SUPREME COURT OF QUEENSLAND

CITATION:	*Swettenham v Wild* [2005] QCA 264
PARTIES:	**LEONARD THOMAS GEORGE SWETTENHAM** (plaintiff/appellant) **v** **ROSE-MARIE BEVERLEY WILD** (defendant/respondent)
FILE NO/S:	Appeal No 11135 of 2004 SC No 6780 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2005
JUDGES:	McMurdo P, Williams JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the orders made at first instance.** **3. Declaration that Rose-Marie Beverley Wild holds her legal ownership of Lot 413 on RP 223343, County of Ward, Parish of Gilston, on trust to pay Leonard Thomas George Swettenham $213,760.** **4. Liberty to apply within 14 days for any further orders necessary to give effect to these reasons.** **5. The respondent pay the appellant's costs of and incidental to the trial and the appeal.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS - INDEPENDENT OF INTENTION – PARTICULAR CASES – where joint venture the purchase of a house subject to the right of the appellant to reside in a family environment EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – IMPLIED TRUSTS – RESULTING TRUSTS – WHERE INTENTION PRESUMED – REBUTTAL OF IMPLICATION – PRESUMPTION OF ADVANCEMENT –

REBUTTAL OF PRESUMPTION OF ADVANCEMENT – parent/child relationship – where circumstances of relationship may be used to rebut the presumption – common intention of parties dependent on a continuing state of affairs or joint endeavour – where the joint endeavour failed

Allen v Snyder [1977] 2 NSWLR 685, cited
Baumgartner v Baumgartner (1987) 164 CLR 137, followed
Bennett v Horgan (unreported, Supreme Court of New South Wales, Bryson J, No 4056 of 1991, 3 June 1994), referred to
Calverley v Green (1984) 155 CLR 242, cited
Lawrence v Branch [2002] WASCA 292, cited
Muschinski v Dodds (1985) 160 CLR 583, followed
Nelson v Nelson (1995) 184 CLR 538, cited
Turner v Dunne [1996] QCA 272; Appeal No 196 of 1995, 20 August 1996, followed
Willets v Marks & Skram Investment Pty Ltd [1994] QCA 006; Appeal No 115 of 1993, 14 February 1994, cited

COUNSEL: K F Boulton, for the appellant
D A Savage SC for the respondent

SOLICITORS: Hunter Solicitors for the appellant
Holding Redlich acting as Town Agents for McMillan Criminal Law for the respondent

[1] **McMURDO P:** I agree with Atkinson J that the appeal should be allowed for the reasons she gives and with the orders she proposes.

[2] **WILLIAMS JA:** The relevant facts are fully set out in the reasons for judgment of Atkinson J and it is not necessary for me to repeat them. I agree with her Honour's analysis of the issues raised on the hearing of the appeal, but it is desirable that I add some brief reasons of my own because this Court is departing from the decision at first instance.

[3] The appellant's basic desire after the death of his wife was that he live in a granny flat attached to a house in which his daughter, the respondent, resided so that she would be able to provide him with some care in his advancing years. He achieved that aim by purchasing the property in question at Nerang, initially in his own name. At that stage the parties agreed upon the financial arrangements referred to by Atkinson J in her reasons, but the respondent, and her husband, did not meet their obligations. Nevertheless, at that stage the overall arrangement worked satisfactorily; although he slept in the granny flat the appellant spent a lot of time essentially as one of the respondent's family. Throughout that period it remained his intention that ultimately the respondent should succeed to the ownership of the house; his will so provided.

[4] Against the background of his intention ultimately to benefit the respondent, and partly with a view to encouraging the respondent and her husband to assume more of the financial obligations, in late 2002 it was agreed that the appellant would transfer the property to the respondent. But the clear intention of all the parties was

that the pre-existing arrangement between the parties would continue, the only change would be with respect to the ownership of the property.

[5] Very shortly after that transfer was completed on 17 January 2003 there was a serious falling out between the appellant and the respondent. The evidence would suggest that it was unreasonable conduct on the part of the respondent which precipitated that, but the legal issues can be resolved without the necessity of attributing blame for the breakdown of the relationship.

[6] It became impossible for the appellant to continue residing in the granny flat and he ultimately purchased a unit in a retirement village and moved there to live. He had to borrow a significant sum of money in order to do so.

