

IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2014  
[2014] NZSC 162

BETWEEN                      WILLIAM ELLIOT HAMILTON  
   First Applicant

   GEOFFREY MIRKIN  
   Second Applicant

   W E H TRUSTEE LTD  
   Third Applicant

AND                              JANE MAREE MURRELL  
   Respondent

Court:                      William Young, Glazebrook and Arnold JJ

Counsel:                      M E Parker and M R Cowan for Applicants  
   L A Andersen for Respondent

Judgment:                      12 November 2014

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**JUDGMENT OF THE COURT**

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- A      The application for leave to appeal is dismissed.**
- B      The applicants are jointly and severally liable to pay the respondent costs of \$2,500, plus reasonable disbursements.**
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**REASONS**

[1]      The first applicant, Mr Hamilton, and the respondent, Ms Murrell, began a relationship in 2002, which ended in early 2010. In January 2004, the couple moved into a house which was being built by a building company operated by Mr Hamilton, himself a builder. The property was owned by the third applicant, the W E Hamilton Family Trust, of which Mr Hamilton was a trustee along with a solicitor, the second applicant, Mr Mirkin.

[2] After the house was completed, the couple lived in it, before moving to a new location in 2007. Initially, the house was rented but then, about two years later, it was sold. After separation, Ms Murrell claimed that some of the proceeds of the sale price were held by the family trust on constructive trust for her, reflecting her contributions to the property.

[3] At trial, Pankhurst J accepted that Ms Murrell had contributed to the property, and held a reasonable expectation that she had an interest in it. The Judge identified the extent of the interest as being a 15 per cent interest, a sum of \$37,500. However, although the Judge accepted that there were circumstances where a constructive trust could attach to trust property, he held that this was not one of them. Although it was unconscionable for Mr Hamilton to deny that Ms Murrell had a reasonable expectation of an interest in the property, the property was owned by the trust, of which Mr Hamilton was only one trustee. The other trustee, Mr Mirkin, had not created an expectation in Ms Murrell of an interest in the property. Accordingly Ms Murrell's claim failed.<sup>1</sup>

[4] On appeal, the Court of Appeal disagreed with Pankhurst J on this last point.<sup>2</sup> The Court considered that the evidence showed that Mr Mirkin had left everything to do with the building of the house to Mr Hamilton and allowed him to bind the trustees accordingly. In what it described as an "unusual fact situation", the Court of Appeal considered that it would be unconscionable for the trustees to deny Ms Murrell's claim.<sup>3</sup>

[5] The applicants argue that the factual findings made by Panckhurst J did not support the Court of Appeal's findings as to the extent of Mr Hamilton's authority to act on behalf of the trustees. They submit that the Court of Appeal effectively found that the trust was a sham or an alter ego trust and this went beyond any conclusion that could legitimately be reached on the basis of Panckhurst J's factual findings. The Court of Appeal had confused factual control of trust property with legal authority and had over-looked the principles of unanimity and non-delegation in relation to trustees.

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<sup>1</sup> *Murrell v Hamilton* [2013] NZHC 3241.

<sup>2</sup> *Murrell v Hamilton* [2014] NZCA 377.

<sup>3</sup> At [28].

[6] We are not satisfied that it is necessary in the interests of justice that we hear and determine this appeal. We do not accept that it involves any issue of general or public importance.<sup>4</sup> Rather, as the Court of Appeal noted, this is a case which turns on its particular facts. Furthermore, the case has no commercial significance and we see no risk of a substantial miscarriage of justice.

[7] The application for leave to appeal is dismissed. The applicants are jointly and severally liable to pay the respondent costs of \$2,500, plus reasonable disbursements.

Solicitors:  
Parker Cowan Lawyers, Queenstown for Applicants  
Staley Cardoza, Dunedin for Respondent

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<sup>4</sup> On other facts, there may be an issue as to the appropriate test for constructive trusts in cases of this type.