

The constructive trust heresy

By Anthony Grant, Barrister, Radcliffe Chambers

In *Murrell v Hamilton* [2014] NZCA 377, the Court of Appeal held that a constructive trust can be imposed over the assets of an express trust. Trustees can, by representations to a third party, cause the trust's assets to be given away to the third party, even though the assets are held for other people.

Professor Charles Rickett, Dean of Law at AUT Law School, says that the Court of Appeal was wrong. In two recent speeches, he has ridiculed the reasoning of the Court in *Murrell* and also the way the courts here are generally dealing with the law of trusts. He says, for example, that the law of trusts in New Zealand is "shambolic"; that it is "doctrinally incoherent"; that the *Murrell* decision is "Robin Hood law" and "the kind of law that exists ... in Zimbabwe".

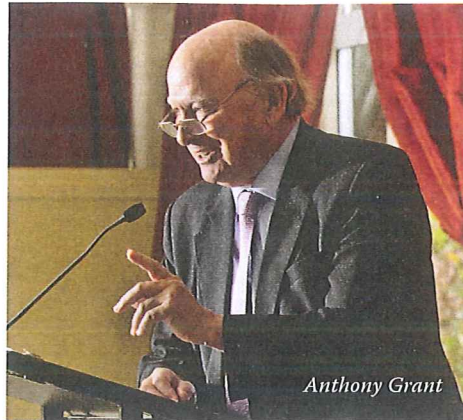
His reasoning for saying that the *Murrell* decision is wrong is simple. A trustee holds property for the benefit of beneficiaries. The trustee has no right to the beneficial interest in the property and cannot give it away to a stranger. To do so is tantamount to theft.

Yet the decision in *Murrell v Hamilton* authorises the alienation of trust property to a stranger as a result of a trustee's conduct and for this the trustee has no financial accountability.

The critical paragraph in the Court of Appeal's decision in *Murrell* is this [at para 30]:

"We emphasise that allowing Ms Murrell's claim ... does not alienate Trust property, that is, it does not take away from the beneficiaries of the Trust something to which they are entitled. Rather, it means a part of the value of the Trust's property which should not accrue to the Trust does not accrue to it."

In the last sentence of the above paragraph, the Court of Appeal says that when it strips the trust of assets to satisfy the equitable claim of a



The Court of Appeal appears to acknowledge that it would be wrong for a court to "alienate Trust property" in support of a constructive trust claim, yet that is the effect of the Murrell decision. In my experience, claims of constructive trusts have, following the Murrell decision, become commonplace and are now sprinkled as liberally in statements of claim as sugar is sprinkled on a bowl of breakfast cereal.

third party, it does not "alienate Trust property". Rather, it takes "part of the value of [a] Trust's property".


In his speeches, Professor Rickett ridicules the idea that "value" can be viewed separately from a trust's physical assets.

A trustee does not own "value". A trustee owns physical assets and the extraction of "value" from a trust is achieved by extracting part of a trust's assets.

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Litigants in the Family Court and High Court are bound to accept the Court of Appeal's decision but they can, in doing so, reserve the right to challenge the decision in the Court of Appeal and beyond. Although the principles of *stare decisis* are supposed to prevent a Court from disavowing one of its decisions, that principle seems not to be so strong these days and a differently constituted Court of Appeal might feel free to look at the *Murrell* decision with new eyes.

After all, if the Supreme Court can disavow its decision in *Ward* [2010] 2 NZLR 31, which was one of its more significant decisions in 2009, by saying in a footnote (as it did recently in *Clayton No 30*), that *Ward* was wrongly decided, the Court of Appeal should presumably feel free to overturn its decision in *Murrell v Hamilton*, either explicitly or, if that is thought to be a little "difficult", then via a footnote which most people won't read. 

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