approach is that the courts can focus on the conceptual workings of the principle rather than concern itself with an all embracing definition.

The strength of this approach to unconscionability can be seen in the remedies. There are two possibilities. First, if we assume that there was no common intention that both spouses were to have an interest in the property, but rather the spouse with title was to retain sole ownership irrespective of the fact that the other worked hard in the home, then the court should be able to render such an agreement as

void not merely because it is unfair, but because it is an unconscionable agreement in the circumstances. The court could then make a proper division. Secondly, once the court had found the agreement unconscionable they could impose a constructive trust on the property and then go through the division process in the usual manner.

More often than not, the second remedy would flow from the first. In this sense, the concept of unconscionability advanced will necessarily have to satisfy a less stringent test than the situation where there is a legally binding contract. It may be therefore that the test for unconscionability in this context is a sub-species of the test for unconscionability in contract law.

C. The "Joint Venture" Approach

It has been stressed thus far that the flexibility of the test for unconscionability is vital. This was illustrated in the High Court of Australia in Muschinski v Dodds[289] where Deane J, after rejecting unjust enrichment as a general basis for liability, left open the possibility of further development based upon the principle of unconscionability.

The dispute arose because although the house in which they were living had been taken as tenants in common, Mrs Muschinski had contributed over $25,250 and Mr Dodd's only $2,500 to the purchase and improvement of the house. In these circumstances Mr Dodd's contended a half share in the house. Deane J commenced by stating that a constructive trust could not be imposed simply to indulge "idiosyncratic notions of fairness and justice"[290]. Provision of a remedy could be justified only...

> ... when warranted by established equitable principles or by the legitimate process of legal reasoning, by analogy, induction and deduction, from the stating point of a proper understanding of the conceptual foundation of such principles. [291]

Deane J commented that although notions of fairness and justice could not be tests in themselves,[292] they remained an underlying feature of most equitable relief. He also made it clear that the imposition of constructive trusts should not be confined to traditional categories,[293] since it was a remedial institution which equity imposed regardless of intention wherever the retention or assertion of beneficial ownership to property was contrary to equitable principles. This set the scene for Deane J to use the analogy of a failed joint venture to impose a constructive trust based upon unconscionability.

Where a partnership or joint venture is frustrated by events occurring without blame attributable to the parties and the consequences of failure have not been regulated by contractual agreement, equity entitles the joint ventures to a proportionate payment of their capital contribution. Equitable intervention is based on the principle that the failure of the enterprise makes it unconscionable for one partner to retain the benefit of contribution made for its purpose.[294]

> It follows that equity requires that the rights and obligations of the parties be adjusted to compensate for the disproportion between the contributions. [295]

In assessing whether one party is acting unconscionably in asserting their legal rights, the court will be influenced:

> [B]y the special considerations applicable to a case when a husband and wife or persons living in a "de facto" situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home making and family care. [296]

In Baumgartner v Baumgartner[297], all the members of the High Court of Australia accepted that a constructive trust could be imposed to prevent the appellant unconscionably retaining the benefit of the respondent's contribution.

The author submits that there are two very important advantages to this approach. First, it allows, as shown by the willingness of the Australian courts, a court to take into account both financial and domestic contributions when assessing property rights. Secondly, this notion of unconscionable retention of benefit frees the court from having to fashion phantoms of common intention.[298]

In addition, the concept of "joint venture" can be extended beyond unmarried couples to other relationships where the parties have merged their resources in pursuit of a common goal.[299]

However, it should not be thought that unconscionability in this sense will be appropriate in all cases, nor that it is generally a tool to dispense justice. Deane J in Muschinski[300] was not merely concerned with the actual contributions to the purchase price but also the respective shares in the surplus remaining after the repayment of the respective contributions. It remains for the courts to develop and refine exactly what the doctrine extends to and on what principles. It is also important to apply this doctrine cautiously since couples live together without getting married for a variety of reasons.[301]

Parkinson points out that it may in fact be unconscionable to grant a spouse a beneficial interest in the property where the legal title holder did not intend to share the equity in the home and that they were merely sharing living expenses.[302] However, the author submits that the courts are sufficiently mature to be able to decide whether a "de facto relationship" exists and it is from this finding that the various inferences as to "property rights" can be made. It would surely be inconsistent in the large number of cases for a title holder to plea sole right to the home when by definition, by entering into a de facto relationship, the couple are deemed to be a type of partnership.

The author sees no reason why this approach could not be developed in New Zealand. As a final point, it is not clear why the High Court saw this approach to the concept of unconscionability as more consistent with "traditional methods of legal analysis"[303], than the concept of unjust enrichment.[304] Tochey J has commented:

> [I]s 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 M R's notion of "a constructive trust of a new model" imposed wherever justice and conscience require it. 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.

Thus Tochey J would see the unconscionable retention of benefit principle which Deane J promoted as akin to the principle of unjust enrichment which Deane J rejected.

PART IX : ESTOPPEL

A. Introduction

Although the primary foundation advanced for the constructive trust is unjust enrichment, there is another concept which is deeply entrenched in our law which should continue to be seen as an alternative foundation: estoppel. This is even more so given recent expressions that the multitude of estoppel categories should now be condensed thus creating a general category of equitable estoppel. This general category will be able to adopt to new situations more easily than the old compartmentalised principles of estoppel.

There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not.[305] Traditionally, the law of estoppel has been categorised into three branches; common law estoppel, promissory estoppel and proprietary estoppel.[306] Common law estoppel is invoked where a person makes a representation upon which another relies to his or her detriment, where the representation is of an existing (not future) fact.[307] Promissory estoppel is an equitable estoppel and extends to representations as a future conduct.[308] This branch was traditionally thought of as allowing estoppel to be used only as a defence. However, the Australian High Court in Walton Stores (Interstate) Ltd v Mahor[309] extended its use as a 'sword' that is, as a course of action. Finally, proprietary estoppel is also an equitable estoppel which applies in situations where a person has created the expectation that they will confer an interest in property on another.

As with most equitable doctrines the categories ensured the development of estoppel according to strict legal principles and rules. Thus Atiyah has criticised the interpretation of the cases establishing common law estoppel, saying those cases were also good authority for invoking estoppel where there were representations as to future conduct.[310] Thus there would be no need for promissory estoppel. He concedes, however, that the doctrine of promissory estoppel has now grown so strong and vigorous that "it may be too late for the Courts to recognise what they have actually done".[311] It appears that this is not so. Deane J in Walton Stores[312] preferred to find room for estoppel as to future conduct within common law estoppel. To do so he overruled Jordon v Maney,[313] which had restricted common law estoppel to existing facts, saying that case was no longer good law in Australia. Deane J criticised the tendency to maintain common law and equitable estoppel as separate doctrines.

These represents a move in the area of estoppel to cut down the number of specific categories by enunciating a more general concept of estoppel. As Lord Denning put it.[314]

> **The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. It has evolved during the last 150 years in a sequence of separate developments - proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general category shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so. If one of them seeks to go back on it, the Courts will give the other such remedy as the equity of the case demands.**

Not only are the categories merging, but with them the Courts are moving away from the older, stricter tests and towards a more flexible, liberal one.

It is submitted in this part that the doctrine of estoppel, and particularly proprietary estoppel, should be seen as a legitimate foundation for the constructive trust, particularly in light of the recent developments.

B. Proprietary Estoppel

It should be noted at the outset that the proprietary estoppel doctrine and the common intention concept are both concerned with action in reliance of an understanding as to an interest in property and the prevention of unconscionable behaviour in denying that interest by the person who contributed to the understanding. However, an important difference is that the proprietary estoppel doctrine is attracted by a unilateral expression of donative intention whereas the common intention doctrine requires an express or tacit agreement.[315]

In Re Basham (deceased)[316] the judge held that proprietary estoppel was a form of constructive trust which arose when A acted to his or her detriment on the faith of a belief known to and encouraged by B that he or she had or was going to be given a right in or over B's property, so that B was prevented by equity from insisting on his or her strict legal rights if to do so would be inconsistent with A's belief. The judge, however, proceeded to analyse the facts in terms of the traditional requisite elements of estoppel. The so-called 'five probanda' laid down

by Fry J in Willmott v Barber[317] has been expressed by Sir Alexander Turner in these terms:[318]

1. In the first place, the plaintiff - in the case before him, the person said to have been 'encourage' happened to be the plaintiff - must have made a mistake as to his legal rights.

