

DE FACTO PROPERTY DISPUTES IN NEW ZEALAND*

DR NICKY RICHARDSON

Lecturer in Law, University of Canterbury

The number of persons living together outside marriage is on the increase in New Zealand,¹ and this has led to a corresponding rise in the number of de facto relationships that break down. In New Zealand the term 'de facto relationship' is used to describe two persons living together in a relationship in the nature of marriage (including a relationship between two persons of the same sex).²

At present there is no legislation governing the distribution of property upon the breakdown of a de facto relationship. Although legislation was considered in 1975 and 1988³ the division of property continues to be determined by various equitable principles.⁴ There have been a number of recent decisions concerning this topic and the object of this article is to state the law by outlining the options open to litigants and then by discussing the case law chronologically. By way of conclusion the difficulties with the present law are summarised.

I. EXISTING LAW

There are three possible avenues open to litigants who are unable to agree on the distribution of their property. First, if the parties have agreed to marry it may be possible for one party to maintain a claim on the assets of the partnership pursuant to the Domestic Actions Act 1975. The object of this statute is to restore the parties to an agreement to marry, as far as possible, to the position they would have been in had the agreement to marry not been entered into. Obviously, this legislation is of no use to the majority of couples living together as such couples do not agree to marry. Another possibility for persons living together outside marriage is to enter a so called "domestic contract". This contract allows de facto partners to regulate the division of property, by contract, prior to the breakdown of the relationship. Section 40A of the Property Law Act 1952 provides that such a contract shall not be void as contrary to public policy or for want of consideration. Whilst it is impossible to obtain figures on the number of persons entering such contracts it seems that most de facto couples do not enter into

* This article was presented at the 1996 ALTA Conference held at Flinders University, Adelaide.

1 The New Zealand Census records 161,856 people in 1991 who considered themselves to be unmarried cohabitantes as compared with 87,960 in 1981 and 114,279 in 1986. The number of exnuptial births in 1993 was 22,355 which was 30% of all births for the year. See New Zealand Year Book 1993. (In 1994 the percentage of all births for 1994 was 30%. See "Vital Statistics, "Hot Off the Press", Department of Statistics.)

2 This term is used in this way in the following pages.

3 Working Group on Matrimonial Property & Family Protection 1988. At p 65 the report says: "The Group is unanimous that the present law relating to de facto relationship is unsatisfactory and should be reformed."

4 Various statutes mitigate the consequences of de facto relationships. The Status of Children Act 1969 abolishes the concept of the illegitimate child. Other enactments contain provisions whereby a "de facto relationship is equated with that of a married couple". For example, see Social Security Act 1964, The Child Support Act 1991, the Income Tax Act 1976, Immigration Act 1987, The Domestic Protection Act 1982 and the Family Proceedings Act 1980.

agreements regulating the division of property in the event of their relationship ending.⁵ The third approach is for one partner in a de facto relationship to rely on general equitable principles.

Equitable Principles

The law in this area has been developing over a number of years. A recent Department of Justice Memorandum⁶ has noted that “these developments have not been straightforward nor without debate”, but that one constant theme has been the application of the law of trusts to settle property disputes arising out of de facto relationships. Before discussing the law of trusts other alternatives need mentioning. Estoppel, unjust enrichment, unconscionability and restitution, have all been evoked in New Zealand as alternatives to the law of trusts. For example in the leading case⁷ on de facto property disputes one judge⁸ favoured an approach based on estoppel. Richardson J in the New Zealand Court of Appeal considered that, with some limitations, the doctrine of estoppel provides “an appropriately principled approach, short of legislation, to the resolution of property disputes arising on the breakdown of de facto relationships in cases where the parties have not dealt expressly with the matter and an actual common intention cannot be discerned”.⁹ Another way the courts have endeavoured to settle disputes is by relying on restitutionary principles.¹⁰ Unjust enrichment and unconscionable conduct have also been considered.¹¹ The use of trusts has, however, become the prevailing approach in New Zealand.

II. TRUST LAW

Express, resulting, implied and constructive trusts are all relevant in this area of the law.

