HARVEY V BEVERIDGE: COMMON INTENTION CONSTRUCTIVE TRUSTS IN NEW ZEALAND?

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This article discusses the reasoning of the High Court and Court of Appeal in Harvey v Beveridge *in respect of the existence of "common intention constructive trusts" in New Zealand law. It analyses the development of constructive trusts doctrine in New Zealand, and argues that a different approach was taken to the application of this doctrine in relationship property disputes compared with the equivalent English doctrine. This difference was not recognised in* Harvey v Beveridge*, and it is argued that an adequate understanding of this difference requires us to grapple with the underlying foundations of the New Zealand law, which were left open during the Court of Appeal's development of the doctrine.*

I INTRODUCTION

In what circumstances, and for what reasons, can you make a legally recognised claim of rights to property that you are not the legal owner of? This is an important question in many people's lives, and one that a legal system should provide clear answers to. The law relating to constructive trusts provides one answer to this question, but while the main categories are relatively clear, the doctrinal basis for such trusts in the context of relationship property is uncertain.[1] This article considers the answer to this question that has been given in recent New Zealand judicial analysis of the law relating to constructive trusts in the recent *Harvey v Beveridge* decisions of the High Court and Court of Appeal,[2] in which a claim to equitable ownership of a residential property was considered

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1 See for example *Halsbury's Law of Canada* (online ed, 2011) "Trusts" at [HTR-44]; Donovan WM Waters, Mark Gillen and Lionel D Smith (eds) *Waters' Law of Trusts in Canada* (4th ed, Carswell, Toronto, 2012) at [11.I]; and Robert Chambers "Constructive Trusts in Canada" (1999) 37 Alta L Rev 173.

2 *Harvey v Beveridge* [2013] NZHC 1718, [2013] NZAR 1364 [*Harvey* (HC)]; and *Harvey v Beveridge* [2014] NZCA 72, (2014) 29 FRNZ 539 [*Harvey* (CA)].

by reference to the doctrine of "common intention constructive trust". This article analyses the courts' reasoning in light of the historical development of the doctrine and suggests how it could be further clarified.

II PROFESSOR ATKIN'S CONTRIBUTION TO FAMILY PROPERTY SCHOLARSHIP

Another impetus for this article is the desire to pay tribute to Professor Bill Atkin on the occasion of his 40th year at Victoria University of Wellington's Faculty of Law. The article's subject matter is fitting given that Professor Atkin spent much of that time enlightening law students and the legal community on the developing law of family property and family law in general – ultimately becoming one of the leading New Zealand authorities on family law. He began his career here just before the passage of the landmark Matrimonial Property Act 1976, which entrenched the concept of equal sharing of family property,[3] and over the years he has seen social and legislative mores change to the extent that the family property regime was in most parts extended to "de facto" relationships in 2001.[4] Indeed, Professor Atkin's scholarship clearly influenced these changes,[5] for example as a member of the Working Group on Matrimonial Property and Family Protection.[6] These developments in the statutory family property regime make the law discussed in this article – equity's contribution to regulating property relations within close personal relationships – less important in determining entitlements to property after the relationship had ended. Yet this law is still applicable in a number of situations, and the decisions in *Harvey* demonstrate that both its doctrinal nature and its relationship with English authority is still not entirely clear.

This specific question was analysed by Professor Atkin in the early 1990s, in a book on the law relating to *Living Together Without Marriage*.[7] At that time, one of the key issues in that area – ownership of property – was not regulated by the statutory regime that applies today, but by the general law. Indeed, Professor Atkin noted that "the tail has wagged the dog" in the sense that cases involving de facto partners had significantly impacted the development of the general law in areas

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3 See Bill Atkin and others "Fifty Years of New Zealand Family Law" (2013) 25 NZULR 645 at 662. See also Anthony H Angelo and Bill Atkin "A Conceptual and Structural Overview of the Matrimonial Property Act 1976" (1977) 7 NZULR 237.

4 Property (Relationships) Amendment Act 2001. See the initial analysis of this legislation in the 2001 edition of Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (Butterworths, Wellington, 2001).

5 Bill Atkin "Family Property Law Reform" in Bill Atkin, Graeme Austin and Virginia Grainer (eds) *Family Property Law & Policy* (New Zealand Institute of Advanced Legal Studies and Victoria University of Wellington Law Review, Wellington, 1995) 77.

6 *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988); and Bill Atkin "More law reform: the report of the Working Group on Matrimonial Property and Family Protection October 1988)" (1989) 2 FLB 18.

7 Bill Atkin *Living Together Without Marriage: The Law in New Zealand* (Butterworths, Wellington, 1991).

such as trusts and estoppel, as the courts had attempted to "stretch and mould concepts to do justice between the parties".[8] The analysis sat between the old English jurisprudence of common intention and the new test of reasonable expectations propounded by the Court of Appeal under (then) President Cooke;[9] the traditional analysis was being doubted by academic commentators, and although the New Zealand judges were "by no means unanimous" in their "precise method for resolving de facto cases", Professor Atkin observed that:[10]

> … there may be little advantage in keeping the different categories of trust … In de facto cases, the traditional cases, it is today argued, focus attention on the wrong things, and, instead, there should be a new kind of analysis which is more suited to modern-day needs.

This was a prescient observation, coming before the canonical restatement of the reasonable expectations approach a few years later in *Lankow v Rose*,[11] the decision that confirmed the move away from the English common intentions approach. As Professor Atkin later observed, the New Zealand Court of Appeal "carved out its own formula", allowing a more liberal approach to recognising equitable rights.[12] His view then was that, on first glance, the reasonable expectations test appears "to offer a just and tolerably clear way of tackling property disputes of *de facto* partners".[13] However he cautioned that the law had become far from certain, and the success of a claim and the quantification of the award has not been easy to predict.[14] Nevertheless in 2004 we heard no phantoms of common intention[15] rattling their chains in Professor Atkin's discussion, and saw no reference to English authority; given the shift in approach of New Zealand courts, none was necessary.

Yet a decade later, in the recent decisions in *Harvey*, we seem to see a return to the language of the "common intention constructive trust" (CICT), and reference to the old and new English cases; the impression that one gains on first glance is that the English approach to these issues is alive and well and an alternative to the New Zealand "reasonable expectations constructive trust" (RECT). In *Harvey*, a man claimed rights in his friend's residential property, which he said had been given to

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8 At 74.

9 See the discussion below in *Part IV:B: The Express CICT in the Formative Court of Appeal Authorities?*

10 Atkin, above n 7, at 75–76.

11 *Lankow v Rose* [1995] 1 NZLR 277 (CA).

12 Bill Atkin "The Challenge of Unmarried Cohabitation – The New Zealand Response" (2003) 37 Fam LQ 303 at 306.

13 At 308.

14 At 309–310.

15 Kevin Gray "The Law of Trusts and the Quasi-Matrimonial Home" [1983] CLJ 30 at 33, cited in *Hayward v Giordani* [1983] NZLR 140 (CA) at 144 per Cooke J and *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (HC) at 436 per McGechan J.

him; however, there was no legal transfer or steps taken to complete such a transfer, no formal declaration of trust and no contribution to the property. The High Court nevertheless identified a possible claim – enough to prevent summary judgment against the defendant – under the CICT approach. On appeal, the Court of Appeal dismissed the CICT approach where there is no contribution or detriment, but it did not analyse in detail how it sits in relation to the RECT test.

It is therefore likely that the revival of the language and concepts of common intention will continue until the law is further clarified: soon after it was decided, the High Court decision in *Harvey* was cited favourably in *Ridge v Parore*, where it was said that CICTs "form a well-established part of the law of trusts in England and Australia".[16] It is argued here, with respect, that such a view is misleading in that in recent years, New Zealand courts have been applying neither the "extended" idea of the CICT as it exists in England, nor the unconscionability approach used in Australia.[17] The High Court's decision suggests that the complex, controversial and still-developing English CICT approach to the recognition of informal property rights in land, through the mechanism of the constructive trust, is applicable here; the Court of Appeal doubted but did not reject this.

However, the continuing existence of the CICT approach in New Zealand would be out of step with what happened from the 1970s through the 1990s when this jurisdiction's constructive trusts law took a different path than those followed in England and other comparable jurisdictions.[18] This was a deliberate choice to found constructive trust law in New Zealand in the area of property to which a relationship partner has contributed according to the reasonable expectations of a beneficial interest.[19] No longer would the courts look to infer or impute intentions where there was no clearly expressed common intention as to beneficial ownership; instead where the claimant had a reasonable expectation of a beneficial interest due to their contribution to the defendant's property, the courts would recognise that it would be unconscionable for the defendant not to recognise this

16 *Ridge v Parore* [2014] NZHC 318 at [19].

17 The Australian doctrines in this area are based on the idea of the unconscionability of retaining benefits received by the defendant in the context of a joint endeavour that subsequently fails: *Muchinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Halsbury's Laws of Australia* (online looseleaf ed, 2015) "Trusts" at [430-620]; and John Mee *The Property Rights of Cohabitees* (Hart, Oxford, 1999) at ch 8, especially at 252–264. Compare with *Harvey* (HC), above n 2, at [25].

18 For discussions of the developments over these years, see Bill Atkin *Living Together Without Marriage: The Law in New Zealand* (Butterworths, Wellington, 1991) at ch 5; and Mark Henaghan and Nicola Peart "Relationship Property Appeals in the New Zealand Court of Appeal 1958-2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 years* (Hart, Oxford, 2009) 99 at 129–145.