2. Secondly, the plaintiff must have expended some money, or must have done some act upon the faith of his or her mistaken belief.

3. 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 or she does not know of it, he or she is in the same position as the plaintiff.

4. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights.

5. Finally, 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 rights.

The driving principle of equitable estoppel (which is the general category, examples of which are promissory estoppel and proprietary estoppel)[319] is "unconscionable conduct". It is this characteristic more than any other which distinguishes equitable estoppel from contract, and which answers the objections concerning the absence of offer and acceptance, and of consideration.[320] This also means there is no need for a pre-existing contract or pre-existing legal relationship:

> One may discern in the cases a common thread which links them together namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adaption that it would be unfair or unjust if he were left free to ignore it" per Dixon J in Grundt at 675, see also Thompson at S47. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore it.[321]

However, it is important to remember that the principle of promissory estoppel advanced by the Court in Walton Stores,[322] although based on unconscionability, was guided by the test advanced by Brennan J[323] which set out six specific elements which had to be satisfied before the Court could find unconscionable conduct and thereby equitable estoppel. The decision in Walton Stores[324] has since been approved of and applied in at least two cases in New South Wales.[325] Compare this to the approach by the Privy Council in Maharaj v Chand,[326] concerning promissory estoppel. There, Sir Robin Cooke expressed the view that regardless of whether the facts establish an interest in land, they may satisfy the requirements for a promissory estoppel because although that doctrine is firmly established, its frontiers are still being worked out.[327] He was therefore not prepared to define particular categories, but merely relied upon that part of the general doctrine of equitable estoppel that was required by the particular facts. The trend in England has therefore resembled that in other jurisdictions - of breaking down the barriers between categories and of the rigidity of traditional tests. Thus in Re Basham[328] the judge cited with approval a passage from Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd[329] where Oliver J explained the "broadening process" in this area:

> ... the more recent cases indicate, in my judgment, that the applicant of the Ramsdan v Pyson (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 to ascertaining whether in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowing or unknowingly, he has allowed or encouraged another to assume to his detriment rather 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 result of the application of equitable estoppel principles is the imposition of a constructive trust. In addition, it may result in the he creation of an equitable charge on the property or the imposition of a personal liability to repay money regarded as a loan,[330] or an order for the conveyance of the fee simple estate,[331] or a lien,[332] or finally, as in Taylor Fashions Ltd,[333] a decree of specific performance. It is because of the width of the remedies that Finn has agrued that the rationale of proprietary estoppel should be the prevention of an assertion of a strict legal right, rather than the making good of representations. He says[334]:

> **The issue to which these instances gave rise was whether E had previously so conducted himself in relation to P as would make it "fraudulent" "inequitable", or "unconscionable" - to use the changing language of the cases - to occasion the consequences which would flow from his being permitted to insist upon his rights.**

Finn points out a more fundamental objection to the development of estoppel as a tool to enforce representations. By allowing representations to be made good it amounts to effectuating a voluntary promise.[335] However, it may be said in response that the main aim of using estoppel in this way is to prevent unconscionable conduct and the entering of a voluntary promise is a ramification of this - not all voluntary promises will therefore be enforced.[336] Nevertheless, Finn makes some valuable comments:

> This is not to say that the law should not be more sensitive to the injustices which can be occasioned by the breaking of non-contractual promises. The contention, rather, is that equitable estoppel is not the appropriate vehicle to carry the judges into the field of judicial regulation. In that area of promising of making representations, currently untouched by equitable estoppel, the problem it is suggested is a problem about promising and promises - about if, when and why there should be enforcement; about the doctrines of consideration, of unilateral contract and conditional gifts; about contract law itself. These, not equitable estoppel, are the matters to be examined and reappraised if a new departure is to be made.[337]

C. Advantages in De Facto Cases

> It seems high time that more use was made of equitable estoppel principles to resolve disputes between unmarried co-habitees.[338]

The result of using equitable estoppel in this area will be that less time will be spent searching for some, perhaps, artificial common intention and more time concentrating on the reality of the expectation created or encouraged by the legal owner of the property.[339] The doctrine of equitable or proprietary estoppel will be even more appropriate to resolve disputes between de facto spouses than the common intention trust wherever the parties intentions do not coincide with their contributions.[340]

The imposition of a constructive trust rooted in a doctrine akin to estoppel appeared convincingly in the judgments in Eves v Eves.[341] For this reason, Gray[342] has said that there is "without doubt a close relationship between the operation of proprietary estoppel and the device of the constructive trust". Subsequent developments have confirmed this conceptual explanation. The relevant principles of proprietary estoppel were set out by Lord Scarman in Crabb v Arun D C:[343]

> ... it is now well-settled law that the Court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there any equity established? Secondly, what is the extent of the equity if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?

The Denning trust has been explained as resting on an estoppel-like doctrine and as one of the several means of satisfying an estoppel. Thus in Grant[344] v Edwards[345] it was said:

> I suggest that, in other cases of this land, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in Gissing v Gessing. In both, the claiment must to the knowledge of the legal owner have acted in the belief that the claiment has or will obtain an interest in the property. In both, the claiment must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them, but they rest on the same foundation and have on all other matters reached the same conclusions.

The judge went on to cite Crabb[346] where Scarman LJ said that the remedy of estoppel is the "minimum equity to do justice".[347]

The essence of equitable estoppel is that in some way or another the legal owner has induced the other spouse to believe that he or she will have a share in the property.[348] This would be difficult to prove in cases where conversations were only vaguely remembered, but as Plimmer v Wellington City Council[349] illustrates, it is sufficient to give rise to an estoppel that this was the assumption that underpinned the parties' relationship - an assumption which the legal owner shared and upon which the plaintiff relied.[350] Thus where one spouse has paid the household bills or cared for the children the estoppel principle will recognise

that in reality such work is often a conditional gift. So it is this spouses intention that is the starting point of the inquiry, although it will be important how that intention appeared to the property holder.[351] Nevertheless, the plaintiffs claim would not need to be based on any given words spoken at a specific moment.[352] Further, where the remedy is the minimum equity to do justice, the remedy need not be proprietary because the advantage of estoppel over the common intention trust is that the extent of the beneficial interest need not be specified.[353]

The main problem that has been expressed with this approach is that not only does the person claiming a proprietary interest have to show detrimental reliance, but also a relationship between the behaviour of the title holder and the detriment suffered by the claiment; detriment alone is insufficient.[354] Neave argues that the requirement is normally satisfied by showing that the person with legal title encouraged or induced the claiment's acts, which were performed on the basis that the claiment had been given or would be given an interest in the property.

Hayton[355] puts it as this:

> **... Where M simply told W he regarded the house as much hers as his, and where W then happened to act like a good de facto wife, then since such endeavours are likely to be referable to love and affection and to enjoying living in a tidy well-kept house, such conduct should not amount to detrimental reliance induced by a belief that in M had orally given W a half share in the house, thus W should not have any proprietary interest.[356]**

However, this view has been expressed because of the fear of detrimental reliance and equitable estoppel ousting the doctrine of consideration in contract.[357] Yet Hayton[358] recognises that although housewives' services may neither be inherently indicative of a contract or of an expectation that a beneficial interest in the house exists or is being acquired,

neither spouse is likely to know of formal requirements and therefore a Court may be prepared to regard the title holder as fraudulent to insist on his or her strict legal rights, where the other spouse has been a good de facto wife.[359]

Neave argues that even if it is accepted that the claiment suffers a detriment by providing such services, it may be difficult to show a link between the performance of the services and the behaviour of the legal title holder. This agreement presumes the cooking, cleaning and general household chores would still have been done regardless of any belief about an interest in land,[360] that is, even if the de facto wife accepted that she would get nothing should the relationship end.