1. Express trusts

If a settler has created a valid express trust a court will enforce it. The finding of an express trust in the context of de facto relationships is straightforward. The creation of an express trust effectively enables a partner who has entered into a domestic contract to be given a proprietary interest in certain property.

2. Resulting trusts

A resulting trust arises where a person apparently disposes of an asset but in actual fact retains a beneficial interest.¹²

If a party purchases property and places it in the name of the other party or in joint names then a resulting trust can be imposed. Similarly, a contribution towards the purchase price of a property could lead to a resulting trust to the extent of that contribution. An implied trust may arise where there is intention to confer a benefit but the formal requirements of an

5 See De Facto Marriages: Property Law Reform. Department of Justice, April 1995.

6 Ibid at 5.

7 *Gillies v Keogh* [1989] 2 NZLR 327. See also *Fleming v Beevers* [1992] NZFLR 13.

8 Richardson J at 344 et seq.

9 Ibid at 347 and see Cooke P. Ibid at 334.

10 See for example *Daly v Gilbert* (1993) 10 FRNZ 370; *Leary v Patterson*, High Court Auckland, 29.11.1994, CP 81/83.

11 See *Gillies v Keogh* op cit n 7 at 340 per Cooke P.

12 See Maxton Neville's *Law of Trusts Wills and Administration in New Zealand* (8th ed. 1985) at 52 et seq.

express trust have not been met. It appears that implied trusts based on common intention are rarely found by New Zealand courts¹³ but that common intention is treated by the courts as a material factor in the decision to impose a constructive trust.¹⁴

3. Constructive Trusts and Reasonable Expectations

The most common approach adopted in New Zealand is to use the concept of constructive trusts to resolve property disputes arising on the breakdown of a de facto relationship.

The present law is based on *Gillies v Keogh* and the concept of reasonable expectations as developed in the case. Decisions after *Gillies v Keogh* have explained and developed the law. It is proposed to outline these cases in chronological order. In *Gillies*, Cooke P noted that the facts are all important in this class of case. Thus it appears appropriate to start with the facts of *Gillies v Keogh*.¹⁵

(a) *Gillies v Keogh*

The plaintiff, a single man, and the defendant, a separated woman met at the end of 1981. In 1982 they went on a working holiday together to Australia and later in the same year the defendant purchased a house in her sole name. The plaintiff did not contribute to the purchase price but he substantially improved the property. The house was later sold and another purchased, again in the name of the defendant. Once again the plaintiff improved the property. A joint account to which both had contributed finance was used to repay the mortgage. The defendant had consistently maintained that both houses were hers. The relationship ended in 1985.

The plaintiff claimed a 40% share in the net equity of the second property. His claim was based on an express or implied agreement or a constructive trust. In the High Court the Judge did not find any express or implied agreement but found a constructive trust on the basis of unjust enrichment and awarded the plaintiff \$10,000 being approximately half of the capital gain in respect of the first property. The defendant appealed.

The Court of Appeal¹⁶ held that because the defendant had made it quite clear that the properties were hers and hers alone the plaintiff could have no interest in either property.

The President of the Court said¹⁷

The practical position now reached in de facto union cases by all the various routes appears to me to be that the Courts have regard to the reasonable expectations of persons in the shoes of the respective parties, giving particular weight to the following factors.

First, a major factor must be the degree of sacrifice by the claimant. The degree of sacrifice by one partner will be a guide to the measure of any unjust enrichment of the other ... A second and equally obvious major factor to be weighed is the value of the broadly measurable contributions of the claimant by comparison with the value of the broadly measurable benefit received.

13 Op cit n 5 at 3.

14 See for example *Timmermans v Duncan* Unreported, High Court, Auckland Registry, M 881/93, Judgment 7 September 1994.

15 Op cit n 7.

16 Cook P, Richardson, Casey and Bisson JJ.

17 Ibid at 333 et seq.

The third factor considered highly relevant was the existence of any property arrangement the parties may have made themselves for the distribution of the property.