19 See for example *Lankow v Rose*, above n 11, at 281–282 per Hardie-Boys J, comparing the alternative approaches and stating that one "legal rubric" providing "clear criteria for the imposition of constructive trusts in the area of de facto relationships" should be identified.

interest.[20] There need be no shared agreement or intention for such an interest to exist, nor any representation on the part of the defendant: so long as the claimant had contributed and reasonably expected an interest, this would be enough.

The English courts have now arguably reached an almost functionally equivalent test with the decisions in *Stack v Dowden*[21] and *Jones v Kernott*.[22] The frank statement in the former case, that courts could impute a common intention as to the shares of the beneficial interest in property in light of the "whole course of dealing between the parties",[23] has replaced the quest to infer such intentions in earlier decisions.[24] Nevertheless, the point remains: the different approaches for the recognition of equitable interests in property as between relationship partners are aiming at similar responses to similar circumstances – and they are stated as different doctrines due to judges' preferences for that particular statement in terms of the fairness of the substantive result, ease of application or avoiding fictions.[25] The tests were not meant to sit alongside each other.[26] If this were not the case, New Zealand law in this area would still be subject to James Mee's embarrassing analogy: "It is as if, wanting to look especially well at a party, a guest arrived wearing all her frocks at once."[27] The better approach is shown in the Canadian Supreme Court's clear restatement of its

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20 *Hayward v Giordani*, above n 15, at 148 per Cooke J; *Pasi v Kamana* [1986] 1 NZLR 603 (CA) at 605; *Gillies v Keogh* [1989] 2 NZLR 327 (CA) at 330–331 per Cooke P and at 344 and 346–347 per Richardson J; *Phillips v Phillips* [1993] 3 NZLR 159 (CA) at 168 per Cooke P; *Lankow v Rose*, above n 11, at 281–282 per Hardie Boys J, at 288 per Gault J and at 293 per Tipping J.

21 *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 at [25].

22 *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

23 *Stack v Dowden*, above n 21, at [60].

24 See John Mee "*Jones v Kernott*: Inferring and Imputing in Essex" [2012] Conv 167; Terence Etherton "Constructive Trusts: A New Model for Equity and Unjust Enrichment" (2008) 67 CLJ 265; Nick Piska "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 MLR 120; Simon Gardner "Family Property Today" (2008) 124 LQR 422 at 427–428; Graham Virgo *The Principles of Equity and Trusts* (Oxford University Press, Oxford, 2012) at 326–329; and Charlie Webb and Tim Akkouh *Trusts Law* (4th ed, Palgrave Macmillan, London, 2015) at 220–224.

25 See for example *Lankow v Rose*, above n 11, at 289 per Gault J.

26 Compare Gault J's statement in *Lankow v Rose*, above n 11, at 289: "… it is not necessary to choose between the various approaches. To adopt one as providing a workable means of dealing with the increasing number of cases in this area is not to reject the others. In any case it will be open to a claimant to formulate a case on any of the bases so far employed. They will include claims based on contract, express, implied or resulting trusts, common intention, unconscionability, estoppel and unjust enrichment." See also David Hayton "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 205 at 239.

27 Mee, above n 17, at 292.

own break with the English common intention approach,[28] and New Zealand courts should do the same.

It should be remembered that, for the most part, the law relating to equity's contribution to resolving property disputes after the breakdown of de facto relationships has been replaced with the general statutory relationship property regime.[29] The Property (Relationships) Act 1976 regime for division of relationship property applies to de facto relationships that end after or on the day that the amendments to the Act came into force on 1 February 2002.[30] The law of constructive trusts will apply only in a much smaller range of circumstances – but of course still crucially important to the parties involved.[31] Achieving a coherent and doctrinally sound law of constructive trusts is another reason to look further into the decisions and their reasoning.

III HARVEY V BEVERIDGE

The decisions in *Harvey* related to alleged facts concerning the beneficial ownership of a residential housing unit that was legally owned by the late Dr Mark Byrd and occupied by his friend Ian Beveridge, who claimed an equitable interest in it. Dr Byrd had provided Mr Beveridge with the use of a residential unit free of charge.[32] When Dr Byrd died, Mr Beveridge claimed that the residential unit was his property – that Dr Byrd had given it to him and told him repeatedly that "it is yours".[33] This was not reflected in Dr Byrd's will, and the executor – Reverend Harvey – gave notice to Mr Beveridge to vacate the property, as she was required to do.[34] However Mr Beveridge refused to do so and lodged a caveat on the title, claiming that the property was his.[35]

There were crucial legal problems with this latter claim. Dr Byrd had not legally gifted the property to Mr Beveridge, as this would have required registration under the Land Transfer system.[36] The property was clearly legally owned by the executor, as administrator of the will.[37]

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28 *Kerr v Baranow* 2011 SCC 10, [2011] 1 SCR 269 at [21]–[29].

29 Jessica Palmer "Constructive Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 335 at [13.2.4].

30 Property (Relationships) Act 1976, s 4C(2).

31 For discussion of the circumstances where the general law including constructive trusts is still applicable despite the partial codification of the law in the Property (Relationships) Act 1976, see Nicola Peart "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 1161 at 1168–1179 and 1197–1198.

32 *Harvey* (HC), above n 2, at [1].

33 At [61]–[64].

34 *Harvey* (CA), above n 2, at [43].

35 At [3].

36 Land Transfer Act 1952, s 41. See Jody L Foster "Title by Registration" in GW Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) 263 at 268–283.

What then about a claim in equity? One obvious equitable ownership claim would be an express trust, but there was no written and signed evidence of the declaration of trust – without which an express trust is invalid[38] under s 25(2) of the Property Law Act 2007. Mr Beveridge needed to circumvent this formality, and so argued for the existence of a constructive trust, which is specifically excluded from the formality requirement.[39] In the High Court, the executor's application for summary judgment was rejected because the law was not settled, meaning that a constructive trust claim might be made out at trial.[40] However, in the Court of Appeal this decision was overturned, because no constructive trust claim could have possibly been made out. The divergence of these two courts will be explained below.

A The High Court Decision

In the High Court decision (*Harvey* (HC)), the summary judgment application was made by the executor Reverend Harvey for possession of the unit and mesne profits relating to Mr Beveridge's having remained in the unit after being asked to vacate it. There was also an application to remove the caveat that Mr Beveridge had lodged against the title.[41]

Because he had not made any significant contribution to the property, Mr Beveridge's claim could not rely on *Lankow* RECT principles or on proprietary estoppel principles.[42] Instead, a claim based on expressed intentions – a CICT – was identified by counsel, primarily with reference to the decision of Fisher J in *Cossey v Bach*.[43] This, Osborne AJ argues, is a different kind of trust than the "constructive trust based on expectations" identified in *Gillies v Keogh* and *Lankow*.[44] The Associate Judge observes that New Zealand trusts law texts "universally cover the type of trust in *Gillies v Keogh* based on reasonable expectations".[45] The implication is that they are deficient in

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37 Administration Act 1969, s 24.

38 In *Laws of New Zealand* Trusts at [43], the commentary seems to be taken from *Halsbury's Laws of England*, because it states that writing is only required evidence of the trust. But the English formality provision s 52(1)(b) Law of Property Act 1952 (UK), states only that declarations of trust must be "manifested and proved by some writing signed by some person who is able to declare such trust or by his will", whereas s 25(2) requires that a trust of land "must be created in writing and signed by the settlor". Thus the New Zealand formality provision mirrors s 52(1)(c) of the English Law of Property Act 1925 (UK), which requires that disposition of an existing equitable interest "must be in writing".

39 Property Law Act 2007, s 25(4)(a).

40 *Harvey* (HC), above n 2, at [86].

41 At [2].

42 At [6] and more fully at [38].

43 *Cossey v Bach* [1992] 3 NZLR 612 (HC) at 628.

44 *Harvey* (HC), above n 2, at [9]. *Gillies v Keogh*, above n 20; and *Lankow v Rose*, above n 11.

45 At [11].

missing another key area of relevant law, the CICT.[46] Indeed, later Osborne AJ argues that New Zealand texts and commentaries do not spend much time discussing the CICT, in contrast with those in Australia and the United Kingdom – the latter stimulated by the continuing importance of constructive and resulting trusts in matrimonial property disputes and the recent decisions of *Stack* and *Jones*.[47] The Associate Judge states that no "developed treatment" on the CICT in authority or commentary was cited to him.[48]

The requirements identified are as follows:

- First, there must be an unequivocal common intention (that the claimant have a beneficial interest in the property).[49] "Common" means that the intention must be shared by both parties.[50] This point is justified with a discussion of the recent English cases.[51] The Associate Judge notes the puzzle that where there is no formality requirement a valid trust will arise simply due to the unilateral intention of the owner of the property.[52] However, that situation, discussed in *Cossey* and *SM v MH*,[53] is "by its nature fundamentally different to the common intention constructive trust".[54] Yet as discussed further below, it is not clear why this is so.
- Osborne AJ then states that the common intention be an actual subjective intention.[55] This accords with his previous requirement of an express intention derived from unequivocal words or conduct. However, by drawing on the English case law, the concept of inferring common intention from the parties' conduct is introduced.[56]
- The next requirement, discussed exclusively with reference to English authority, is that the common intention must be expressed at the time of acquisition of the property, or if there is compelling evidence of the intention, or as an exception, the beneficial interest might be

46 At [9].

47 At [14]. *Stack v Dowden*, above n 21; and *Jones v Kernott*, above n 22.

48 At [23].

49 At [26].

50 At [27].

51 At [28].

52 At [30].

53 *SM v MH* HC New Plymouth CIV-2007-443-656, 28 October 2008.