Despite these academic arguments, it is submitted that the Courts are taking a much more liberal view and looking at the 'conscience' of the title holder once he or she is relying on their legal title. The basic question is whether it is unconscionable for the title holder to assert his or her title. If it is unconscionable the Court will no doubt find the relevant test as satisfied. Thus in Greasley v Cooke[361] the Court held that they could assume that the claiments detrimental acts, which consisted of housekeeping for the de facto husband and his family and caring for his mentally ill sister, had been induced by the representation that she could remain in the house for her life, when invoking proprietary estoppel. The Courts do not appear to have similar flexibility when invoking the common intention concept.[362] Recent cases in England and Australia suggest the usefulness of estoppel becoming recognised. Parkinson[363] says:

> **Estoppel is clearly an approach which, like the notion of unconscionability, has the potential to take over the field. It could be used in most situations where de facto spouses are in dispute over their property.**

D. The Approach in New Zealand

Cooke P's view in Pasi v Kamana[364] revealed an inherent dissatisfaction with the state of the law in this area, a dissatisfaction shared by various judges and commentators since the inception of the Denning trust[365]. It now seems, however, that New Zealand courts are moving to remedy this by picking up on the dicta of Sir Nicholas Browne Wilkinson VC in Grant v Edwards[366] where he suggested that in other de facto property cases "useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel".[367]

The approach taken by McGechan J in Stratulatos v Stratulatos[368] is indicative of this suggestion.[369] McGechan J starts by saying that the classical doctrine in recent years has become considerably more flexible. He emphasises the tendency of the courts to move away from (but not ignore) strict adherence to the five probanda, (each being regarded as essential in the past) towards a more general approach based simply upon "unconscionability". A similar trend has developed in England, manifesting itself in Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd.[370] The liberalising trend was picked up and applied in New Zealand by Barker J in Andrews v Colonial Mutual Life Assurance Society Ltd:[371]

> **However, the recent cases show that strict adherence to the probanda is not necessary; ...[the courts have been] directed to ascertain whether it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed to assume to his detriment**

> **rather than inquiring whether the circumstances can be fitted into some preconceived formula.**

In Wham-OMFG Co. v Lincoln Industries,[372] Davidson CJ referred to the advent of a more flexible test based on unconscionability.

And in Westland Savings Bank v Hancock,[373] where the bank relied on estoppel to counter claims that various mortgage interest rate increases were unlawful, Tipping J expressed the relevant test to be whether the bank had established that it would be unconscionable, unfair or unjust for the Hancocks now to assert that the bank had no right to increase the rate of interest it did.[374] After noting that the Privy Council seemed to approve of the three expressions "unfair", "unconscionable" and "unjust" in Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd,[375] Tipping J proceeded to see whether there was anything in the conscience of the defendant to stop them relying on their strict legal rights. It seems undeniable that under the modern approach to proprietary estoppel ...

> **... the five probanda have become more indicators than prerequisites, providing some guidance towards a modern and a more generalised test simply of unconscionability. [Emphasis Added].[376]**

Maxton views the development towards a large principle of unconscionability as inviting comparisons with a broad concept of unjust enrichment free from the restrictions of common intention.[377]

An important development that has accompanied the move towards a general test has been a move towards a general category of 'equitable estoppel', which would encompass both promissory estoppel and proprietary estoppel. As mentioned, Brennan J in Walton Stores[378] thought that there was little

purpose in dividing instances of estoppel into categories of promissory and proprietary, especially since they are not necessarily exhaustive of the cases in which equity will intervene. In Westland Savings Bank,[379] Tipping J rejected an argument formed to draw a distinction between estoppel by encouragement and estoppel by acquiescence, given the new base for proprietary estoppel.

The New Zealand Court of Appeal appears to be in favour of a composite form of equitable estoppel. In Burbery Mortgage Finance and Savings Ltd v Hindsbank Farming Co Ltd,[380] a situation traditionally described as one of promissory estoppel was able to found a cause of action and the fact that the parties were not in a pre-existing contractual relationship posed no difficulty. Cooke P stated:[381]

> **The principle of promissory estoppel does not seem to be limited to dealings between parties who have prior contractual rights inter se ... In [Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 697] Oliver J (as he then was) spoke of various categories of estoppel as instances of an equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable; he warned against concentration on whether the circumstances can be fitted within the confines of some preconceived formula serving as a yardstick of unconscionable behaviour.**

With the merging of the categories, so to has the courts stressed its flexibility when giving a remedy. Although some texts have stated that particular estoppels can only give rise to certain remedies,[382] McGechan J suggested in Stratulatos that "tendencies to lay down fixed approaches to relief or to seek certainties are not appropriate in this field."[383] He emphasises how traditionally the area of estoppel provided a "range of potential relief" without difficulty. He preferred the approach by the Privy Council in Plimmer[384] as stating the current position of the law:

the court must look at the circumstances in each case to decide in what way equity can be satisfied.[385] This, he said:

> **... in my view, is still the search. Indeed, its broad character has become even more appropriate with the expansion of proprietary estoppel on to a more general unconscionable basis. It is not effective equity to create a wide jurisdictional basis, and then take a narrow view as to available relief.[386]**

The relief available will be that which is necessary to cure the underlying unconscionability: nothing more, nothing less.[387] It is submitted that in addition to arguing the common intention trust (if appropriate) prudent counsel should also plead the imposition of a constructive trust based upon proprietary, or equitable, estoppel. The foregoing makes it clear that the courts are more likely to accept such an argument, while it will be easier to reflect the reality of the situation in the context of estoppel as opposed to common intention. That is not to say other remedies should not also be pursued: only that the principle of unconscionability, through estoppel, is a valid foundation for the imposition of the constructive trust and the courts are likely to recognise it (over common intention and the Denning trust). Estoppel would therefore provide a theoretical foundation for the constructive trust where one is seriously lacking. And in the words of McGechan J:[388]

> **I have little doubt that the tide is running in favour of the simple and overt imposition of a constructive trust when such is necessary to do justice, rather than fashioning "phantoms of common intention" in order to resolve the property relationship.**

If this statement is a true reflection of the direction of the law in this area, one may ask 'is this not the same formulation that the Denning trust espoused, that is, to do justice in the circumstance?'. It may

well be that this refined and flexible concept of estoppel is merely the new model constructive trust given another name. The reason, however, why the courts are likely to accept it is because estoppel has "an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction",[389] and therefore the persona of equity 'developing the law', as opposed to merely creating law where the justice of a case requires it, is kept up.

Part X : UNJUST ENRICHMENT

A. Introduction

> 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 MacFarlan (1760) 2 Burr 1005 at 1012, 97 ER 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 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.[390]

The constructive trust is a concept of wide scope, and of a scope that is gradually growing. This is why exact definition of the constructive trust cannot be framed. This is not surprising given few legal concepts can be exactly defined, that is, defined in such a way that it includes all that falls within the concept and excludes everything else.[391] Up until now we have been content with asserting that some things are outside the concept, such as express trusts, while other things are within it. This follows what Sir Francis Bacon in his famous Readings Upon the Statute of Uses said: the nature of a use is best described by considering what it is not, and then what is is, for it is the nature of all human science and knowledge to proceed most safely, by negatives and exclusives to what is affirmative and inclusive.[392]

Why is it then that while some jurisdictions[393] are able to fit unjust enrichment within a general theory of constructive trust, others[394]

cannot? It is submitted that the answer lies not in the concept of unjust enrichment but with the jurisdiction administering it. The passage quoted at the beginning indicates that flexibility and discretion are common features of most equitable remedies. It is therefore up to each jurisdiction to formulate rules to regulate or allow these inherent features. It is submitted that the reason why unjust enrichment has not been generally accepted in England and New Zealand is because of a simple unwillingness, rather than inability, to recognise the concept. But as we shall see, in a restitutionary framework unjust enrichment can provide a workable foundation for the constructive trust.

B. Restitutionary Relief

> **Equity's rules were formulated in litigation arising out of the administration of a trust. In contrast, restitutionary claims are infinitely varied. In our view the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust ...**[395]

The objections to using 'justice' as a yardstick have already been noted in respect of the Denning trust. The main critic against using justice as a test in the restitutionary context is Birks[396] who argues that to decide case on the basis of "abstract reasonableness or justice" will produce an unacceptable measure of uncertainty in the law. Assuming that Birks is right, the author submits that Goff and Jones' formulation of unjust enrichment could be used in the place of 'justice' as the foundation for a constructive trust.

There have been various views expressed as to exactly what restitution means and what it therefore encompasses.[397] Thus it is said to

encompass; firstly, fulfillment of expectations engendered by a binding promise; secondly, compensation for wrongful harm; and thirdly, reversal of unjust enrichment. Goff and Jones[398] analyse the law of restitution through the concept of unjust enrichment. Support for this can be found in the judgment of Edmund Davies LJ in Carl Zeiss Stiftung v Herbert Smith (No. 2)[399] where he said unjust enrichment is the cornerstone of restitution and that it "may defy definition, yet its presence or absence from a situation may be beyond doubt."