Cooke P when elaborating on these three factors said that sacrifice will often, though not always, be related to the length of the union. "One has to remember that sacrifice cannot always be measured in dollars and cents. The longer the union, the more likely that one or other partner will have forgone other opportunities in life."¹⁸ With regard to the second factor, Cooke P noted that contributions to household expenses, or to maintenance, repairs or additions, may amount to no more than fair payment for board and lodging and the advantages of a home for the time being.

The President continued by saying¹⁹

I think that a claimant cannot succeed if a reasonable person in his or her shoes would have understood that throughout the relationship the other party had positively declined to acquiesce in any property sharing or other right.

The first case to discuss *Gillies* in any detail, was *Cossey v Bach*.²⁰

(b) *Cossey v Bach*

In *Cossey v Bach* the parties' marriage had been dissolved and both had remarried. These second marriages also ended in dissolution. On 26 March 1989 the plaintiff won \$666,660 at Lotto and four days later his former first wife, the defendant, returned to him. The plaintiff retired and collected his superannuation which amounted to \$36,000; in all he contributed \$700,000 to the relationship. The defendant had a \$5,000 interest in a home unit. The parties bought a new house and registered it in their joint names, with the plaintiff paying the entire purchase price. A year later the money ran out, the plaintiff had to resume work and the defendant left. During the relationship there were no improvements or direct or indirect contributions to the property by either party. The facts were thus radically different from *Gillies v Keogh*.

Fisher J summarised the law in a number of points. He emphasised that the legal title must always be the starting point. Expressed intention, even unilateral expressed intention is determinative.

His Honour said that in a stable and enduring de facto relationship and in the absence of expressed intention to the contrary, it will readily be accepted as reasonable that family assets would be shared. For this purpose contributions may be of an intangible nature, need not be traceable to the property in dispute or may have little measurable value. Applying the concept of reasonable expectations to the facts Fisher J held that Ms Cossey's contributions only minimally exceeded the value of the benefits she had received. She was awarded 15% interest in the property they had lived in during their year together.

In the same year as *Cossey v Bach* the High Court had to decide *Fleming v Beevers*.²¹ Miss Fleming was a 20 year old student when she entered into a de facto relationship with Mr Beevers, a 47 year old university lecturer. Some fourteen years later, Mr Beevers died, leaving his estate to his children. Miss Fleming claimed a constructive trust in relation to the home the couple had shared. Whilst the house had been purchased by Mr Beevers,

¹⁸ Ibid at 334.

¹⁹ Ibid.

²⁰ [1992] 3 NZLR 12.

²¹ Op cit n 7.

Miss Fleming had contributed money to both renovations and maintenance as well as helped with the garden and general household expenses.

The Court awarded Miss Fleming \$27,000 (a third of the sale price) of the house by way of constructive trust.

Fraser J held that financial contributions to renovating the bathroom, painting the exterior of the house, laying a lawn and helping with the foundations of the garden shed went beyond routine contributions to living. Miss Fleming had given up the possibility of marriage and obtaining matrimonial assets. She had also given up life as a single professional woman with the possibility of building up separate assets such as a home of her own.

Fraser J said that he agreed with Fisher J's comments in *Cossey v Bach* that as a matter of policy the courts should not seize the opportunity to extend to de facto relationships the enlightened approach found in the Matrimonial Property Act 1976.²²

His Honour said that on the issue of contributions "the approach is to be by assessing broadly the value of the plaintiff's proprietary contributions and her reasonable expectation in all the circumstances". This suggested a general approach, however in *Lankow v Rose* Tipping J discussed in greater detail what was required to succeed. Until *Lankow v Rose* two arguments persisted. One view was that the Court should look at the nature of the relationship as a whole and make an award. The opposing view is that there must be a link between the services and the particular property.²³ *Lankow v Rose* endorsed the latter approach.

