SUPREME COURT OF QUEENSLAND

CITATION:	*Peterson v Hottes* [2012] QCA 292
PARTIES:	**DIANA LESLEY PETERSON** (appellant) **v** **JULIANNE HEIDI HOTTES** (respondent)
FILE NO/S:	Appeal No 3292 of 2012 SC No 3084 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2012
JUDGES:	Muir and Gotterson JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The declaration made on 12 March 2012 is set aside.** **3. The respondent pay the appellant $18,581 (25 per cent of $74,324).** **4. The respondent pay to the appellant the sum agreed between the appellant and the respondent to be the monies received between 30 September 2011 and the date hereof on account of rental for the property less the total of rates, insurance, management costs, maintenance and repairs in respect of the property paid or payable by the respondent in respect of that period and, in default of agreement, that sum determined by a judge of the trial division.** **5. The respondent pay the appellant twelve months interest on the sum of $18,581 at the rate of 10 per cent per annum, namely $1,858.00.** **6. Within five (5) days of today's date, the appellant file and serve written submissions as to costs, such submissions not to exceed three (3) pages in length.**

7. Within ten (10) days of today's date, the respondent file and serve written submissions as to costs, such submissions not to exceed three (3) pages in length.

It is declared that the respondent holds her interest in the property referred to in paragraph [1] of the primary judge's reasons for judgment on trust for the appellant beneficially as to 25 per cent and for herself beneficially as to 75 per cent.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – GENERALLY – OTHER MATTERS – where appellant is respondent's mother – where appellant provided $70,911 to respondent to assist in the purchase by respondent of a residential property – where appellant sold her home prior to providing respondent with such funds – where property purchased in respondent's name in order for her to obtain a first home owner's grant – where appellant lived in the newly purchased property with respondent for several years until the relationship broke down irretrievably – where appellant claimed beneficial interest in the property – where primary judge found that it was unconscionable of respondent to assert a beneficial ownership in the property against appellant without acknowledging that the payment was a conditional gift in respect of which the condition had failed – where primary judge found that the intention of appellant was to make a conditional gift to respondent rather than obtain a proportionate interest in the property – where appellant submits primary judge failed to give due regard to a trial witness in arriving at her decision regarding the intention of the parties – where appellant submits primary judge failed to give adequate reasons for finding that appellant's intention was not to share a proportionate interest – where appellant submits primary judge erred in not finding respondent held the property on a constructive trust in proportion to the parties' contributions to the purchase of the property – whether a constructive trust or some other measure of equitable compensation or charge should be applied

Allen v Snyder [1977] 2 NSWLR 685, cited
Bathurst City Council v PWC Properties Pty Ltd (1998) 195 CLR 566; [1998] HCA 59, considered
Baumgartner v Baumgartner (1987) 164 CLR 137; [1987] HCA 59, considered
Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10, considered
Muschinski v Dodds (1985) 160 CLR 583; [1985] HCA 78, considered
Peterson v Hottes [2012] QSC 50, considered
Swettenham v Wild [2005] QCA 264, considered
Turner v Dunne [1996] QCA 272, cited

COUNSEL: G Handran for the appellant
C Carew for the respondent

SOLICITORS: Dowd & Company Lawyers for the appellant
HWS Lawyers for the respondent

[1] **MUIR JA**: The appellant, who was born in 1930, provided $70,911 to the respondent, one of her two daughters, in 2001 to assist in the purchase by the respondent of a residential property at Bridgeman Downs. The property adjoined the home of a Mr Szep who was then in a de facto relationship with the respondent. It is common ground that the appellant and the respondent contemplated at the time the appellant provided the money that the appellant would live in the property with the respondent and her son. The parties' intention in this regard was fulfilled from the time of the purchase in December 2001 until the end of 2007 when the relationship between the appellant and the respondent broke down irretrievably and the appellant left the property.

[2] The appellant commenced proceedings in the Supreme Court claiming, inter alia, a beneficial interest in the property. On the trial of the proceedings, issues identified by the parties as those requiring determination by the primary judge included:[1]

> "(c) whether the payment made by the plaintiff to the defendant that was used to acquire the property was a gift to the defendant or whether the plaintiff paid the money pursuant to and in reliance upon the arrangement;
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> (d) whether it is unconscionable for the defendant to retain the beneficial interest in the whole of the property;
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> (e) if it is unconscionable, whether a constructive trust or some other measure of equitable compensation or equitable charge should be applied by reference to the proportion which the plaintiff's payment represented of the overall acquisition cost of the property, and either of the profit made by the defendant in respect of the property since January 2008 or the costs incurred by the plaintiff on account of accommodation since January 2008."