Goff and Jones emphasise their view that "the principle of unjust enrichment is capable of elaboration and refinement"[400] on the basis that three factors must be present before there is a right to restitution. These are:

1. The defendant must have been enriched by the receipt of a benefit.

2. The defendant must have been enriched at the plaintiff's expense.

3. It would be unjust to allow the defendant to retain the benefit.

Birks on the other hand sees unjust enrichment as the causation event and restitution as the response. Thus he sees restitution in terms of a subtraction and a wrong. It is not intended, however, to go into the academic arguments surrounding unjust enrichment and the basis for restitution in general, but rather to highlight the different visions. Yet it is important to note the context within which restitution properly fits. One may question why the courts continue to label unjust enrichment as an unworkable and vague concept once we appreciate the analysis and foundation given to the concept by writers such as Goff and Jones, and Birks.

It should not be thought that restitution is only consequent on wrongs (that is, torts), breaches of contract and on equitable obligations. Restitution may be possible where there is no wrong at all.[401] For example, where a contract is frustrated by the fault of neither party, claims will lie in restitution for recovery of benefits transferred between the parties pursuant to the contract. Birks call this "autonomous restitution" as opposed to "restitution for wrongs".[402] This type of restitutionary recovery can be explained on the concept of unjust enrichment.

C. Refusal to Recognise the Concept

Any person who has attempted to write about unjust enrichment will have noted that, compared to many other areas of the law, very little time and literature has been devoted to this topic. This may perhaps be a direct result of the failure and refusal by most commonwealth countries to accept the principle of unjust enrichment as a valid concept. This has been so, at least until recently.

Proprietary remedies cannot be fully understood without some appreciation of the doctrine of unjust enrichment.[403] Although it is not usually accepted, it is a principle which appears in most legal systems. It suffices here to say that it lays down as a general principle that where the defendant is unjustly enriched at the plaintiff's expense, the defendant must make restitution to the plaintiff.[404]

Any development of unjust enrichment in England has been held back by the dispute on whether or not a quasi contractual action is theoretically

based upon an implied contract.[405] In England, judicial pronouncement on this matter is to be found in Reading v Attorney-General.[406] The High Court, the Court of Appeal and the House of Lords all agreed that the unfaithful army sergeant was accountable for the profit which he made. Denning J (as he then was) said the claim was for restitution moneys which, in justice, ought to be paid over. Lord Parker said:[407]

> **It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in law of Scotland, and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right of restitution so described would be too widely stated.**

Although there is no such right of restitution in every case of unjust enrichment, all restitutionary claims are united by the principle.[408] Ultimately, the search is to do justice between the parties.

There have been numerous suggestions that had it not been for Lord Denning's creativity then there would be no suggestion at all of the doctrine of unjust enrichment forming a part of English law. Marcia Neave says that "clearly in his judgment Lord Denning is using he constructive trust as a remedial device designed to prevent unjust enrichment."[409] In the course of his judgment in Avondale Printers Stationers Ltd v Haggie,[410] Mahon J commented that if the English Court of Appeal was using the constructive trust as a general remedial device against unjust enrichment then that represented a novel departure from the accepted modes of restitution and also a departure from the manner in which the English Courts had treated the constructive trust as a legal concept (that is, as a substantive institution).[411] Mahon J also

attributes the evolution of the principle of unjust enrichment as a doctrine to do what is fair and just[412] to Lord Denning. Later in his judgment, Mahon J says that although the decision in Hussey v Palmer[413] and Lord Denning's judgments in Binions v Evans[414] and Cooke v Head[415] reveal the invocation of unjust enrichment as a principle of fairness, such an approach is vindicated neither by principle nor authority,[416] despite the acceptance of these cases as examples of restitutionary proprietary claims by Goff and Jones.[417]

This conclusion accords with what was said in Carl Zeiss Stifting[418] by Edmund Davies LJ and by Mahon J in Carly v Farrelly[419]. The true position in England is probably reflected in the words of Lord Diplock in Orakpo v Manson Investments Ltd.[420]

> **My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system is based upon the civil law.**

New Zealand is in a similar position to England in respect of the development of unjust enrichment. Mahon J in Avondale Printers[421] analysed the state of the doctrine in New Zealand and convincingly concluded that he found himself obliged on the law as it stood to say that "a general doctrine of unjust enrichment is not part of New Zealand".[422] In coming to this conclusion Mahon J relied upon his previous comments in Carly v Farrelly:[423]

> **I must say that on the facts of this case I think I am being asked to apply a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying nations of fairness and conscience shall be the**

legal determinant. No stable system of jurisprudence could permit a litigant's claims to be consigned to the formless void of individual moral opinion.

This has remained the law despite the decision in Van den Berg v Giles[424] which has been analysed by some commentators in terms of a principle of unjust enrichment. This is understandable given Jeffries J in Van Den Berg[425] relied on Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[426] where Lord Wright said that "any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment".[427] Goff and Jones, however, provide an alternative explanation. They explain Van den Berg as one of compensation for improvements made by an expectant purchaser to the knowledge of the owner.[428]

It should be noted, however, that many of the de facto cases can be explained on the basis of unjust enrichment,[429] as shall be seen later. More explicitly, the crucial point in Mikoz v Raats[430] (a de facto property dispute) was that the principle enunciated by Dickson J in Pettkus v Becker[431] seems to have been adopted by Williamson J as one of the two bases for the imposition of the constructive trust which gave the plaintiff a one-sixth interest in the property.[432] Williamson J held that no evidence of a common intention was expressed, nor could it be inferred.

A reason given for the absence of unjust enrichment in New Zealand law is that there are numerous statutes which give relief in cases in which in other jurisdictions issues of unjust enrichment have been explored.[433] This, however, cannot bee said in the case of property disputes between de factos and any other family members (with the exception of married or engaged couples). It is submitted that a better view is that advanced by

Cooke J in Hayward v Giordani[434] where he concluded that the Canadian approach to unjust enrichment would be very helpful in New Zealand.[435]

Not surprisingly, the courts in Australia have also been reluctant to recognise a principle of unjust enrichment as a general remedy. Again, the general trend has been dicta in de facto property cases. However, the judgment of Gaudron J in Trident General Insurance v MacNeice Brothers[436] may be interpreted as using unjust enrichment as a basis for imposing liability, although none of the other Justices rested their decision on that ground.

Unlike the jurisdictions discussed thus far, the doctrine of unjust enrichment appears to be emerging in Canada as a cause of action in itself, rather than merely being a principle that underlies other legal doctrines. This is not only so in de facto cases. For example, take the case of Re Northern Union Insurance Co Ltd.[437] Here, BC Hydro insured against loss or damage with Northern Union up to a limit of $19.3 million. Northern Union reinsured the layer from $1 million to $10 million with three insurers. BC Hydro sustained loss of $3.5 million. Northern Union paid the first layer of insurance of $1 million. Before paying off the balance the insurer went into liquidation. The liquidator claimed the proceeds of the reinsurance polices for the benefit of the general body of creditors. BC Hydro claimed the proceeds of the reinsurance policies, submitting that the premiums paid by BC Hydro "gave rise" to the policy of reinsurance and BC Hydro's loss "gave rise" to the process of $2.5 million.[438] The court held there was no constructive trust of the proceeds in favour of BC Hydro. The court applied the three pronged test to be applied by a court in determining whether in fact a constructive trust had arisen. They said there must be; first, on

enrichment, secondly, a corresponding deprivation and thirdly, an absence of any juristic reason for the enrichment.

It is submitted that 'but for' the insurance which BC Hydro took out, the insurer would not have taken out reinsurance and therefore the necessary link is established between the insured and the pay out by the reinsurers. The court, however, found no such link, given that there were various clauses in the contract between the reinsurer and insurer excluding liability to the general insured. One may question whether the decision would have been different if there had been no such contract between the insurer and reinsurers. Despite the result, the value of this decision is the recognition by the court that the doctrine of unjust enrichment can be used to impose a constructive trust outside the context of de factos.