[7] In the proceeding the appellant claimed a declaration that he held an equitable interest in the Nerang property. At first instance it was held that his interest in the property was limited to an entitlement to equitable compensation represented by the cost of his residing in similar accommodation for the rest of his life. In consequence the respondent was ordered to pay $45,000.00 by way of equitable compensation.

[8] On appeal it was argued that the Court should impose a constructive trust reflecting the breakdown of the joint endeavour pursuant to which legal title in the property had been transferred to the respondent.

[9] In *Muschinski v Dodds* (1985) 160 CLR 583 Mason and Deane JJ recognised that the court could impose a constructive trust consequent upon the failure of a joint venture between the parties because it was unconscionable for the man to assert his legal entitlement without recognising the considerable financial input from the woman. I agree with the analysis of that decision made by Atkinson J, but would add the following quote from the judgment of Deane J at 622:

> "In circumstances where the parties neither foresaw nor attempted to provide for the double contingency of the premature collapse of both their personal relationship and their commercial venture, it is simply not to the point to say that the parties had framed that overall arrangement without attaching any condition or providing any safeguard specifically to meet the occurrence of that double contingency. As has been seen, the relevant principle operates upon legal entitlement. It is the assertion by Mr. Dodds of his legal entitlement in the unforeseen circumstances which arose on the collapse of their relationship and planned venture which lies at the heart of the characterisation of his conduct as unconscionable. Indeed, it is the very absence of any provision for legal defeasance or other specific and effective legal device to meet the particular circumstances which gives rise to the need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in the particular class of case."

[10] That approach was affirmed by all the members of the High Court in *Baumgartner v Baumgartner* (1987) 164 CLR 137. In their joint judgment Mason CJ, Wilson and Deane JJ based their decision on the proposition that after the relationship had failed in circumstances where the property had been financed in part through the pooled

funds of the parties, the man's assertion of entitlement to the exclusion of any interest in the woman was unconscionable conduct which attracted the intervention of equity and the imposition of a constructive trust. Toohey J reasoned that the constructive trust could in the circumstances be based either on unconscionable conduct or on the principle of unjust enrichment.

[11] In the present case the conduct of the respondent in asserting an entitlement to the full legal and beneficial ownership of the home to the exclusion of any interest in the appellant is clearly caught by the reasoning in *Muschinski v Dodds* and *Baumgartner v Baumgartner*. Her conduct is clearly unconscionable and in the circumstances equity would intervene and impose a constructive trust. I am also of the view, although it is not necessary in the circumstances to elaborate on the reasoning, that the same conclusion could be reached by relying on the concept of unjust enrichment as it has been developed in a number of recent cases.

[12] Here the appellant contributed virtually all of the purchase price of the house in question and that was done against the background of an agreed joint endeavour intended to mutually benefit the parties; the respondent was to get the benefit of ownership of the house and the appellant was to get the benefit of a home in which to reside in a family atmosphere and receive comfort and care from the respondent. The formal arrangement between the parties did not make provision for what would happen if that joint endeavour failed.

[13] In the circumstances of this case the constructive trust which the Court imposes should be based on the contributions to the acquisition of the property made by each of the parties.

[14] In the circumstances I agree that the declaration formulated by Atkinson J gives proper recognition to those considerations.

[15] I agree with the orders proposed by Atkinson J.

[16] **ATKINSON J**: Leonard Swettenham is an elderly widower who was born in October 1923. He and his wife had three children, two sons, Alan and Barry, and a daughter, Rose-Marie, who is the respondent to this appeal. Mr Swettenham's wife died in 1999 after an illness of some duration and Mr Swettenham was then left alone in a large house at Williamstown in Victoria.

[17] Before his wife's death, Mr Swettenham had formed the intention to move to Queensland where his daughter lived. In 1998 his daughter married and he told her of his intention to move to Queensland when Mrs Swettenham died. He told Rose-Marie, who lived in rented accommodation, that he would like to buy a house in Queensland for her which had a granny flat that he could live in and she could look after him.

[18] When his wife died in 1999, Mr Swettenham proceeded to carry out that intention. He sold his house at Williamstown and from the proceeds he gave about $100,000 to each of his two sons by way of assistance to them. He also repaid a debt of about $60,000 to his son Barry. The gifts were absolute gifts with nothing expected in return.