[3] Other issues identified by the parties are no longer live. Nor are issues (c) and (d) which were decided in favour of the appellant.

[4] The primary judge found that the presumption of advancement which arose by reason of the relationship between the parties had been rebutted by evidence, including evidence of the appellant's intention known to the respondent, to make the payment in order to "secure a continuing arrangement to reside with the [respondent]". The primary judge also found that:

- the appellant made the payment at the request of the respondent with the intention of securing a continuing arrangement to reside with the respondent and that the payment was "in the nature of a conditional gift";

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1 *Peterson v Hottes* [2012] QSC 50 at [53].

- the appellant did not establish an intention that she obtain a "proportionate interest in the property";[2]

- it was not established that any statement was made by either the appellant or the respondent to the effect that the appellant would be included as an owner of any property subsequently acquired by the respondent to replace the property;[3]

- the appellant understood that the property when purchased was to be in the sole name of the respondent so that the respondent could obtain a first home owner's grant;

- the presumption of a resulting trust was rebutted by the existence of an intention on the part of the appellant to make a conditional gift rather than to obtain a proportionate interest in the property;

- it was unconscionable of the respondent to assert a beneficial ownership in the property against the appellant without acknowledging that the payment was a conditional gift in respect of which the condition had failed;[4] and

- it was unconscionable for the respondent to retain the sum of $70,911 and the respondent became liable on the irretrievable breakdown of the relationship between the parties on 31 December 2007 to repay the $70,911 to the appellant.

[5] It is now convenient to consider the grounds of appeal relied on by the appellant and the arguments advanced on behalf of the appellant in support of them.

The primary judge erred in failing to have due regard to the evidence of Mrs Floyd in arriving at her findings as to whether the parties intended that the appellant obtain an interest in the Bridgeman Downs property. In this regard the primary judge also erred in not treating Mrs Floyd's evidence as evidence of the parties' intention rather than merely an inconsistent statement by the respondent

[6] Mrs Floyd gave the following account in her evidence-in-chief. She was a friend of the parties. When she visited the parties at home in Townsville a few weeks before they left Townsville for Brisbane, they discussed their intended move to Brisbane and said that they were "going to sell the [Townsville] house". Later, at about the time of the parties' move to Brisbane, it was said to Mrs Floyd, again at the Townsville residence, that the appellant "was going to allow funds from … the sale of her house, to assist in getting the Bridgeman Downs house". The respondent said that she was purchasing the house and had received a first home owner's grant. The respondent also said:

> "That she was buying the house in her name and that at a later stage, that something – when the first home owner's loan was finished – I don't know, there's a multiple amount of time I think – that that would be then changed to compensate [the appellant]."

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2 Reasons at [66].
3 Reasons at [63].
4 Reasons at [68].

[7] Asked if the respondent identified what would be changed, Mrs Floyd responded "that she would be looking after [the appellant]".

[8] The primary judge said of this evidence:[5]

> "The [respondent] does not recall any discussions of this nature with Mrs Floyd and denies … making any statement to Mrs Floyd about 'compensating' her mother.
>
> The conversations with Mrs Floyd took place on social occasions and were mainly in general terms and superficial. Although Mrs Floyd must have been given the information by the [respondent] that she was buying the property in Brisbane in her own name and had obtained the first home owner's grant, I am not satisfied that the terms of the conversation recalled by Mrs Floyd are clear or unambiguous enough to amount to evidence of a declaration made by the defendant against her interest."

[9] In cross-examination it was put to Mrs Floyd that the respondent did not say to Mrs Floyd at any time that she was going to change the name on the title to the Bridgeman Downs property. Mrs Floyd denied that, professing a recollection to the contrary. It was then put to Mrs Floyd that at no time did the respondent say to Mrs Floyd "… that she was going to compensate her mother, but rather she was going to look after her". Mrs Floyd responded, "No. That's not my recollection… I remember this quite distinctly, what happened on that day".