Pettkus v Becker[439] and Rathwell v Rathwell[440] show a clear application of unjust enrichment as a general principle. It is interesting at this point to note that Cooke P's terminology in Pasi v Kamara[441] bears a striking resemblance to that employed by the Supreme Court of Canada in Sorochan v Sorochan.[442] In that case the court imposed a constructive trust to remedy an unjust enrichment situation. The appellant had lived with the respondent for 42 years, working on his farm throughout that time for no remuneration. The court found:[443]

> **[the appellant] did all of the household work, including the raising of their six children. In addition, she looked after the vegetable garden, milked the cows, raised chickens, did farmyard chores, worked in the fields, hayed, hauled bales, harvested grain, and helped to clear the land of rocks. She also sold garden produce, milk and eggs to pay for food and clothing for the family and for the schooling of the youngest child.**

Following Pettkus[444] and Rathwell,[445] the three requirements which had to be satisfied for an unjust enrichment were restated. That is, an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment.[446]

It is whilst bearing the above guidelines in mind that we shall now examine the principle of unjust enrichment in the context of property disputes.

D. Unjust Enrichment and Property Disputes

In Pettkus v Becker,[447] the Supreme Court of Canada elevated unjust enrichment from an underlying principle to a fully fledged cause of action in itself.[448] It appears that unjust enrichment will develop into a vital force in Canadian private law. In doing so its purpose will not be to re-define the nature of social relationships, but rather to regulate fairly, some of the economic consequences of social life in modern society. What lessons can we in New Zealand take from this approach?

The first lesson is that we need at least some "workable" and "consistent" foundation for the constructive trust. Litman rightly observes that:[449]

> **It is widely acknowledged that fear of the concept of unjust enrichment has caused English courts to resort to fictitious and artificial reasoning to correct specific instances of unjust enrichment. The result of this indirect approach has been the development of wholly inappropriate doctrine, the creation of conceptual**

confusion and the retardation of the pace of development of a comprehensive and cogent law of unjust enrichment.

Birks himself confesses that no subject can ever be rationally organised or intelligably applied if it is dominated by the language of fiction, of deeming, and of unexplained analogy[450]. It is submitted that our second lesson should be to choose a concept which best avoids these problems. An open and honest approach to unjust enrichment would allow its use as one of the primary goals of the constructive trust. Waters gave this advice to English courts over twenty-five years ago. He convincingly argued that the constructive trust could only be a remedy and that it could usefully be understood in no other sense.[451] The weakness he identified with the English approach was their staunch adherence to viewing the constrictive trust as a substantive institution. Waters recognised the value of unjust enrichment as the basis of a constructive trust after analysing the American position. He saw American law as completely freed from the notion that the constructive trust could ever be substantive.[452] Had more attention been paid to his advice at the time, the "common intention" and "new model" controversies may not have arisen.

A similar message has now been conveyed by Wingfield in his illuminating article "The Prevention of Unjust Enrichment: or How Shylock gets his Comeuppance".[453] He begins with the proposition that any civilised society is bound to prevent unjust enrichment. As there are no suggestions that English, or New Zealand, society is uncivilised, his logical conclusion is that unjust enrichment has been a, if not "the", primary goal of private law, but in the guise of specific remedies rather than as a general doctrine in itself. The underlying point in his paper is that to say that English society, or any civilised society, has never

recognised the principle of unjust enrichment is incorrect. Implicit in this is that he would not therefore object to the express recognition of a general doctrine of unjust enrichment. Let us now turn to some of the more specific issues in this area. It should, however, be borne in mind that we are talking about restitutionary constructive trusts, that is, to prevent unjust enrichment. There are obviously non-restitutionary constructive trusts too.[454]

In Pettkus v Becker,[455] Dickson CJ concluded that the connection between deprivation and enrichment must be "substantial and direct"[456] and that this was an "issue of fact".[457] That is, for proprietary relief, some connection must be shown between the acquisition of property and corresponding deprivation.[458] In numerous unjust enrichment cases decided since Pettkus,[459] the courts have taken the view that the connection between the claimant's contribution and the defendant's acquisition, retention or maintenance of a particular asset may be indirect.[460] Dickson CJ in Sorochan v Sorochan[461] said that "the link need not always take the form of a contribution to the actual acquisition of the property".[462] He went on to say.[463]

> **A reasonable expectation of benefit is part and parcel of the third precondition of unjust enrichment (the absence of any juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in the property and whether the respondent was or reasonably ought to have been cognisant of that expectation.**

It is implicit in the above passage that even if there is no true causal link, a court will still find unjust enrichment if there is a reasonable expectation by one party of a proprietary interest. It therefore seems a proprietary remedy will be available where there is either a causal

connection between the enrichment of the defendant and the deprivation of the plaintiff, or, where the plaintiff had a reasonable expectation of a proprietary interest.[464] Indeed, in Sorochan v Sorochan[465] the Supreme Court took a generous view of the causal connection element imposing a constructive trust in favour of a female de facto spouse who had worked on a farm, done all domestic work and reared the couples six children over a period of 42 years. The court suggested that a reasonable expectation of obtaining a proprietary interest might justify the imposition of a constructive trust to prevent unjust enrichment.[466] The suggestion raises the possibility of a proprietary remedy being given to a spouse who has been mainly involved with housework and child rearing, and thus recognising that such contributions have directly or indirectly enabled the other spouse to acquire property.[467] Although this approach may appear counter to English and Australian thinking, it is submitted that this view represents a realistic and practical approach. Neave concludes that this approach has "increased the uncertainty"[468] surrounding the applications of the unjust enrichment principle. The author respectfully disagrees. Not only is this approach applauded on social policy grounds, it reflects the true nature of the relationship and the relative values of each partners contributions. In deciding what the monetary value is of each party's contributions the court is doing no more than the division process it is required to do under matrimonial law.

In Pettkus[469] the court was willing to hold that the "no juristic reason" for enrichment element was satisfied where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in the property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he or she knows or ought to have known of that reasonable expectation.[470]

The success which plaintiffs have enjoyed in obtaining restitution for contributions of domestic services to cohabitation relationships suggests that Canadian courts may not be strictly wedded to the notion put forward by Goff and Jares, that if a plaintiff has conferred a benefit on a defendant while acting voluntarily in his or here own self interest, restitution will be denied.[471] It could be said the majority of women (as it usually is) who cohabitate make a gift of their housewifely services or perform them in return for board and lodging, holidays and a good time,[472] and therefore, they should not be able to obtain a monetary award and be put on the same footing as married co-habitees without legislation to that effect.[473] A more realistic view would suggest that the donar of these domestic services is contributing them on the condition that the relationship will last.[474] Many women risk co-habiting with a man in the hope that marriage will follow, while many men take advantage of this by deferring marriage for as long as they can.[475] Only if the defendant can establish an actual and specific intention to make a gift of domestic services, irrespective of the continuity of the relationship, should the defence of gift be countenanced.[476]

Professor Bala has commented that, in his view, the decision in Pettkus[477] is evident that the judiciary is "prepared to recognise the common law relationship"[478] and that it seems to place the onus upon the enriched spouse to prove that there was a clear donative intent or agreement "in marked contrast to earlier cases which applied a 'donative presumption' to situations of unmarried cohabitation".[479] This accords with the view expressed by Professor McClean[480] that, to the extent Murdoch[481] stood for "the proposition that a wife's labour cannot constitute a contribution in money's worth" and "stands in the way of

recognition of constructive trust as a powerful remedial instrument for redress of justice", he would not follow Murdoch.[482]

Recognition that spousal services in the home provides the other spouse with a valuable benefit goes hand in hand with recognising that such services are a form of labour and therefore deserving of compensation. This recognition also serves to counter any 'subjective devaluation'[483] arguments that is, that such services are of no value to the spouse who goes out to work. By denying the value of such services the spouse is denying any enrichment. Although these services have no exchange value, they nevertheless have a market value, and therefore price.[484] Indeed, it may be argued that as the grantee would have had to incur an expense to get these services, no reasonable person would attempt to say that the benefit conferred by the performance of these services by the other spouse were of no value to him or her: that is, it is an "incontrovertable benefit"[485] in a liberal sense.

It seems, however, that before any of these points can be expected to be addressed in a court in New Zealand, we will have to accept and follow Wingfield's concluding words:[486]

> **The major stumbling block to a generalised duty to prevent unjust enrichment is the failure to acknowledge th extent to which our legal system already seeks to prevent unjust enrichment and the belief that restitutionary actions have little or no conceptual relationship with contractual actions.**

Part XI : CONCLUSION: THE NEED FOR A NEW APPROACH

This paper has highlighted and discussed the concepts which provide real alternatives upon which to base the imposition of the constructive trust in New Zealand. At the same time, however, it has been recognised that the approach of our Court of Appeal, and of some of the lower courts as indicated in Stratulatos,[487] shows a genuine endeavour to adopt a flexible, liberal approach to the problems in this area. What is of concern is that the law on constructive trusts has not been, or attempted to be, settled upon a particular foundation, particularly in light of the attempts to do so in other jurisdictions.