(c) *Lankow v Rose*²⁴

Ms Rose and Mr Lankow started living together in February 1980. They formed what appeared to be a stable de facto relationship. This came to an end in February 1990 when Ms Rose discovered that Mr Lankow had transferred his affections elsewhere. In 1980 Mr Lankow's indebtedness almost equated the value of his assets. He therefore had no net wealth at the start of their relationship. Ms Rose had cash savings of a little over \$2,000.00, plus a modest car and miscellaneous items of furniture and personal effects. Throughout their relationship the parties both worked hard in what was seen at the time as a marriage partnership in all but legal form. In their several ways they each contributed fully to what they achieved together. On separation Ms Rose's assets were worth about \$30,000.00 and Mr Lankow's approximately \$625,000.00. The High Court Judge awarded Ms Rose a half share in the property that the parties had shared as a home since 1985 and in certain residual chattels. His Honour held that Ms Rose had put "her all" into the relationship. Her contributions had been in money, in domestic services, administrative, secretarial and semi legal services.

Mr Lankow appealed to the New Zealand Court of Appeal, arguing that Ms Rose was entitled to nothing. The appeal was dismissed and a cross appeal by Ms Rose was allowed, but only on the points relating to the actual

22 50:50 sharing is the starting point for married couples in New Zealand. This need to differentiate between married and non married couples was also emphasised in the recent Court of Appeal decision of *Lankow v Rose* [1995] NZFLR 1.

23 See for example *Nash v Nash* [1994] NZFLR 921. The court refused to evaluate the argument but did note that the latter approach would seem to give unmarried partner claimants effective recourse to all the property including what, in the case of a marriage, would be separate property.

24 [1995] NZFLR 1.

implementation of the division. In total Mr Lankow was to pay Ms Rose some \$225,000.²⁵

Tipping J²⁶ summarised what the claimant must show in order to establish a constructive trust in a de facto property dispute. First, there must be a contribution, direct or indirect to the property in question. Indirect contributions are as real as direct contributions. His Honour gives the example of one partner paying for all the groceries whilst the other pays the mortgage.²⁷ The grocery paying partner's indirect contribution to the house is no less real than if the roles were reversed. A contribution, to qualify is defined as "any payment or service by the claimant which either:

1. of itself assists in the acquisition, improvement or maintenance of the property or its value; or
2. by its provision helps the other party acquire, improve or maintain the property or its value."

Thus contributions in the home may qualify as contributions to the home. Having established a contribution or contributions the claimant must show the expectation of an interest in the asset. This expectation must be a reasonable one. Finally the claimant must show that the defendant should reasonably expect to yield the claimant an interest.

If the claimant can establish these requirements equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust. Once imposed the trust can be put into practical effect by such means as the justice of the case requires. A vesting order or an order for payment to the claimant of the assessed value of the beneficial interest are the two most likely orders.

The Court held that Ms Rose had made contributions, direct and indirect to the property that had been the couple's home, and that she had expected an interest in the property in return for her contributions. This was a reasonable expectation and any reasonable person in Mr Lankow's circumstances ought to have expected to give Ms Rose an interest. The fact that he had not, made his conduct unconscionable and justified the intervention of equity and the imposition of a constructive trust.

The Court held that there was an essential difference between motive and expectation. Ms Rose had stated in her evidence that she did work for her de facto partner and his company to save him money and keep his company afloat. The appellant argued that this evidence demonstrated that Ms Rose had no expectations of an interest in any of his property. Tipping J²⁸ said this was a confusion of concepts. Ms Rose was saying what her motivation was, and it did not follow from her stated motivation that she had no expectation of an interest.²⁹

Cooke P, Hardie Boys, McKay and Tipping JJ all emphasised the difference between marriage and de facto relationships. Cooke P saw the difference as basic³⁰ and Hardie Boys J stated that he would not regard it as a reasonable expectation that de facto couples should share in assets in the same way that married couples do.³¹

25 Leave to appeal to the Judicial Committee of Privy Council has been granted.

26 Op cit n 24 at 19.

27 Ibid.

28 Hardie Boys J ibid at 6 made the same observation as did Gault J ibid at 10.

29 Ibid at 21.

30 Ibid at 3.

31 Ibid at 10.

McKay J³² pointed out that whilst the New Zealand Matrimonial Property Act 1976 had no application to de facto relationships it is part of the background of modern law and modern social attitudes by which people are influenced. The fact that spouses are generally entitled to share in matrimonial assets has an influence on the expectation which parties to a de facto relationship may have. His Honour noted that the Act also has an influence on society's attitude to what is reasonable in a de facto situation. Tipping J³³ on the other hand, emphasised the fundamental difference between the two types of relationships. Matrimonial legislation gives a husband and wife a presumptive half share whilst in a de facto union the claimant starts from nothing and must prove contributions.