[10] The primary judge said of the evidence of the parties:[6]

> "There were aspects of the evidence of each of the [appellant] and the [respondent] that I found difficult to accept, and the [respondent] particularly had a tendency to exaggerate or overstate her contributions to the joint household and to offer explanations or justifications for her conduct, rather than answering the questions that she was asked. Despite these reservations about the [respondent]'s evidence, I am not satisfied that this should result in simply rejecting the [respondent]'s evidence in preference for the [appellant]'s evidence. Where it is necessary to do so, I will therefore indicate which evidence I accept or reject, when making specific findings on issues of fact."

[11] The primary judge did not expressly state any reservations about the reliability of Mrs Floyd's evidence and she did not, in light of her above quoted comments, expressly prefer the contradictory evidence of the respondent. The respondent denied having a conversation with the appellant about the receipt of a first home owner's grant and about buying the property in her name in order to obtain the grant. She also denied having any conversation about the relevant transaction with Mrs Floyd at the appellant's Townsville property.

[12] Counsel for the appellant argued that the primary judge failed to duly consider and give sufficient weight to Mrs Floyd's evidence, particularly her evidence in cross-

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5 Reasons at [26] – [27].

6 Reasons at [3].

examination. Mrs Floyd's evidence should not be evaluated in isolation from other evidence and circumstances, including the case advanced by the appellant and her supporting evidence.

[13] In opening the appellant's case at first instance, her counsel said, in effect, that the respondent told the appellant that the property had to be registered in her name to enable her to obtain the first home owner's grant, but that "if the property was … sold and another purchased, that the next property would be in both of their names. There was no discussion as to proportions". In her evidence-in-chief, the appellant repeatedly re-stated the substance of her counsel's opening in this regard. The appellant's evidence-in-chief and the opening accorded with the case pleaded in the further amended statement of claim.

[14] In cross-examination, however, the appellant asserted a verbal agreement with the respondent "at the very beginning" that she would have a 50 per cent interest in the property. She also professed a belief that the respondent would put her name on the title to the property. Later in the cross-examination, the appellant gave evidence to the effect that, in the presence of Mrs Floyd and the respondent, it was said by the appellant that the respondent was going to buy the Bridgeman Downs house in her name "because she wanted to get the first home owner's grant" and that the respondent was going to "do it", i.e. put the appellant's name on the title to the property.

[15] The appellant's belated and unexplained change in her version of events deprives her evidence in cross-examination, referred to above, of any credibility. It also reflects adversely on her credibility generally. There are other matters which also adversely affected the appellant's credibility. For example, in order to assist the respondent to obtain a loan, she provided false information to a bank in a letter and swore a declaration which asserted, contrary to her evidence in these proceedings, that the payment to her daughter was a "cash advance".

[16] In my respectful opinion, the primary judge was justified in not placing much weight on the evidence of Mrs Floyd. The primary judge was correct in her assertion that the conversations Mrs Floyd was reporting "took place on social occasions and were mainly in general terms and superficial". It was, I think, implicit in her Honour's remarks that it was unlikely that Mrs Floyd would have an accurate recollection of the substance of what was said to her on such occasions after the lapse of about ten years. There was no evidence that Mrs Floyd had thought about or attempted to recall the conversations in the intervening period.

[17] Also, one would think that the appellant, who was involved directly in the subject dealings, would be likely to have a more accurate recollection and understanding of the arrangement between the parties than Mrs Floyd who had no involvement in the parties' affairs. Perusal of the transcript of Mrs Floyd's evidence suggests that Mrs Floyd, not surprisingly given the effluxion of time, had considerable difficulty in distinguishing between her understanding of the arrangement between the parties and the words used in the two conversations on which her understanding was based. Moreover, her language suggests that there may well have been an element of reconstruction in her evidence.

[18] I do not accept the assertion that the primary judge "completely overlooked the evidence [of Mrs Floyd] given in cross-examination". The primary judge did not

refer to it specifically, but it added little of substance to Mrs Floyd's account in evidence-in-chief and there was no compelling need to refer to it. To the extent that the cross-examination evidence departed from the evidence-in-chief, it was necessary to be cautious about its accuracy.

[19] Even if it was the case, which I doubt, that the primary judge considered that Mrs Floyd's evidence of the two conversations at the appellant's Townsville residence were admissible only as a declaration or declarations against interest, it is apparent from the above discussion that it was not appropriate to give much weight to Mrs Floyd's evidence or to assess it in isolation from other evidence. Putting aside the question of the use which could be made of Mrs Floyd's evidence, I can see no reason why this Court would attach greater probative value to it than did the primary judge.

