**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2008-485-2494**

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| UNDER | Part 4 of the High Court Rules |
| IN THE MATTER OF | The equitable interest of the late Eileen Amelia Johanna Williams in 78 Salamanca Road, Wellington |
| BETWEEN | ALISON ELIZABETH MORGAN<br>Plaintiff |
| AND | DENIS JOHN MORGAN<br>Defendant |

Hearing: 4 June 2009

Counsel: P S Davidson and J Fyfe for plaintiff
B A Corkill QC for Defendant

Judgment: 26 June 2009 at 11.15am

I direct the Registrar to endorse this judgment with a delivery time of 11.15am on the 26th day of June 2009.

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**RESERVED INTERIM JUDGMENT OF MACKENZIE J**

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## Introduction

[1] Mr and Mrs Morgan were married in 1980 and separated in March 2006. At the time of their separation they lived in a property at Salamanca Road Wellington. Mrs Morgan's mother, Mrs Eileen Williams, also lived in that property, in a separate flat. Mrs Williams died on 31 October 2008. Mrs Morgan, as the sole executrix of her will, brings this proceeding seeking a determination that Mrs Williams had an equitable interest in that property, held in trust for her benefit by Mr and

Mrs Morgan. She also seeks other declarations and orders consequent on that determination.

**Background facts**

[2] After their marriage Mr and Mrs Morgan lived in a property on The Terrace, a property in which Mrs Morgan and Mrs Williams were living at the time of the marriage. That was owned jointly by Mrs Williams and Mrs Morgan. They lived in The Terrace until soon after their only child was born, and they all moved to a property in Easdale Street in March 1983. It was a house with a flat underneath. That was purchased by Mrs Williams, Mrs Morgan and Mr Morgan as tenants in common in equal shares. In was financed by (in round figures) $130,000 from the sale of the property at The Terrace, $37,000 cash from sources not now able to be traced, and a $25,000 mortgage from ANZ Bank. The ANZ Bank mortgage was later replaced with a United Building Society (UBS) mortgage. In September 1991, Mr and Mrs Morgan purchased a property in Kinross Street. That purchase was partially financed by a draw down of $353,000 under a facility from AA Finance, secured (apparently) over both properties. The UBS mortgage was repaid. In August 1992 a property at Salamanca Road Kelburn (the Kelburn property) was purchased in the joint names of Mr and Mrs Morgan. That was bought with 100% finance of some $417,000, secured over that property, the Easdale Street property and the Kinross Street property. Mr Morgan is a builder and Mrs Morgan an accountant, and they carried out a number of property developments. The Kelburn property was initially let, and the parties continued to live in Easdale Street. All three moved into the Kelburn property when the Easdale Street property was sold in January 1994.

**The legal principles**

[3] Ms Davidson for the plaintiff submits that the equitable interest of Mrs Williams for which the plaintiff contends may arise either as a resulting trust or a constructive trust.

[4] The type of resulting trust relied upon is that which results in favour of persons who provide the consideration for the transfer of property to others. In such circumstances, equity will not (except in cases where a presumption of advancement arises) presume that a gift is intended. Rather, the presumption is that the provider of the financial assistance intends to retain a beneficial interest, which will be given effect to by a presumption of equity that the legal owners of the property purchased with the assistance of that provision will hold the property, or a proportionate share in it, on a resulting trust for the provider of the assistance. The relevant circumstances for this sort of resulting trust were described in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 by Lord Browne-Wilkinson at page 708 in the following terms:

> Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption* , which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton, Law of Trusts and Trustees,* pp. 317 et seq.; *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291, 312 et seq.; *In re Vandervell's Trusts* (No. 2) [1974] Ch. 269, 288 et seq. …

[5] The legal basis for such a trust is also helpfully stated by Fisher J in *Cossey v Bach* [1992] 3 NZLR 612 at 630.