[19] After his wife's funeral, Mr Swettenham flew back to the Gold Coast with his daughter and they looked for a suitable house. Mr Swettenham and Ms Wild found a house which suited their purposes at 2 Rob Roy Court, Nerang (Lot 413 on RP 223343 County of Ward, Parish of Gilston) (the "property"). The property, including some improvements which were needed immediately, cost $235,000 Mr Swettenham paid $190,000.00 of his own money and all of the incidentals. Ms Wild and her husband were to contribute the remaining $45,000 needed for the purchase but neither of them had that amount of money available to them either in cash or capacity to borrow. Accordingly, Mr Swettenham borrowed $55,000 with Ms Wild and her husband agreeing that they would assume responsibility for making all repayments in relation to the loan. $45,000 of the $55,000 borrowed was used to complete the purchase and the additional $10,000 was used by the respondent's husband to purchase a motor vehicle. Mr Swettenham, Ms Wild and her family moved into the residence at Rob Roy Court in about June 2000.

[20] The transfer of the title of the property to Mr Swettenham was registered on 20 June 2000. The learned trial judge found that it was Mr Swettenham's intention at the time of purchasing the property to benefit Ms Wild ultimately by giving the property to her, whether under his will or by way of gift in his lifetime. That was confirmed by the terms of his will which he made on 26 November 2000 whereby he bequeathed the property to his daughter.

[21] The arrangement between them was not, however, just a financial arrangement. In return for his purchase of the house for his daughter to live in with her family, Mr Swettenham would also be living in a family environment. His daughter was to provide an evening meal for him and he would get his own breakfast and lunch. She also cleaned his bathroom. Mr Swettenham did not want her to be out of pocket so suggested he would give her $40.00 per week, which he did for some time. That was subsequently varied so that instead of Mr Swettenham giving that money weekly to Ms Wild, he undertook the responsibility of paying the rates and insurance for the property which worked out to about the same amount. The advantage for Mr Swettenham of this mutual arrangement was that he would be living in a family environment and be looked after as he aged by his daughter, Ms Wild, and her family.

[22] The arrangement made for the repayment of the mortgage was that Ms Wild was to deposit moneys sufficient to cover repayments into Mr Swettenham's ANZ account. Repayments for the mortgage would be paid by direct debit from that account. Mr Swettenham gave Ms Wild a deposit book so that she could deposit $100.00 per week for the mortgage payments.

[23] The family lived together harmoniously in their respective living areas for some time. The common area between the home and the granny flat was left unlocked and Mr Swettenham was able to move freely to and from the home for his evening meal and he, Ms Wild and her family could enjoy each other's company. Mr Swettenham often watched television with the family in the evenings and helped his grandson, Robert, with his homework and played card games with him. He had full use of the garden of the property.

[24] Unfortunately, Ms Wild and her husband fell behind in making the agreed deposits into Mr Swettenham's ANZ account. Mr Swettenham was upset that Ms Wild and her husband were not keeping their part of the bargain. The arrangement then

changed so that Ms Wild and her husband were to give the sum of $100.00 to Mr Swettenham each week and he would then bank those monies into his ANZ account. That arrangement worked better, although there were still occasions when Ms Wild and her husband failed to give him the agreed weekly payments.

[25] In late 2002, the parties agreed that Mr Swettenham would transfer the property to Ms Wild. She and her husband were to borrow sufficient funds on first mortgage over the property to pay out the mortgage in Mr Swettenham's name. Mr Swettenham transferred the property to his daughter subject to his right to reside in it for his lifetime. Ms Wild was registered as the owner of the property on 17 January 2003. The arrangement between the parties was otherwise to continue as before.

[26] Very shortly after the transfer, however, a serious family dispute occurred on 23 February 2003 which caused a complete break down in the relationship between the parties. Mr Swettenham's son, Barry, was visiting with his girlfriend. Mr Swettenham, Barry and his girlfriend and Ms Wild's daughter Emma and her boyfriend went out together in the afternoon of 23 February. Ms Wild and her husband were excluded from the outing because there had been some friction between her and her daughter Emma. Ms Wild was furious about being excluded.

[27] After Mr Swettenham and Barry and his girlfriend had retired to bed for the night, Ms Wild and her husband returned to the home. Ms Wild was so angry with Barry that she entered the main bedroom of the granny flat with her husband and son and ordered her brother out of the flat. The dispute escalated with some physical violence and Ms Wild ordered her father out of the granny flat where he lived. There was, as a result, a complete breakdown in the relationship between Mr Swettenham on the one hand and Ms Wild and her family (other than Emma) on the other. After that time, the doors to the respective areas occupied by Mr Swettenham and Ms Wild were locked. Ms Wild no longer provided Mr Swettenham with an evening meal or cleaned his bathroom and Mr Swettenham did not pay the rates or insurance for the property. He was unable to access the garden or enjoy the companionship of the family; he especially missed his grandson, Robert.