54 *Harvey* (HC), above n 2, at [30].

55 At [38].

56 At [39].

intended at some point after acquisition.[57] Here is a point where the influence of the extended English CICT doctrine seems to be causing problems; characterizing intentions occurring after the acquisition as "exceptional" was not part of the developing New Zealand RECT jurisprudence, and is no longer the English law relating to CICTs.[58]

- Osborne AJ notes that the English CICT has applied predominantly to relationship property, particularly the family home.[59] However – crucially for Beveridge's case – the Associate Judge argues that the English CICT can apply outside personal (romantic) relationships,[60] and even to commercial relationships. The latter is a controversial point in England.[61]

- The most controversial requirement of the Associate Judge's CICT test is whether one or more of contribution, detriment, reliance or alteration of position on the part of the claimant is required.[62] Osborne AJ observes that while contribution is required by some formulations, this is not found in New Zealand common intention decisions, of which the comprehensive analysis set out by Fisher J in *Cossey* is singled out as important.[63]

It is this last point – the discussion of detriment – that is most crucial, because it highlights the question of the doctrinal basis for CICTs. This question arises because effectively what has occurred in a situation where all of the other requirements obtain is that a trust has been declared, but it is invalid due to formality rules for dispositions of land. Where the owner of personal property expresses an intention that they are bound to hold it for another's benefit as well, this is an express trust regardless of contribution or detriment.[64] But in the case of trusts relating to land, the formality rule under s 25 of the Property Law Act 2007 makes invalid declarations of trust that are not written and signed.[65] The formality does not apply to resulting or constructive trusts,[66] which by their very

57 At [31]–[33].

58 See for example the analysis of changes in intention over time in *Jones v Kernott*, above n 22, at [48] and [51], and the "whole course of dealing" approach in *Stack v Dowden*, above n 21, at [60].

59 *Harvey* (HC), above n 2, at [34]–[35].

60 As shown by Osborne AJ's citation of *Mollo v Mollo* [2000] WTLR 227 (Ch).

61 For comment see *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754 at [85]–[88] per Etherton LJ. See also Terrence Etherton "Constructive Trusts and Proprietary Estoppel: the Search for Clarity and Principle" [2009] Conv 104 at 105–115; Nicholas Hopkins "The *Pallant v Morgan* "Equity" – Again: *Crossco No 4 Unlimited v Jolan Ltd*" [2012] Conv 327; and Man Yip "The *Pallant v Morgan* Equity Reconsidered" (2013) 33 LS 549.

62 *Harvey* (HC), above n 2, at [40].

63 At [44]. *Cossey v Bach*, above n 43.

64 *Paul v Constance* [1977] 1 WLR 527 (CA); and *Rowe v Prance* [1999] 2 FLR 787 (Ch).

65 *Harvey* (HC), above n 2, at [48].

nature arise less intentionally and more informally. Thus the importance of interpreting what looks like an (informal) express trust as a constructive trust.

In *Harvey* (HC) the Associate Judge agrees with what he takes to be the orthodoxy that such an express common intention trust is a constructive trust.[67] The well-known problem with this orthodoxy is that if what we are dealing with is in substance an informal declaration of trust of land, then to bring it into the category of constructive trusts there must be something that makes the settlor's not giving effect to the trust unconscionable. Equity does not aid a volunteer;[68] exceptions include where there is a valid and constituted express trust,[69] and where there is some element of unconscionability in the defendant's conduct with respect to the claimant that justifies equity's intervention.[70] Thus a contribution or other detriment seems to logically be required, as Osborne AJ notes:[71]

> I am inclined to the conclusion that such authorities appropriately recognise that, in the absence of such, the unconscionability or fraud on the statute which justifies the Court's upholding of constructive trusts will be absent. If something in the nature of detriment is not required, it is arguable that the Court would be unjustifiably enforcing an express trust which was not documented in writing.

However, the Associate Judge found that the law in New Zealand was not settled, so that in the context of a summary judgment he could not say that detriment was a requirement so as to mean that Beveridge's claim was untenable.[72]

B The Court of Appeal

The High Court's decision was overturned in the Court of Appeal decision (*Harvey* (CA)). After noting Osborne AJ had "comprehensively analysed" the concept of the CICT,[73] the Court of Appeal rejected the applicability of the doctrine to the situation: "None of the authorities relied on … supports the proposition that there is any basis [in these circumstances] for a 'common intention'

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66 Property Law Act 2007, s 25(2).

67 *Harvey* (HC), above n 2, at [48].

68 *Milroy v Lord* (1862) 45 ER 1185; *Re Rose* [1952] 1 Ch 499 (CA); and *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075 at [52]–[54].

69 *Commissioner of Stamp Duties (Queensland) v Joliffe* (1920) 28 CLR 178 at 187.

70 *Pennington v Waine*, above n 68, at [55]–[61].

71 *Harvey* (HC), above n 2, at [49].

72 At [51].

73 *Harvey* (CA), above n 2, at [27].

constructive trust".[74] The Court found issue with both the Associate Judge's application of the law to the facts and his statement of the requirements of the CICT.

In coming to its decision, the Court provided a useful wide-ranging discussion of the general area of informal equitable property rights, setting out and then dismissing a number of possible arguments for Mr Beveridge having an interest in the property.[75] This was necessitated by the Court's characterisation of Dr Byrd's (purported) intention as being to gift his property to Mr Beveridge, rather than to hold it on trust for him.[76] This will bring to most lawyers' minds the forceful reminder in *Milroy v Lord* that transactions must be given the legal meaning that they naturally bear;[77] as the present Court observes, intention to make a gift cannot be interpreted as an intention to declare a trust.[78] In any case an express trust would be void for not complying with the formality provisions of the Property Law Act 2007.[79] Furthermore, as no steps had been taken to effect that transfer, there could be no argument that equity should "complete" the gift.[80] The Court reiterated the corollary point that an incomplete gift can be "revoked" at any time.[81]

The Court's discussion of the claimant's CICT argument is relatively brisk in comparison to Osborne AJ's. The first of two key paragraphs suggests a distinction between the New Zealand authorities in the area and the present claim:[82]

> None of the authorities involved a claim based on the alleged unconscionability of an executrix in implementing the instructions of a will-maker who it is accepted was entitled to resile in his will from unimplemented intentions expressed during his lifetime. The authorities were all concerned with the requirements for resulting or constructive trusts in the context of relationships that are now covered by the Property (Relationships) Act 1976. It is therefore unnecessary for us to decide in the present case

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74 At [45].

75 Note that these arguments were apparently not made by counsel nor accepted by Osborne AJ. See *Harvey* (HC), above n 2, at [3]: "There is a single ground of opposition, namely that Mr Beveridge beneficially owned the unit by reason of a common intention constructive trust."

76 *Harvey* (CA), above n 2, at [31].

77 *Milroy v Lord*, above n 68. See also *T Choithram International SA v Pagarani (British Virgin Islands)* [2001] 1 WLR 1 (PC).

78 *Harvey* (CA), above n 2, at [33].

79 Property Law Act 2007 s 25(2): "A trust must be created in writing and signed by the settlor if— (a) it relates to land; and (b) it is to take effect in the lifetime of the settlor."

80 *Harvey* (CA), above n 2, at [31]. See *Scoones v Galvin and the Public Trustee* [1934] NZLR 1004 (CA); and *Corin v Patton* (1990) 169 CLR 540. See also Struan Scott and others *Adams' Land Transfer* (online looseleaf ed, LexisNexis) at [S41.6].

81 *Harvey* (CA), above n 2, at [32].

82 At [45].

> whether in New Zealand a "common intention" constructive trust should be recognised *in the context of a different relationship* and *in the absence of any significant contributions to the value of the property concerned or any detriment*, that is, any alteration of position in reliance on the expressed intention. [Emphasis added.]

Strictly speaking, the Court of Appeal is saying that the earlier precedents had different facts from the present case, and in the related footnote the Court shows that the authorities cited by the High Court were not decided on the CICT doctrine.[83] That is of course true, but why should that matter if the principles and rules found in the authorities apply to the present situation? If, as Osborne AJ claimed, it is arguable that authority such as *Cossey* allows for a constructive trust based on express common intentions, then it is necessary to decide whether that is correct, and whether this claim is limited to certain kinds of relationships where there is a contribution or detriment. The latter are obviously plausible bases for distinguishing Mr Beveridge's situation from those in the other constructive trust decisions, but they are said to be "unnecessary" distinguishing bases. However the justification for excluding a constructive trust claim is not identified in the first two sentences.

However, in the next key paragraph the Court of Appeal does distinguish Beveridge's claim from those recognised in the authorities, by saying that a contribution to the property by the claimant is required before a CICT can be recognised:[84]

> It is well-established that constructive trusts based on the "reasonable expectations" of the parties do require evidence of some contribution, direct or indirect, to the property at issue. We are not at all sure that in this context the Associate Judge was right to suggest that a distinction should be drawn between constructive trusts based on "reasonable expectations" and "common intention" constructive trusts in order to avoid the need for evidence of contribution justifying an order for the transfer of ownership of the Unit to Mr Beveridge. The question whether the distinction should be drawn may, however, be left to another day given the acknowledgment that at least an element of unconscionability is required for both. We observe that, in the absence of any evidence of contribution or any other factor, there would appear to be no element of unconscionability sufficient to support the creation of a "common intention" constructive trust.