> Resulting trusts are based upon the rebuttable presumption that without more, a settlor must have intended to retain the beneficial interest in such of his own property as he has not effectively disposed of to another. The presumption is that a person providing or contributing to the purchase price of real or personal property in respect of which a sole or joint interest is conveyed into the name of another retains an equitable interest in the property conveyed to the extent of his contribution if there is nothing to indicate that he intended to confer the beneficial interest upon the legal transferee. Line 17

[6] The relevant category of constructive trust is that which may be imposed by the Court to give effect to a common intention of the parties that one party should have a beneficial interest in property in which the legal interest is vested in another. The leading recent authorities on this category of constructive trust are cases in

involving claims to property by one partner to a *de facto* relationship to property in which the legal interest is vested in the other party to that relationship, in the period before the Property (Relationships) Act 1976 was extended to *de facto* relationships. The leading authorities are *Gillies v Keogh* [1989] 2 NZLR 327 (CA) and *Lankow v Rose* [1995] 1 NZLR 277 (CA). The requirements were stated by Hardie Boys J in *Lankow v Rose* in these terms at page 282:

> The essential requirements I see to be twofold: that the plaintiff contributed in more than a minor way to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly; and that in all the circumstances the parties must be taken reasonably to have expected that the plaintiff would share in them as a result. Both statements need some amplification. In the first place, by contributions to assets one is not referring to those contributions to a common household that are adequately compensated by the benefits the relationship itself confers. The contribution must manifestly exceed the benefits. Putting it in conventional estoppel terms, the plaintiff's contributions must have been to his or her detriment; or in Canadian terms they must have resulted by the end of the relationship in the enrichment of one to the juristically unjustified deprivation of the other. Further, the contributions need not be in money; they may be in services or in any other respect. But there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets for, as a claim to a constructive trust is a proprietary claim, a claim to an interest in property, the contributions must have been made to assets; not necessarily to particular assets, but certainly to the defendant's assets in general. The contributions may then be recognised by the imposition of a trust over a particular asset or particular assets, which may in turn be quantified or satisfied by a monetary award.

[7] The claim to an equitable interest in this case was put by Ms Davidson on the basis that a resulting trust or a constructive trust, giving rise to a proprietary interest, arises. It is not, however, appropriate to "compartmentalise" claims in a way which might obscure the underlying equities involved. As well as equitable proprietary claims, there are also available personal claims in restitution. These two categories of claim, proprietary and personal, should not be viewed in isolation. The tensions in the law arising from the two categories of claim are described by Lord Goff of Chieveley in *Westdeutsche Bank* in these terms (at p 685):

> Ever since the law of restitution began, about the middle of this century, to be studied in depth, the role of equitable proprietary claims in the law of restitution has been found to be a matter of great difficulty. The legitimate ambition of restitution lawyers has been to establish a coherent law of restitution, founded upon the principle of unjust enrichment; and since certain equitable institutions, notably the constructive trust and the resulting trust, have been perceived to have the function of reversing unjust

> enrichment, they have sought to embrace those institutions within the law of restitution, if necessary moulding them to make them fit for that purpose. Equity lawyers, on the other hand, have displayed anxiety that in this process the equitable principles underlying these institutions may become illegitimately distorted; and though equity lawyers in this country are nowadays much more sympathetic than they have been in the past towards the need to develop a coherent law of restitution, and to identify the proper role of the trust within that rubric of the law, they remain concerned that the trust concept should not be distorted, and also that the practical consequences of its imposition should be fully appreciated. There is therefore some tension between the aims and perceptions of these two groups of lawyers, which has manifested itself in relation to the matters under consideration in the present case.

**Was there a gift by Mrs Williams?**

[8] Before turning to apply those legal principles to the facts, it is necessary to address the legal effect of an earlier document signed by Mrs Williams. In 1984 all three parties were living in Easdale Street property, which was owned by them as tenants in common in equal shares. On 10 March 1984, Mrs Williams signed a document which read as follows:

> I Eileen Amelia Johanna Williams, retired of 10 Easdale Street, Wellington 1., wish to reduce my shareholding in the property at 10 Easdale Street in favour of my daughter Alison Elizabeth Morgan and her husband Denis John Morgan.
>
> I feel that the fact that the property has been registered in equal third shares is incorrect as I pay no expenses and have asked my daughter to calculate my actual contribution. This has been ascertained at 15%. I have seen the calculations and agree with them.
>
> I understand that I can transfer my shareholding informally by up to $12,000 a year. As I am secure in the knowledge that my daughter and her husband will continue to support me until my death I wish to transfer my share to them completely over the next few years as follows:
>
> | | |
> |---|---|
> | 10.3.84 | $11,666 |
> | 15.3.85 | $11,500 |
> | 20.3.86 | $11,500 |
> | 24.3.87 | $11,500 |
> | 28.3.88 | $11,500 |
> | 30.3.89 | $11.500 |
> | | $69,166 |
>
> I have made no other gifts within 12 months of the above gifts and to the best of my knowledge and belief the particulars shown above are true and correct.