[20] For the above reasons, these grounds were not made out.

The primary judge failed to give adequate reasons for finding that the appellant's actual intention was not to share a proportionate interest in the property

[21] The finding under challenge is contained in the passage in paragraph [66] of the primary judge's reasons in which her Honour expressed her satisfaction "that the [appellant] has shown that her actual intention was for an arrangement in the nature of a conditional gift without intending to share a proportionate interest in the property". It was submitted that the reasons left a reader "to speculate as to the reasons upon which the primary judge made that critical finding".

[22] I do not accept the submission.

[23] Both the appellant and the respondent were unsatisfactory witnesses. The primary judge was thus obliged to look beyond their oral evidence in order to make critical findings of fact. An important piece of evidence in this regard, enshrined in an unchallenged finding, is that the appellant understood "that the purchase was to be in the [respondent's] name solely, so that the [respondent] could obtain the first home owner's grant". In the absence of evidence of knowledge on the part of the appellant that the appellant understood that, in order to obtain the grant, the respondent was required to declare that she would be beneficially entitled to the whole of the interest in the land, this finding did not exclude the possibility that the appellant may have understood that she was to have a beneficial interest in the property. However, the case pleaded, opened and sworn to by the appellant in evidence-in-chief, was that there was an arrangement that the appellant's name would not be on the title to the property and the appellant gave no evidence of a belief that, despite the state of the title, she was to have an interest in the property.

[24] The primary judge found, in effect, that the subject transaction was implemented in a rush and that there was "no meeting of the minds of the parties as to the true nature of the payment of $70,911.01". The primary judge also rejected the appellant's evidence of an arrangement "whereby she would be included as an owner when there was a subsequent purchase" as being the appellant's "rationalisation of how any future transaction should proceed". That finding, in my view, is unassailable. It depended largely on the primary judge's determination of credibility. As was discussed earlier, there were good reasons for the primary judge to approach the evidence of both parties with great caution.

[25] Against this background, there being no credible evidence led by the appellant as to an actual intention on her part to obtain an interest in the property whilst it was held by the respondent, the findings under challenge are readily explicable and the primary judge's reasoning process sufficiently emerge from the reasons.

[26] Another difficulty with the appellant's argument is that no evidence has been identified which would justify the finding by this Court that it was the intention of one or both of the parties that the appellant have an interest in the property. The evidence shows an intention on the part of each of the parties that the appellant live permanently with the respondent and her grandson and the failure of both to advert to the possibility of events occurring which would disturb this arrangement. The fact that the appellant made some relatively minor improvements to the house and the property by way of purchase of security screens and curtain materials has little bearing on the question now under consideration, particularly as the respondent was responsible for paying "the rates, electricity and the other expenses of home ownership".[7] The fact that the appellant reposed trust in the respondent was relied on by counsel for the appellant, but the existence of such trust also supports the conclusion that the appellant gave no thought to securing her rights in consequence of her payment or even as to what those rights were.

[27] This ground was not made out.

The implicit finding that the respondent made no statement to the appellant to the effect that the appellant would be included as an owner when there was a subsequent purchase of property and that this matter was not discussed between the parties was erroneous, contrary to "incontrovertible facts", "glaringly improbable", and not the subject of adequate reasons

[28] The findings were justified for the reasons already discussed. As the findings were based on the primary judge's assessment of credibility, it is impossible to conclude that they were contrary to "incontrovertible facts" or that they were "glaringly improbable". Nor is there any question of insufficiency of reasons. The appellant gave evidence that she was told by the respondent that she would be included as an owner when there was a subsequent purchase. There were good reasons for not accepting her evidence and she was disbelieved. No further explanation of the findings was required.

The primary judge erred in not finding that the respondent held the property on a constructive trust in proportion to the parties' contributions to the purchase of the property despite the finding that the appellant made the payment pursuant to a joint endeavour to secure a right to reside in the dwelling on the property

[29] It was submitted that the primary judge did not consider whether a constructive trust should be imposed and rejected its imposition on the basis that it was disproportionate to the requirements of conscientious behaviour. It was submitted that if the constructive trust had been considered such a trust "based on the appellant's proportionate contribution to the acquisition of the property" would have been imposed. It was further submitted that the primary judge failed to appreciate that constructive trusts are imposed, traditionally, irrespective of the parties'

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7 Reasons at [36].

intentions.[8] Reliance was placed on *Swettenham v Wild*,[9] in which an appellant who had contributed funds pursuant to a joint endeavour to secure a right to reside on a property was given the benefit of a constructive trust based on the parties' respective contributions to the acquisition of the property after the endeavour failed.