At first sight, some of the concept advances in this paper may have appeared a recipe for palm-tree justice. But then so too would a statement made in the United Kingdom before Donoghue v Stevenson to the effect that "a person whose negligence has harmed another is required to compensate the other". The principles have been advanced in the best 'form' that our current understanding enables them to be advanced. It is hoped that these 'forms' will be developed and refined by the Courts.

Although this paper has focussed on de facto's, there is no reason for the formulations to be limited to spousal relationships. The concepts could apply as between parent and child, between other members of a family, between members of a company, or even between strangers. It is because of the variety of possible relationships that the constructive trust may apply to that various concepts have been advanced. Principal among them has been the doctrine of unjust enrichment. By analysing the

constructive trust in a restitutionary context the door has also been opened up to a wealth of remedies to meet current, and future problems.

Illustrative of the advantages of having various foundations for the constructive trust is the recent unreported decision of Hardie Boys J in Calvert v Nelson.[488] The plaintiffs, as personal representatives of a Mr Warner, claimed an interest in the defendant's Christchurch property, which according to a caveat, arose by virtue of a trust. This was an application under s145 of the Land Transfer Act for an order that the caveat not lapse. The point of interest here is that the plaintiff argued that a constructive trust had arisen in one of three ways:

1. By virtue of the equitable principle which does not allow a legal owner to fraudulantly assert his title to defeat anothers beneficial interest: Avondale Printers & Statreners v Haggie

2. That there was an implied/imputed common intention that Mr Warner should have a beneficial interest, or that a trust should be imposed in the absence of intention: Haywood v Giodarni and Pasi v Kamand.

3. By operation of the doctrine of unjust enrichment: Pettkus v Becker.

Although Hardie Boys J rejected all three arguments concluding that no arguable case existed to sustain the caveat, this case showed the diversity of the constructive trust. However, it seems more plausible to develop unjust enrichment as the primary rule for the constructive trust because it will solve most cases without having to resort to the alternative foundations.

The reality of the situation is that there seems more scope for palm-tree justice when applying the common intention analysis, than when applying the principles espoused in this paper. The English judiciary, however,

seem partial to traditional appearances which promote the law as stable, although it must always be changing.[489] It is submitted that New Zealand courts should not feel restrained by decisions from the United Kingdom but should rather be more responsive to our own needs and the best solutions to those needs. Primarily, unjust enrichment would appear the most viable foundation for a remedial concept of the constructive trust, with doctrines like equitable estoppel and unconscionability as alternatives in appropriate areas. By having alternatives, the court will not have to 'stretch' any of the foundations to illogical extremes should new problems arise. At the same time the courts should adopt a liberal approach to the remedies it can confer once a constructive trust has been found, or in place of or in addition to the constructive trust.

When one examines the current state of the law relating to constructive trusts in many countries, and the diversity of approaches the courts have taken, it still remains true that the court is ultimately doing what is 'just' and 'fair' in the circumstances, despite assertions that the court is not doing that. When one also examines the criticisms of the various approaches, again one sees a striking resemblance to the criticisms made in relation to the Denning trust, that is, criticisms about breadth, uncertainty and amount of judicial discretion available under the concepts. Should one therefore conclude that the concepts advances in this paper are of no greater value than the Denning trust?

The answer to this question must be <u>NO</u>! It is true that some criticisms may be found about each of the concepts advanced in this paper. But then what legal or equitable principle has developed without any criticism? After all, constructive criticism allows refinement and advancement. Despite the criticism, one can fine many times more support for the

principles. It is natural that those jurisdictions who have rejected the principles in this paper have sought to justify their decisions by highlighting the shortcomings of the principles while those who support them have highlighted the attributes of these principles. And so New Zealand must decide whether the advantages of these concepts will allow us to take-on their potential problems, or whether we are not yet well equipped enough to deal with such problems. In either case, we must decide upon the proper theoretical foundation for the imposition of a constructive trust that is seen as best for New Zealand, and set about developing it. It is in this context the author has submitted the doctrine of unjust enrichment and we should not feel discouraged from pursuing this doctrine merely because there are dissenting views overseas, or because other jurisdictions may be using other approaches.

FOOTNOTES

1. Martin, J.E. Hanbury and Maudsley Modern Equity (12th ed, 1985) Stevens & Sons, London, p 3.

2. Beatty v Guggenheim Exploration Co. (1919) 22S NY 380 per Cardozo J, p 386; Soar v Ashwell [1893] 2 QB 390.

3. Appleton v Appleton [1965] 1 WLR 25 Lord Denning said (at p 28):

> ... I prefer to take the simple test. What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?

4. Refer to Part X of this paper.

5. Pasi v Kamana [1984] 1 NZLR 603, per Cooke P at p 605.

6. Idem.

7. Hayward v Giordani [1983] NZLR 140, per McMullin J at p 153.

8. The person on whose behalf the rights are to be exercised is called the Cestuis que trust. (Beckford v Wade (1805) 17 Ves 87 at p 95, PC, per Grant MR).

9. Maxton, HJ. Nevill's Law of Trusts, Wills and Administration in New Zealand (8th ed, 1985) Butterworths, Wellington, at p 1.

10. See generally, above n 9, at p 12-13.

11. Above n 1, at p 67.

12. See, eg P H Pettit, Equity and the Law of Trusts (4th ed, 1979).

13. Above n 9, at p 13.

14. Pettit, P H Equity and the Law of Trusts (8th ed, 1984), Butterworths, London at p 55.

15. Hayton, D.J. Underhill and Hayton Law of Trusts and Trustees (14th ed, 1987), Butterworths, London at p 301.

16. Bannister v Bannister [1948] 2 All ER 133, CA.

17. Above n 2.

18. Above n 15, at p 301.

19. Riddal, J G The Law of Trusts (2nd ed, 1982) Butterworths, London, at p 312.

20. See eg Re Sharpe [1980] 1 WLR 219.

21. (1937) Para 160.

22. Maudsley, R.H. "Proprietary Remedies for the recovery of Money" (1989) 75 LQR 234.

23. Above n 1, at p 307.

24. Above n 19, at p 315.

25. Idem.

26. Ibid, at p 316.

27. Paling, D R "The Constructive Trust - A Trust in The full Institutional Form or Merely an Equitable Remedy" [1973] NZLJ 247.

28. See eg, agent and principal, director and company, partner and co-partner.

29. (1726) Sel Cas 61.

30. Griffith v Owen [1907] 1 Ch 195.

31. Boardman v Phipps [1967] 2 AC 46; [1966] 3 All ER 721.

32. Soar v Ashwell [1893] 2 QB 390.

33. Hayward v Miller [1915] AC 318.

34. Hughes v Williams (1806) 12 Ves 493.

35. See above n 9, at p 76.

36. [1979] 2 NZLR 124.

37. Above n 16.

38. Whether the trust imposed to give effect to the agreement to make mutual wills is a resulting or constructive trust is a point which has excited some debate. See above n 12, p 104-107.

39. Meagher, RP, Gummow, WMC and Lehane, JRF Equity Doctrines and Remedies (2nd ed, 1984) Butterworths, Australia para 306.

40. Denning, The Closing Chapter (1983), Butterworths, London at p 20 per Lord Bacon.

41. Above n 40, at p 20-21.

42. Denning, The Due Process of Law (1980) Butterworths, London, at p 194.

43. "Matrimonial Property and Family Protection" Report of the Working Group, October 1988 at p 64.

44. On census night in 1986, 114,279 people claimed to be living in de facto relationships, being 4.6% of the adult population, and representing a 30% increase on the equivalent figure in the 1981

Census, when a question about de facto relationships was asked for the first time in New Zealand.

45. Aitken, WR "De factos engaging our attention" [1988] NZLJ 12.

46. Idem.

47. Above n 43, at p 64.

48. "De facto marriage" - Introductory Papers. New Zealand Law Society Seminar, October 1983 Leaders: Mrs CJ Ruston and Mr R.L. Fisher) p 18.

49. Above n 48 at p 19.

50. See generally above in 48 pp 19-20.

51. [1977] 1 NZLR 279, CA.

52. Above n 7.

53. [1972] NZLR S94.