In 1995, in *Nuthall v Heslop*³⁴ Tipping J elaborated on his judgment in *Lankow v Rose*.

(d) *Nuthall v Heslop*

Mr Heslop and Mrs Clark had lived together for five years. When the relationship terminated Mrs Clark claimed both financial and non financial contributions to the relationship. It was argued that Mrs Clark had contributed to Mr Heslop's overall asset position not by increasing it but by diminishing his need to spend. She had done work on the farm cottage in which they lived (this cottage was in the name of a company in which the defendant owned shares) and assisted in her partner's jet boating business. Mrs Clark had also worked as an unpaid secretary and had helped run the farm and cared for the home. In total it was said that Mrs Clark had spent about \$55,000 from her own resources largely on living and general expenses. Tipping J³⁵ acknowledged that "in a sense Mrs Clark subsidised Mr Heslop's living expenses to some extent by paying more than her half share". The consequences it was argued enabled Mr Heslop to make less of a loss than he would have otherwise. Besides the \$55,000, Mrs Clark claimed to have contributed \$7,000 to the cottage the parties lived in, and \$8,000 to Mr Heslop's business; a total of \$70,000. In summary it was argued that if Mr Heslop had been obliged to spend more himself he would necessarily have been worse off. Tipping J said that "in reality Mrs Clark's claim amounts to the proposition that she should be compensated retrospectively for having contributed more than half the money consumed during the relationship on general living and partnership purposes."³⁶

Tipping J reiterated the need for:

1. Contributions, direct or indirect to the property in question.
2. An expectation of an interest.
3. That such an interest be a reasonable one.
4. That the defendant should reasonably expect to yield the claimant an interest.

His Honour also repeated his view that paying for the groceries (whilst the other services the mortgage) is an indirect contribution.

In the present case it was argued that if a couple had lived off the earnings of one partner, thus enabling the other to keep his capital intact, that should be construed as an indirect contribution of a qualifying kind to the

32 Ibid at 14.

33 Ibid at 20.

34 [1995] NZFLR 755.

35 Ibid at 758.

36 Ibid at 760.

other partner's asset or assets.³⁷ Tipping J said that he did not have such a situation in mind when he wrote his judgment in *Lankow v Rose*.

His Honour held that the court's jurisdiction is not an exercise in general wealth distribution. The starting point is to identify what assets the defendant owns, and then to consider the plaintiff's direct and indirect contributions. The issue in *Nuthall v Heslop* was whether the Judge's concept of "maintenance" of property were apt to cover circumstances where one partner had supported the other enabling that other to keep an asset intact. Tipping J said that it was not possible in such circumstances to say that the "contribution" of the one partner has directly maintained the asset of the other and that whilst it might be possible to take the view that in such circumstances there is indirect maintenance it is of a passive rather than an active kind.³⁸

The problem with Mrs Clark's approach, as his Honour saw it, was that it has the capacity to put a de facto plaintiff in a better position than a married plaintiff. His Honour gave the illustration of a case where the asset attached would, in a married context, be the defendant's separate property. Such an approach would be "taking the concept of sustenance beyond what is generally understood in a matrimonial property context".³⁹

Tipping J went on to give the example of a de facto relationship where the man supports the family unit beyond a half share with the woman having an asset worth a certain sum. If the plaintiff's argument was to be adopted then at the termination of the relationship the man should be able to recover from the woman a sum representing the excess over his half share of the partnership expenditure. This would be done by a constructive trust over the woman's asset. The Court in *Nuthall v Heslop* was not persuaded that there should be judicial development of the law in this way. It involved social policy and was a matter for Parliament.

