IN THE DISTRICT COURT
AT WHANGAREI

CIV-2013-011-000020
[2016] NZDC 4025

	BETWEEN	SELINA FENELLA NEIGHBOURS Plaintiff
	AND	BRIAN STUTT Defendant

Hearing: 8 March 2016

Appearances: Mr Mark for the Plaintiff
No appearance by the Defendant

Judgment: 11 March 2016

RESERVED JUDGMENT OF JUDGE D J McDONALD

Proceedings

[1] The proceedings were commenced on 27 November 2013 by Ms Neighbours filing an information capsule in the District Court at Whangarei. A response was filed by Mr Stutt. On 23 April 2015 following earlier argument I refused the Defendant's application to strike out the Plaintiff's claim in its entirety, see CIV-2013-011-000020. On 5 June 2015 at a telephone conference Judge de Ridder ordered the filing of a statement of claim, statement of defence and any counterclaim and if a counterclaim was to be filed a statement of defence to that. On 3 July 2015 the Plaintiff filed a statement of claim. A statement of defence and counterclaim was filed on 14 July 2015. A statement of defence to the counterclaim was filed on 4 August 2015.

[2] On 31 August 2015 at a further telephone conference the trial date of 8 March 2016 for five days was set down. At that same conference a close off of pleadings was set for 30 September 2015.

Hearing

[3] A five day fixture was set for 8-14 March 2016. At a telephone conference before me on 18 February 2016 Mr Mark, for the Plaintiff, indicated he was ready to proceed. Mr Cox for the Defendant advised the Defendant had a torn ligament and was unable to attend the fixture. He was seeking an adjournment. I directed a medical certificate be provided by 12 noon 19 February 2016. No medical certificate was or has been received.

[4] At further telephone conferences on 19 February 2016 and 22 February 2016 Mr Cox was unable to advance any further support for his application to adjourn. No affidavit from Mr Stutt and no medical report or certificate has been provided as to why Mr Stutt would be unable to attend Court. I direct that the trial will proceed.

[5] At a telephone conference on 1 March 2016 Mr Cox sought leave to withdraw. He advised that Mr Stutt had instructed him not to attend the hearing on 8 March 2016. Following those instructions Mr Stutt dispensed with Mr Cox's services. Mr Cox no longer has any instructions from Mr Stutt. Mr Cox indicated that he had been advised by Mr Stutt that Mr Stutt would not be attending the hearing. I granted Mr Cox leave to withdraw.

[6] I directed my Registrar to write to Mr Stutt advising him of the hearing date, that he could appear in person or with a new solicitor but that the case would proceed that day.

[7] On 8 March 2016 Mr Stutt did not appear nor did any lawyer appear on his behalf. No communication has been made by Mr Stutt with the Registry. I proceeded to hear the case in the Defendant's absence. No good reason had been advanced to me as to why I should not do that. Mr Stutt was well aware both from Mr Cox and from my Registrar of the hearing date.

Procedure at hearing

[8] Although this was a hearing where the Defendant was not present it is still necessary for the Plaintiff to prove on the balance of probabilities that each of the five claims or causes of action have been established; see Rule 10.14.

Background

[9] The parties met in about 1993 through an interest in breeding parrots. Ms Neighbours separated from her husband in 1995. Ms Neighbours separated from her husband she and Mr Stutt formed a sexual relationship. He was married and remained with his wife throughout despite promises that he would leave her and move in with Ms Neighbours. Ms Neighbours was encouraged to move to Whangarei from Auckland by Mr Stutt. Mr Stutt was a real estate agent in Whangarei. She did so in 1997. She purchased a unit in [address 1 deleted]. That unit was found by Mr Stutt. He carried out the negotiations.

[10] In 1999 or thereabouts Mr Stutt persuaded Ms Neighbours to become an escort. Mr Stutt was involved in the early part of that by dropping Ms Neighbours off and picking her up after her appointments.

[11] There were a number of houses purchased by Ms Neighbours in Whangarei. All of those were arranged by Mr Stutt. He was instrumental in getting her to purchase then sell then buy again. That is [address 2 deleted], [address 3 deleted], [address 4 deleted]. Ms Neighbours' evidence, which is uncontradicted, and which I accept, Mr Stutt was involved in a number of questionable business practices.