54. Cowcher v Cowcher [1972] 1 WLR 425.

55. [1970] AC 777.

56. [1971] AC 886.

57. Above n 55 at p 826.

58. Burns v Burns [1984] 2 WLR 582.

59. Pettit (above n 55), per Sir Jocelyn Simon, at p 811.

60. Gray, Kelvin [1983] CLJ 30 at p 44, quoted by Cooke J in Hayward v Giordani at p 145.

61. [1972] 1 WLR 1286.

62. Above n 1, at p 3.

63. In Gissing v Gissing, above n 56.

64. Eves v Eves [1975] 1 WLR 1338 at p 1341.

65. Ford, H A J and Lee, WA Principles of The Law of Trusts (1983) The Law Book Company Limited, Australia, p 1027.

66. Above n 16.

67. [1948] 2 All ER 133, CA.

68. Pettit (above n 55) and Gissing (above n 56).

69. Above n 65, at p 1029.

70. Above n 9, at p 58-59.

71. Above n 9, at p 59.

72. Above n 58.

73. Falconer v Falconer [1970] 1 WLR 1333 at p 1336.

74. Cowcher v Cowcher [1972] 1 WLR 425 per Bagnall J at p 430.

75. Above n 9, at p 81.

76. Barbour, WT "The History of Contract in Early English Equity" Oxford Studies in Social and Legal History pp 156-157.

77. Above n 1, at p 4.

78. Above n 1, at pp 305-307; Waters, DWM The Constructive Trust: The Case for a New Approach In English Law (1964) The Athlone Press.

79. (1920) 33 Harv. L.R. 420 (R Pound).

80. Above n 29.

81. Above n 1, at p 306.

82. Goode, RM (1983) 3 L S 283 at 292.

83. (1980) 117 DLR (3d) 257.

84. (1986) 160 CLR 583.

85. Ibid, p 596.

86. Above n 1, at p 329.

87. Above n 2 (Beatty) per Chief Justice Cardozo at p 386, 389.

88. Above n 9, see Chapter 4 generally.

89. [1977] 2 NZLR 279.

90. [1972] 2 All ER 38.

91. Idem.

92. [1978] 1 NZLR 356.

93. Ibid, at p 367.

94. Above n 7.

95. In effect, McMullin J was setting out the narrow position adopted by the English authorities which required common intention, and the more liberal view taken in New Zealand whereby the Court would look for a just result rather than a common intention. See above n 7 at p 153.

96. Above n 7.

97. Above n 58.

98. Above n 7, at p 153.

99. Above n 7.

100. Above n 7.

101. Above n 83.

102. [1977] 2 NSWLR 685.

103. See Part X.

104. Stenger, RL "Cohabitants and Constructive Trusts - Comparative Approaches" [1988-89] Vol 27 J. Fam L 373, at p 431.

105. Above n 7.

106. Above n 55.

107. Above n 56.

108. Above n 58.

109. Per Cooke J in Hayward (above n 7).

110. Above in 45, at p 14.

111. Above n 58.

112. Above n 5.

113. Above n 5, at p 605.

114. [1987] BCL 1251.

115. Above n 55, at p 795.

116. Above n 84.

117. HC Hamilton, CP 184/86, 2 May 1988.

118. Above n 5.

119. Above n 117, per Anderson J.

120. Above n 117.

121. Above n 5.

122. Above n 117.

123. Above n 5.

124. [1988] 2 NZLR 424.

125. Ibid, at p 436.

126. Above n 5.

127. Above n 124, at p 437.

128. See Cooke P in Pasi (above n 5) at pp 605.

129. See Restatement of The Law of Restitution para 160 (1937).

130. Oakley AJ Constructive Trusts 2 (1978), at p 3.

131. Above n 55.

132. Above n 56.

133. Cooke v Head [1972] 1 WLR 518 at p 519-520.

134. Above n 58.

135. [1986] 2 All ER 426.

136. Above n 15, at p 332.

137. Lowe and Smith "The Cohabitant's Fate" 47 Mod L Rev 341 (1984).

138. Ibid, at pp 344-45.

139. Idem.

140. Above n 65, at p 991.

141. Above n 65, at p 989.

142. Bailey (1978) 52 ALJ 174; Neave (1978) 11 MVLR 343, 580: Wade (1979) 6 U of Tas L R 97.

143. Balfour v Balfour [1919] 2 BK 571.

144. Pettit (above n 55) at p 796 per Lord Reid.

145. For eg, by Professor Neave, "The Constructive Trust as a Remedial Device" 11 Melb V L Rev 343 (1978).

146. For eg, Ogilvie v Ryan (1976) 2 NSWLR 504 and Valent v Salmon Equity Div S Ct NSW (Dec 8, 1976).

147. Above n 102.

148. Helsham "De Facto Relationships and the Imputed Trust" 8 Sydney L Rev 571, 574-75 (1979).

149. Per Priestley JA Summarising the rules in Allan in Baumgartner v Baumgartner 10 Fam LR 319 (1985).

150. These criteria for the imposition of a constructive trust were set out by O'Bryan J in Hohol v Hohol 6 Fam LR 49 (Sup Ct Vict 1980).

151. Above n 65, at p 1031.

152. Above n 102.

153. Above n 148 at p 576.

154. Above n 102.

155. Hodkinson, K "Constructive Trusts: Palm Trees in the Commonwealth" 1983 Conv. & Prop Law (NS) 420, 426, 428.

156. Idem.

157.Above n 102.

158. Above n 104 at p 413-414.

159. 62 ALR 429 (1985).

160. Ibid, at p 446.

161. Above n 159, at p 457.

162. Above n 159, at p 451.

163. Above n 159, 451-452.

164. Above n 159.

165. For eg, Parliament in New South Wales passed the De Facto Relationships Act 1984 in October 1984; it received the Royal Assent in December; and it came into force on July 1 1985.

166. [1978] 1 RFL 2d 1.

167. Ibid, at p 4.

168. [1973] 13 RFL 185.

169. Above n 104, at p 397.

170. Above n 55.

171. Above n 56.

172. Above n 166.

173. Klippert GB Unjust Enrichment (1983), Butterworths, Toronto at p 190.

174. Above n 166.

175. Above n 104, at p 398.

176. Above n 166.

177. Above n 166, at p 109.

178. Above n 104, at p 398.

179. Above n 166, at p 15.

180. Above n 83.

181. Idem.

182. Above n 166.

183. Above n 83.

184. Above n 104 at p 411.

185. Espinasse v Low (1964) 7 Bro Parl Cas 345 at 355, HL is an illustration of the early recognition of this principle.

186. Barnes v Addy (1874) 9 Ch App 244 at 251, per Lord Selbourne where he recognised this principle.

187. Halsbury's Laws of England (4th ed, 1984) Vol 48, Butterworths, London para 584.

188. For example, contract and commercial law.

189. (1984) 156 CLR 41 at p 99.

190. Ibid, at p 99.

191. Idem.

192. Above n 1, at p 330.

193. Above n 9, at p 80.

194. [1972] Ch 359.

195. [1972] 2 WLR 729, 735.

196. Megaw and Stephenson LJJ.

197. Above n 16.

198. For eg, see Maxton, (above n 9) at p 80 and Pettit (above n 14) at p 155.

199. Above n 194.

200. [1976] 1 WLR 582.

201. Above n 1, at p 331.

202. [1980] 1 WLR 219.

203. Above n 200.

204. [1982] 1 WLR 1044.

205. Above n 194, per Dillon J.

206. Above n 204.

207. SS 29, 34(4).

208. [1981] AC 513; Above n 1, at p 332.

209. Ibid, at p 531.

210. [1977] 1 WLR 285.

211. [1981] AC 487.

212. See Carly v Farrelly [1975] 1 NZLR 356.

213. Above n 1, at p 334.

214. Above n 1, at p 333.

215. (1939) 55 LQR 37 at pp 51-53 (Holdsworth).

216. See Goff and Jones The Law of Restitution (2nd ed), and now the (3rd ed), 1986.

217. Carl Zeiss Stiftung v Herbert Smith (No. 2) [1969] 2 Ch 276 per Edmund Pavres LJ.

218. Lord Evershed (1954) 70 LQR 326, 329.

219. Goff and Jones The Law of Restitution.

220. Birks, P An Introduction To The Law of Restitution (1985) Clarendon Press, Oxford.

221. Burrows, AS "Free Acceptance ;and The Law of Restitution" (1988) 104 LQR 576, at p 576.

222. Idem.

223. Goff and Jones The Law of Restitution (1966) pp 30-31.

224. Above n 220, at - 265. See also p 104.

225. Above n 220, at p 265.

226. Sandford, J "Free Acceptance in Restitution" Seminar presented for 'Equity and Restitution' Victoria University of Wellington, 18th July 1989.