Mrs Clark's argument was "really an invitation to the Court to adjust retrospectively the way the parties have chosen to run their domestic finances in the interests of some amorphous concept of equality".⁴⁰ If the parties had chosen to run their affairs in the way they had then there is no justification for the assumption by the Court of an ex post facto power to require equality by constructive trust or otherwise. His Honour was of the view that all kinds of potentially intractable problems could arise if the Courts expanded the concept of constructive trust yet further.

On the facts of the case it was found that Mrs Clark spent \$15,000 above her half share of general living and partnership expenses. There was no evidence that Mrs Clark had an expectation that she would be compensated for this by being awarded a share in Mr Heslop's general assets at the end of the relationship.

On the balance of probabilities it was impossible to find that any work or money contributed by Mrs Clark increased the value of Mr Heslop's assets except for the \$3,000 increase in the value of the cottage.

One could possibly argue that if one party pays for the groceries and the other pays the mortgage then the former has contributed, indirectly, to the other's asset. By paying for the groceries that party leaves more money in the hands of the partner who could presumably use it to increase the value of some other asset. It is a small step to accept Mrs Clark's argument that one

37 Ibid at 757.

38 Ibid at 758.

39 Ibid at 759.

40 Ibid.

party contributes to the assets of the other by contributing to that other's costs and thus reducing his or her loss (or increasing his or her overall wealth).

Tipping J in *Nuthall v Heslop* refused to develop the law in this way. The case reinforces the need to isolate and consider each asset and then consider the contribution to it. As initially attractive as Mrs Clark's argument was, his Honour clearly illustrates the problems that could arise by its adoption. A partner with a lower income, but with some assets, could easily find him or herself in the unenviable position of having to part with the asset to meet the other's claim if that other had, with the higher income, provided more to general living expenses during the relationship. This decision, clarifying as it does, *Lankow v Rose* illustrates the Courts present approach to de facto property disputes in New Zealand.

(e) *X v Y*⁴¹

Mrs X and Mr Y had lived together for over twenty years and during this time had developed real estate at a profit.

The parties decided to live together in 1974. Mr Y, who had no assets of any significance, moved into Mrs X's home in S Avenue. This property was upgraded, subdivided and subsequently sold in 1980. A house and land in H Road was then purchased and registered in Mr Y's name for fiscal reasons. The plaintiff contributed \$62,500 from the sale of the S Avenue property. Later, following a serious accident, Mrs X received \$14,450 and \$12,720 ACC lump sum payments, she put these towards the development of H Road. The couple's savings likewise went into the development. In the early 1980s Mr Y worked and kept both parties whilst Mrs X worked full time on the site as a labourer. She also kept the accounts and made curtains and soft furnishings for the first units to be completed. Later the defendant gave up employment, went on unemployment benefit and worked full time on the development. Between mid 1988-1992 the plaintiff received \$76,001 and the defendant \$27,000. Early in 1992 a mortgage was arranged in order to complete the project. Two instalments totalling \$44,200 were advanced for the development.

About Easter 1992 the plaintiff was informed that her daughter alleged that the defendant had raped and sexually abused her as a child. This caused the relationship to end between X and Y (although Y's prosecution ended with a discharge on both the rape and indecent assault counts) and the parties did not live together from 16 May 1992 onwards. Just before separating, on 14 May 1992, at a meeting with a solicitor, the plaintiff alleged that the parties agreed to split their property on a fifty fifty basis. The defendant contended that the H Road land was excluded from this split. Mr Y continued the development of the property and all the units on the property were completed in 1994. On 25 March 1994 the parties and their legal representatives met, the plaintiff argued that a binding agreement was reached at the meeting to share equally. The defendant denied this. The units were subsequently sold for over \$700,000.