[30] The critical findings of the primary judge for present purposes are as follows:[10]

> "[67] It is relevant that, apart from the payment for the security screens for the property, the [appellant] did not make any financial contribution towards the expenses of the property that were expenses associated with ownership while she resided there which was consistent with her willingness to support the [respondent's] sole ownership of the property.
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> [68] In view of what I have found to be the nature of the joint endeavour between the [appellant] and the [respondent] that proceeded on the basis that ownership of the property was for the [respondent] alone, it is only unconscionable for the [respondent] to assert her beneficial ownership in the property against the [appellant] to the extent of refusing to acknowledge that the payment that was made by the [appellant] to assist in the purchase was a conditional gift where the condition subsequently failed."

[31] The primary judge appeared to consider that the fact that the appellant was content to let the respondent have sole title to the property strongly militated against the imposition of a constructive trust which gave the appellant a beneficial interest in the property. She also, with respect, appears to have failed to have regard to the principle that a constructive trust may be imposed "… regardless of actual or presumed agreement or intention 'to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle'".[11] Immediately before that quotation, from the reasons of Mason CJ, Wilson and Deane JJ in *Baumgartner v Baumgartner*,[12] speaking of the application of a general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them, quoted with approval the following statement of Deane J in *Muschinski v Dodds*:[13]

> "... the principle operates in a case 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. The content of the principle is that, in such a case, equity will not permit that other party

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8 *Allen v Snyder* [1977] 2 NSWLR 685 at 692, 699; *Turner v Dunne* [1996] QCA 272 at 9 – 10, 18.
9 [2005] QCA 264.
10 Reasons at [67] – [68].
11 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 per Mason CJ, Wilson and Deane JJ.
12 (1987) 164 CLR 137.
13 (1985) 160 CLR 583 at 620.

> to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do."

[32] I hasten to add that I do not mean to convey that the intentions or agreement of the parties as to how property is to be held are irrelevant to the question of whether the respondent's conduct was unconscionable.

[33] The following observations of Deane J are also pertinent: [14]

> "… 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 characterization 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."

[34] In considering the order which ought be made, the primary judge was obliged to consider all relevant circumstances.[15] One highly relevant circumstance was the purpose for which, to the knowledge of the respondent, the appellant made her financial contribution to the purchase of the property. There was more than one such purpose. The appellant no doubt intended to assist the respondent but, at the same time, she had in mind securing her future accommodation by obtaining a congenial environment in close proximity to her daughter and grandson in which to see out her remaining years. The arrangement also secured the respondent's future accommodation.

[35] The respondent, in persuading the appellant to provide money to her for the purchase through the sale of the appellant's home, ought reasonably to have been aware that the appellant was placing her financial security in the respondent's hands. It is relevant also that the parties were moving from one jointly shared home to another. The respondent lived with the appellant in the appellant's Townsville home between 1990 and her move to Brisbane in 2001. The respondent's son was born in 1991 and she separated from the boy's father shortly thereafter. The respondent was unemployed and on receipt of a sole parent benefit after her son's birth until commencing teaching in the second half of 1998. She obtained a PhD in 1997. Throughout the time the respondent resided with the appellant she paid no rent or board but paid half the electricity and telephone charges and she provided her own and her son's food. Cooking and cleaning duties were shared between the appellant and the respondent.

[36] Counsel for the respondent argued that the absence of evidence of the extent, if any, to which the property had increased in value since its acquisition counted against the imposition of a constructive trust. That, as I understand it, was because the monetary worth of the order and its value in relation to the amount of monies provided by the appellant was unknown. I am unable to accept this argument.

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14 *Muschinski v Dodds* (1985) 160 CLR 583 at 622.

15 See *Giumelli v Giumelli* (1999) 196 CLR 101 at 125.

[37] A problem with the primary judge's order is that, although the parties each made contributions to their joint endeavour, only the respondent will reap the benefit of any accretion in value of the property. Although there was no valuation evidence, I do not think it is impermissible for this Court to use its own general knowledge to conclude that it is likely that the property increased in value substantially in the 11 years since it was acquired. But, even in the absence of such a conclusion, it would be appropriate for the co-venturers to share in any accretion in value or to bear any losses in proportion to their respective contributions. An additional reason for this approach is that it prevents the appellant suffering the loss represented by the difference between the present value of the $70,911 and its value at the time the monies were paid. That loss or disadvantage is likely to have been accentuated for present purposes by increases in the market value of the residential property.