[9] Counsel for Mrs Morgan submits that this document did not and could not have any legal effect and that its legal effect is precisely nil. Counsel for Mr Morgan submits that the intent of the document is clear and that it would have been enforceable since it met the requirements of the Contracts Enforcement Act 1956. He submits that the fact that gift duty statements were not made is a revenue matter and not an issue going to the validity of the gifts.

[10] The respondent's proposition that this document would have been enforceable since it met the requirements of the Contracts Enforcement Act would depend upon the document being intended to have bilateral effect as a contract. I do not consider that the document has any bilateral effect. It is expressed in unilateral terms. The only part of the document capable of being regarded as containing some reciprocal obligation is the statement about continuing support from Mr and Mrs Morgan. That is clearly not a commitment binding on them enforceable by Mrs Williams. It would strain the legal concept of a contract as an agreement between two (or more) parties, imposing obligations on both sides, to interpret that statement as constituting an offer to Mr and Mrs Morgan capable of acceptance by conduct. That being so, it is unnecessary to consider further the possibility that the document has some effect as a contract between Mrs Williams and Mr and Mrs Morgan.

[11] The only possible basis upon which this document could have direct formal legal effect would be as a gift. A gift *inter vivos* may be made in one of three ways:

(a) By deed or other instrument in writing;

(b) By delivery, in cases where the subject of the gift admits of delivery; and

(c) By declaration of trust.

[12] The second method of making a gift is not relevant: there has been no delivery of any property. As to the first and third methods, I do not consider that the document is, on its proper interpretation, intended to operate as a deed or instrument

transferring Mrs Williams' legal interest in the Easdale Street property to Mr and Mrs Morgan, nor is it sufficient to constitute a declaration of trust in respect of her interest in the land. For a trust to be created in this way, there must be a present and irrevocable intention on the part of the alleged trustee to declare herself a trustee: *re Cozens* [1913] 2 Ch 478: Laws of New Zealand, Gifts, paragraph [38]. What is required for the creation of a trust has been the subject of recent consideration by the Court of Appeal in *Begg v Commissioner of Inland Revenue* [2009] NZCA 160, particularly at paragraphs [42] to [44]. A trust is created when trustees accept the transfer of property to them to be held in trust, or the owner of property declares an intention that it be held in trust. It must be "impressed with the terms of a trust", in that it must be shown that trust obligations have been created in respect of the property. Mrs Williams' interest in the Easdale Street property did not become "impressed with the terms of a trust" by virtue of that document. It is expressed as a statement of a future intention to "reduce her shareholding" in the property, not as a declaration that her interest in the property will thenceforth be held for Mr and Mrs Morgan. The document did not operate as a gift of the sums of money specified. No money was transferred at that time. At most, it was a statement of intention to make gifts of those sums in the future. The document is insufficient to constitute a completed gift of either the legal interest in the property or the sums of money specified.

[13] In the 1984 document, Mrs Williams said that her interest was not one third but that her actual contribution had been ascertained at 15%. Her legal interest in the property was one third. If, as I have held, the document itself did not constitute a gift to Mr and Mrs Morgan, that statement cannot by itself constitute a partial gift. An equitable interest less than the legal interest of one third could arise only if Mr or Mrs Morgan could establish a constructive trust in their favour. That is not suggested, and there is no evidence to support such a proposition.

[14] For these reasons, I consider that the document does not have any legal effect as a completed gift of Mrs Williams' interest in the Easdale Street property, or of the money sums specified.

[15] In reaching that view, I have had regard only to the document itself, and not to the evidence as to the circumstances in which it came to be signed, or as to Mrs Williams' intention and motives in signing that document. Those are potentially relevant to the second purpose for which the document may be relevant, namely as an indication of Mrs Williams' intentions, or the expectations of her or Mr and Mrs Morgan relevant to the existence of an equitable interest in the Kelburn property. I return to that aspect later.

**Contributions**

[16] The first requirement, for the establishment of a constructive trust or a resulting trust, is that there has been a contribution, direct or indirect, to the Kelburn property, purchased in August 1992. For a resulting trust to be established, on the basis of that category of resulting trust which arises from a contribution to the purchase of a property, the contribution would have to be made at the time of purchase. For a constructive trust, a wider range of contributions may be relevant. It is appropriate to consider the potential contributions relied upon in three broad categories: contributions to the purchase price of the Kelburn property; contributions to household or property expenses while the parties were living in the Kelburn property; and contributions to that property from the sale of Easdale Street property.