The plaintiff put forward her case on the following alternative basis:

1. An oral contract existed whereunder it was agreed that the parties share equally both chattels and property. This contract arose either in May-June 1992 or alternatively on 25 March 1994.⁴²

41 Unreported, High Court, Auckland Registry, M.100/95. Reserved Judgment of Penlington J 23 November 1995.

2. A common intention express trust existed whereby the parties were to share the net proceeds of sale from the H Road development in equal shares.
3. An implied trust existed whereby the parties agreed that they had undertaken the development jointly and that the net proceeds of sale were to be shared equally.
4. A constructive trust arose from (i) the inferred common intention of the parties to share the net proceeds of sale from the development in equal shares and (ii) their respective contributions to that asset.

Mrs X sought a declaration that she was entitled to 50% of the net proceeds of sale from the development. The questions for the Court were, therefore, whether a contract existed, and if not, whether a trust express, implied or constructive could be imposed by way of equitable relief.

Penlington J found that an express trust existed. It had been the parties' common intention since the inception of the development in 1981 that the equity in the property be split on a fifty fifty basis. The meeting of 14 May 1992 confirmed this, and nothing that occurred later contradicted this finding. His Honour recognised that he was required to apply an objective test to ascertain whether there was an unequivocal expression of common intention by the parties. The Judge found an abundance of evidence to confirm a common intention to share equally. The plaintiff's cash injections, her work on the development, the parties' joint approach to the project and various correspondence all showed an intention to share equally. It followed that the plaintiff was entitled to fifty per cent of the net proceeds of sale.

His Honour held that if he was wrong in his view that an express trust existed then the evidence established an implied trust.

On the issue of constructive trusts Penlington J considered that the evidence clearly established that the plaintiff had directly contributed to the development of H Road. Her cash contributions, ACC lump sum payments, her savings, her physical work and accounting book work were direct contributions. As to the issue of expectations the plaintiff had an expectation of an interest in the development. "Given what she had contributed directly and indirectly to the development her expectation of an interest in the development was entirely reasonable and likewise it was entirely reasonable for the defendant to expect to yield the plaintiff an interest in the development".⁴³ The plaintiff had also made a sacrifice in so far as she had given up the use of her interest in the property and rented other premises whilst the development was being completed. Thus even if the plaintiff had not established an express or implied trust she had definitely established a constructive trust to the extent of a fifty per cent interest in the H Road development and accordingly a fifty per cent interest in the net proceeds of sale.

42 The plaintiff alleged that a contract could be inferred from the oral and written utterances of the parties in May-June 1992 or alternatively an oral agreement was made on 25 March 1994. His Honour noted that the test whether a contract has been formed is an objective one and that the Court must make an objective determination of the intentions of the parties at the material time (at p 19). On the evidence there was at most an acceptance *in principle* in 1992 and this did not amount to acceptance in the contractual sense. (See *Oracle NZ Ltd v Price Waterhouse Administration Ltd & Cromcorp Church Street Ltd* (CA 135/94 Judgment 4 August 1995)). Furthermore, the plaintiff had not, on an objective test, established that a binding contractual agreement had been reached on 25 March 1994.

43 *Ibid* at 43.

III. DIFFICULTIES WITH THE PRESENT LAW

1. Uncertainty

As a result of case law it is now settled that a de facto partner is not to be treated as a married partner. He or she must start by showing a contribution to the property in dispute. An area of uncertainty arises if the contribution is indirect. Paying the groceries counts but it is uncertain what would happen if the grocery paying partner purchased nothing but stayed at home and, say, cared for the partner's children by a former union or his or her dependent parent. Tipping J has not developed the *Gillies v Keogh* concept of sacrifice. Perhaps in the future a court would in the circumstance just posed, emphasise the sacrifice made by the caregiver. Alternatively, this example could be seen as an example of an indirect contribution as Tipping J did say that a contribution was any service which by its provision helps the other party acquire, improve or maintain the property or its value. It can be argued that 'sacrifice' as a concept is too vague and emotive a concept. What to one person might appear to be a sacrifice might to another be the reverse.