Put differently, RECTs and CICTs both require contribution or some other reliance that would cause detriment to the claimant if the right in the property was not recognised. However, it was the contention of Mr Beveridge that under the both the New Zealand and English doctrine of CICTs, the fact that the parties had an express common intention about the beneficial ownership of the property – even without detriment – means that it would be unconscionable for Ms Harvey not to give effect to that beneficial ownership. In other words, the claim is that there is a distinction between CICT

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83 At [45], n 27.

84 At [46].

and RECT in terms of the detriment requirement. That position is not completely implausible, given the analysis Osborne AJ provided with reference to considerable authority and reasoning; it requires further discussion of authority and principle if it is to be shown to be incorrect. It is therefore useful to look more closely at the doctrinal foundations of the law in order to consider whether a distinction should be drawn between the CICT and the RECT.

IV THE ROLES OF THE EXPRESS CICT IN NEW ZEALAND

A The Place of the Express CICT

Despite the Court of Appeal's doubts about the express CICT existing alongside RECTs, there is both English and New Zealand authority that could be interpreted as supporting such a trust. It should be remembered that the idea of an express CICT was theoretically the archetypal case out of which the extended CICT and RECT developed, as can be seen in the foundational English decisions of *Pettitt v Pettitt*[85] and *Gissing v Gissing*.[86] Further, in another key decision (before the recent reformulations in *Stack*), the express CICT was clearly stated in *Lloyd's Bank v Rosset* as arising if:[87]

> … independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially.

While this version of the CICT that gives effect to the express intentions of the parties clearly exists in England, it is comparatively uncommon.[88] The more prominent situation is where no such expressed intention exists, and the courts must decide whether, on the conduct of the parties, an inferred or imputed intention can be found; this is the "extended CICT" that goes beyond the actual expressed intentions of the parties.[89] In other words, there is no kind of constructive trust based on expressed common intentions separate from the general English approach to CICTs; the express CICT is merely an uncommon variation of the general doctrine. (Whether one should sort the common intention trusts into three categories, split between express intentions, inferred intentions and imputed intentions, is immaterial here.)

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85 *Pettitt v Pettitt* [1970] AC 777 (HL).

86 *Gissing v Gissing* [1971] AC 886 (HL).

87 *Lloyd's Bank v Rosset* [1991] 1 AC 107 at 132.

88 See Paul Matthews "The Words Which Are Not There: A Partial History of the Constructive Trust" in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, Oxford, 2009) 1 at 46–47; and *Grant v Edwards* [1986] Ch 638 (CA) at 647 (common intention is a "rarer class of case").

89 Nicola Peart "Towards a Concept of Family Property in New Zealand" (1996) 10 IJLPF 105 at 113–114.

If it is accepted that the English jurisprudence of CICTs can be seen as split internally between the express and extended CICTs, there is a new way of arguing against the High Court's approach to the CICT in *Harvey*, which appears to draw on the English CICT approach as it exists in the contemporary authorities.[90] On this view, the inapplicability of the recent statements of English law in *Stack* and other cases to the facts in *Harvey* is not merely due to the lack of contributions of the claimant, as the Court of Appeal stated: more fundamentally, it is due to the fact that the law in New Zealand is different, because our courts have replaced the CICT approach with the RECT. In developing the law during the 1970s and 1980s the New Zealand Court of Appeal viewed the RECT approach as a superior development of the English approach – not as a coexisting alternative.[91] As Professor Atkin commented at the time, the RECT approach "represents a radical departure from the language found in the leading English cases".[92] Professor Nicola Peart's chapters on "Equity in Family Law" in one of the main New Zealand commentaries also suggests this development. She argues that "conscious of the constraints and artificiality of the common intention approach, the courts in … New Zealand took a different tack".[93] In the 2003 edition, Professor Peart discussed implied (extended) CICTs on the English model alongside the RECT;[94] in 2009 the analysis of the English doctrine is presented as different from the New Zealand RECT approach.[95] Standard applications of constructive trust claims cite *Lankow*, and sometimes *Gillies*, rather than *Gissing*, *Pettitt* and *Rosset*.

This, it is suggested, is as it should be, given the shift from the English approach to the RECT. The multiplication of substantively equivalent doctrinal approaches to respond to the same situation is a recipe for confusion and inconsistency in the application of the law.[96] This is not to say that there should not be different legal doctrines that apply to different factual situations and events, or that some overlap between doctrines in relation to the same events should not be tolerated. Instead, the claim is that if different jurisdictions have developed slightly different approaches to the same factual events, then it does not make sense for courts to apply each of these approaches as an alternative. It would be better to say that the situation of express common intentions should be

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90 For example it has been stated that the CICT approach "has been abandoned in comparable jurisdictions": Graeme Moffat, Gerry Bean, and Rebecca Probert *Trusts Law* (5th ed, Cambridge University Press, Cambridge, 2009) at 607.

91 See the references above at n 20. See also Alastair Hudson and Geraint Thomas *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at 814.

92 Bill Atkin "De Factos Engaging Our Attention" (1988) NZLJ 12 at 13.

93 Peart, above n 31, at 1199.

94 At 1202–1205.

95 At 1198–2108.

96 See the critique provided in Mee, above n 17, at 292–293. More generally, see Peter Birks "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWAL Rev 1 at 7.

understood as decided within the RECT framework where the reasonable expectation is grounded on an expressed intention for beneficial sharing.

Removing the extended CICT approach from New Zealand law is beneficial due to the perceived controversy and uncertainty surrounding the English doctrine.[97] Even after *Stack*, the nature of the CICT is uncertain.[98] Professor Hudson argues:[99]

> The result of this failure to introduce clarity is that the whole sorry circus of courts at first instance taking entirely different approaches to the law will begin again … so that ten years from now we shall be trying to identify patterns in another spaghetti of case law.

Further, the wildly divergent results as between the English Court of Appeal and Supreme Court's decisions in *Jones* exemplify the uncertainty; the differences among the judges within the Supreme Court in that case is further evidence.[100]

The argument above is that the resort to English doctrine is no longer necessary or legally sound in New Zealand law; it must be supported with reference to the development of the doctrine in New Zealand, to which I shall now turn.

B The Express CICT in the Formative Court of Appeal Authorities?

Osborne AJ's view that express CICTs may still exist alongside the RECT has some support in authority and commentary. However, with the prevalence of RECT situations, most New Zealand decisions have not often been concerned with express CICTs, and so the relationship between these doctrines has not been well discussed. The argument presented here is that the express CICT is not distinct and complementary to the RECT (Osborne AJ's position), but rather is merely an uncommon kind of RECT. What evidence do we find of express intention constructive trusts in the development of the New Zealand authority, and are they explained by reference to the English CICT approach?

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97 Mee, above n 17, at 117; Robin Lister "Equity and Trusts: The International Fallacy? *Stack v. Dowden* [2007] UKHL 17" (2007) 41 Law Teacher 350 at 351; Alastair Hudson *Equity and Trusts* (8th ed, Routledge, Abingdon, 2014) at 708 and 774; and William Swadling "The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed" (2007) 123 LQR 511 at 518.

98 Swadling, above n 97.

99 Hudson, above n 97, at 774. See also Swadling, above n 97; Martin Dixon "The never-ending story – co-ownership after *Stack v Dowden*" [2007] Conv 456; and Simon Gardner and Katherine Davidson "The Future of *Stack v Dowden*" (2011) 127 LQR 13.

100 See the varying views on how to impute an intention as between the judges in *Jones v Kernott*, above n 22. For discussion see James Brown "*Jones v Kernott*: Which Road to Rome" (2012) 26 TLI 96; and Man Yip "The rules applying to unmarried cohabitants' family home: *Jones v Kernott*" [2012] Conv 159.

The case which is often seen as the starting point for the New Zealand jurisprudence in this area is *Hayward v Giordani*,[101] in which Cooke P notes that the English cases of *Pettitt* and *Gissing* have led to an orthodoxy under which substantial contributions to property, combined with an inferred common intention to share beneficial interests, can lead a court to recognise a trust.[102] Although he did not see fit to choose between identifying it as either "resulting, implied, or constructive", any of these being outside of the statutory formality.[103] Cooke P felt able to "draw the inference that there was a sufficient common intention of equal sharing to give rise to a trust".[104] This was separate from constructive trusts in which "actual intention could not be inferred" but given the circumstances reasonable people would have agreed on beneficial sharing if they had thought about it.[105] Thus, a distinction was made between trusts arising from an express or inferred actual common intention and those that the Court will find in circumstances where despite a lack of actual common intention, "flowing from the joint efforts of the parties and reasonable expectations".[106] At this stage the English express or extended CICT approach continued to dominate, as the RECT approach had not yet arisen.