First, second, third and fourth causes of action

[12] Mr Mark for at least the first three causes of action relies on a constructive or resulting trusts to sheet home liability against the Defendant.

[13] A trust may be express, constructive or resulting. Briefly summarised:

(a) An express trust is one which is deliberately established and which the trustee deliberately accepts. It requires the coincidental satisfaction of three certainties: certainty of intention, certainty of subject matter and certainty of object.

(b) A constructive trust arises by operation of law and possibly through the Courts remedial discretion; it is not directly dependent on the intention of the parties.

(c) A resulting trust is said to give effect to the presumed intentions of the parties. In general terms it might be said that "resulting trusts align with the concept of unjust enrichment".

Constructive trust

[14] A constructive trust usually arises in the context of a de-facto relationship but extends to filial relationships. It can be wider than that. The decision of *Lankow v Rose*[1] sets out "the essential requirements" of a constructive trust.

> [First] 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 [secondly] that in the all the circumstances, the parties must be taken reasonably to expect that the plaintiff would share in them as a result.

[15] Tipping J set out the elements that the claimant needs to prove in order to establish that equity should regard as unconscionable but a defendant's denial of a claimant's interest and so impose a constructive trust on a defendant:

(a) Contributions, direct or indirect to the property in question;

(b) An expectation of an interest therein;

(c) That such an expectation is a reasonable one; and

[1] [1995] 1 NZLR 277 (CA) at 289

(d) That the defendant should reasonably expect to yield the claim and interest.

[16] In *Gormack v Scott*, Cooke P added to the principles by making the following observations:

> First… where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations.
>
> Secondly, if (as the Judge thought here) the common intention was too vaguely expressed to receive implementation as such, the evidence bearing on common intention may still be relevant in considering the reasonable expectation of the parties.
>
> Thirdly, in considering reasonable expectations, attention is not to be confined to the inception of the relationship or the time when the property in question was purchased. The inquiry extends to the whole circumstances and history of the relationship…..
>
> The purpose of a constructive trust is generally not to create an ongoing trust relationship, but to force the disgorging of money or property by the constructive trustee. In this way, "a constructive trust is a means to an end".

[17] I have also had regard to what was said in *Fortex Group Ltd (in receivership) v McIntosh Cox & Forde*[2].

[18] I accept Mr Mark's submission that there "appears to be two triggers for the exercise of the Court's discretion to grant a remedial constructive trust. One is unjust enrichment the other in unconscionability. I also accept his submission that there are three elements of unjust enrichment; "an enrichment of the defendant, to the detriment of the plaintiff, and in the absence of a juristic reason for the enrichment."

[19] In my view there is unconscionability as well which I will discuss below.

First cause of action

[20] Ms Neighbours told me from the time she became an escort, at the insistence of Mr Stutt and with his initial support, she handed over half of her cash earnings to

[2] [1998] 3 NZLR 171 (CA) at 173 and 180

him for him to save on her behalf. She told me, and I accept, that these were small amounts on regular occasions. The only time she did not hand over her earnings was for overnighters. Ms Neighbours told me she kept a written record of her earnings. From 2003 to 2010 half her earnings, which she handed to Mr Stutt amounted to $47,089. Ms Neighbours said that there was a "definite agreement" with Mr Stutt that he was to hold the money for her and that he would pay it back when she asked. I accept even in the absence of the "written record" that cash payments were made in that amount to Mr Stutt. There is no evidence that all or even part of that sum was for services that Mr Stutt was providing to Ms Neighbours to enable her to work. Mr Stutt I find had an aversion to banks. I would infer from Ms Neighbours evidence that Mr Stutt did not like banks because banks left a paper trail.

[21] I find it proved on the balance of probabilities that Ms Neighbours did hand over or give to Mr Stutt $47,089 on the express agreement or understanding that both were fully aware that he was holding the money for her to be repaid or given back to her on her request. She has requested it. He has refused to pay it. In my view this could well be an express trust. There was "certainty of intention" that Mr Stutt would in effect act as Ms Neighbours' banker. It was "certainty of subject matter" that as she would pay over half her earnings to him to safeguard and there was "certainty of object" that is he would repay it when asked.