227. Goff and Jones The Law of Restitution (3rd ed, 1986) Sweet and Maxwell, London p 144.

228. Idem.

229. Above n 226, at p 5.

230. Above n 220, at p 104.

231. Above n 220, at p 114.

232. Above n 5.

233. Above n 221.

234. Above n 220, at p 266.

235. Above n 221, at p 578.

236. Above n 221, at pp 578-579.

237. Above n 227, at pp 19-23.

238. Above n 220, at pp 116-124.

239. Above n 220, at p 116.

240. Above n 221, at p 579.

241. Above n 221, at p 580.

242. Above n 221, at 579.

243. Above n 221, pp 580-581.

244. Burrow's (above n 221) thesis is underlined by this argument.

245. See eg William Lacey (Hounslow) Ltd v Davis [1957] 1 WLR 932.

246. Above n 15 at p 325; Neave, M "Three Approaches to Family Property Disputes - Intention/Belief, Unjust Enrichment and Unconscionability" Chapter 10 in T.G. Yondon Equities, Fiduciaries and Trusts (Crosswell, 1989), 247.

247. Trebilcock, "The Doctrines of Inequality of Bargaining Power, Post Benthamite Economics in the House of Lords" (1976) 26 Univ. of Toronto LJ 359.

248. Bridge v Campbell Discount Co [1962] AC 600 per Lord Radcliffe at p 626.

249. Neave, above n 246, at p 257.

250. Ibid, at p 253.

251. [1985] 1 NZLR 159.

252. [1986] 1 NZLR 226; [1986] 1 NZLR 237.

253. Sheridan LA, Fraud In Equity (1957) p 73.

254. However, the doctrine is very old: see Fry v Lane (1888) 40 Ch D 312.

255. [1985] AC 686 (HL).

256. Ibid, p 709.

257. Above n 252.

258. Above n 251.

259. Fry v Lane (1888) 40 Ch D 312, at p 322.

260. Holbrow, D H "Nicholls v Jessup - Unconscionability in New Zealand after O'Connor v Hart" Legal Writing contribution for LLB (Hons) Victoria University of Wellington, 1988, p 4

261. M Cope Duress, Undue Influence and Unconscionable Bargains (1985) 134; I J Hardingham "Unconscionable Dealing" in P D Finn (ed) Essays in Equity (1985), 3; Commercial Bank of Australia Ltd v Amadio (1983) ISI CLR 447, 462 per Mason J (HC of A)

262. Above n 227, at p 258

263. Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 474 per Deane J

264. M Cope, above n 261, 138: L A Sheridan, above n 253, p 84

265. Chen-Wishart, M "Unconscionable Bargains" (1987) NZLJ 107, at p 107

266. Above n 260, at p 4

267. Above n 253

268. Ibid, p 84-85

269. Above n 227, at p 258

270. Nicholls v Jessup [1986] 1 NZLR 226 CH p 229

271. Ibid

272. Above n 265

273. Above n 260, at pp 16-17

274. Idem

275. Above n 251, at p 166

276. Above n 260, at p 17

277. Spangole, J A "Analysing Unconscionability Problems" (1967) U Pal R 931, at p 950

278. Above n 260, at p 19

279. Above n 251

280. Above n 227, at p 258

281. Above n 263

282. Above n 263, at p 462 per Mason J

283. Above n 251

284. Above n 251, at p 174

285. Above n 263; Moffat v Moffat [1984] 1 NZLR 600

286. Above n 252, at p 235

287. Above n 251, at p 171

288. Above n 124, at p 435 per McGechan J

289. Above n 84

290. Above n 84, at p 615

291. Idem

292. Thus rejecting the new model constructive trust

293. Above n 246, at p 267

294. Idem

295. 62 ALR 429 at p 457

296. (1986) 160 CLR 583, at p 622

297. (1987) 62 ALJR 29 (HC)

298. Above n 60

299. Above n 246, at p 270

300. Above n 295

301. Parkinson, P "Doing Equity Between De Facto Spouses". From Calvery v Green to Baumgartner" (1988) 11 Adel LR 370

302. Idem

303. Above n 246, at p 271

304. Above n 297

305. Halsbury's Laws of England (4th ed, 1976) vol 16, Butterworths, London, para 1501

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318. Sir Alexander Turner's authoritative definition in Spencer Bower and Turner, Estoppel By Representation (3rd ed, 1977) p 287.

319. Above n 309.

320. Ivory, A "Incomplete Contract Saved By Estoppel" (1989) 5 BCB 37 at p 38.

321. Above n 309, at p 524.

322. Above n 309.

323. Above n 306, at pp 4-5.

324. Above n 309.

325. Above n 320, at p 39.

326. [1986] 3 All ER 107.

327. Maxton J, "Property Rights and De Facto Relationships - 2" (1987) 4 BCB 181, at p 183.

328. Above 316, at p 414.

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330. Hayton D "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" Chapter 9 in T G Yondon (ed) Equity, Fiduciaries and Trusts (Crosswell, 1989) 205 at p 233.

331. Pascoe v Turner [1979] 2 All ER 945 CA.

332. Unity Joint Stock Mutual Banking Association v King (1858) 25 Beau 72.

333. Above n 329.

334. Finn, P D Essays in Equity (1985), The Law Book Company Limited, Australia: Chapter 4 "Equitable Estoppel" by P D Finn at p 71.

335. Ibid, at pp 62-72.

336. For a similar view see Parkinson, above n 301.

337. Above n 334, at p 94.

338. Davies, JD "Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land" (1980) 7 Adel LR 200.

339. Above n 330, at p 234.

340. Above n 301.

341. [1975] 1 WLR 1338.

342. Gray, K Elements of Land Law (1987), p 419.

343. [1976] Ch 179 at 192-3.

344. Above n 135.

345. Idem, per Sir Nicolas Browne - Wikinson V-C.

346. Above n 343.

347. Ibid at p 198.

348. In Walton Stores Mason CJ, Wilson J and Brennan J held that the silence and inaction of the appellants was sufficient to induce the expectation that exchange of contracts was a formality, in the circumstances of that case (at 526, 542).

349. (1884) 9 App Cas 699.

350. Above n 301, at p 303.

351. Above n 330, at p 235.

352. Above n 301, at p 303.

353. Morris v Morris [1982] 1 NSWLR 61.

354. Above n 246, at p 257.

355. Above n 330, at p 235.

356. See Coombes v Smith [1986] 1 WLR 808 (Ch D) and Midland Bank v Dobson [1986] 1 FLR 171 (CA)

357. Above n 330, at p 236.

358. Idem.

359. Grant v Edwards, above n 135.

360. Above n 246, at pp 256-257.

361. [1980] 1 WLR 1306 (CA).

362. Above n 246, at p 258.

363. Above n 301, at p 306.

364. Above n 5.

365. Above n 327, at p 183.

366. Above n 135.

367. Ibid, at pp 129-130.

368. Above n 124.

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371. [1982] 2 NZLR 556 at 570.

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381. Ibid, at p 6.

382. Above n 227, at p 143 and above n 65 at para's 1718 & 1719.

383. Above n 124 at p 438.

384. Above n 349.

385. Ibid, p 714.

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387. Idem.

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390. Pettkus v Becker (1980) 117 DLR (3d) 257 at pp 273-275 cited with approval in Hayward v Giordani by Cooke J at 147.

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392. Ibid at p 40.

393. For eg, America and Canada

394. For eg, New Zealand, Australia and England

395. Above n 227, at p 78

396. Above n 320, at p 378

397. Birks; Burrows; Healy and Goff and Jones (see Bibliography for refrences)

398. Above n 227

399 [1969] 2 Ch 276 at p 301

400. Above n 227, at p 16

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402. Above n 320, at pp 6-7, 23-25 and Chapter 5

403. Above n 1, at p 631

404. Restatement of Restitution, para 1

405. (1924) 40 LQR 34-36 (H G Hanbury): Goff and Jones, p 5

406. [1951]AC 507, 513

407. Ibid, p 513-514

408. Above n 227 at p 11

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426. [1943] AC 32; [1942] 2 All ER 122

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