Discussion of expressed intentions of the parties was also necessary in *Gillies* due to the defendant's clear statements that the claimant would have no right in the defendant's property. Cooke P, after considering recent Commonwealth and Court of Appeal jurisprudence concerning the courts' ability in de facto relationship disputes to give effect to rights to property that do not mirror the legal title, argued that the various doctrinal bases identified took account of the same factors, "largely saying much the same thing in different words".[107] The President argued that actual common intention was not needed,[108] although he also agreed with counsel that a constructive trust may arise where there is express agreement concerning shared ownership.[109] Whatever the doctrine, "reasonable expectations in the light of the conduct of the parties are at the heart of the matter", and

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101 *Hayward v Giordani*, above n 15. There is also a detailed discussion of the English jurisprudence in *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124 (SC).

102 At 143–144.

103 At 144.

104 At 145.

105 At 145–146.

106 At 148.

107 *Gillies v Keogh*, above n 20, at 330. Compare with Fisher J's substitution of similar concepts in describing the reasonable expectations approach in *Cossey v Bach*, above n 43, at 626, and Gault J's approach in *Lankow v Rose*, above n 11, at [289]. A trenchant critique of this logic is provided by Mee, above n 17, at ch 9.

108 At 332.

109 At 333.

the relevant conduct identified was the sacrifices of the claimant and contributions of the claimant that the defendant takes the benefit of.[110] Importantly, is seems that contributions or sacrifice are key factors even where there is an expressed intention of shared beneficial ownership.[111] The language of reasonable expectations had begun to replace the extended CICT and other doctrinal bases for intervention,[112] but Cooke P does not base this on any particular doctrinal principle. In contrast, Richardson J founded his analysis on a "principled basis" with reference to estoppel principles.[113]

It is in the current landmark,[114] *Lankow*, that the RECT approach replaces the CICT in the sense that neither express common intention nor the English jurisprudence play an important role. The key features of the new test were the claimant's contribution, alongside the reasonable expectation of an interest in the property.[115] Tipping J's formula in *Lankow* has become the canonical statement of the requirements of RECTs. He and Hardie-Boys J made unconscionability the foundation for the claim,[116] and fleshed out the RECT test without basing it exclusively within either estoppel or unjust enrichment concepts.[117] What is obvious is that the Court of Appeal takes itself to be rejecting the English CICT approach to this kind of constructive trust. Tipping J, in the decision supported by Gault and McKay JJ, rejected the English focus on express intention or understanding, an approach which he characterised as "essentially contractual or quasi-contractual [and] unnecessarily artificial".[118] The Court also sought to state the law as clearly as possible; as Hardie-Boys J stated in *Lankow*, "it is important that whatever the legal rubric there should be clear criteria for the imposition of constructive trusts in the area of de facto relationships".[119] While concurring with Tipping J's decision, Gault J preferred the Canadian unjust enrichment approach (though he stated that a claim could have equally been made through estoppel, inferred common intention or unconscionability).[120]

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110 At 331.

111 At 333–334.

112 See this use of the RECT in *Phillips v Phillips*, above n 20.

113 *Gillies v Keogh*, above n 20, at 344 and 347.

114 See for example *Horsfield v Giltrap* (2001) 20 FRNZ 404 (CA) at [20], citing Tipping J's decision.

115 *Lankow v Rose*, above n 11, at 294 per Tipping J and at 282 per Hardie-Boys J.

116 At 294 per Tipping J and at 281 per Hardie-Boys J.

117 At 293–294 per Tipping J and at 282 per Hardie Boys J.

118 At 293.

119 At 282.

120 At 289 per Gault J.

In the landmark authorities in this area, the English CICT approach is replaced by the RECT approach. It is, however, clear that the RECT would be satisfied in circumstances where an express common intention existed alongside the other requirements.[121] It would of course be odd to use the terminology of "reasonable expectations" where there were actual expressed intentions: reasonable expectations are used to ascertain the existence and content of equitable interests in the absence of expressed intentions. Whatever we call the situation, the requirement of contributions seems unquestionable: it features in the statements of law in each of the cases discussed above. In *Harvey* the claimant would have to argue that the extended CICT remains outside the RECT analysis, and – despite the importance of detriment/contribution in the English and New Zealand authority – that contributions to the property are not required. Can this interpretation be founded in New Zealand case law, despite the above analysis of the Court of Appeal's development of the RECT?

C The Survival of the Express CICT?

There are still indications in the case law that the RECT has not become the exclusive kind of constructive trust claim relating to informal property rights in New Zealand. In a line of cases on which Osborne AJ drew on in deciding *Harvey* (HC), it has been said that when express common intentions with respect to beneficial ownership have been set down, it is not necessary to determine what the reasonable expectations of the parties were.[122] But these cases have usually been decided on other grounds – meaning that a brief mention of the express CICT has not been accompanied by any discussion of a requirement of contribution or detriment – and a detailed discussion and clarification in the higher courts has not occurred.

It is also arguable that expressed intentions of beneficial ownership should be recognised only through express trusts or through the dominant RECT, the New Zealand law having moved on from the English CICT approach. The case that later courts have focused on when identifying a CICT that sits alongside the RECT is *Cossey*, decided in 1992 between *Gillies* and *Lankow*. There Fisher J – who had written a commentary on family property[123] – sought to "set out the core principles of *Gillies v Keogh*" as they should apply to de facto property disputes in general.[124] The express intentions of the parties as to beneficial interests were identified as determinative: if the parties had by their words or conduct "expressed their own proprietary formula" this was "the end of the matter".[125] Although these comments were obiter,[126] this reasoning seems most influential on

121 Arguably this describes the position of Cooke P in *Gormack v Scott* [1995] NZFLR 289 (CA) at 293–294.

122 *Gormack v Scott*, above n 121; *Horsfield v Giltrap* [2000] NZFLR 1047 (HC); *Boys v Calderwood* HC Auckland CIV-2004-404-290, 14 June 2005 at [96]–[98]; *SM v MH*, above n 53, at [44]; and *Coffey v Coffey* [2012] NZHC 1765 at [110]–[111].

123 RL Fisher *Fisher on Matrimonial Property* (2nd ed, Butterworths, Wellington, 1984).

124 *Cossey v Bach*, above n 43, at 627 per Fisher J.

125 At 627.

Osborne AJ's view that detriment may not be required: Fisher J places doubt on statements of Cooke P in *Gillies* that contribution or detriment is required for a claim to be made out.[127]

However Fisher J's argument is not entirely clear on the distinction between constructive trusts and express trusts – as was observed in *SM v MH*.[128] He stated that where a couple "clearly evinced a common intention that the property be beneficially owned by them in equal shares, this overtook any alternative arguments founded upon constructive trusts or contributions".[129] The Judge further explains that a common intention as to beneficial ownership will have to be agreed on where both partners have a disposing interest in the property, but that it is also "always open to the owner of the property to unilaterally settle an interest upon the other".[130] This suggests a distinction between "express common intention" situations and the reasonable expectation approach, but without explaining whether the former is an express or constructive trust. In summarising the position, Fisher J identifies three distinct categories: (a) unequivocal expressed intentions that are common or held by the person with disposing power over the property; (b) unilateral expressed intentions by the person with disposing power over the property; and (c) reasonable expectation constructive trusts.[131] With respect, the reasoning behind these categories is not entirely clear, but there is at least some support for the continued existence of express CICTs.

Beyond *Cossey*, the judicial analysis of the express CICT sitting alongside the RECT is sparse and usually obiter comment in lower courts – in other words, it is of little support for the English express CICT remaining in New Zealand. This can be seen in the decisions cited by Osborne AJ:

- In *X v Y*, an express trust was found on the facts, with the idea of express common intentions falling under this head.[132] An alternative constructive trust claim was set out with reference only to the RECT approach as found in New Zealand authorities.[133]
- The existence of a "common intention trust" was accepted in the unreported case *Boys v Calderwood*.[134] The requirements of such a trust were set out simply by reference to Fisher

126 As noted in *Harvey* (HC), above n 2, at [24].

127 *Cossey v Bach*, above n 43, at 627–628.

128 *SM v MH*, above n 53, at [44].

129 *Cossey v Bach*, above n 43, at 627.

130 At 628.

131 At 631–632.

132 *X v Y* HC Auckland M100/95, 28 November 1995 at 32–39 per Penlington J.

133 At 39–43.

134 *Boys v Calderwood*, above n 122, at [96]–[98].

J's decision in *Cossey*,[135] and the discussion does not clearly refer to the English CICT approach as opposed to express trusts.

- As has been noted, in *SM v MH* it is not clear whether the trust identified as arising due to "unequivocal expressed intention" is seen as an express trust or a constructive trust.[136] The English authority is not discussed. The formality requirement for trusts of land, which seems to apply to the right of occupation of a house that was the subject matter of the trust.[137] The ambiguity and lack of analysis gives this decision little weight in showing that express CICTs remain in New Zealand.
- In the High Court's decision in *LG v MER*,[138] Wild J identified the "common intention constructive trust" as based in the common intentions – express or inferred from conduct – as the beneficial ownership of property.[139] The constructive trust claim involved was characterised as that discussed by Mahon J in *Avondale Printers & Stationers v Haggie*;[140] however, the kind of claim discussed in that case generally arises where property is transferred on the basis that such beneficial ownership would exist, and it would be equitable fraud if this interest was not recognised.[141] Although Wild J also cited English text and authority for the CICT, the "receipt after undertaking" constructive trust is different from the English CICT. Therefore this decision also does not provide sound support the existence of the express CICT.
- In *Clark v Clark*, Asher J seems to say that the express CICT could be recognised in New Zealand:[142]

> … there is a type of constructive trust which does turn on common intention. The relevant intention is that which each party manifests by their words and conduct, notwithstanding that for one reason or another an express trust is not formed. … While it is possible to infer a constructive trust in these circumstances from conduct, the express words of the parties, if proven, will be highly relevant.