[22] At the very least this was a constructive trust. Mr Stutt had become unjustly enriched. It would be unconscionable not to order Mr Stutt to repay the earnings of Ms Neighbours to her. As was said in *Gormack* the purpose of a constructive trust is to force the "disgorging of money" by the constructive trustees. It is a "means to an end".

Second cause of action

[23] In October 2010 Ms Neighbours home at [address 4 deleted] was sold. The registered proprietor was Ms Neighbours' trust. She was encouraged, I infer, pressured by Mr Stutt to set up a family trust not only to purchase the home but also as a way of Mr Stutt being able to use the trust for his own purposes. When the home sold Ms Neighbours received in to her personal bank account $123,000. Mr

Stutt was aware of that deposit. There is no need for me in this discussion to consider the position of the family trust; that is between the trust and Ms Neighbours.

[24] I find accepting Ms Neighbour's evidence, he "pestered" her to hand the money over to him. He required it to be handed over in cash. At the time Ms Neighbours was particularly vulnerable. She had been diagnosed with cancer and was undergoing treatment for it. The only money that she kept from the sale of the home was $50,000 that she had put on term deposit. That was much to the disgust of Mr Stutt.

[25] I accept that Ms Neighbours handed Mr Stutt $35,000 in October or November 2010 at her rental flat in [address 5 deleted], Kensington. She said and I accept that she had withdrawn it from her Westpac account on a number of occasions at Mr Stutt's insistence. The money was handed over to Mr Stutt personally. It was contained in a bag.

[26] Mr Pearce gave evidence before me. He told me he was aware that Ms Neighbours was going to hand over $35,000 to Mr Stutt. He was a friend of Ms Neighbours. He watched her count the money prior to handing it over. He was annoyed at her because he considered that she was being used by Mr Stutt. He was firmly of the view that Mr Stutt would not pay it back or give it back to Ms Neighbours if she asked for it. In that he was absolutely right. He also gave evidence confirming Ms Neighbours evidence that Mr Stutt pestered her for money and that money had to be in cash.

[27] Ms Neighbours' bank statement for October/November 2010 was produced. It shows large and small withdrawals in excess of $35,000 from 22 October 2010 to 8 November 2010.

[28] I find it proved on the balance of probabilities that Ms Neighbours did give or hand over to Mr Stutt $35,000 in October/November 2010. It was not a gift or a loan or a repayment of loan owed by Ms Neighbours to Mr Stutt. He demanded the money, she gave it to him.

[29] Ms Neighbours also handed Mr Stutt $10,000 in cash. She initially obtained a bank cheque for that amount which he rejected. He wanted cash. She went back to the bank, cancelled the bank cheque, withdrew $10,000 in cash and gave it to him. That transaction is supported by the bank statement and by the cheque stub.

[30] I find it proved on the balance of probabilities that those two payments were made. The payments were not a gift or repayment of a loan or a loan by her to him. All the money was Ms Neighbours.

[31] Applying the law to those facts I find that the Plaintiff handed over the two sums to Mr Stutt on trust, either a constructive trust or a resulting trust. Mr Stutt was unjustifiably enriched. It would be unconscionable not to require him to disgorge the money. It is not necessarily in my view, but if I am wrong about it being a constructive or resulting trust then at the very least it was a loan made by her to him payable on demand. I find it proved beyond reasonable doubt that she gave him those sums of money in the expectation it would be repaid when she wanted it.

Third cause of action

[32] Ms Neighbours claims $26,756.65 as from Mr Stutt as repayment of a credit card debt incurred on her credit card by Mr Stutt. Ms Neighbours was coerced in my view to making a large number of withdrawals using her credit card to provide ongoing amounts of cash to Mr Stutt. That amount is quite separate from the $45,000 in relation to the second cause of action. Her bank statement to some extent supports that. The claim by Ms Neighbours is for sums from July 2009 to October 2010 may be in to early November 2010.

[33] Her bank statement produced covers a much shorter period. It is unfortunate that preceding bank statements covering a wider period were not produced or indeed covering the whole period. However I am entitled to accept the evidence given by Ms Neighbours that that is what occurred. Given the history of the parties relationship Mr Stutt I find was the dominant partner with Ms Neighbours very much in the subservient role. I accept her evidence as to how these withdrawals were made, why and the amount.