[28] Not wishing to continue living in such a hostile environment, on 1 October 2004, Mr Swettenham purchased a unit in a retirement village and moved there to live. In order to purchase the unit at the retirement village Mr Swettenham borrowed $105,000.00. The security for that loan was his son Barry's house. The learned trial judge found that the relationship irretrievably broke down from 23 February 2003 without any attributable blame.

[29] Mr Swettenham commenced proceedings in the Supreme Court, claiming a declaration that he held an equitable interest in the property. Ms Wild successfully contended that he held an interest in the property but only to the extent that he was entitled to equitable compensation of the cost to reside in similar accommodation for the rest of his life. The learned trial judge ordered Ms Wild to pay Mr Swettenham equitable compensation of $45,000.00 for his entitlement to reside in the flat for the remainder of his life and declared that she held the property subject to an equitable charge in favour of Mr Swettenham to secure the payment by her to him of the equitable compensation of $45,000.00.

[30] Mr Swettenham's counsel argued on appeal that notwithstanding Mr Swettenham's intention to give the property to his daughter subject to his right to reside in the granny flat, the parties held their respective legal and equitable interests on a constructive trust. This argument relied upon the decision of the High Court in *Muschinski v Dodds*[1] where a constructive trust was imposed by the court to reflect the respective contributions of the parties in spite of their common intention to own the property in equal shares. A constructive trust is traditionally imposed irrespective of the parties' intentions.[2]

[31] The correct decision in this case depends on a consideration of the interplay of three equitable doctrines or principles – the presumption of a resulting trust in favour of the person who provided the purchase price; the presumption of advancement in favour of the child who receives property from a parent; and the doctrine of a constructive trust arising where it would be unconscionable for one party to retain the benefit of the equitable as well as the legal interest in the property where the common endeavour between the parties failed without attributable fault.

[32] The starting point in this case is the legal interest of the respondent in the property subject to the appellant's right to reside. Where the purchase price is provided by a person other than the person holding the legal interest, there is a presumption of a resulting trust in favour of the person who provided the purchase price. Such a presumption is capable of being rebutted by evidence of intention. Where a party who provides the purchase price intends to confer an immediate legal and beneficial interest on the other party, the presumption of a resulting trust is rebutted. That is what happened in this case.

[33] As in *Muschinski v Dodds*, there was no express or implied agreement, arrangement or understanding between the parties that they should hold their legal interests upon trust for themselves in shares corresponding to their respective contributions.[3] There could not, in those circumstances, be any recourse to the presumption of equity that, where two or more persons advance the purchase price of the property in different shares, the person to whom the legal title is transferred holds the property upon resulting trust in favour of the person who provided the purchase price in proportion to the respective amounts provided.[4]

[34] The presumption of a resulting trust is also here rebutted by the presumption of advancement[5] or more accurately by the inference which equity makes that in the relationship between parent and child, any benefit provided for the child at the cost of the parent has been provided by way of "advancement" so that the equitable estate follows the legal title.[6]

[35] That is not, however, the end of the matter. The circumstances surrounding a relationship may be used to rebut the presumption of advancement. The learned trial judge found that the presumption of advancement was not rebutted in the circumstances but I am respectfully unable to agree with that conclusion. The presumption or inference of advancement is capable of being rebutted usually by

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1 (1985) 160 CLR 583.
2 *Allen v Snyder* [1977] 2 NSWLR 685 at 692, 699.
3 (supra) at 611.
4 *Calverley v Green* (1984) 155 CLR 242 at 268-269.
5 *Calverley v Green* (supra) at 267.
6 *Nelson v Nelson* (1995) 184 CLR 538 at 547 per Deane and Gummow JJ.

evidence of actual intention not to pass the equitable title leading the court to enforce a resulting trust rather than an express trust.[7] In my view, the inference of advancement may also be displaced where the common intention of the parties, which was consistent with the presumption of advancement, was dependent on a continuing state of affairs or relationship or common endeavour. Where that common endeavour breaks down, the presumption of advancement may no longer apply. The difference can be seen by comparing the gifts of money made to Barry and Alan Swettenham compared to the gift made to Ms Wild of a house in which Mr Swettenham could also reside in a granny flat while enjoying the advantages of living in a family environment and being looked after by his daughter and her family as he aged. The gifts to Barry and Alan were absolute. However the gift to Ms Wild was dependent upon the on-going relationship or joint endeavour. If the joint endeavour failed, then a constructive trust may arise. Counsel for the respondent conceded on the appeal that this was an appropriate case to impose a constructive trust. That concession was correctly made.