[38] Counsel for the respondent further submitted that the absence of evidence as to how any third party should be affected by an order which imposed a constructive trust was a reason for not making such an order. The adverse impact of such an order on third parties is no doubt a relevant consideration, but counsel pointed to no evidence which suggested that there were any third parties, other than a bank which had a mortgage over the property securing the monies borrowed by the respondent to secure its purchase, whose interests were likely to be affected by such an order. The bank's mortgage was registered at or about the time of completion of the purchase and counsel for the respondent did not identify any prejudice the bank could suffer through the imposition of a constructive trust.

[39] The respondent argued that an order for the payment to the appellant of $70,911 was an "appropriate equitable remedy which [fell] short of the imposition of a trust".[16]

[40] Reliance was also placed on the following passage from the reasons of the Court in *Bathurst City Council v PWC Properties Pty Ltd*:[17]

> "… before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant."

[41] The foregoing discussion, however, shows that the money order favoured by the respondent is insufficient to address the respondent's unconscionability.

[42] The appellant has thus made good her argument that the primary judge's reasons were affected by appellable error. For the reasons given above, it would be unconscionable for the respondent to retain the full title to, and benefit of, the property and it should be declared that the respondent holds the property in trust beneficially as to 25 per cent for the appellant and as to 75 per cent for herself. The $70,911 provided by the appellant is very nearly 25 per cent of the total purchase price (plus stamp duty and other outlays) of $282,508.

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16 *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 [10].

17 (1998) 195 CLR 566 at 585.

[43] The parties agreed at first instance that between 2 February 2008 and 30 September 2011, the respondent received $91,742.85 in rental payments in respect of the property. The respondent's costs and expenses of maintaining the property during that period were agreed at $17,418.29. Consistent with the earlier reasoning, it would be unconscionable for the respondent to retain more than 75 per cent of the net rents and profits of the property she received. There was no evidence as to the quantum of the rents and outgoings after 30 September 2011, but that does not present a particular problem. If the parties are unable to agree a figure, one can be fixed by the primary judge or another judge of the trial division.

Conclusion

[44] Although I would order payment of a specific sum on account of rents and profits for the period between 2 February 2008 and 30 September 2011, I would order that interest be paid on the sum ordered only for a period of 12 months. That, and not ordering interest in respect of the net rent accrued after 30 September 2011, will make allowance for the respondent's overall management of the property and the fact that the interest rate (equal to that prescribed pursuant to Practice Direction 21 of 2012) exceeds the going commercial rate (about which there was no evidence). I mention that the record did not reveal the property's title description, hence the general description below. Finally, I note that although the Notice of Appeal sought an order pursuant to s 38 of the *Property Law Act* 1974 appointing trustees for sale of the property, no oral or written argument addressed the appropriateness of such an order which could possibly affect the interests of a third party having regard to the statutory declaration referred to in paragraph [31] of the primary judge's reasons.

[45] For the above reasons, I would order that:

1. The appeal be allowed;

2. The declaration made on 12 March 2012 be set aside;

3. The respondent pay the appellant $18,581 (25 per cent of $74,324);

4. The respondent pay the appellant the sum agreed between the appellant and the respondent to be the monies received by the respondent between 30 September 2011 and the date hereof on account of rental for the property less the total of rates, insurance, management costs, maintenance and repairs in respect of the property paid or payable by the respondent in respect of that period and, in default of agreement, that sum determined by a judge of the trial division;

5. The respondent pay the appellant twelve months interest on the sum of $18,581 at the rate of 10 per cent per annum, namely $1,858.00;

6. Within five (5) days of today's date, the appellant file and serve written submissions as to costs, such submissions not to exceed three (3) pages in length;

7. Within ten (10) days of today's date, the respondent file and serve written submissions as to costs, such submissions not to exceed three (3) pages in length; and

It is declared that the respondent holds her interest in the property referred to in paragraph [1] of the primary judge's reasons for judgment on trust for the appellant beneficially as to 25 per cent and for herself beneficially as to 75 per cent.

[46] **GOTTERSON JA**: I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[47] **HENRY J:** I have read the reasons of Muir JA. I agree with those reasons and the orders proposed.