The cases cited for this proposition were English – they were the "trusts of family homes" decisions, although Cooke P's reasoning in *Gormack v Scott* is consistent with this point.[143] It may

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135 At [97].

136 *SM v MH*, above n 53, at [44].

137 At [55].

138 *LG v MER* [2010] NZFLR 1001 (HC).

139 At [91].

140 *Avondale Printers & Stationers Ltd v Haggie*, above n 101.

141 *LG v MER*, above n 138, at [91]. See *Avondale Printers & Stationers Ltd v Haggie*, above n 101, at 163.

142 *Clark v Clark* [2012] NZHC 3159, [2013] NZFLR 534 at [54].

be that the Judge thought this a stand-alone case of constructive trust, arising without any contribution. He observes that an express trust that fails due to lack of conformity with formalities can be upheld as an express trust – again without any reference to contributions or detriment.[144] Asher J seems to treat RECTs arising in de facto relationships as a separate kind of trust, and there he states that a contribution to the property must be shown.[145] It is the latter claim that succeeds in the case,[146] and the prior discussions of constructive trusts should be regarded as obiter (that are not fully analysed).

Some post-*Lankow* Court of Appeal decisions that mention express common intention have also been decided on the RECT approach, and without clear discussion of the basis and relationship of these approaches.[147] In light of the lack of clear higher court support for the continuing existence of a separate express CICT founded in the current English law, the Court of Appeal in *Harvey* (CA) might have been bolder: the express CICT does not exist in New Zealand law, and situations where there is an express intention to share property beneficially should be argued as either an express trust or RECT. The New Zealand courts moved away from the English approach to the RECT, and there is no reason to go back to the old doctrine where there is an express common intention, for this situation falls within the "indigenous" doctrine. The decisions that recognise the importance of expressed intentions work within the logic of the new doctrine.

D The Contribution/Detriment Requirement

In addition to the Court of Appeal doubting that a distinction between the CICT and the RECT should be drawn, its main dispute with the High Court decision was on whether contributions or other detrimental reliance was a requirement for the imposition of a constructive trust where there is a common intention or reasonable expectations that one has an interest in another's property. The reason that prevented Osborne AJ from granting summary judgment to Reverend Harvey was the doubt that he found in the New Zealand law (of CICTs) concerning a requirement of contribution to the property or detrimental reliance: neither of these was asserted in a form that would have grounded a claim in terms of a RECT or proprietary estoppel. But Osborne AJ observed that in the case of the express CICT, such requirements were not unequivocally found in the cases.

Because of what he sees as the lack of discussion of the requirements of the CICT in New Zealand authority or commentary, particularly concerning whether there is a requirement of

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143 *Gormack v Scott*, above n 121, at 293: "Where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations."

144 *Clark v Clark*, above n 142, at [55], citing *Pennington v Waine*, above n 68.

145 At [56].

146 At [57] and following.

147 *Gormack v Scott*, above n 121; and *Horsfield v Giltrap*, above n 122.

contribution or detriment, Osborne AJ looks to the English authorities.[148] There the Associate Judge does find requirement of detriment, which he sees as doctrinally sound, because:[149]

> … in the absence of such, the unconscionability or fraud on the statute which justifies the Court's upholding of constructive trusts will be absent. If something in the nature of detriment is not required, it is arguable that the Court would be unjustifiably enforcing an express trust which was not documented in writing.

Here is a clear recognition that the orthodox view of the English CICT approach requires contribution or detriment, which has been supported in most of the authority[150] and commentary.[151] While in the most recent developments of the law of extended CICTs the requirement of detriment is not explicitly stated,[152] it is arguable that *Stack* neither explicitly overruled the prior law on this point nor created a test that did not require detriment.[153] The detriment requirement is supported by recent judicial pronouncements, including the Court of Appeal decision in *Smith v Bottomley*[154] and

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148 *Harvey* (HC), above n 2, at [49].

149 At [49].

150 See *Gissing v Gissing*, above n 86, at 905 per Lord Diplock; *Lloyd's Bank v Rosset*, above n 87, at 132–133 per Lord Bridge; *Grant v Edwards*, above n 88, at 654. *Midland Bank v Dobson* [1986] 1 FLR 171 (CA); and *Yaxley v Gotts* [2000] Ch 162 (CA) at 176.

151 For example see John Mee "Joint Ownership, Subjective Intention and the Common Intention Constructive Trust" [2007] Conv 14; Nick Hopkins "The *Pallant v Morgan* Equity" [2002] Conv 35; Brian Sloan "Keeping Up With the *Jones* Case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios" (2015) 35 LS 226 at 228–229; John Randall "Proprietary estoppel and the common intention constructive trust – Strange bedfellows or a match in the making?" (2010) 4 J Eq 1 at 37–39; Matthews, above n 88, at 47–48; John Mowbray and others "Trusts Arising on the Acquisition of Property" in *Lewin on Trusts* (18th ed, Sweet & Maxwell, London, 2008) 289 at 321 and 330; *Halsbury's Laws of England* (online ed, 2013) 98 "Trusts and Powers" at [117]; Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at 869–870 and 882–888; Robert Pearce, John Stephens and Warren Barr *The Law of Trusts and Equitable Obligations* (5th ed, Oxford University Press, Oxford, 2010) at 313–314, 337–338 and 371–374; Webb and Akkouh, above n 24, at 210–211; and Hudson and Thomas, above n 91, at 816 and 1518–1519.

152 Virgo, above n 24, at 325 and 329; Gardner, above n 24, at 434–435; and Etherton, above n 61 at 109–110. Compare the Court of Appeal's statement in *Harvey* (CA), above n 2, at n 29 about the requirement of contributions in *Jones v Kernott*, above n 22; and *Stack v Dowden*, above n 21.

153 Hudson, above n 97, at 766; David Fox "Trusts Arising to Enforce an Informally Expressed Intention" in John McGhee (ed) *Snell's Equity* (32nd ed, Sweet & Maxwell, London, 2010) 717 at 747; and Sloan, above n 151, at 228–229. See also Neuberger LJ's comments in his dissenting judgment in *Stack v Downden*, above n 21, at [124] regarding the common intention: "… such an intention may be express (although not complying with the requisite formalities) or inferred, and must normally be supported by some detriment, to justify intervention by equity".

154 *Smith v Bottomley* [2013] EWCA Civ 953, [2014] 1 FLR 626 at [31]: detrimental reliance is "a critical element of [the] claim to a beneficial interest in the properties in question … by way of constructive trust".

the argument of Lewisham LJ in the recent English Court of Appeal decision in *Curran v Collins*:[155]

> The need for detrimental reliance on the part of the claimant is an essential feature of this kind of case. … Although [the claimant's lawyer's] skeleton argument suggested that the need for detrimental reliance had been abolished by *Stack v Dowden* and *Jones v Kernott*, she rightly abandoned that argument in the course of her oral address. The judge's finding on that point… was that [the claimant] did not in any way act to her detriment in reliance on the specious excuse "or at all". That in itself is fatal to [the claimant's] case.

However, as the case was an application for summary judgment, Osborne AJ observed that because the New Zealand law of CICTs is not settled, and in light of the reasoning in a number of High Court decisions, detriment might not be required in New Zealand, and thus Beveridge might have a defence.[156]

In contrast, the Court of Appeal found that New Zealand law mirrored the English; without contribution or detriment there would be nothing unconscionable in not giving effect to expressed common intentions to hold land on trust.[157] Even just looking at the New Zealand authority, contribution or other detriment was almost always central, as seen in the key Court of Appeal cases: *Hayward*,[158] *Pasi v Kamana*,[159] *Oliver v Bradley*,[160] *Gillies*[161] and *Lankow*.[162] Since *Lankow*, Tipping J or Hardie-Boys J's statements of the law have effectively become the test for the RECT, and subsequent cases have emphasised the requirement of a contribution.[163] Thus, Osborne AJ's view that the requirement of detriment is not settled in New Zealand depends on treating the express

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155 *Curran v Collins* [2015] EWCA Civ 404, [2015] Fam Law 780 at [77]–[78]. See also the way in which Hong Kong decisions make detrimental reliance a requirement of CICTs, effectively applying the English law: *Chen Tek Yee v Chan Moon Shing* [2015] HKCFI 723; *Kwan So Ling v Woo Kee Yiu Harry* [2015] HKCFI 698; and *Mo Ying v Brillex Development Ltd* [2015] HKCA 156.

156 *Harvey* (HC), above n 2, at [50].

157 *Harvey* (CA), above n 2, at [46]

158 *Hayward v Giordani*, above n 15, at 143–144.

159 *Pasi v Kamana*, above n 20, at 604–605 per Cooke P, at 608 per McMullin J and at 609 per Casey J.

160 *Oliver v Bradley* [1987] 1 NZLR 586 at 589–590 per Cooke P. The importance of contributions is implicit at 593–594 per Henry J.

161 *Gillies v Keogh*, above n 20, at 331 and 333–334 per Cooke P, at 343–347 per Richardson J and at 350–351 per Bisson J.