[36] In *Muschinski v Dodds*, the circumstances were such as to entitle Mrs Muschinski, as the party making the greater contribution, to claim relief by way of the declaration or imposition of a constructive trust. A constructive trust may arise when the common intention of the parties was based on the expected continuation of the relationship between them and the relationship fails without attributable fault. In those circumstances, Deane J observed[8] that:

> "…where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it … equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do."[9]

[37] It may in such circumstances be inequitable to leave the legal and beneficial interests to fall where they lay at the end of the relationship.[10]

> "Both common law and equity recognize that, where money or other property is paid or applied on the basis of some consensual joint relationship or endeavour which fails without attributable blame, it will often be inappropriate simply to draw a line leaving assets and liabilities to be owned and borne according to where they may prima facie lie, as a matter of law, at the time of the failure."

[38] Mason J agreed with the statement of principle by Deane J with regard to constructive trusts and their application in such a case.[11]

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7 *Nelson v Nelson* (supra) at 547.

8 (supra) at 620.

9 See also *Willets v Marks & Skram Investment Pty Ltd* [1994] QCA 006; Appeal No 115 of 1993, 14 February 1994 at 10-13.

10 *Muschinski v Dodds* (supra) at 618.

11 (supra) at 599.

> "The failure of the projected development of the land, including its subdivision and the sale of part of the land, through no fault of the parties, provides a firm basis for declaring that the parties hold their respective interests in the property as tenants in common on a constructive trust, after payment of any debts incurred in the improvement of the property, to repay to each his or her respective contributions and as to the residue for them both in equal shares. The circumstances of the case, viewed in the light of the common intention that Mr. Dodds was to take an immediate and unconditional interest in the property, did not make it inequitable that he should retain that interest, notwithstanding the failure of the projected development. But it would be inequitable for him to retain his interest without crediting to Mrs. Muschinski the contributions which she made to the acquisition and improvement of the property. Although Mrs. Muschinski. intended that he should take an immediate and unconditional half interest, that intention was accompanied by an expectation, shared by Mr. Dodds. that the projected development would take place for their mutual benefit and that Mr. Dodds would be making substantial contributions to it. I agree with Deane J that the general principle underlying the proportionate repayment of capital contributions to joint venturers on the failure of a joint venture is wide enough to support this aspect of the constructive trust."

[39] The reasoning of Mason and Deane JJ was followed by the High Court in *Baumgartner v Baumgartner*[12] particularly at 148 where Mason, Wilson and Deane JJ, after referring to a passage from the judgment of Deane J in *Muschinski v Dodds*[13] held:

> "His Honour pointed out that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention 'to preclude the retention of assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle'. In rejecting the notion that a constructive trust will be imposed in accordance with idiosyncratic notions of what is just and fair his Honour acknowledged that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, including the constructive trust."

[40] That principle has been applied in this Court[14] in *Turner v Dunne*[15] where Pincus JA observed[16] that:

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12 (1987) 164 CLR 137

13 (supra) at 614.

14 This reasoning has also been followed and applied in the Court of Appeal in New South Wales in *Green v Green* (1989) 17 NSWLR 343 at 354 per Gleeson CJ; in the Full Court of the Supreme Court of South Australia in *Parij v Parij* (1997) 72 SASR 153 and *Chapman v Chapman* [2000] SASC 195, 29 June 2000 at [25]; and by the Full Court of the Supreme Court of Western Australia in *Lloyd v Tedesco* [2002] WASCA 63; (2002) WAR 360 per Murray and Hasluck JJ.

15 [1996] QCA 272; Appeal No 196 of 1995, 20 August 1996.

16 At p 9 – 10 .

> "It is clear from the principal judgment in *Baumgartner* that a trust may be imposed 'regardless of actual or presumed agreement or intention'."