*(a) Contribution to purchase price*

[17] As I have noted, the Kelburn property was purchased in the names of Mr and Mrs Morgan alone, financed 100% by a mortgage secured on (*inter alia*) the Easdale Street property. Mrs Morgan gives as a reason for the purchase of the Kelburn property in her and Mr Morgan's names only as being, to her recollection, that they felt that once Easdale Street was sold Mrs Williams need not be exposed to any further liability on any mortgages that might still be secured over the other properties, as well as the rest home issue. Mr Morgan, in his affidavit, said that he did not understand there to be an issue about Mrs Williams having a liability as a mortgagee and that that had never been an actual issue previously. There is no

evidence, beyond Mrs Morgan's recollection, which might confirm whether Mrs Williams did have a concern about incurring liability as a mortgagee. If it was the common intention that she have an ownership interest in the property then, unless there was a contribution from her to the purchase in cash, a liability under the mortgage would have been a necessary corollary of ownership. Mrs Williams must have given a personal covenant on the mortgage, as a registered proprietor of Easdale Street. I consider that it is not established, on the balance of probabilities, that considerations of potential mortgage liability may have contributed to a common intention that Mrs Williams should have an equitable, but not a legal, interest in the Kelburn property. There is no evidence of any other financial contribution, apart from assuming personal liability under the mortgage by virtue of her status as registered proprietor of an interest in the Easdale Street property, by Mrs Williams to the purchase of the Kelburn property. There is no evidence that Mrs Williams made any direct contribution to the mortgage repayments, or that in any other way she incurred any liability under her personal covenant in the mortgage.

[18] In these circumstances, I do not consider that there can be any resulting trust as a consequence of Mrs Williams having made a contribution to the purchase price of the property purchased in the name of Mr and Mrs Morgan.

*(b) Contributions to expenses*

[19] Mrs Morgan's evidence in her first affidavit was that Mrs Williams made contributions to expenses related to the Kelburn property over the years from 1993 to 2006. Mr Morgan, in his affidavit, said: "I was aware that, from time to time, Mrs Williams offered us sums of money, generally in the order of $1,000 or $2,000. She said it was to help us out. It was never expected or asked for. I understood these were gifts. It was never suggested that those sums were for the house." Mrs Morgan produced, with her affidavit, a list, kept by Mrs Williams and in her handwriting, which lists many of those payments. Some are described as rates or maintenance, some are described as gifts, and some do not have any description of their purpose. The payments were made on a frequent, but irregular, basis, and were of different amounts, generally in round figures. Excluding some amounts which

were said to be monies inherited by Mrs Williams and paid to Mrs Morgan, the payments are of the order of $60,000 over the period from 1995 to 2006.

[20] Mrs Williams was living in a flat on the Kelburn property. It would be understandable that she would feel some moral obligation to make a contribution towards the expenses of that property. It is not possible to draw any conclusion as to whether she may have considered that the payments were an appropriate contribution to costs because she was living in a flat in a property owned by Mr and Mrs Morgan, or a contribution to her share of the costs arising from an obligation as joint owner. I do not find the evidence of assistance, one way or the other, on that issue. By themselves, the contributions do not give rise to a constructive trust in favour of Mrs Williams. They may have relevance to a consideration of the intentions and expectations of the parties, a topic to which I return later.

*(c) Contribution from Easdale Street proceeds*

[21] The third relevant area of potential contribution is the application of the funds from the sale of the Easdale Street property.

[22] The statement from the solicitors acting on that sale indicates that $322,000 was paid to ANZ to repay a mortgage, and that the balance of $255,000 was paid into Mr and Mrs Morgan's joint account. No payment was made to Mrs Williams, although she is named on the settlement statement as one of the owners. There is no evidence available as to whether Mrs Williams gave instructions to the solicitors authorising them to pay the nett proceeds to Mr and Mrs Morgan's account to the exclusion of her. The evidence is unclear as to the repayment of the ANZ mortgage. The copy of the certificate of title which was in issue suggests that that may be an error. There had (as I have noted) been a mortgage to ANZ when the property was purchased in 1983, but that appears from the title search to have been discharged in 1988. It seems that the relevant mortgage which was discharged may have been the mortgage to AA Finance Limited, which had been registered in September 1991, though that is not clear from the title search. That mortgage appears not to have been, at least directly, the mortgage raised to purchase the Kelburn property, since

the facility agreement which is in evidence, which Mrs Morgan describes as the one entered into at that time, is dated August 1992.