162 *Lankow v Rose*, above n 11, at 282 per Hardie-Boys J, at 289–290 per McKay J and at 294–295 per Tipping J. See also *Partridge v Moller* HC Invercargill CP 82-87, March 9 1990 at 12.

163 For example, *Smythe v Wadland* HC Auckland CIV-2005-404-3459, 16 July 2007 at [82]–[85] per Frater J.

CICT as separate from the RECT approach; otherwise, it is clear that contribution or other detriment is essential to the claim.

Commentary on early New Zealand decisions clearly viewed detriment as a requirement before equity would intervene.[164] Professor Atkin's expansive discussion of the early development of English and New Zealand law noted that "proof of common intention will not itself be enough to complete the claim for an equitable interest in the property. It will also be necessary to prove that the plaintiff acted to his or her detriment."[165] Although Professor Peart's recent commentary in *Equity and Trusts in New Zealand* does not mention any requirement of contribution or determine when the courts are giving effect to expressed intentions,[166] in her earlier discussions of the law the requirement of contributions is clear,[167] as is evident in the passage that Osborne AJ cites.[168] The authors of *Fisher on Matrimonial and Relationship Property* also seem to identify contributions as a necessary aspect of giving effect to an informal express trust of land, commenting in the context of noting the statutory formality:[169]

> If, on the strength of an oral declaration of trust by [one party, the other] contributes to the acquisition or improvement of property, subsequent acceptance of oral evidence of the trust would seem necessary to prevent fraud on the part of the [first party].

What, then, of the cases that suggest that contribution is not required? In *Harvey* (HC) Osborne AJ identifies *Cossey* as the main authority.[170] Although Fisher J noted the emphasis on contributions in the New Zealand development of the RECT,[171] he also identified a common intention trust that he said did not rely on contributions,[172] and later contrasts the express intention situation from constructive trusts, which "require that the claimant has made sacrifices and/or contributions in reliance upon the reasonable expectation of an interest in the property".[173] Where Fisher J referred to *Hayward*'s use of common intentions, he stated that "this overtook any

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164 Atkin, above n 92, at 14; JK Maxton "Equity" [1989] NZ Recent L Rev 130 at 134; and Peart, above n 31, at 1204.

165 Atkin, above n 7, at 93.

166 Peart, above n 31, at 1200–1201.

167 Nicola Peart "A Comparative View of Property Rights in De Facto Relationships: Are We All Driving in the Same Direction?" (1989) 7 Otago LR 100 at 103; and Peart, above n 89, at 115.

168 *Harvey* (HC), above n 2, at [15].

169 Fisher, above n 123, at [4.28].

170 *Harvey* (HC), above n 2, at [44].

171 *Cossey v Bach*, above n 43, at 626.

172 At 627–628.

173 At 628.

alternative arguments founded upon constructive trusts or contributions",[174] suggesting that contributions are irrelevant to an express trust claim. This all suggests an express common intention trust sitting alongside the RECT. However, it is not completely clear whether what Fisher J was referring to was a CICT: as noted in *Harvey* (HC), a later judge interpreted Fisher J as referring to express trusts.[175] Furthermore, in *Hayward*, Cooke P's statement of the law does require contributions, which did exist on the facts.[176] Thus *Cossey* is not a strong authority to show that an express CICT does not require contribution or reliance in New Zealand.

E The Doctrinal Basis

Ultimately the question of whether contribution or other detrimental reliance is required by New Zealand constructive trust doctrine in this area depends on how one reads the development of the law as expressed in authority and interpreted in commentary. It was argued above that the English CICT approach was rejected in New Zealand, so that express common intentions must instead be incorporated into our Court of Appeal's new RECT approach. In any case, the development of the reasonable expectation test was based on the fundamental equivalence of proprietary estoppel, CICTs and unjust enrichment – each of which responded to contributions or other reliance. With respect, the view that a distinctive New Zealand CICT that does not require contribution or other reliance may exist has neither much support in principle, nor in the authority and commentaries: whether the RECT replaces other approaches or not, all of the possible other claims including the CICT require contribution or reliance. The Court of Appeal in *Harvey* (CA) takes a similar position, albeit without providing an in-depth analysis of the various approaches or the relevant case law and commentary.

Why there is a requirement of contributions or detrimental reliance at all is a crucial point, because it requires an analysis of the doctrinal basis of the law in this area – which has been said to "lack any independent theoretical basis".[177] The cause of action that grounds the RECT has always been unclear,[178] and the Court of Appeal's development of the doctrine denied the need to identify any one doctrinal foundation.[179]

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174 At 627.

175 *SM v MH*, above n 53, at [44].

176 *Hayward v Giordani*, above n 15, at 144–145.

177 Mee, above n 17, at 293. See also Simon Gardner's analysis of the doctrinal basis for family property decisions in Simon Gardner "Rethinking Family Property" (1993) 109 LQR 263; and Gardner, above n 24.

178 Rickett "Causes of Action and Remedies: Getting it Clear!" (1994) NZLJ 207; and Peart, above n 31, at 1205.

179 See discussion above at *Part IV:B: The Express CICT in the Formative Court of Appeal Authorities?*; and Mee, above n 17, at ch 9.

1 Giving effect to the informal express trust?

One option that cannot be accepted is that a constructive trust arises in response merely to a common intention that the beneficial rights in the property be held on trust – a situation that might create an express trust if it were not for the signed writing formality.[180] As Penner puts it: "Why, if a common intention to share property is proved or inferred from all the evidence, does this not operate as an effective *declaration* of trust, albeit an informal one?"[181] Whether the formality rule should be avoided is questionable; it has reasons behind it.[182] As the Court of Appeal observes,[183] to bypass the formality simply by saying that an informal declaration of trust is effective as a constructive trust if the beneficiary also intends to benefit from it will allow many other claimants to make this argument. This would virtually destroy the formality rule.[184]

Osborne AJ recognised in *Harvey* (HC) that there was a tension between expressed intention trusts of land and the formality.[185] However, he said the express CICT was different from the express trust: "The concept of a trust obligation created by the unilateral intention of the legal owner … is by its nature fundamentally different to the common intention constructive trust invoked by Mr Beveridge in this case."[186] However the fundamental difference is not explained further. Explaining the relevant intention later, the Associate Judge cites an Australian text that observes: "Proof of a real intention on the part of the title-holder that the party seeking relief was to have a beneficial interest is needed to found the Court's jurisdiction to prevent unconscionable reliance on legal rights."[187] This could be found in written or oral statements or inferred from the parties' actions in the circumstances.[188] But again this shows that the "settlor" has requisite intention to hold their property on trust for the claimant, which is all that is required to satisfy the "certainty of intention" requirement for an express trust. The "common" aspect of the express CICT might provide some distinction from the express trust, but it is not clear how except by reference perhaps to detrimental

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180 Fisher, above n 123, at [4.8]. For observations about the role of the CICT in avoiding the formality requirements, see Gino Dal Pont "Equity's Chameleon – Unmasking the Constructive Trust" (1997) 16 Aust Bar Rev 46 at 65–70. James Penner *The Law of Trusts* (9th ed, Oxford University Press, Oxford, 2014) at 113 and 120. The relevant English provision is s 53(1)(b) of the Law of Property Act 1925 (UK).

181 Penner, above n 180, at 113. See also Moffat, Bean and Probert, above n 90, at 607.

182 See Ben McFarlane *The Structure of Property Law* (Hart Publishing, Oxford, 2007) at 99–111; and Patricia Critchley "Taking Formalities Seriously" in Susan Bright and John Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press, Oxford, 1998) 507.

183 *Harvey* (CA), above n 2, at [47].

184 Gardner, above n 24, at 435.

185 At [13].

186 At [30].

187 At [38].

188 At [39].

reliance; the simple fact that the intended beneficiary knows of the failed trust does not give rise to unconscionability, and to hold otherwise would be to subvert the formality.

2 Fraud on the statute

The same reasoning can be applied to suggestions that the express CICT should be seen as drawing on the venerable doctrine that formality rules should not themselves be used to perpetrate a fraud.[189] The root of the modern doctrine is *Rochefoucauld v Boustead*.[190] This line of cases holds that statutory formality rules should not apply where it was clear that a beneficial interest was intended by the parties, and the defendant's not recognising that interest can be characterised as a fraud on the statute.[191] This idea has been identified by some commentators as the possible foundation of the express CICT and the RECT.[192]

However, this doctrine is quite different to the usual CICT/RECT situation, for it is most commonly used in circumstances where land or other property is acquired by the defendant on the understanding that a beneficial interest in the property be recognised in favour of the donor or another person.[193] The situations covered by this doctrine are not analogous to one in which a person owns property themselves and either self-declares a trust or acts in a way to give another a

189 *Bannister v Bannister* [1948] 2 All ER 133 (CA); *Hodgson v Marks* [1971] Ch 892 (CA); and Penner, above n 180, at 120. See also *Allen v Snyder* [1977] 2 NSWLR 685 (NSW CA).

190 *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA).

191 *McCormick v Grogan* (1869) LR 4 HL 82 (HL); *Bannister v Bannister*, above n 189; *Binnion v Evans* [1972] 1 Ch 379; *Peychers v Peychers* [1955] NZLR 564 (SC); *Avondale Printers & Stationers v Haggie*, above n 101; *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5 at [57]. See the various recent academic analyses of these trusts: Simon Gardner "Reliance-Based Constructive Trusts" in Charles Mitchell (ed) *Constructive and Resulting Trusts* (Hart, Oxford, 2009) 63; Matthews, above n 88, at 21 and following; Ying Khai Liew "The Secondary-Rights Approach to the 'Common Intention Constructive Trust'" [2015] Conv 210; and Ben McFarlane "Constructive Trusts Arising on a Receipt of Property Sub Conditione" (2004) 120 LQR 667.