The reasonable expectation of an interest in the property and the requirement that the defendant should reasonably expect to yield the claimant an interest poses interesting possibilities. In *Gillies v Keogh*⁴⁴ it will be recalled, one partner emphasised continually that the property was hers and hers alone. If one applies *Lankow v Rose* to the facts then clearly the plaintiff made direct contributions to the houses and he would also expect an interest in the property. His expectation can be seen as reasonable. The interesting point is whether or not the defendant should reasonably expect to yield the claimant an interest in the property.

It is very easy in the *Gillies v Keogh* situation to argue both ways. It was a hard result or inequitable from the plaintiff's point of view. He had obviously worked hard and had his partner not emphasised the fact that the property was hers, he would presumably have succeeded. From the defendant's point of view, she had already lost one matrimonial home and wanted security for the future. It seems fair and equitable that from her stance the property remains hers.

It has been suggested⁴⁵ that the present approach leaves women at a disadvantage for two reasons. First, their contributions will often be non-financial and secondly their contribution is more likely to involve part-time work generating lesser amounts of money. Thus women can be seen as disadvantaged when showing contributions. Tipping J⁴⁶ expressly acknowledged that where contributions are of an indirect nature there may be greater difficulties of proof and assessment.

It has also been noted⁴⁷ that this uncertainty in the law has led to two main consequences. First, parties who are able to afford litigation end up conducting drawn out and expensive legal proceedings,⁴⁸ and second, where claims are smaller or the parties simply cannot afford litigation, the potential claimant is left without a remedy.⁴⁹

44 Op cit n 24.

45 Op cit supra n 5 at 6.

46 In *Lankow v Rose* op cit n 24 at 8.

47 Ibid at 6.

48 Mr Lankow is on his way to the Privy Council.

49 Disputes are heard in the High Court. Such proceedings are costly and tend to take time.

2. Quantum

The research carried out by the Justice Department in 1995⁵⁰ found that the awards imposed by the courts typically range from a 15% to a 30% interest in the property on which a claim is founded. Only two reported cases have awarded 50% interest.⁵¹ In *D v A*⁵² Doogue J found that the relationship “was in all respects but name a marriage. For the court not be able to apply directly the principles of the matrimonial property legislation to the facts of the case appears to me to work an injustice”.

On the other hand in *Lankow v Rose* Hardie Boys J expressly assented that he “would not regard it as a reasonable expectation that de facto couples should share in assets in the same way that married couples do”.⁵³

3. Narrowness of Remedy

There appear to be no reported cases in New Zealand where equity has given a de facto spouse a right of occupation of the home.⁵⁴ This means that the family home must be vacated, which, if children are involved, can obviously cause hardship.⁵⁵

IV. CONCLUSION

The resolution of property disputes arising on the breakdown of a de facto relationship is a controversial field and it would seem inevitable that Parliamentary intervention occur. Until this happens some would say that judges will continue to achieve “workable and wise solutions”.⁵⁶ In *Lankow v Rose* the then President of the Court of Appeal said:

There is necessarily some uncertainty. How could it be otherwise when human relationships are so variable? Legislation laying down some more hard-and-fast approach might be desirable, not only theoretically but in practice. If any such change is under consideration, however, a point to be borne in mind is that the present New Zealand case law represents an attempt to ensure justice while recognising that there is a basic difference between legal marriage and de facto unions. In contemporary society it may be questionable whether, ideally, any law can aim at more.⁵⁷

50 Op cit n 5 at 3.

51 *Lankow v Rose*. Ms Rose was awarded 50% interest in the home. *Bryenton v Toon* (1990) 7 FRNZ 256 also awarded 50% interest.

52 (1992) 9 FRNZ 43 at 48.

53 And see text supra at n 30.

54 Op cit n 5 at 8.

55 In some cases an occupation order may be granted pursuant to the Domestic Protection Act 1982. However, these orders can be overridden by the sale of the property. Even where the parties are co-owners one party may force a sale pursuant to s. 140 Property Law Act 1952. See *Rivell v Baker* (1984) 3 NZFLR 20.

56 Op cit n 24 per Cooke P at 3.

57 Ibid.