[23] Mrs Morgan says in her affidavit that the nett proceeds of the Easdale Street property were used to reduce the mortgage and to make improvements to the Kelburn property including the building of an apartment for Mrs Williams. Her evidence that the proceeds of sale were used in that way is not directly contested by Mr Morgan, and there is no further evidence as to how those funds were used.

[24] As a one third owner of Easdale Street, Mrs Williams would have been entitled to one third of the equity on its sale. Also, she may have been entitled to some adjustment for the mortgage repayment, since it seems at least possible that the mortgage that was discharged included monies owing in respect of some other property owned by Mr and Mrs Morgan alone. The evidence is insufficient to enable me to examine that possibility.

[25] Unless there was a perfected gift at the time the sale proceeds were paid into Mr and Mrs Morgan's account, then a constructive trust, or a right to trace, or some other remedy for unjust enrichment, would possibly have been available to Mrs Williams. If the funds were subsequently expended, in part, in improvements to the Kelburn property, then a constructive trust might potentially arise.

[26] It seems that there are several possibilities as to why the whole of the nett proceeds were paid to Mr and Mrs Morgan alone. The evidence does not enable me to reach any conclusions on that point. That issue can not be adequately resolved on the evidence before me. I consider that the plaintiff's claim that Mrs Williams' estate has an equitable interest cannot properly be determined without consideration of matters upon which further investigation is necessary. I do not consider that it is appropriate to proceed to a final judgment on the present state of the evidence. The only available evidence, the settlement statement, suggests on its face that the proceeds were paid to only two of the three registered proprietors. An inference that that was unauthorised would involve a finding that the solicitors had not acted properly in accounting for the sale proceeds. I am not prepared to draw such an inference on the evidence available, at least until the possibility of there being further

evidence which may assist has been investigated. A finding that the payment to Mr and Mrs Morgan was authorised would involve an inference that solicitors did have instructions from Mrs Williams to authorise payment to Mr and Mrs Morgan. There is no evidence as to their instructions from which such an inference could be drawn. While the transaction took place about 17 years ago, there is a possibility that further evidence may be available. I am reluctant to proceed to a final judgment until that possibility has been investigated.

[27] There is power, under r 11.2 of the High Court Rules, to issue an interim judgment, and to order any accounts, inquiries, acts, or steps that the Court considers necessary. I consider that this is an appropriate case for the exercise of that power. I think that further inquiry is necessary on the following matters:

(a) What instructions, if any, were given by Mrs Williams to the solicitors acting on the sale of the Easdale Street property as to payment of her share of the sale proceeds?

(b) What were the liabilities which were discharged by the payment of $322,386.85 paid in discharge of the ANZ mortgage over that property, and what proportion of those liabilities related to properties other than the Easdale Street property?

(c) What part of the sale proceeds of $255,221.99 were expended on improvements to the Kelburn property?

[28] I consider that an opportunity should be given to the parties to adduce further evidence on these questions. I direct that the plaintiff should file any affidavits first, that the defendant should then file any affidavits, and that the plaintiff should have an opportunity to file reply affidavits if necessary. At this stage, I do not consider it appropriate to fix a timetable for those steps. Further inquiry will obviously be needed, on matters that are now some 17 years old. That may take some time. Leave is reserved to both parties to apply for any necessary directions. I anticipate that, when any further evidence is complete, I will fix an opportunity for further submissions, either by a further hearing, or by written submissions.

[29] I have not in the course of this interim judgment addressed fully all issues relating to the intention and expectations of the parties. I have noted, at paragraphs [15] and [20], two matters which will need further consideration in that regard. There are other matters arising from the evidence with which I must deal. I do not think it appropriate to discuss these aspects further in this interim judgment. I consider it preferable that my consideration of the issues not addressed in this judgment be deferred until any additional evidence can be taken into account.

**"A D MacKenzie J"**

Solicitors: M Duggan, Nelson for plaintiff
M C Jeffcoat, Wellington for defendant