192 This view is found *LG v MER*, above n 138, at [91]–[92], which is cited by Osborne AJ in *Harvey* (HC), above n 2, at [29]. See Peart, above n 167, at 103, 110–111, 128, 133–134; and Nicola Peart and Graeme Austin "Equity in Family Law" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (Brookers, Wellington, 2003) 1179 at 1206; and Peart, above n 31, at 1205. See also Darryn Jensen "Rehabilitating the Common Intention Trust" (2004) 23 UQLJ 54 at 64-65; and MP Thompson "Constructive Trusts and Non-binding Agreements" [2001] Conv 265.

193 *Avondale Printers & Stationers v Haggie*, above n 101, at 162–163 per Mahon J; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at [15]; *Ispt Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697 at [329]–[336]; and *Lincu v Krnjulac* [2014] NSWSC 532 at [53]. See the various similar general discussion of the nature of trusts in the *Rochefoucauld*-type situations in Nick Hopkins "Conscience, Discretion, and the Creation of Property Rights" (2006) 26 LS 475; Hopkins, above n 151; Gardner, above n 191, at 68–70; McFarlane, above n 191; Virgo, above n 24, at 120–123; and Fox, above n 153, at 739–740. Mee, above n 17, at 158 makes a similar argument against the use of *Rochefoucauld* reasoning to found the English CICT.

reasonable expectation of an interest in the property, and *Rochefoucauld* and similar cases are not prominent in the relevant English or New Zealand authority or commentary relating to constructive trusts in relationship property contexts. Furthermore, some commentators have identified detrimental reliance as the justification for the doctrine in this area;[194] Professor Simon Gardner provides a theory of these cases of constructive trust as arising to oblige the defendant "to make good the loss that X [the claimant] would otherwise suffer when, in reasonable reliance on Y [the defendant's] undertaking to allow a right in some property which is or comes to be in the Y's hands, X foregoes an opportunity to bring this right about in some other way".[195] This explanation of the "fraud on the statute" trusts does not apply to most CICT/RECT situations. However, it may be argued that these doctrines share the same justificatory foundations,[196] as will be briefly suggested below.

3 *Emphasising the contribution or detrimental Reliance basis: estoppel or unjust enrichment*

The basis for the claim in CICTs and RECTs is unconscionable behaviour by the owner of property in relation to someone else who has, in the course of the parties' dealings or relationship, come to expect an interest in the defendant's property. Although the situations of transfer subject to an undertaking or condition (discussed in the section above) are different from most of those falling under the CICT/RECT doctrines, arguably they are linked by a justificatory basis in preventing detrimental reliance, including contributions to another's property. For while the doctrinal basis for CICT/RECTs is controversial and often not fully explained, it is commonly identified as either a form of, or analogous to, estoppel or unjust enrichment.

Despite the continuing developments and controversy in the English law, a common doctrinal explanation of CICTs remains that the reliance on an expectation of an interest is what makes it unconscionable for the defendant to cause detriment by not giving effect to the common intention.[197] Where there is an express agreement or undertaking regarding the family home, the detriment requirement is what saves the arrangement from merely being an unenforceable express trust.[198] In England, the idea of detrimental reliance has been dominant from the beginning of the

194 Simon Gardner *An Introduction to the Law of Trusts* (3rd ed, Clarendon, Oxford, 2011) at 97 and 328–334; McFarlane, above n 191; and Ying Khai Liew "*Rochefoucauld v Boustead* (1897)" in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in Equity* (Hart Publishing, Oxford, 2002) 423.

195 Gardner, above n 191, at 79.

196 Jensen, above n 192, at 64–65.

197 Matthews, above n 88, at 46–50. See also Liew, above n 191.

198 Gray and Gray, above n 151, at 890; Fox, above n 153, at 749; Gardner, above n 194, at 339; Jill E Martin *Hanbury and Martin: Modern Equity* (19th ed, Sweet & Maxwell, London, 2012) at 298; Denis SK Ong *Trusts Law in Australia* (4th ed, Federation Press, Annandale, 2012) at 594–595; David Hayton "Constructive trusts of homes – a bold approach" (1993) 109 LQR 485; and Etherton, above n 61, at 125.

CICT,[199] with English authority and commentary commonly being premised on the claimant showing detrimental reliance on the common intention as to beneficial ownership of the property.[200]

Similarly, the New Zealand Court of Appeal's approach can be seen as founded on detrimental reliance in the form of contributions to the property; alternatively one might emphasise the New Zealand doctrine's reference to contributions and reasonable expectations, which draw on the Canadian jurisprudence of unjust enrichment.[201] While the choice of doctrinal foundation will make a difference to outcomes in some cases due to the nature of that doctrine, it seems clear that the explanation of unconscionability in the CICT/RECT depends on detrimental reliance. Something more is needed than mere common intentions, expressed or not. At least this is the view arrived at here after the above analysis of the development of the New Zealand doctrine in light of its roots in English authority and its possible doctrinal foundations. Although this author respectfully disagrees with Osborne AJ's similar analysis in *Harvey* (HC), I join him in saying that the New Zealand authority and commentary does not speak unequivocally on the nature of constructive trust claims in this area, including whether there is any requirement for contribution or other detrimental reliance.

V CONCLUSION

The law relating to equity's recognition of informal beneficial rights to property has always raised difficult conceptual questions; clearly analysing them and charting the preferred path forward is the task of courts and commentators, not to mention lawyers advising their clients. The development of New Zealand law relating to the availability of constructive trusts in relationship property disputes has, it is respectfully submitted, suffered from its refusal to clearly choose and justify a doctrinal path to achieving practical justice between parties. This resulted in the High Court decision in *Harvey* (HC) that found the law uncharted and equivocal, followed by the Court of Appeal reversal that claimed that the law was settled, but without discussing in any substantial way the doctrinal points made below. We now know that such constructive trust claims require contributions or other detrimental reliance, but how this is reconciled or opposed to the authorities cited by Osborne AJ is not discussed by the Court of Appeal.

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199 *Gissing v Gissing*, above n 86, at 905 per Lord Diplock; *Lloyd's Bank v Rosset*, above n 87, at 132–133 per Lord Bridge; *Grant v Edwards*, above n 88; and *Austin v Keele* (1987) 61 ALJR 605 (PC). See Matthews, above n 197, at 46–50.

200 Mee, above n 17, at 141; and McFarlan, above n 198, at 614.

201 See *Petkus v Becker* [1980] SCR 834; *Sorochan v. Sorochan* [1986] 2 SCR 38; and *Peter v Beblow* [1993] 1 SCR 980. For discussion see Mitchell McInnes "A Return to First Principles in Unjust Enrichment: *Kerr v Baranow*" (2011) 51 Can Bus LJ 275; Mee, above n 17, at ch 7; and Chambers, above n 1. For suggestions that unjust enrichment might replace the current English approach, see Etherton, above n 24; Gardner, above n 177; and Gardner, above n 24. For the identification of the New Zealand approach as using unjust enrichment concepts, see Mowbray and others, above n 151, at 332.

Stepping back, it seems that the difficulty in this law is the result of the equivocality of its development. In his detailed comparative and doctrinal analysis of approaches to *The Property Rights of Cohabitees*, published in 1999, John Mee argued that the New Zealand Court of Appeal's development of the law in relation to de facto property disputes was problematic in these respects due to its refusal to identify and analyse any one doctrinal approach:[202]

> … the New Zealand courts have taken a distinctly anti-theoretical approach, concentrating firmly on the instrumentalist goal of achieving a broad adjustive discretion. Their willingness to view all the other doctrines as co-extensive is … explicable on the basis that their focus is primarily on the results generated by the doctrines. … [D]etrimental consequences have followed from the failure to channel intellectual resources … into working out fully the parameters of any one theory. … [A] number of points of uncertainty … might have been cleared up if a doctrinal basis had been identified and worked through.

While this law is more the exception than the rule in resolving de facto relationship property disputes, it would still be worthwhile for the courts to clarify it in a way that makes sense of its historical development and shows its continuing place in a coherent New Zealand doctrinal system. The uncertainty that is found in the High Court in *Harvey* (HC) concerning the detriment requirement, and the lack of analysis of the relationship between the New Zealand approach and the English CICT jurisprudence, could have been remedied by the Court of Appeal agreeing on one established doctrinal basis, or providing a more detailed analysis of law. While such a systematic analysis of the New Zealand law in this area was not necessary to resolve *Harvey*, some further explanation would have been welcomed, as these issues do need to be resolved if the law is to be clear and coherent. Although the Court of Appeal in *Harvey* (CA) was not sure that it is correct "that a distinction should be drawn between constructive trusts based on 'reasonable expectations' and 'common intention' constructive trusts",[203] Osborne AJ demonstrated that such a distinction is suggested by some New Zealand authority and commentary. While there are other pressing demands on judicial time and energy, explaining whether this is so, and why, would be an important contribution to clarifying the doctrinal basis of the constructive trust in New Zealand.

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202 Mee, above n 17, at 267 and 292.

203 *Harvey* (HC), above n 2, at [46].