McPherson JA agreed:[17]

> "Recent decisions of the High Court have established that, when an enduring joint relationship between a man and a woman[18] comes to an end, their respective rights in and to property do not, or do not necessarily, fall to be determined according to strict legal entitlement. Ownership at law may be qualified by the equitable remedy of a constructive trust, which may be imposed 'regardless of actual or presumed agreement or intention' on the part of those concerned. See *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 (Mason CJ, Wilson and Deane JJ)."[19]

[41] The imposition of a constructive trust is not confined to the breakdown in relationship between de facto couples. A constructive trust was imposed in *Bennett v Horgan*[20] in a case very similar on its facts to this. As Bryson J observed in that case:

> "It is a sadly recurring judicial experience to see that family relationships do deteriorate and become intolerable, and that the persons involved did not foresee that this might happen."

As his Honour also, observed if the parties had foreseen that their relationship would change so that the shared accommodation arrangement would become intolerable, the arrangement to share occupancy would not have been made at all.

[42] In this case, Mr Swettenham intended that Ms Wild would take the legal title to the property. However in return he was to retain not only a right to reside in the granny flat but also receive the support and comfort of living in a family environment with his daughter and her family as he aged. That was the joint endeavour between them and not, as the learned trial judge held, the conferral by Ms Wild on Mr Swettenham of the right to reside in the granny flat for the rest of his life. That joint endeavour between the parties was to be for their mutual benefit but failed through no attributable fault of either party. Mr Swettenham contributed a large proportion of the purchase price. In these circumstances it would be unconscionable for Ms Wild to retain the beneficial interest in the whole of the property subject only to Mr Swettenham's right to reside in the granny flat.

[43] In determining what constitutes unconscionability, one is not left "at large to indulge random notions of what is fair and just as a matter of abstract morality".[21] In this case, as in *Muschinski v Dodds*, the conduct which has an unconscionable character is the respondent's conduct in seeking to assert and retain the benefit of a

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17 At p 18.

18 The principle applies equally to other family relationships: *Bennett v Horgan* (unreported, Supreme Court of New South Wales, Bryson J, No 4056 of 1991, 3 June 1994); *Lawrence v Branch* [2002] WASCA 292.

19 See also *Willets v Marks & Skram Investments Pty Ltd* (supra) at 12-13, 29; *Brown v Manuel* [1996] QCA 065; Appeal No 95 of 1995, 22 March 1996 at 6 per Davies JA and Mackenzie J.

20 (supra) at 11.

21 *Muschinski v Dodds* (supra) at 621.

legal interest in the property without making any allowance for the fact that the appellant contributed a disproportionate amount of the cost of its purchase,[22] where, as here, no arrangement had been made between the parties as to what should happen in the unforeseen circumstances of the collapse of the relationship. There is a need to call in aid the principle of equity applicable to preclude the unconscionable assertion of legal rights in this class of case, just as in *Muschinski v Dodds* it was held that "equity requires that the rights and obligations of the parties be adjusted to compensate for the disproportion between their contributions to the purchase and improvement of the … property."[23]

[44] It follows that a constructive trust should be imposed so that, irrespective of their intentions, the parties should be proportionately repaid their respective contributions to the property acquired during the relationship.

[45] Prima facie, Mr Swettenham is entitled in these circumstances to the proportionate share of the property relative to his capital contribution to the property. Such an order would have given Mr Swettenham his proportionate share of the increase in the value of the property. It had increased in value from $235,000.00 when it was purchased in 2000 to $390,000.00 at the time of trial. However, what Mr Swettenham sought on appeal was merely repayment of his original contribution together with a modest rate of interest from the time of the break down of the relationship giving a total sum of $213,760.00. To this, he is undoubtedly entitled.

[46] The appeal should be allowed and the orders made at first instance set aside. The Court should make a declaration that the respondent holds her legal ownership of the property on a constructive trust to repay the appellant $213,760.00, being his contribution to the purchase price together with interest. The respondent should pay the appellant's costs of and incidental to the trial and the appeal.

Orders

1. Appeal allowed.
2. Set aside the orders made at first instance.
3. Declaration that Rose-Marie Beverley Wild holds her legal ownership of Lot 413 on RP 223343, County of Ward, Parish of Gilston, on trust to pay Leonard Thomas George Swettenham $213,760
4. Liberty to apply within 14 days for any further orders necessary to give effect to these reasons.
5. The respondent pay the appellant's costs of and incidental to the trial and the appeal.

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22 (supra) at 622; see also *Turner v Dunne* (supra) at 5 per Pincus JA; *Stone v Owen* [2000] QCA 56 at [9], [13]; [2001] 1 Qd R 419 at 421, 422

23 (supra) at 622.