[34] I find there was a constructive trust in relation to this money. Mr Stutt was unjustly enriched and it was unconscionable to allow him to retain the money. He got himself in to this position because of his dominance over her.

Fourth cause of action

[35] Ms Neighbours told me that she repaid a loan to a Mr Robert Auckett on behalf of Mr Stutt. Mr Stutt borrowed the money from Mr Auckett and then refused to repay it. Mr Auckett was a client of Ms Neighbours. She felt, I find, the need to repay the debt on behalf of Mr Stutt. She was not happy about repaying it. Mr Pearce told me he handed the $5,000 in repayment of the debt over to Mr Auckett on behalf of Ms Neighbours. Mr Auckett's letter, 9 in the bundle, supports that the loan was made and who repaid it. I have some difficulty in finding that any trust arrangement arose. It appears from the evidence of both Ms Neighbours and Mr Pearce that having obtained the loan, Mr Stutt just refused to pay it. There is no evidence that Mr Stutt then forced Ms Neighbours to pay it on his behalf.

[36] There is some evidence in what Ms Neighbours told me that there was an agreement between her and Mr Stutt that she would pay the loan and that he would then pay her back. However her evidence leaves me in doubt as to whether there was a meeting in mind between her and Mr Stutt as to that. It may well be that she paid it, because Mr Stutt would not, in the expectation it should be paid back not that she had an agreement or contract with Mr Stutt that that would be the case.

[37] I find this cause of action cannot be made out on the balance of probabilities.

Fifth cause of action

[38] This relates to various chattels which Ms Neighbours had Mr Stutt store after she sold her [address 4 deleted] home. She did not have the space. He did. When the relationship between the two ended she asked for the items back. He refused to give them to her. At the hearing Mr Mark submitted that I need only consider the African Grey parrot(s) and the spa pool. I do so.

Spa pool

[39] Ms Neighbours told me that the spa pool belonged to her. She gave it to him to store. He refused to return it. She produced a receipt for the spa pool. It cost $5,999 when purchased from Sun Dome Spas on 18 July 2005. It was in October/November 2010 that the spa pool would have been given to Mr Stutt to store. Ms Neighbours claims the full amount. I find it proved beyond reasonable doubt that the spa belonged to Ms Neighbours. I also find it proved beyond reasonable doubt that Mr Stutt has refused to give the chattel back. Having found liability I must now turn to the question of quantum. The question for me to decide is to what value to put on a spa pool that was five years old when Ms Neighbours stored it at Mr Stutt's place. It would be less than $5,999. I must find it proved by the Plaintiff that not only has the cause of action been made out but also the quantum of damages. I find the value of the spa pool as at October 2010 would have been half its value when purchased, $3,000.

The parrots

[40] I accept Ms Neighbours evidence that she gave Mr Stutt $16,000 to purchase African Grey parrots. It was expressly to purchase parrots on her behalf. He was an expert with parrots. He bred parrots. Ms Neighbours took possession of one grey parrot but Mr Stutt took it back because he told her he thought it was sick. African parrots do not depreciate if they are healthy. Ms Neighbours asked for the parrots. Mr Stutt refused to give them.

Other items

[41] Various other items were originally claimed as listed in the statement of claim. I have difficulty, even if I find that they were Ms Neighbours and that he refused to return them, in quantifying a value. No receipts have been produced. No photographs showing their condition when they were stored. Not even the make and model of the weed eater, chainsaw and the like have been disclosed in the evidence.

[42] Mr Mark did not pursue these claims. Given the inability to quantify a value I will not allow this claim.

Result

[43] There will be judgement for Ms Neighbours against Mr Stutt for:

(a) $47,089 – half her earnings as an escort;

(b) $35,000 – given to him in trust in October/November 2010;

(c) $10,000 – given to him in November 2010;

(d) $26,756.65 – the credit card debt of his paid by her;

(e) The spa pool, $3,000 and the African Grey parrots $16,000.

[44] There will be total judgment for the Plaintiff in the sum of $137,845.65.

[45] Interest from 27 October 2010 at the District Court Act 1947 rate.

[46] Costs and disbursements on the application to strike out.

[47] Costs and disbursements on these proceedings.

[48] The Plaintiff is to file a memorandum as to costs within 21 days. If none is filed, the costs and disbursements will be fixed by me.

D J McDonald
District Court Judge